



THE INTERNATIONAL CRIMINAL COURT

CONFRONTING CHALLENGES ON THE PATH TO JUSTICE

HENRY M. JACKSON SCHOOL OF INTERNATIONAL STUDIES
TASK FORCE 2013 | UNIVERSITY OF WASHINGTON

Cover Photograph: “ICC launches commemorations for 17 July – International Criminal Justice Day.”

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Task Force Report 2013*

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Our Task Force would like to give special recognition to our tireless leader, Stefanie Frease. For your hours of hard work, availability, patience and good humor; for the stories you shared to make the Court come alive, and for helping us “sort the wheat from the chaff”—we thank you.

We would also like to thank all those who contributed to the creation of this report, especially our evaluator, Dr. Kelly Askin. The time and effort you have given us is truly appreciated.

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ACRONYMS

AfCHPR	African Court on Human and People's Rights
ASP	Assembly of States Parties
ASPA	American Service-members' Protection Act
AU	African Union
BIAs	Bilateral Immunity Agreements
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CLRs	Common Legal Representatives
CMN	Critical Matrix Network
DRC	Democratic Republic of the Congo
ESF	Economic Support Funds
ExCom	Executive Committee
FNI	Front for National Integration
ICC Act	International Criminal Court Act
ICC or “the Court”	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMET	International Military Education and Training
IMT	International Military Tribunal
JCCD	Jurisdiction, Cooperation, and Complementarity Division
JLOS	Justice, Law and Order Sector
JPL	Justice and Peace Law
LRA	Lord's Resistance Army

LTP	Legal Tools Project
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
NTC	National Transitional Council
OPCV	Office of the Public Counsel for Victims
OTP or “the Office”	Office of the Prosecutor
PIDS	Public Information and Documentation Section
PTC	Pre-Trial Chamber
PTC-I	Pre-Trial Chamber-I
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SIDA	Swedish International Development Agency
SWGCA	Special Working Group on the Crime of Aggression
TC-1	Trial Chamber-1
TFV	Trust Fund for Victims
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
UPC	<i>Union de Patriotes Conglaise</i>
US	United States of America
VPRS	Victim Participation and Reparations Section
VPRU	Victim Participation and Reparations Unit
WCD	War Crimes Division

EXECUTIVE SUMMARY

Rebecca Lee

Since the Rome Statute entered into force in 2002, the International Criminal Court (ICC or the Court) has encountered many challenges, undermining its legitimacy and credibility in the international community. This report argues that if the first ten years of the ICC's existence are any indication of its potential in the long run, these challenges must be confronted over the next few decisive years. This is imperative to ensuring the Court reaches its full potential to bring justice to the most serious crimes of international concern under its jurisdiction. Currently, a lack of efficiency and effectiveness in producing results has led to a serious decline in its perception of legitimacy with the international community. To date, the ICC has produced only two verdicts: one conviction and one acquittal. With this poor track record, comprehensive improvements are essential for improving the Court's capacity to prosecute crimes that threaten international peace and security.

Each chapter of this report identifies key factors which are crucial to ensuring justice is served and the Court's mandate is fulfilled. Section one explains the internal and external factors that affect selecting situations (the distinction between "situation" and "case" will be defined in the introduction). Problems in selecting situations stem from complications inherent to complementarity and determining gravity. To further complicate this issue, politics and a supposed "African bias" have inhibited international support for the Court. Section two identifies issues in the investigation strategy of the Office of the Prosecutor (OTP or the Office), particularly its charging strategy and the apparent neglect of gender crimes. It also addresses a structural problem concerning varying standards of proof. Section three examines the role of victims in the Court, including their participation as victims in the judicial process, efforts to conduct outreach to "information poor" communities, and reparations provided through the Trust Fund for Victims. Section four concludes with the inherent issues that come from the Court's critical internal and external relationships. This includes interactions between the four organs of the Court, which are vital to its efficiency and effectiveness. Likewise, integral to its function as a court of last resort, cooperation with its states parties and non-states parties is essential for investigating, charging, and enforcing arrests of individuals under the Court's jurisdiction.

This report finds that the ICC is at a decisive period in its path to establishing a global presence. It is therefore crucial that it produce more substantial results to ensure its longevity as a global presence aimed at deterring mass atrocities and maintaining international peace and security. The failures experienced in its formative years may be identified as growing pains of a young institution, but the ICC cannot afford to continue losing credibility. Already, it has faced resistance from many states—in particular several within the African Union—while many states parties are either delayed in meeting or do not fulfill their financial obligations. The global recession is a factor, but more importantly, many states parties have lost faith in the Court's capacity to utilize its resources effectively. Moreover, the Court's unique mandate to provide

restorative justice obliges it to define and establish an adequate support system for victims. Unlike former and current international tribunals, the ICC is permanent, and has the potential to be a beacon for victims of the horrific crimes outlined in its Statute. To maximize this potential, the Court's overarching strategy must be streamlined to more efficiently satisfy its four underlying principles, namely to: (1) achieve positive complementarity, (2) provide focused investigations and prosecutions, (3) address the interests of victims, and (4) maximize the impact of the Court's work.¹

Recommendations put forward in this report offer ways in which the Court can improve its capacity for achieving international justice. There are three encompassing recommendations that are fundamental to those made in each chapter. Individual recommendations offered in the forthcoming chapters are aimed at achieving these underlying goals:

- **Increase the legitimacy and credibility of the Court, including the OTP.** A court of law must be perceived as legitimate in order to be trusted to make judgments that satisfy the people it serves. Credibility is equally vital because the ICC serves the global community. Its lack of enforcement mechanisms forces the Court to rely on the cooperation of national governments for successful investigations and prosecutions. If the Court is perceived as legitimate and credible, domestic governments will be more inclined to support investigations and enforce arrest warrants.
- **Improve the efficiency of investigations and trials.** The Court took six years to prosecute and deliver its first conviction. Its second case took three years to try, and resulted in an acquittal. Many of the inefficiencies leading to these prolonged trials are due to unproductive investigations, ineffectual evidence gathering, and problems inherent in the system. Internal and external Court relationships also play a decisive role in streamlining the trial process.
- **Improve the effectiveness of the Court.** To date, neither of the Court's two decisions were seen as having effectively delivered justice (e.g. the only conviction resulted in a 14-year sentence that was not reflective of the crimes committed). Unsuccessful investigations and delayed judicial proceedings have contributed to the ineffectiveness. In addition, the lack of accountability of the Prosecutor has perpetuated these mediocre results.

These three encompassing recommendations are interconnected, and a comprehensive improvement in all areas outlined above is the only way to close the gap between the expectations of the Court and its delivery of justice. If the legitimacy and credibility of the Court increases, there will be a direct improvement to its efficiency and effectiveness.

¹ ICC – OTP, *Prosecutorial Strategy 2009-2012*, 1 Feb. 2010, The Hague.
<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>

“What is the responsibility incumbent upon us to ring the bell; to raise the red flag; to take action; to make sure others take action; and above all, to prevent, and certainly to intervene in order to mitigate the harm produced by human conflict?”

M. Cherif Bassiouni

INTRODUCTION

Thea Marriott and Rebecca Lee

Between 1919 and 1994, the international community held multiple *ad hoc* investigations, criminal tribunals, and internationally sanctioned national prosecutions.² The first of these came about in response to widespread calls for justice and retribution in the wake of unprecedented suffering during the first two world wars, after modern warfare technology and abandonment of traditional battlefields had led to atrocities which “deeply shock[ed] the conscious of humanity.”³ Thus, affected populations of the world felt an urgent need to recognize and confront these crimes by restoring some level of justice in the aftermath.

CREATING A PERMANENT COURT

Despite growing pressure for a response to these violent events, investigations were originally instigated for just a few situations. When adjudicating bodies were assembled to try the cases brought before them, they were on an *ad hoc* basis, and given limited jurisdiction over only one conflict or region. After the Nuremberg and Tokyo trials that followed the conclusion of World War II, the first two international criminal tribunals were established in the 1990’s for the former Yugoslavia and Rwanda.⁴ The success of these courts gave the impetus for creating a permanent, standing court to try individuals charged with the most heinous of international crimes. The international community’s hope was to decrease the amount of time it took to investigate situations and bring alleged criminals to justice by establishing an institution that would provide punitive and restorative justice to specific areas of conflict. This was meant to increase the global community’s effectiveness in bringing justice to the world’s victims of atrocities and mass violations of human rights, as well as serve as a standing deterrent to future perpetrators of these crimes.

A conference in Rome called the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference, was held from June 15 to July 17, 1998. It brought together delegations from 160 nations and multiple interested organizations in pursuit of creating a decree to establish a permanent international criminal court—the first of its kind. After five weeks of emotional deliberation, the efforts of conference attendees culminated in adoption of the International Criminal Court Statute, or the “Rome Statute.” Seven countries (including the United States and China, both permanent members of the UNSC) voted against the Statute, with twenty-one states abstaining.⁵ Thus the International Criminal Court (ICC or the Court) was established with 120 votes in its

favor. After receiving its first 60 ratifications, the Rome Statute entered into force on July 1, 2002. To date, there are 122 states parties to the ICC.

COURT STRUCTURE

Article 34 of the Rome Statute establishes four organs of the Court: the Presidency; Chambers; the Office of the Prosecutor (OTP or the Office); and the Registry. The Presidency is in charge of the overall function and administration of the Court (excluding the OTP, which operates independently). It is comprised of three judges who serve three-year terms and are selected from within the Court. Chambers are made up of three divisions: Pre-Trial, Trial, and Appeals. It has eighteen judges whose combined responsibility is to conduct the legal proceedings of the Court. The OTP is in control of handling situations that are referred to the Court in accordance with guidelines discussed in further detail below. This includes responsibility for investigating and prosecuting alleged criminals. Finally, the Registry serves as a non-judicial head of administration for the Court, and is run by the Registrar. This office functions under the authority of the President of the Court.⁶

Though not considered an organ of the ICC, the Assembly of States Parties (ASP) plays an important role in its performance. It acts as an oversight mechanism for the organs of the Court, especially the OTP, the Presidency, and the Registry. The ASP is the only body vested with the right to make amendments to the Rome Statute, and is made up of one representative from each state party—each of which has one vote. States that have signed the Statute, but not ratified it, are known as “observer states,” and can observe the proceedings of the ASP, but not vote. The ASP elects 21 people to serve three year terms on its executive committee, known as the Bureau. The ASP is also vested with the authority to establish subsidiary bodies to carry out its functions.⁷

In addition to creating the first permanent international criminal court of its kind, the Rome Statute also founded an institution for restorative justice called the Trust Fund for Victims (TFV). The TFV was established specifically for addressing the needs of those who have suffered the greatest from violence during conflicts involving crimes investigated by the Court. Article 79 of the Statute states that “the Court may order money and other property collected through fines or forfeiture to be transferred...to the Trust Fund.”⁸ Further, the TFV is mandated to enforce the follow-through of reparations ordered by the Court, and provide both physical and psychosocial rehabilitation and support to victims of crimes that fall under its jurisdiction.⁹ Thus, the TFV exists in order to alleviate the pain and suffering of both individuals and communities by providing a means of recovery. This makes the ICC unique as a Court in that it is responsible not just for holding perpetrators of the worst crimes responsible for their acts, but also for working to restore a positive semblance of normalcy in the lives of victims. Though it would be

impossible to fix or undo the damage done to individuals, families, and communities by the horrors experienced in violent conflict, there is a great deal that can be done to improve the process of rebuilding lives, retaining dignity, and returning victims to the status of fully functioning members of society.¹⁰

INTERNAL FUNCTION / SITUATIONS AND CASES

Besides understanding the ICC's structure, comprehending the way the Court functions is imperative for appreciating the challenges it has faced. The Court may open a preliminary examination of a situation in which a state or region has been in conflict based on three possible triggers. These are through: (1) a state party's referral, (2) referral of a situation to the Court by the United Nations Security Council (UNSC), or (3) initiation of examination by the Prosecutor, also known as *proprio motu*, based on information involving crimes that fall within the Court's jurisdiction. These crimes are broken into four categories laid out in Article 5 of the Rome Statute, and include genocide, crimes against humanity, war crimes, and the crime of aggression.¹¹

Preliminary examinations determine whether the Court has jurisdiction over an area of conflict, based on temporal, territorial, and subject matter guidelines laid out in the Statute. It is important to note the distinction between *situations* and *cases* in the ICC to understand its procedural process. Once a preliminary examination establishes that the Court does indeed have jurisdiction over a situation, a full investigation into that situation may commence. Individual *cases* relate to concrete incidents and specific suspects that emerge from the investigation of a particular situation or conflict. As a court of last resort, the ICC is designed to complement existing national judicial systems. Thus the jurisdictional limits outlined above are only applicable if the relevant national court of a conflict proves either unwilling or unable to investigate a situation itself.¹²

ROLE OF LEGITIMACY

As discussed above, the ICTY and the ICTR set a precedent for international justice by holding many perpetrators of the most serious crimes accountable for their actions. As a result, the idea of establishing a permanent international criminal court resonated with national governments and organizations around the world, as evidenced by the overwhelming participation at the Rome Conference. Even so, optimism for the Court's success was dampened at the outset when three of the UNSC's five permanent members—namely the US, China and Russia—voted against its inception. Despite these states' continued refusal to adopt the Statute, they nonetheless

influence the Court in many ways. This factor has served to undermine the intended apolitical nature of the Court, and greatly affected its legitimacy.

Legitimacy in particular is essential to the ICC's success. Legitimacy is the collective acceptance of an authority that is deemed to be lawful and justified in their decisions over its sphere of influence. This attribute is essential in maintaining the Court's prominence in the global community as an objective and believable institution. This credibility is public recognition of the Court's integrity and reliability. Courts are inherently different from other political institutions, and depend upon their unique makeup to fulfill the judicial commitments for which constituents hold them accountable. The processes and results of a court often contribute heavily to the framing of this opinion, and their capacity to "do justice and otherwise contribute to bettering the human condition" relies heavily on democratic accountability and transparency.¹³ In her paper entitled *The Normative Legitimacy of International Courts*, Nienke Grossman stated that among other factors, "the extent to which an international court implements the objectives it was created for may also affect its legitimacy."¹⁴ Thus, a court's legitimacy is fundamentally dependent on the public perception that it is operating to the fullest and best of its ability toward upholding the rule of law. The ICC is no exception. It is imperative that the ASP and other interested actors perceive the Court as fulfilling the goals laid out for it in the Rome Statute.

EXPECTATIONS AND CHALLENGES

Since its inception, the ICC has faced many challenges in bringing justice to victims and fulfilling the expectations of the international community. The lack of oversight mechanisms built into the Court's structure, coupled with its political nature, has complicated its ability to achieve the objectives mandated by its statute.

As the first institution of its kind, the Court's unique structure and jurisdiction are meant to provide a permanent global challenge to impunity. However, its legitimacy and credibility are undermined by its deficiencies. The ICC has had severe difficulties in producing intended outcomes, taking nearly ten years from its inception to deliver its first conviction in March 2012. Even then, convicted Congolese militia leader Thomas Lubanga was given just a 14 year sentence for punishment of his war crimes. The Court's second trial, that of another Congolese militia leader, Mathieu Ngudjolo Chui, took three years and resulted in his December 2012 acquittal. This was due to insufficient evidence. The Court's 50 percent success rate has greatly contributed to its dwindling credibility.

These slow proceedings and disappointing results are a result of systemic issues enabled by the ASP, which is meant to be the oversight mechanism for the Court. However, the politics inherent in such an assembly have prevented any serious pursuit of this role. The ASP has failed to hold

the Court accountable for its dismal results; moreover, it has yet to address personnel issues that affect strategic decisions and the rules inherent in the procedural process of the Court.

MOVING FORWARD

Problems inherent in the Court's structure and function have led to an absence of accountability, thus eroding its legitimacy. In the past ten years, the OTP has experienced high turnover rates and dysfunctional leadership, both of which have reflected in the lack of rigor put into investigations. The ASP is the only body able to hold the OTP accountable for poor performance, as well as address the perception of bias against Africa, but its passive behavior contributes to the increasing negative sentiment that further undermines the Court. Without a mechanism for enforcing investigations and arrests, the ICC relies on domestic judicial systems and law enforcement to carry out its mandates. Thus, the success of the OTP's investigations and prosecutions depends on the willingness of the international community to assist the Court. As a result, the reputation of the Court is essential, as it has the ability to boost or discourage this cooperation.

Despite the Court's poor track record, the OTP's increased caseload proves that the international community maintains high expectations. If these are to be met, and the Court's potential ever fully realized, then the challenges outlined in this report must be confronted in the near term. The recommendations made in the following chapters address the methods of situation selection, investigation strategies, the role of victims, and critical relationships of the Court. These are aimed at improving the Court's efficiency and effectiveness, to ultimately increase its legitimacy and credibility in the international community.

² M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* 11, (Spring 1997): 1.

³ Rome Statute of the International Criminal Court ("Rome Statute"), U.N. Doc. A/CONF.183/9, July 17 1998, entered into force July 1 2002, preamble

⁴ "Comite International Geneve," *Ad hoc tribunals*,

<http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>

⁵ "United Nations Diplomatic Conferences," *International Criminal Court*, 1998,

<http://untreaty.un.org/cod/diplomaticconferences/icc-1998/icc-1998.html>

⁶ "Cour Pénale Internationale/International Criminal Court," *Structure of the Court*

<http://www2.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={9B0AAEF8-0280-490C-A5AA-1DFABB0FB0EF}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/&NRCACHEHINT=Guest#a>

⁷ "Congressional Research Service – The Library of Congress," *International Criminal Court: Overview and Selected Legal Issues*, 2002.

<http://www.au.af.mil/au/awc/awcgate/crs/rl31437.pdf>

⁸ Rome Statute, art. 79

⁹ "Fonds au Profit des Victimes/The Trust Fund for Victims," *Welcome Page*,

www.trustfundforvictims.org

¹⁰ "Cour Pénale Internationale/International Criminal Court," *What is the role of the Trust Fund for Victims?*,

<http://www2.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/27>

¹¹ Beginning in 2017, the Court will have jurisdiction over a fourth category of crime: the crime of aggression.

¹² Rome Statute, part 2

¹³ Joel B. Grossman, "Judicial Legitimacy and the Role of Courts: Shapiro's Courts." *American Bar Foundation Research Journal* 9, no. 1 (1984): 215, www.jstor.org/stable/pdfplus/828310.pdf?acceptTC=true&

¹⁴ Nienke Grossman, "The Normative Legitimacy of International Courts," (University of Baltimore – School of Law, December 5, 2012), 2.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185304

SECTION 1
SITUATION SELECTION

CHAPTER 1

INTERNAL FACTORS AFFECTING SITUATION SELECTION

Allison Bray and Eslam Al-Fatatry

When choosing which situation to investigate, the OTP must determine a situation's admissibility according to the legal criteria outlined in Article 53 of the Rome Statute. In doing so, it must assess complementarity and gravity of the situation. Complementarity, which provides that the ICC will only prosecute crimes if national judicial systems are unable or unwilling to do so, is central to the ICC mandate as a means of respecting national sovereignty. Due to a lack of domestic implementation of effective legislation, however the OTP has become obliged to open investigations into an increasing number of situations. In regards to gravity, the OTP must determine whether a situation meets the gravity threshold in order to determine admissibility. The OTP, however, has no coherent applicable guidelines for assessing the gravity threshold. As a result, it has become overly reliant on the PTC-I interpretation of the gravity threshold and has applied it inconsistently, undermining the OTP's ability to remain independent, objective, and impartial. As both complementarity and gravity play a vital role in determining a situation's admissibility, the ICC must work to improve the ability of national jurisdictions to try cases domestically and create adaptable guidelines for applying the gravity threshold in order to ensure the OTP remains impartial when determining which situations to investigate.

PHASES OF PRELIMINARY EXAMINATION

The preliminary examination process is conducted for all situations brought before the OTP to determine whether the legal criteria established in Article 53 of the Rome Statute has been met.¹⁵ The OTP, on the basis of the facts and information available and in the context of the overarching principles of independence, impartiality, and objectivity, determines whether a situation warrants an investigation.¹⁶ The preliminary examination process is initiated by a referral to the Prosecutor by a State Party, by the UNSC or by the Prosecutor acting *proprio motu*.¹⁷ The Prosecutor has comprised a filtering process of four phases to analyze the seriousness of all communications received. Using information made available and seeking

additional information as needed, the OTP determines whether a situation has ‘reasonable basis to proceed’.¹⁸ These four phases are listed in the *ICC-OTP 2010 Policy Paper on Preliminary Examinations*.¹⁹

- Phase 1: provides an initial assessment of all information on alleged crimes received (communications) under article 15, in order to filter out all information on crimes that are manifestly outside the jurisdiction of the Court
- Phase 2: representing the formal commencement of preliminary examination, involves an analysis of all information on alleged crimes, including ‘communications’ that were not rejected in Phase 1
 - Phase 2(a): analysis focuses on issues of temporal and geographical or personal jurisdiction
 - Phase 2(b): analysis focuses on alleged crimes within the jurisdiction of the Court
- Phase 3: focuses on analysis of admissibility – complementarity and gravity
- Phase 4: examines the interest of justice to enable a final recommendation on whether there is a reasonable basis to initiate an investigation

The first section of this chapter will explain the necessary jurisdiction requirements a situation must satisfy in order to be found admissible. The second and third sections will address the issues of admissibility of a situation, first, in the context of complementarity and second, in the context of gravity. In order to be found admissible during the third phase of the preliminary examination, a situation must satisfy both complementarity and gravity.

JURISDICTION (PHASES 1 AND 2)

Once a situation is determined as inside the Court’s jurisdiction during phase 1, the OTP moves to phase 2 of the preliminary examination process. The OTP, using information available, determines if there is reasonable basis to “believe that a crime within the jurisdiction of the Court has been or is being committed.”²⁰ A situation must satisfy temporal, subject matter, and territorial or personal jurisdiction.²¹ The temporal jurisdiction of the Court is only applicable after July 1, 2002 when the Statute entered into force. Further, if a state ratifies the Statute after its entry into force, the Court can only prosecute crimes from that point forward, unless specifically declared by the state.²² A situation also must satisfy subject-matter jurisdiction in respect to the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.²³ The situation must finally satisfy territorial and personal jurisdiction limitations. The OTP, when exercising its jurisdiction initiated through State Party referral or *proprio motu*, may exercise its jurisdiction if a crime was or is being committed on the territory of or by a national of a state that had ratified the Statute.²⁴ A state may also accept the jurisdiction of the Court, allowing the OTP to begin a preliminary investigation, without having to ratify the Statute.²⁵ If the situation was referred to the Prosecutor from the UNSC, the Court may exercise its jurisdiction without constraint from territorial and personal parameters. The temporal, subject

matter, and territorial or personal jurisdiction preconditions set parameters for which the OTP can conduct a preliminary examination within a situation.

ADMISSIBILITY - COMPLEMENTARITY (PHASE 3)

The ICC is intended to be a complement to national court systems, meaning that it operates in situations where individual countries cannot or will not prosecute. The complementarity aspect of the Rome Statute was intended, at least in part, to allow for flexible and adaptable national responses to violations of the crimes within the ICC jurisdiction. In that sense, the complementarity regime of the Statute strikes a very delicate balance between judicial independence and the competing interests of state sovereignty.²⁶ However, the overwhelming desire of individual nations to keep their own courts from being second-guessed by the ICC has begun, and will most likely continue, to lead to a growing consensus among countries' responses to complementarity.²⁷ In theory, the ICC's presence should incentivize states to investigate and prosecute cases of core international crimes (set of crimes that reflect behavior that can never be tolerated in any conflict at all) in order to avoid any intrusion by the ICC into cases occurring on their territories.²⁸ The OTP describes this obligation as *positive complementarity* and has subsequently encouraged genuine national proceedings, reliance on national and international networks, and participation in a system of international cooperation. The 2010 Kampala Review Conference, the first conference on the Rome Statute, concluded that individual states require stronger national frameworks to exercise criminal jurisdiction. The conference asserted that a more systematic approach towards empowering national legal orders was needed.²⁹

Current and Future Issues

Although complementarity functions as a catalyst for national courts, it is likely that significant obstacles to effective domestic prosecution of ICC crimes will persist because of destroyed or seriously weakened legal systems.³⁰ The systemic nature of these crimes remains unchanged and so do the obstacles to national prosecutions. This is already apparent in situations that appeared before the Court. The obstacles to domestic prosecution of the core crimes committed in Uganda, the Democratic Republic of the Congo (DRC) and Sudan largely correspond to those that existed in situations prior to coming into force of the Rome Statute.³¹

Expert assessments of the question as to whether the *procedural setting* of complementarity is effective suggest a more nuanced answer. The regulation in the Statute and the Rules of Procedure and Evidence (RPE) epitomizes a relationship between national criminal jurisdiction and the ICC with a fair degree of antagonism and mutual suspicion.³² The procedural framework can reasonably be expected to work better in situations for which it was developed than in situations of more cooperative and affable modes of co-existence. However, the possibility of that was largely neglected during the crafting of the Rome Statute.³³

Democratic Republic of Congo

International crimes of sufficient gravity have been committed in the DRC. Domestic military tribunals have attempted to apply the Rome Statute in response to these crimes, but it was only after the intervention of the United Nations (UN) that these tribunals started to show some improvement. The UN created a system of direct support to improve the capacity of the DRC to conduct investigations and prosecutions. In the DRC's case, it was necessary to have mobile courts for law enforcement officials to bring criminals in remote areas to justice. Although the DRC seems to be conducting good-faith efforts to fight impunity, the international community realized the shortcomings of the current problematic practice of the military justice system.³⁴ In light of the UN's conflict mapping report released in August 2010, several parties proposed the idea of a mixed war crimes chamber as a more effective replacement for the military justice system. The international community also realizes the need for building domestic complementarity expertise in the DRC. Recent field research found that donors in the capital city of Kinshasa seemed to have little knowledge of the resolution adopted earlier that year at the Review Conference. Not only did the donors have a vague familiarity with the Review Conference, none knew about the complementarity resolution adopted at Kampala. Moreover, the field representatives of DRC's government did not seem to be aware of the complementarity-specific pledges that were made by their government representatives at the Review Conference.³⁵ This sheds light on two important issues; the ineffective communication between officials at headquarters and those in the field, and lack of coordination between political, legal and development efforts.

It is also problematic that only military tribunals had legislation enabling them to prosecute international crimes. New legislation is needed to shift the jurisdiction over war crimes, crimes against humanity, genocide, and crimes of aggression and sexual violence from military to civilian courts. The problem, however, remains that the DRC lacks capacity in almost every area needed to conduct proper investigations and prosecutions and to hold fair trials. DRC's police forces are ill prepared and poorly equipped and they often fail to provide their basic functions of security, undertaking investigations, or enforcing arrest warrants in support of international crimes proceedings.³⁶ There is also a severe shortage of legal and paralegal professionals in DRC's legal system in addition to lack of any systematic training in international criminal law. At the level of management, the court's capacity to function was described by international observers as "close to zero"—officials still use paper and pencil to track proceedings. The current legislation regarding the protection of victims and witnesses does not into account the country's enormous deficit in terms of capacity and resources to implement it.³⁷

Domestic courts, like the DRC, would benefit from modern case management systems and expertise sharing like the ones initiated by the ICC, called the Legal Tools Project (LTP) and Case Matrix Network (CMN). The ICC LTP is a virtual database of a collection of legal

information, digests, and software to service users to work with international criminal law anywhere in the world. The CMN is an application that provides knowledge and expertise to help the legal community with cases involving core international crimes. These two projects initiated by the ICC will be expanded later in this chapter. It is likely that these programs will yield a significant improvement in the DRC's capacity to prosecute international crimes occurring on its territory.

Uganda

Uganda's legal system is more capable of conducting investigations and trials when compared to many other African countries. The Ugandan government added a War Crimes Division (WCD) to its Supreme Court, which has dedicated investigators, prosecution teams, judges, and lawyers within the Directorate of Public Prosecutions. Some foreign observers reported a trend of biased practice of complementarity targeting members of anti-government groups.³⁸ Donors have been working closely with the Justice, Law and Order Sector (JLOS) to enhance Uganda's domestic capacity of effective investigation and prosecution of international crimes. Several reports indicated that neither the donors nor the JLOS seemed to be familiar enough with the objective requirements of international criminal investigations and trials to be able to assess the needs of Uganda's domestic capacity of fair prosecution. The Ugandan government would also benefit from the LTP and CMN in determining their immediate needs in complementarity-related programming and planning.³⁹

Uganda crafted a legal framework specifically designed for complementarity efforts in the form of the International Criminal Court Act (ICC Act).⁴⁰ This legislation, however, does not apply to crimes committed before June 25, 2010. The main concern is that when the ICC Act is considered along with Amnesty law, several ex-combatants and government officials might escape the reach of complementarity efforts. Government officials can use this loophole to target members of anti-government groups, which raises the serious concern of selective and biased prosecution.

Uganda's legal community, although trained in public international law, has a deficit in international criminal law knowledge. Some complementarity-specific training sessions have been conducted for prosecutors, defense, and judges but high turn-over rate and lack of practical knowledge (as opposed to academic knowledge which they seem to possess) hinder the efforts of building domestic capacity.⁴¹ There is a severe lack of standardized training for paralegals, judiciary support staff, interpreters, and archive management officials to support the efforts of domestic prosecution. It is also important to address the inadequacy of Uganda's witness protection program associated with international crimes. The physical infrastructure seems to be sufficient for WCD and War Crimes Prosecution Unit to continue its fight against impunity. The LTP and CMN can fill in the current gaps of Uganda's domestic capability of prosecuting international crimes.⁴² It is also important to make the Review Conference's resolution legally

binding in order to ensure objective prosecution of members of all groups regardless of their government affiliations.

Kampala Review Conference

The importance of the principle of complementarity was reasserted by the Assembly of States Parties to the Rome Statute (ASP) during the Review Conference held in Kampala, Uganda 2010. One of the main areas of focus of the conference was on how to enhance the capacity of national prosecutions. The fourth day of the conference was primarily dedicated to a stocktaking exercise during which States Parties, civil society organizations, and other delegates discussed the issues that arose from the principle of complementarity. Three main issues were identified: (1) lack or inadequacy of national implementing of legislation, (2) lack of operational capacity, (3) lack of training.⁴³ The outcome of the stocktaking exercise was a resolution that stresses the primary responsibility of States to investigate and prosecute the crimes under the jurisdiction of the ICC and which highlights the importance of effective domestic measures to implement the Rome Statute. Although adopted by consensus of the ASP, the resolution is not legally binding to any of the states.

The Legal Tools Project

The LTP, developed by the ICC, offers a comprehensive online knowledge system and provides an expansive library of legal documents and research and reference tools. The system is an excellent source of facilitating the efficiency and practice of national prosecution of core international crimes and is very accessible. This system was created to be used within the Court with the aim of enhancing the effectiveness of prosecuting core international crimes. Given its versatility, the system was later expanded and made available to external actors including civil society and international organizations.⁴⁴ To further enhance the credibility and reliability of the system, the ICC decided to outsource the program to several academic partners with expertise in the fields of international criminal law, national legal systems, and jurisprudence. The ICC is considering expanding the system even further by subjecting it to the oversight of independent practitioners and experts in order to guarantee its objectivity.

The LTP comprises of three main domains of service: (1) the Legal Tools Database and Website, (2) digests on the law and evidence of international crimes and modes of liability, and (3) the *Case Matrix* application offers a comprehensive online service of arranging compelling evidence in core international crime cases. Access to The Legal Tools Database and Website is currently free of charge and should continue to be so. They both serve as a public platform for sharing pertinent legal information to the investigation, prosecution, defense and adjudication of grave international crimes. Among the notable resources offered are databases of previous decisions and indictments from international criminal tribunals, preparatory work for national and

international proceedings, treaties, and details of national legal systems and preceding decisions of domestic courts.⁴⁵

The Elements Digest serves as a comprehensive source of raw data, notes, and analyses regarding the proceedings and modes of liability as mandated by the Rome Statute. The Means of Proof Digest enables users to access the categories of evidence that have been utilized in domestic and international criminal jurisdictions to satisfy the different levels of evidence and modes of liability specified in the Rome Statute.⁴⁶

It is of paramount importance for lawyers and legal professionals involved in national and international crimes to have adequate access to legal information. It is never enough to have well-educated investigators and lawyers. One of the first steps in all capacity building in criminal justice for grave crimes is providing effective access to legal information on war crimes, crimes against humanity, and genocide. If the cost of access is high, several potential users will be excluded. Securing enough funding for the expansion of the project is a necessity for its growing success.

Case Matrix Network

The Case Matrix Network is an ambitious project aimed at providing direct legal assistance to individual states in their effort to enhance national capacities of prosecution. The Network serves as a highly efficient case management tool by which fast, but precise, investigation, prosecution, defense and adjudication of international crimes. It provides services by which the expertise developed in international criminal jurisdictions could be utilized by national legal actors in national empowerment and capacity to investigate and prosecute international crimes. This system is currently used by more than twenty countries and will hopefully reach all members of ASP in the near future.⁴⁷

Legal Tools Project and Case Matrix

During the Review Conference in Kampala, Uganda, members of the ASP, civil society organizations, and representatives of international organizations identified the issues associated with the complementarity regimes. After serious deliberation the ASP adopted a resolution that emphasizes responsibility of states to investigate and prosecute crimes under the jurisdiction of the ICC. It also highlighted the need for effective domestic measures to implement the Rome Statute. The LTP and CMN are two programs that directly tackle the issue of implementing the resolution. These programs can be very effective and their reach should be expanded to include all members of the ASP. Although the resolution was adopted by consensus of the ASP, there exists no legal obligation to implement its mandates. There is no guarantee that states will honor this resolution, hence it is necessary to make it legally binding with a clear set of positive and

negative incentives in order to encourage genuine, effective, and efficient national prosecution of crimes under jurisdiction of the ICC.⁴⁸

ADMISSIBILITY - GRAVITY (PHASE 3)

Situations are assessed during preliminary examinations using all facts and information available and it is the duty of the Prosecutor to determine whether there is reasonable basis to initiate an investigation. The OTP evaluates a situation's positive complementarity and the gravity threshold "in relation to the most serious alleged crimes and to those who appear to bear the greatest responsibility for those crimes."⁴⁹ When conducting his decisions, the OTP must adhere to the overarching principles of independence, impartiality, and objectivity, as outlined in the Statute.⁵⁰ The gravity threshold provides further limitations for admissibility on situations that have satisfied the jurisdiction parameters. This is important because those crimes that have satisfied jurisdiction requirements are inherently the most serious of international concern. The gravity threshold has played a critical role in determining a situation's admissibility. However, the definition and criteria of gravity in determining a situation's admissibility is not defined in the Rome Statute, RPE, or any other governing documents.⁵¹ It remains a vague expression, referenced throughout a multitude of situations. As such, it is difficult for the Prosecutor to effectively explain the reasoning behind the gravity threshold when finding a situation admissible.

Without a set of coherent guidelines for use of the gravity threshold in determining a situation's admissibility, the OTP has relied on the interpretation by the Pre-Trial Chamber I (PTC-I) that interchangeably linked gravity to being 'systemic or of large scale'.⁵² When used over a range of varied situations, this interpretation has led the OTP to become overly reliant on quantitative factors. This means it has not given sufficient attention to qualitative factors that are equally important in determining the gravity of a situation. Quantitative factors refer to numerical data, such as the number of victims, and qualitative factors refer to categorical data, such as target vulnerability. Thus the OTP's commitment to independence, objectivity, and impartiality while conducting preliminary examinations has been undermined. Including a list of qualitative factors for the OTP to consider would lead to a more efficient and credible examination and alleviate prosecutorial discretion during prioritization of admissible situations. Understanding the role and importance of the gravity threshold for admissibility will be explained first in this section. Next, looking into the situations themselves and the role gravity has played in their admissibility will further explain the need for clarifying the use and means of determining the gravity threshold. Once guidelines have been established, an increase in transparency will aid in the overall advancement of the Court's legitimacy.

Role of Gravity in Admissibility

In determining whether a situation under preliminary examination provides a reasonable basis to proceed, the Prosecutor uses the legal framework in Article 53(1)(a)-(c) for all situations and crimes that come before the Court. Throughout the preliminary examination process, the OTP assesses each situation independently, impartially, and objectively, irrespective of the method the communications was received.⁵³ Once a situation is identified (phase 1) and found to satisfy the jurisdiction restrictions (phase 2), the OTP determines admissibility to satisfy the requirements of article 17 (phase 3). The two components for determining admissibility are complementarity and gravity, in no particular of order, during the admissibility evaluation. Gravity, as laid out in the Rome Statute Article 17(1)(d) of the Rome Statute, analyzes the seriousness of a crime to determine if there is ‘sufficient gravity’ to warrant ICC attention.⁵⁴

The ICC was formed following decades of atrocities, such as those committed in the Holocaust, Cambodia, Rwanda, and Yugoslavia. The international community viewed these situations as being grave violations of international human rights laws, meriting intervention and prosecution. Gravity was the central theme relating the heinous international crimes and thus is centrally expressed in the Statute’s provisions to provide limitations over the Court’s jurisdiction to help focus investigations to the most serious crimes of international concern.⁵⁵ The term ‘gravity’ is found throughout the Statute as a means for admissibility. The former Prosecutor stated that once the “Court has temporal and subject-matter jurisdiction, the Office [of the Prosecutor] turns to the standard of gravity.”⁵⁶ The PTC-I provided the first interpretation of the gravity threshold and made evident the importance of a methodology for determining whether a situation is of ‘sufficient gravity’. Since there has been no further clarification legally supported. The gravity threshold remains ambiguous and ill defined yet an important determinant for a situation's admissibility.

Importance of gravity

The gravity threshold is essential in determining whether a situation is found admissible. The OTP reviews information concerning material jurisdiction comprised of crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.⁵⁷ The application of the gravity threshold focuses on combating impunity and maximizing deterrence for future crimes. To date, the only judicial interpretation of the gravity threshold was from the PTC-I. The PTC-I, reviewing the Court’s first situation into crimes in the DRC, emphasized the “gravity threshold provided for in Article 17(1)(d) of the Statute must be applied.” The PTC-1 specified, “at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold” and crimes were evaluated based on how “systematical or large-scale” they were conducted. The PTC-I provided a framework for applying the gravity threshold, unlike in the Statute, in determining admissibility⁵⁸. The importance of adhering to a more clarified gravity threshold is

arguably important in that the only successful conviction came out of the PTC-I. Thus illustrating the potential that clarifying the gravity threshold for admissibility could result in delivering convictions and meaningful justice to those affected.

However, because the PTC-I provided this description in reference to the DRC situation specifically and further remains unsupported by legal parameters, the gravity threshold for admissibility of a situation must be altered in order to make it applicable to all situations. Without an explicit definition or set of guidelines for using gravity during admissibility, the Prosecutor is left with too much autonomy and prosecutorial discretion. This has also led to an inconsistent implementation of the gravity threshold for admissibility. This inconsistency is because the OTP continues to use the PTC-I expansion on gravity that was established specifically for the DRC situation. This reliance has resulted in a more narrow evaluation of factors in determining situations admissibility because of the synonymous use of ‘gravity’ with ‘systemic’ or ‘large-scale’, which was implied by the PTC-I. ‘Systemic’ refers to the “organized nature of the acts of violence and the improbability of their random occurrence” while large-scale concerns “the widespread nature of the attack” (PTC-1). As a result the Court has been unable to select situations according to the overarching principles of independently, impartially, and objectively. This has been detrimental to the public perception of the Court’s credibility and legitimacy.

Situation in Iraq

The Prosecutor analyzes and chooses between situations that fulfill jurisdiction requirements to determine admissibility in order to conduct a formal investigation. The former Prosecutor, Luis Moreno-Ocampo, in his 2010 Policy Paper on Preliminary Examinations, stated gravity for admissibility includes the “assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation.”⁵⁹ This further emphasized that in pursuant of impunity, the OTP must assess “gravity in relation to the most serious crimes alleged and to those who appear to bear the greatest responsibility for these crimes.”⁶⁰ This criterion is pulled from the PTC-I interpretation of the gravity threshold assessment and was established in context with the DRC situation. The PTC-I required systematicity or scale as a condition of the gravity threshold in article 17(1)(d) and the OTP has implemented these conditions analogously with gravity for admissibility. As a result, the OTP primarily considers quantitative, numerical factors such as sheer number of victims, when determining admissibility. This narrow evaluation of the factors determining the admissibility of a situation is evident when considering why the OTP dismissed the situation in Iraq.

The Court in 2006 received over 240 relevant communications expressing “the concern of numerous citizens and organizations regarding the launching of military operations and the resulting human loss” by the United Kingdom (UK) national soldiers in Iraq.⁶¹ The potential victims from the willful killing and inhumane treatment allegedly caused by UK national soldiers

in Iraq were between 4 and 12.⁶² The OTP reported that the crimes had been committed within the Court's jurisdiction.⁶³ The Prosecutor thus considers the gravity threshold. The OTP concluded that there were no more than twelve deaths that fell within the jurisdiction of the Court that could be included in a potential investigation. The OTP dismissed the situation in Iraq on the basis of gravity, further stating this dismissal was considered in respect to the other situations that were currently under investigation and featured thousands of willful killings.⁶⁴

In determining if a situation meets the gravity threshold for admissibility, the OTP "takes into account potential cases that could arise from a potential investigation into the situation."⁶⁵ However does not identify specific cases concerning "set of incidents, individuals and charges."⁶⁶ This consideration must be demonstrated and communicated in adherence with the principles of objectivity, independently, and impartially. Conversely, because of the OTP's reliance on quantitative numerical data drawn from PTC-I identified use for the gravity threshold for admissibility has undermined these principles. The situation in Iraq did involve considerably fewer victims than the other situation in the DRC, the Central African Republic (CAR), and Uganda. The Prosecutor identified that "a key consideration [was] the number of victims of particularly serious crimes, such as willful killing or rape."⁶⁷ However, if the OTP also took into consideration qualitative factors, such as the nature of the crimes and the actors involved, the OTP could have reached its conclusion more objectively. In the Iraq situation, it was national soldiers from the UK not members of a rebel militia groups from a developing country that were accused of committing human rights violations. As such, it is possible that their actions were of a systemic nature and warranted further investigation. Further, when determining if a situation is of sufficient gravity, potential cases are taken into account. With all formal investigations into situations in Africa, the gravity threshold can appear to be applied selectively and justice is only brought against less powerful states. The dismissal of the situation in Iraq bolsters this perception. The OTP, by taking into account qualitative factors when conducting preliminary examinations of situations and clarifying the use of gravity in determining admissibility would improve the Courts perceived legitimacy, as its decisions would be of a more objective nature.

Situations in Colombia and Kenya

The situations in Colombia and Kenya were both triggered by the Prosecutor using *proprio motu*. When the Prosecutor is independently initiating a preliminary examination *proprio motu*, it is because there is reasonable basis to believe a crime falling within the Court's jurisdiction has or is being committed. The situations in Colombia and Kenya were found to satisfy the jurisdictional constraints, and thus both were determined admissible. The OTP used the PTC-I interpretation of the gravity threshold in determining that the crimes committed in both situations were by nature systemic and large in scale; a quantitative numerical analysis. There is evidence that national investigations and prosecutions were attempted in both Kenya and Colombia by their governments in order to fulfill the complementarity requirement. However in Kenya, where the

situation is arguably less grave, the Court refused to allow national courts to try cases, and chose to initiate an official investigation. The Court cited gravity as the reason for initiation of the investigation, yet the conflict in Colombia is considerably graver and yet the Court has failed to use the basis of gravity for opening an investigation. The OTP is relying on quantitative analysis of the national investigations and prosecutions in Colombia, rather than the quality of those prosecutions. Allowing Colombia to maintain jurisdiction, highlights the inconsistent use of gravity in determining the admissibility of a situation.

Colombia has been under preliminary examination since 2005. The Colombian prosecutors office reported that since 2005 there have been “60,000 murders, 8,000 displacements, 3,000 disappearances, 2,000 child soldiers, 2,000 torture victims, and 40 cases of sexual violence.”⁶⁸ As such, the OTP concluded the gravity threshold for admissibility had been met.⁶⁹ The OTP has not opened an investigation based on complementarity because Colombia is attempting to investigate and prosecute relevant cases. Colombia, with a sophisticated domestic legal system has the capacity to try such crimes yet the “genuineness and effectiveness of domestic investigations [has been questioned],” and judicial litigation has been perceived inadequate.⁷⁰ The OTP identified “insufficient or incomplete activity in relation to certain categories of persons and certain categories of crimes” during judicial proceedings (Colombia situation). Further, crimes have continued, even escalated, under ICC preliminary examination. The Colombia military has been accused of ‘false positive’ killings that “started during the 1980s and occurred with greatest frequency from 2004-2008.”⁷¹ The military targeted civilians, dressing themselves to appear as guerrillas and performing mass executions to bolster success rates. Colombia has been under preliminary examination for eight years, evidence undermines issues regarding complementarity yet the Court is unable to officially determine whether or not it is admissible for investigation.

The preliminary examination of the Republic of Kenya’s alleged post-election violence began in March 2010. The alleged crimes ranged between “murder, rape, mutilations, looting, destruction of property, arson, and eviction.”⁷² Occurring over a period from December 2007 through February 2008, the OTP found over 1,100 people were killed and some 350,000 were displaced.⁷³ The situation was found to be of sufficient gravity, systemic, and of large-scale, on the basis of quantitative factors. Addressing the next complementarity restrictions, the PTC-II found national proceedings insufficient. However, the PTC-II did make “references to a number of domestic investigation and prosecutions concerning the post-election period, but only in relation to minor offences.”⁷⁴ The PTC-II assigned six cases to senior officials from various political affiliations and organizations.⁷⁵

Though the PTC-I made imperative conclusions regarding the importance of the “gravity threshold [as] a key tool to maximize the Courts deterrent effect” when determining a situations admissibility.⁷⁶ The PTC-I required that in order to satisfy the gravity threshold for admissibility, crimes must be systemic or of large scale and their perpetrators both ‘senior in leadership’ and

‘most responsible’. These conditions are all quantitative by nature and unsupported in the Rome Statute. These conditions are then considered when the OTP evaluates potential cases that could arise from an investigation and thus influencing decisions as to whether a situation is admissible in the preliminary examination. It is prosecutorial discretion, due to the lack of applicable guidelines for using gravity that leads the OTP to draw upon this PTC-I interpretation for the gravity threshold. These conditions were structured by the PTC-I in relation with the situation in DRC and do not constitute applicable guidelines for the OTP to use. Reliance on such conditions for the gravity threshold has led to this dependence on quantitative factors of gravity that has resulted in an inconsistent threshold standard for implementation.

The OTP must promote positive complementarity, yet also prosecute those most responsible for crimes. The OTP in determining the admissibility of Colombia is relying on a quantitative analysis of the national investigations and prosecutions rather than the quality of those prosecutions. Colombia’s prosecutions have “limited results in holding accountable those with high-level responsibility for atrocities.”⁷⁷ Examining the ‘false positives’ killing of civilian cases alone, “convictions were only obtained for less than 10 percent of the 1,727 cases under investigation ... only including two lieutenant colonels and two colonels.”⁷⁸ Judicial proceedings into the ‘false positive’ cases failed to focus on those who might bear greatest responsibility. Further this category of crimes has seen an escalation from 2004-2008, a period that also coincided with ICC preliminary examination in the situation. Though national judicial proceedings have been more numerous in Colombia than in Kenya, Colombia has failed to prosecute those most responsible. The OTP is focusing on the quantity of the proceedings rather than the quality and genuine nature in delivering meaningful justice.

The OTP’s adherence with the PTC-I’s interpretation that authoritative perpetrators must be prosecuted is not being upheld in Colombia. National proceedings have fallen short and created gaps. Colombia has been under preliminary examination for eight years. Evidence has been found that patterns of crimes have taken place that satisfy the temporal, subject-matter, and personal jurisdiction yet genuine investigations and prosecutions are not being conducted in Colombia. The OTP concentrated on “quantitative analysis of open proceedings and indicted persons” and “does not delve into the subject matter of the cases to evaluate their quality.”⁷⁹ Using complementarity as the justification for inadmissibility of Colombia when evidence proves otherwise has undermined the significance of the meaning of gravity and its role in bringing to justice those most responsible. The OTP must create coherent adaptable guidelines for determining a situations gravity threshold. This would alleviate focus on quantitative factors alone, which would help legitimize prosecutorial discretion in using gravity to assesses how genuine national proceedings are. Without adaptable guidelines application has been applied inconsistently and that inconsistency undermines the Courts ability to remain independent, objective, and impartial when determining a situations admissibility.

Transparency

The preliminary examination process requires the Prosecutor to determine whether a situation has reasonable basis to proceed with a formal investigation. In order to determine those situations that most warrant investigation the Prosecutor established a four-phase process. Once information is filtered and identified satisfactory under jurisdictional constraints, the OTP assess its admissibility. The Prosecutor uses considerable discretion when determining a situation's admissibility. A prioritization occurs to determine situations that satisfied jurisdiction in order to determine the crimes 'most grave' and thus warranting investigation. Clarifying the guidelines and methodology for the Prosecutor to use the gravity threshold when determining a situation's admissibility would alleviate prosecutorial discretion and also inconsistency in implementation.

Once the gravity threshold is improved and legally supported, the transparency and communication on how decisions were reached when using the gravity threshold for admissibility would increase the legitimacy and credibility of the Court. Increasing transparency and communication would show commitment to independence, objectivity, and impartiality when conducting preliminary examinations. Transparency promotes positive perceptions among the stakeholders that the Court is devoted to good process and upholding its intentions for meaningful justice through the adherence to the guideline principles of independence, impartiality and objectivity. Transparency also would assist in alleviating criticism concerning decisions made during the preliminary examination process.

Conclusion

The gravity threshold for admissibility is an important step when determining situations admissibility. The Statute requires this further limitation of situations due to the fact that all crimes that satisfy the jurisdiction parameters are also crimes considered most serious. The gravity threshold has played a critical role during situation selection, however, a definition and criteria for its use in determining a situation's admissibility is not legally found in any governing documents. It remains a vague expression referenced throughout a multitude of situations when addressing their admissibility. As such, it is difficult for the Prosecutor to effectively explain the reasoning behind the gravity threshold when finding a situation admissible. The only interpretation remains by the PTC-I through which demonstrated the importance of the gravity threshold in determining a situation's admissibility. The OTP has adopted aspects of the PTC-I interpretation and implemented in assessing a situations gravity threshold. However, due to the nature of the PTC-I interpretation conducted specifically for the DRC situation, the OTP cannot rely on threshold. Creating coherent adaptable guidelines for using the gravity threshold would decrease inconsistency and make the Court more credible.

RECOMMENDATIONS

- Expand the Legal Tools Project and Case Matrix Network to include all members of the ASP.
- Make the Review Conference resolution on complementarity legally binding to ensure states' compliance.
- Create coherent adaptable guidelines that include quantitative and qualitative factors of analysis for the use of the gravity threshold under Article 17(1)(d) in determining whether a situation is admissible and support those guidelines with legal documents.
- Once guidelines are established, increase the transparency of the overall preliminary examination process by putting forth clear reports on the Court's actions, specifically in regard to the use of the gravity threshold for admissibility

CHAPTER 2

EXTERNAL FACTORS AFFECTING SITUATION SELECTION: POLITICAL INFLUENCES

Julie Butters

When the ICC was formally established in 2002, it was intent on remaining an apolitical body capable of fairly prosecuting perpetrators of heinous crimes throughout the world. Increasingly, however, the Court is becoming a political body, as evidenced by its indictment of sitting heads of states, tendency to be influenced by powerful nations, and focus on Africa.⁸⁰ As such, support for the Court has waned, to varying degrees, in both member and non-member states; this poses a major problem for the Court because it derives its legitimacy from the support of its member states. In order to bolster support, the ICC must address criticisms raised by the international community.

INTRODUCTION

Advocates for the ICC praise it as a legal institution immune from political influence.⁸¹ Indeed, the Rome Statute was carefully crafted in order to ensure that all states and peoples were treated fairly and equally under the law. In reality, however, remaining apolitical has proved difficult for the Court. Its mandate to prosecute mass atrocity crimes has often resulted in identifying one group in a conflict an enemy and the other a friend.⁸² As a result, the ICC has faced criticism from both member and non-member states who believe that the Court's decisions are politically charged.

Much of the criticism of the ICC originates within the African Union (AU).⁸³ At the Court's birth, many AU member states were vocal supporters of the ICC and were actively involved in the negotiations that formed the Rome Statute,⁸⁴ however as time passed, the AU has become progressively more opposed to ICC actions. The first major change in the AU-ICC relationship occurred after the Court opened its investigation in non-member state Sudan in 2005, following a

UNSC referral. This sparked outcry from the Sudanese government, which claimed the investigation was an impeachment of state sovereignty. The watershed moment occurred following the issuance of an arrest warrant for Sudanese President Omar al-Bashir, which led many AU member states to join together in opposition to the warrant. From then on, the relationship between the two bodies has greatly deteriorated, posing a major problem for the ICC, which derives its authority and legitimacy from the support of the international community and individual states. African member states, specifically, represent the greatest conglomeration of ICC member states on any one continent, numbering 33 in total, so their support plays a vital role in maintaining the ICC's legitimacy. As such, the ICC must address concerns raised by the AU.

This chapter will address three major international issues which necessitate ICC action: (1) the tense relationship between the Court and the AU has resulted in actions by AU member states that oppose the Court and threaten its legitimacy, (2) the UNSC's heavy influence on the Court's decisions has caused it to investigate situations in accordance with the will of powerful UNSC member states, which has created discontent within the AU and the broader international community, and (3) AU claims have gained support from various member and non-member states that threaten to create widespread opposition to the Court, which would weaken its ability to function effectively. In light of discontent amongst members of the international community in regards to ICC actions, this chapter will propose possible ways to improve the relationship between the Court, the AU, and the international community as a whole, in order to bolster support for the Court.

Beginning in 2009, the AU issued many complaints and critical views regarding the decisions made by the ICC. In general these complaints fall under three separate, yet related issues:⁸⁵

- The Court is unfairly focusing on Africa.
- The Court allows the political will of powerful States, namely those who are permanent members of the UNSC, to influence its decisions too often.
- The Court is violating state sovereignty by investigating non-member states and indicting sitting heads of state.⁸⁶

As such, in 2009, the AU made a series of suggestions to the ICC as to how it should resolve the perceived problems to improve its relationship with Africa. The AU called for the Court to allow African states to try individuals domestically through complementarity (see chapter 1), to allow the African continent to try individuals through the use of hybrid courts, to revisit the issues surrounding the arrest warrant for al-Bashir and heads of state in general, and to consider the fact that if it does not work to compromise with the AU, all dual AU-ICC members would consider withdrawing themselves from the ICC.⁸⁷ In response, the ICC created a working group of the

ASP to consider the views of the AU, but as a whole, has made little attempt to effectively address AU concerns.⁸⁸ In fact, the Court's actions since 2009 have exacerbated tensions.

BUILDING OPPOSITION TO THE ICC: INVESTIGATIONS OPENED SINCE 2009

Opposition to the ICC amongst AU member states, which began in 2009 following the issuance of an arrest warrant for al-Bashir, has continuously been on the rise since 2009. The Court's investigation of four more African situations, Kenya, Ivory Coast, Libya, and Mali, has drawn criticism of varying degrees from the AU, which has grown increasingly opposed to the Court.

Kenya

In March 2010, the Court initiated an investigation into 2007 (and early 2008) post-election violence in Kenya via the chief prosecutor's *proprio motu* powers, which allow the prosecutor to open an investigation into a situation occurring in an ICC member state of his own initiative.⁸⁹ The conflict ensued following a controversial presidential election in which many Kenyans accused candidate Mwai Kibaki of stealing the election from the current President, Raila Odinga. The controversy surrounding the election sparked tension between the ethnic Kikuyu supporters of Kibaki and the ethnic Luo and Kalenjin supporters of Odinga and resulted in an estimated 1,000 deaths and the displacement of over 400,000 people.⁹⁰ Following the violence, Kenyan authorities failed to thoroughly investigate the conflict or try offenders, so the Court intervened to investigate.

The Kenyan government has made numerous attempts to thwart the investigation. Claiming that Kenyan courts are willing and able to prosecute offenders, the government has invoked its right to complementarity numerous times. It has called for hybrid African Courts to supersede the jurisdiction of the ICC and has made multiple requests for the UNSC to defer the investigation, since it would disrupt the upcoming March 2013 elections (involving two running-mates who both face charges at the ICC) and weaken recently forged ethnic bridges. All of Kenya's requests to try cases nationally have been denied, as Kenya has not been able to adequately prove that its courts were effectively prosecuting those who have committed crimes,⁹¹ and the UNSC has refused to defer the investigation.⁹² Consequently, the investigation has continued, Kenyan officials and the AU have been increasingly less cooperative with ICC initiatives, and the AU has been able to foster a spirit of discontent amongst AU member states wary of the Court's presence in Africa.

Ivory Coast

In 2011, via the prosecutor's *proprio motu* powers, the Court opened an investigation into violence that occurred in the Ivory Coast following the presidential elections of December 2010.⁹³ The election was intended to unify the country after having been divided by ethnic tension since the 2002 civil war, however Laurent Gbagbo, the sitting President, refused to accept defeat to the Presidential incumbent, Alassane Ouattara. His reluctance to surrender the position led to violence between forces loyal to Gbagbo and Ouattara. The conflict lasted until April 2011 when Gbagbo finally relinquished the presidential seat to Ouattara. It claimed an estimated 3,000 lives and left 500,000 people displaced;⁹⁴ the Ivory Coast's failure to properly investigate the violence led the Ivorian government to allow the Court *ad hoc* jurisdiction.⁹⁵

The investigation has drawn criticism from the AU, the Ivorian government, and Ivorian citizens for its failure to indict members of both parties in the conflict.⁹⁶ As of yet, the Court has only publicly issued arrest warrants for Laurent Gbagbo and his wife Simone Gbagbo. Thus, Ivorian citizens feel as though the Court is naming followers of Gbagbo "enemies" of the state and followers of Ouattara "friends," despite a feeling amongst many Ivorians that neither party was entirely guilty or innocent during the conflict. In response, the OTP has maintained that it is utilizing a "sequencing" policy in the investigation, indicting suspects of one group before moving on to investigate members of the other group, however this tactic seems to be disrupting, rather than maintaining, peace. Indeed, Guillaume Soro, Gbagbo's former prime minister and the current head of the Ivory Coast National Assembly, stated that "it was precisely in order not to be accused of victor's justice that [the Ivorian government] brought in the International Criminal Court... Yet, the ICC, to my knowledge, has only issued [two] arrest warrants, [all against the Gbagbo side];"⁹⁷ such a tactic, Soro stipulated, could further stoke political tension and lessen the Court's ability to effectively investigate the situation or obtain cooperation from Ivorian citizens. The Court, despite such criticism, has yet to alter its investigative strategy in the Ivory Coast, which has allowed Ivorian frustration towards the Court to fester and grow.

Libya

The OTP opened an official investigation into the situation in Libya, via a UNSC referral, in February 2011 following the Libyan uprising.⁹⁸ The uprising began on February 15, 2011 and resulted in an estimated 11,500 casualties (including those killed and missing amongst both rebel and state forces). At the conflict's outset, the Libyan regime, led by Muammar Gaddafi, attempted to quell the rebellion through use of unlawful arrests, indiscriminate attacks on civilians, gang rape, and summary executions; the rebels attempted to overthrow the government through use of similar tactics.⁹⁹ As a result, once the international community became aware of the gravity of the conflict, the UNSC approved Resolution 1973 on March 17, which established a no-fly zone over Libya and authorized all necessary measures, short of foreign occupation, to

end the conflict.¹⁰⁰ UN member states then began to assist the rebels through aerial assaults, and in late March, the North Atlantic Treaty Organization (NATO) took over military operations and carried out thousands of air strikes on the Government stronghold of Benghazi until October 2011. In August, opposition forces, the National Transitional Council (NTC), gained control of most of the country and announced the liberation of Libya. Since that time, the situation has been tense but stable.

The Court's investigation into the Libyan conflict has drawn criticism from the international community, the AU, and the NTC, which has been uncooperative with the Court's investigation. Indeed, the NTC claims that the investigation violates Libyan State sovereignty and, consequently, refuses to transfer Abdullah al-Senussi and Saif al-Islam Gaddafi, indicted suspects, to the Hague for trial.¹⁰¹ Additionally, many members of the international community, including Libya, claim that NATO airstrikes violated international law and resulted in the deaths of innocent civilians; the Court has yet to thoroughly investigate this allegation.¹⁰² As a result, the investigation has been hindered by international criticism and NTC non-cooperation. .

Mali

Following a self-referral in 2012, the Court opened an investigation into the current situation in Mali in early 2013.¹⁰³ The violent situation began in January 2012 following Muslim extremists' seizure of Northern Mali and subsequent implementation of a harsh interpretation of Shariah Law. It has resulted in thousands of deaths and human rights violations by both Malian government forces and the extremists as the two groups struggle for dominance. The entrance of French and Nigerian forces in December 2012 stopped rebel forces from gaining greater territorial control of the country, however they have yet to be completely defeated and foreign militaries are reluctant to relinquish control to the weak Malian government, fearing another militant surge by the rebels.¹⁰⁴ Due to the Malian government's inability to subdue or investigate the conflict, the Court formally launched an investigation. Compared to the other four cases previously discussed, the Court has faced little opposition or criticism for its investigation in Mali, given it was a self-referral, however the Court's decision to open another investigation into an African situation has reinforced AU claims that the Court is targeting Africa.

During the four years following the issuance of an arrest warrant for President al-Bashir of Sudan, tension between the AU and the ICC has continuously grown. The AU's major criticisms of the ICC have been reinforced by the Court's actions: the Court has refused to open an investigation into a situation outside of Africa, opened investigations into states that did not desire intervention (Kenya and Libya), and indicted another sitting head of state perceived by the AU to hold diplomatic immunity (Muammar Gaddafi – though he died before being arrested).¹⁰⁵ As a result, the AU has become increasingly opposed to ICC intervention and has attempted to impede investigations through actions that have delegitimized the authority of the ICC.

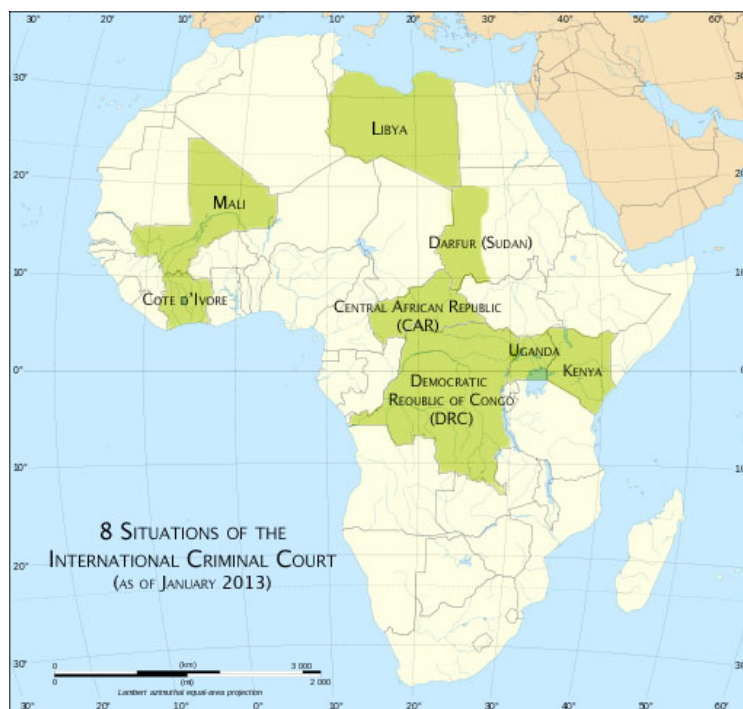


Figure 1. Eight Situations of the ICC

AU ACTIONS DELEGITIMIZING THE AUTHORITY OF THE ICC

African states that are both AU and ICC members represent a large portion of ICC member states, numbering 34 of the total 122. As such, their actions have the ability to strengthen or undermine support for the ICC amongst members of the international community. In the Court's early years, this influence helped bolster support for the ICC because self-referrals by Uganda, the DRC, and the CAR¹⁰⁶ made states less concerned about a rogue prosecutor intent on prosecuting nationals of non-member states. Instead, it demonstrated the role the ICC could play in preventing persistent violence in conflict-torn areas. Conversely, in recent years, the AU has become increasingly antagonistic to the ICC, and its views have permeated the international community's opinion of the Court.¹⁰⁷ Indeed, the AU's accusation that the Court is a mechanism of neo-colonial justice too focused on investigating African nations has caused many groups, including the Arab League, to doubt the Court's commitment to achieving equal justice for all.¹⁰⁸ As a result, the ICC increasingly faces the threat of international condemnation and eroding legitimacy. As Nicole Fritz, Executive Director of the Southern Africa Litigation Centre, stated, "the danger is that 'the rhetoric of condemnation – that the ICC is an agent of neocolonialism or neo-imperialism, that it is anti-African – may so damage the institution that...it is simply abandoned.'"¹⁰⁹ In order to avoid such a disaster, the Court must resolve the issues raised by the AU concerning its fairness as a lawful institution.

Darfur as an Impetus to AU Dissent

The UNSC referral of the situation in Darfur to the ICC in 2005 marked the first major shift in public perception of the Court's actions.¹¹⁰ In large part, the international community viewed it warranted an investigation, as over 200,000 people had been killed and two million displaced since the conflict's start in 2003. The Sudanese government, however, viewed the intervention as an impeachment of state sovereignty. As such, it actively opposed, and continues to oppose, ICC actions by refusing to allow ICC investigators access to areas of Darfur, expelling various humanitarian organizations, and refusing to arrest President Omar al-Bashir.¹¹¹ Additionally, the Bashir Administration has "accused the Court of being part of a neocolonialist plot against a sovereign African and Muslim State," and its claim has gained credence amongst various African and Arab political institutions.¹¹² States, it seems, were wary of the prosecutor's ability to try nationals of non-member states.

Criticism of the ICC has become increasingly prevalent since the issuance of an arrest warrant for al-Bashir in 2009.¹¹³ The warrant marked the first-ever indictment of a sitting head of state and triggered outcry from the AU, which claimed that the warrant was unlawful due to diplomatic immunity and, furthermore, that arresting the Sudanese President would hamper the search for peace in Darfur.¹¹⁴ Eliminating amnesty as an option for al-Bashir, and heads of state in general, the AU claimed, created a no-win situation in which al-Bashir was desperate to maintain his political position and would commit heinous crimes in order to do so.¹¹⁵ As such, the AU asked for the investigation of Sudan to be deferred and the arrest warrant for al-Bashir tabled, however the UNSC failed to issue a deferral, and the ICC refused to withdraw the arrest warrant. In response, the AU began to actively oppose the actions of the Court.

Non-Compliance with ICC Requests

AU states have become increasingly hostile towards the ICC since the issuance of an arrest warrant for President al-Bashir in 2009. In July 2010, al-Bashir visited Chad, an ICC member state, and was not arrested despite Chad's obligation, as a member state, to comply with ICC arrest warrants.¹¹⁶ In the following months, he visited Malawi, Djibouti, Kenya, and Nigeria and was still not arrested,¹¹⁷ despite sharp criticism launched by various humanitarian organizations. Indeed, Kenya invited al-Bashir to the ceremony for the promulgation of its new constitution,¹¹⁸ an important landmark event for the country, and al-Bashir was invited to and attended a meeting at the AU's headquarters in Addis Ababa with no repercussions in January 2013.¹¹⁹ Thus, the AU has not only disobeyed the Court and delegitimized its authority through its refusal to comply with Court orders, but also it highlighted one of the Court's major weaknesses, its lack of an enforcement mechanism.

Currently, the Court is entirely dependent upon its member states to execute arrest warrants,¹²⁰ so the AU's refusal to arrest al-Bashir has left the Court in a precarious situation. The AU is

effectively barring the ICC from prosecuting al-Bashir and exposing the Court's inability to oblige compliance from member states. Moreover, as the Court has no mechanism in place to punish States who disregard its orders, the AU faces no repercussions for its actions (from the ICC) and, therefore, little reason to oblige the Court in the future. In order to remedy this situation and avoid further repetition of similar actions, the Court must improve its ability to oblige compliance from its member states.

Ambiguity between Rome Statute Articles 27 and 98

In 2009, the AU issued a statement condemning the ICC's broad jurisdiction as unlawful and, subsequently, refusing to execute the arrest warrant for al-Bashir.¹²¹ It based this claim on the conflicting statements made in Articles 27 and 98 of the Rome Statute. Article 27 states that heads of state are not granted immunity by the ICC and must be held accountable for the crimes they have committed,¹²² while Article 98 stipulates that states are not obliged to cooperate with the ICC if their actions would violate an international agreement with a third-party state or the diplomatic immunity of a third state's officials.¹²³ As such, the AU claims it would be unlawful to arrest al-Bashir because the Sudan is not a member of the ICC and therefore holds diplomatic immunity. Individual AU member states claim that they do not have to execute the warrant because their membership in the AU precludes their loyalty to the ICC, and as members of the AU, they have pledged to not arrest al-Bashir.¹²⁴

The ambiguity associated with the expectations of member states in relation to non-member states has left the AU with too much room for interpretation. As long as the ICC fails to address this gap in the Statute, the AU will likely continue to disregard its orders and face few repercussions. Currently, the Statute's only means to enforce obedience is to refer non-compliant states to the Security Council, which can subject them to sanctions,¹²⁵ however the UNSC is often reluctant to utilize such measures. As a result, states are able to avoid facing consequences for failing to comply with the Rome Statute.

The call for Hybrid Courts and national prosecutions via Article 17

AU non-compliance with ICC requests has extended beyond many member states' refusal to execute arrest warrants; many AU member states have called for national prosecutions via Article 17 and the implementation of Hybrid Courts to supersede the authority of the ICC.¹²⁶ These actions have not only highlighted the inability of Article 98 to compel compliance from ICC member states, but they have also delegitimized the authority of the Court and revealed its limited means to compel cooperation from States.

The Kenyan government has been consistently uncooperative with the Court's investigation and has attempted to revoke ICC jurisdiction on numerous occasions. In 2010, its parliament passed a

resolution asking the government to withdraw from the ICC.¹²⁷ The government has petitioned the UNSC to defer the investigation multiple times,¹²⁸ claiming it would derail the upcoming 2013 presidential elections. In addition, Kenyan officials continue to deny ICC investigators access to Provincial Commissioners and Police Chiefs that were in charge of the most violent areas during the conflict.¹²⁹ The Kenyan government has worked in concert with the East African Legislative Assembly to pass legislation in 2012 that would allow the Assembly to try Kenyans in Tanzania at the ICTR, rather than allowing the ICC to try Kenyans in the Hague.¹³⁰ It has also been at the forefront of an AU initiative to allow the African Court on Human and People's Rights (AfCHPR) to prosecute crimes committed in Africa that would otherwise be prosecuted by the ICC.¹³¹ The AfCHPR, which was officially created in 2006 and is headquartered in Arusha, Tanzania, has yet to make a significant impact on the jurisdiction of the ICC.¹³² An official proposal aimed at expanding the jurisdiction of the AfCHPR to include war crimes, crimes against humanity, and genocide, is currently under review by the AU.¹³³ If this legislation is implemented, it could be used to preclude ICC prosecution of crimes committed in Africa. Thus, Kenya's actions have kept the ICC from efficiently investigating the situation and delegitimized the Court's authority by insinuating that it has the ability to restrict ICC jurisdiction over the case. This has been met with disapproval from the Court, however, because it lacks the means to take definitive action against Kenya, the ICC can do little to compel compliance from Kenyan officials.

The Court has faced opposition throughout its investigation of the Libyan conflict from the NTC. The NTC has refused to transfer indicted suspects in its custody to the Hague,¹³⁴ and it has been accused of committing atrocities both during and following the uprising of 2011.¹³⁵ Indeed, there is proof that during the capture of Muammar and Saif Gaddafi, the NTC tortured Muammar Gaddafi,¹³⁶ a violation of international law, and there is great speculation that it is responsible for his death.¹³⁷ Additionally, the Libyan government has failed to transfer Saif Gaddafi and Abdullah al-Senussi to the Hague for prosecution. Instead, it has insisted on trying Gaddafi in Libya and opted to bring unwarranted charges against him in order to have jurisdiction over his trial.¹³⁸ In January 2013, Gaddafi appeared in court faced with security charges claiming he was unlawfully communicating with the ICC;¹³⁹ the Court's failure to stop the trial or apprehend Gaddafi has, again, highlighted its inability to compel compliance from its members. In order to gain greater legitimacy and authority, the Court must increase its capacity to compel cooperation with investigations and compliance with Court orders from its member states.

Clarifying obligations

To address this limitation, the ICC must clarify the exact requirements of its member states. This can be achieved through amending Article 98 of the Rome Statute. Article 98 (1) must be amended to definitively eliminate immunity for heads of state, whether they be nationals of an ICC member state or not. By doing so, the Court will eliminate any ambiguity within the Statute

and thereby prevent members of the AU, or any other member state, from exploiting the statute in order to avoid fulfilling their responsibilities to the ICC.

In order to persuade member states to fulfill their responsibilities to the Court as outlined in the Rome Statute, Article 98(2) of the Statute should be amended to include the option to suspend or expel member states who refuse to cooperate with the ICC.¹⁴⁰ The amendment should suspend member states that refuse to cooperate with the Court from the ASP; if the state continues to oppose the Court, the ASP should be given the opportunity to expel the state through a two-thirds majority (in favor) vote. Conversely, if the state begins to cooperate with the ICC, it should be reinstated to the ASP.¹⁴¹ In such a manner, it is unlikely that any state would be unjustly expelled from the ASP, however states would be forced to face suspension if they chose not to cooperate with the ICC.

In conjunction with a mechanism to suspend and expel member states from the ASP, the Court's enforcement capabilities would be augmented if it were to encourage the UNSC to work cooperatively with the ASP in matters of aid for and sanctions against uncooperative countries. The UNSC currently has the capability to enforce trade sanctions upon countries believed to be threatening international security. If it were to work in concert with the ICC to compel uncooperative member states to comply with ICC requests through targeted sanctions, the ICC would have greater persuasive power. For example, Western states decreased financial aid to Malawi when the state failed to arrest al-Bashir during his visit in October 2011. Combined with diplomatic negotiations initiated by the Bureau of the ASP, this measure persuaded the Malawian government to agree to arrest al-Bashir should he return to Malawi. Thus, when al-Bashir refused to forgo the 2011 AU summit meeting scheduled to be held in Malawi despite requests that he not attend, the Malawian foreign minister cancelled the event.¹⁴² This exemplifies the power of economic pressure in persuading states to reconsider noncompliance. A joint effort by the UNSC and the ASP to use the same tactic would compel states to cooperate with ICC orders in the future.

Creating a mechanism to suspend and expel states from the ASP, combined with UNSC issued sanctions, could draw criticism from member states who believe the ICC is too heavily influenced by powerful states—a concept which will be discussed in greater detail below.¹⁴³ Largely comprised of dual AU/ICC members, state parties may feel as though such a mechanism would allow nations to form coalitions eager to punish and oust member states with views opposed to their own. This is unlikely because expulsion would require a two-thirds majority, however they could still oppose the amendment in an effort to maintain the status quo.

Despite possible opposition to amending Article 98, the benefits of amendments would greatly improve the enforcement capabilities of the ICC. It would gain the ability to hold member states accountable for their actions, which would likely lead many states to reconsider disobeying the

Court and would allow the Court to expedite investigations and prosecutions rather than face prolonged opposition to ICC requests. Additionally, eliminating amnesty for all heads of state would bolster the Court's image as an apolitical body by proving that the Court is working to hold *all* states and national leaders equally accountable for their actions. Thus, support for the Court would be reinforced among states that have questioned whether the Court is too heavily influenced by powerful states. Moreover, an amendment of Article 98 combined with greater cooperation between the ASP and the UNSC would improve the Court's ability to successfully investigate situations and prosecute suspects, thereby bolstering its credibility as a legitimate legal institution.

UNSC INFLUENCE WITHIN THE ICC

The ICC has often drawn criticism for appearing to cater to the desires of powerful nations, especially the United States, Russia, and China, when selecting which situations to investigate. The ICC, however, maintains that its choice of cases is based solely on a situation's ability to meet the three requirements for investigation: (1) jurisdiction, whether the situation occurs in member state (if not, the Court can only investigate the situation following a UNSC referral) and involves crimes that fall within the Court's mandate, (2) admissibility, whether the government is unable or unwilling to prosecute offenders (in contrast to a country calling for national prosecutions via the complementarity principle of Article 17) and whether crimes committed meet the threshold of gravity, and (3) the interests of justice, the belief by the Court that an investigation would promote justice in the situation. Nonetheless, many examples of cases forgone or retained "under consideration" for long periods of time, such as Palestine, Colombia, and Syria, have been cited as situations protected from investigation by powerful nations.

Palestine

In April 2012, the OTP officially refused to investigate atrocities committed in Palestine as a result of the Israel Palestine conflict.¹⁴⁴ The OTP stated that its decision was based on the uncertain nature of Palestinian statehood because, at the time, the UN General Assembly did not recognize Palestine as a state and, therefore, it was ineligible for investigation.¹⁴⁵ Many international organizations and leaders, however, have questioned this reasoning, as the situation in Palestine seems to meet the requirements for an ICC investigation despite issues of statehood.¹⁴⁶ Indeed, over 130 governments recognize Palestine as a State,¹⁴⁷ it holds "non-member observer entity" status at the UN (which was upgraded to "non-member observer state" status following a November 2012 vote),¹⁴⁸ "non-member observer" status at the ICC, and has considered itself to be a state since the 1980s.¹⁴⁹ Additionally, it accepted *ad hoc* jurisdiction of the Court and admitted itself to be incapable of prosecuting offenders, so the situation in Palestine, arguably, falls under the jurisdiction of the Court.¹⁵⁰ Furthermore, in regard to gravity, researchers estimate that there have been over 40,000 casualties of the conflict since 2002.¹⁵¹

This figure greatly outnumbers that of several situations currently under investigation by the ICC¹⁵² and, consequently, ensures that the situation meets the gravity threshold. Finally, as an ICC investigation into the Israel/Palestine conflict would force both countries to take responsibility for the actions of their citizens, the investigation would promote justice. As such, it seems as though the situation in Palestine did, indeed, meet the thresholds for investigation by the ICC.

The Court's refusal to investigate the situation in Palestine despite its perceived ability to meet the requirements for investigation indicates that the Court's actions were motivated by factors other than admissibility. Some scholars, such as John Dugard, a professor of International Law and a former Special Rapporteur for the UN Commission on Human Rights and the International Law Commission, cite US opposition to the investigation as the Court's reason for refusing to investigate.¹⁵³ Indeed, the US has opposed numerous attempts to hold Israel accountable for its illegal actions¹⁵⁴ and voted against passing a UN resolution granting Palestine statehood in November 2012.¹⁵⁵ As such, the Court may have been reluctant to investigate the situation in Palestine out of fear of US discontent rather than inadmissibility.

Colombia

The situation in Colombia has been under review by the ICC since 2005,¹⁵⁶ and armed conflict in the state continues to claim the lives and homes of Colombian citizens. The conflict, according to the Colombian prosecutor's office, has resulted in the death, displacement, disappearance, and torture of over 75,000 people since 2005,¹⁵⁷ and despite new measures taken by Colombian authorities, the violent nature of the conflict is not lessening. The ICC claims that it has not opened an investigation into the conflict because the Colombian court system is attempting to fulfill the requirements of complementarity through implementation of a new law, The Justice and Peace Law (JPL), to punish members of the currently warring groups. The JPL, however, is thought by many to be insufficient in its punishment of criminals. Indeed, a report issued by the Institute for Criminal Law and Justice in 2010 cited many shortcomings of the JPL and insinuated that it would be in the best interests of Colombia if the ICC were to intervene.¹⁵⁸ The Court, nonetheless, has failed to open an investigation after eight years of review.

Various African countries, including Kenya, Sudan, and Libya, have attempted to invoke their right to complementarity through Article 17 of the Rome Statute in order to disqualify ICC investigations in their nations, however their requests have been denied by the ICC.¹⁵⁹ In each case, the Court judged the national judicial system to be inadequate and insisted on trying offenders in the Hague. In the case of Colombia, however, the OTP has given the national judicial system authority to prosecute offenders despite criticism by the international community that Colombia is incapable of adequately trying the accused and that its JPL is simply being used as a shielding mechanism for the most serious offenders. Indeed, the JPL offers "pseudo-

amnesty” (most often) to the paramilitaries’ high command by issuing minimal sentences of five to eight years rather than more severe sentences, which are normally handed down for crimes often committed by the high command, such as rape, murder, and kidnapping. It also allows for US extradition of paramilitary commanders,¹⁶⁰ which has had a detrimental effect on the ability of Colombian courts to convict perpetrators because the testimony of extradited suspects plays an important role in adequately proving the guilt of Colombian nationals, and it has proven difficult for Colombian authorities to gain access to extradited detainees.¹⁶¹ Moreover, as those extradited are often high-level offenders, it is difficult for Colombian prosecutors to try them for crimes committed in Colombia.¹⁶² As such, it seems as though the Colombian judiciary system does not have the means to effectively prosecute those who have violated international law, however the Court has yet to revoke Colombia’s privilege to try cases nationally.

The ICC’s failure to issue a formal investigation into the situation in Colombia has often been questioned by parties who feel that the Colombian judicial system has failed to satisfy the requirements of complementarity. Numerous groups, including an ICC roundtable discussion group, have outlined the various challenges the Colombian judicial system has failed to overcome and its apparent unwillingness to prosecute crimes that would implicate the State as a guilty party.¹⁶³ Additionally, groups have examined the effects of current extradition policies with the US and judged them to be detrimental to achieving fair justice in Colombia. Thus, it seems an adequate amount of information is available in the public sphere to convince the Court to formally open an investigation. Its failure to do so indicates that other factors are at play. Indeed, US involvement in the Colombian situation may play a role in the Court’s decision. The US has a strong relationship with the current Colombian government,¹⁶⁴ depends on Colombia as an important source of energy and an integral economic and geopolitical gateway to South America, and has nearly 1,400 civilian or military officials stationed in Colombia at any given time.¹⁶⁵ As such, the US is invested in maintaining the status quo in Colombia in order to sustain the current Colombia-US relationship. If the ICC were to investigate the Colombian situation, it is likely that, in light of the State’s unwillingness to admit its guilt in committing crimes, there would be a regime change. Not only would this disrupt current US-Colombia relations, but it would also jeopardize the US’s access to Colombian resources. Additionally, US civilian and military officials in Colombia would be vulnerable to ICC prosecution if they were found to have committed atrocities in Colombia. Thus, the US would oppose an official investigation into the Colombian situation in favor of a continuance of the status quo in the nation. The ICC’s failure to investigate the situation in Colombia despite evidence of its inability to fulfill the requirements of complementarity indicates that its decision was based on other factors. The Court’s decision appears heavily influenced by US interests.

Syria

In 2011, opposition factions in Syria began an attempt to overthrow the ruling Syrian regime; the conflict has continued, largely unchecked by the international community. Since its outset, the conflict has claimed the lives of over 60,500 people, and there have been numerous publications documenting atrocities and human rights violations committed by both government and opposition forces in the country.¹⁶⁶ The Syrian conflict undoubtedly meets the gravity threshold, as it has claimed a far more lives than some of the conflicts currently under official investigation by the Court. Furthermore, the national government has proven itself unwilling to investigate and prosecute the crimes that have been committed. Indeed, government forces continue to commit atrocities.¹⁶⁷ As such, the only criteria for investigation that has not been met by the situation in Syria is that of jurisdiction. Because Syria is not an ICC member state and has not accepted *ad hoc* jurisdiction from the Court, the Court must attain UNSC approval in order to investigate. Many international organizations have asked the UNSC to refer the situation to the ICC for investigation,¹⁶⁸ however it has failed to do so; as a result, the Court is unable to open an investigation into Syria.

This failure has occurred because Russia and China, permanent members of the UNSC with veto-wielding power, have strong alliances with Syria.¹⁶⁹ Russia and China have repeatedly vetoed movements to refer the Syrian situation to the ICC, and Russia has quashed initiatives attempting to persuade the UNSC to refer the Syrian situation to the ICC, calling them “ill-timed and counterproductive.”¹⁷⁰ Nonetheless, various groups and organizations, including Human Rights Watch, the UN, Arab League, and European Union Foreign Affairs Council, continue to attempt to manipulate the situation in Syria by appealing to the UNSC and implementing bilateral sanctions against Syria.¹⁷¹ Still, the ICC has the greatest capacity to hold all parties guilty of committing crimes accountable for their actions and is not able to investigate due to the interests of Russia and China in Syria.

Implications of UNSC Influence on ICC case selection in Africa

The Court’s failure to investigate situations involving states with ties to powerful UNSC member states, coupled with its continued focus on Africa, has fostered the belief of many that the ICC is subject to political influence.¹⁷² Indeed, the Court’s decision to open official investigations solely into African situations reveals that it not only tends to overlook situations involving states *with* powerful UNSC allies, but also tends to open investigations into states *without* powerful UNSC allies. Unease about the ICC’s political nature grows stronger as situations warranting investigation continue to go unchecked by the Court, and its failure to address such concerns has only served to enhance the distrust and frustration of states.

The Court's decision to reject opening formal investigations into the situations of Palestine and Colombia continues to draw criticism as armed conflict in both areas continues and casualty levels rise. As the Court chose to open investigations into conflicts with far lower casualty rates, such as those in Kenya, the Ivory Coast, and Libya, which resulted in an estimated 1,200, 3,000, and 11,000 casualties respectively, its decision to forgo the Palestinian and Colombian cases points to factors other than the Court's three established thresholds for investigation. As discussed above, the interests of UNSC members play a role in the Court's decision not to investigate situations; likewise, a lack of UNSC interest in nations makes the Court more likely to investigate a situation. For example, the US's vested interest in the Palestine and Colombia has persuaded the Court to forgo investigations into these situations, however the US has little political stake in the Kenyan conflict and it was in the best interests of the US to allow ICC intervention in the Libyan conflict,¹⁷³ so it was less opposed to investigations of these situations. Indeed, many other factors influence the Court's decision to investigate a situation, however its tendency to prioritize African situations over equally or more grave situations outside of Africa has not gone unnoticed by the AU and has increased its feeling that the Court is targeting Africa.

CONCLUSION: BOLSTERING SUPPORT FOR THE COURT

The Court's focus on Africa is consistently defended by its supporters, which claim it is in Africa not by choice, but by necessity.¹⁷⁴ Indeed, the atrocities committed in Africa warrant investigation, however the AU, various scholars, and international groups have questioned the Court's failure to investigate situations outside the continent. There is no geographic mandate in the Rome Statute, so the Court's tendency to concentrate on African conflicts has fostered a feeling amongst AU member states that Africa is being targeted. Thus, multiple AU states have attempted to create hybrid courts and refused to execute ICC-issued arrest warrants in order to undermine the Court's authority. Such actions threaten the Court's legitimacy and limit its ability to effectively carry out investigations. Moreover, AU criticisms have since gained credence in other nations. If trends of dwindling ICC support continue in the next ten years, they will jeopardize the Court's longevity.

To bolster support and decrease criticism regarding situation selection, the Court must effectively address concerns raised by the AU and the international community. By limiting the influence of the UNSC on ICC decisions and pursuing investigations into the gravest situations regardless of states' political affiliations, the Court will improve its standing as an apolitical body. Additionally, by eliminating head of state immunity for all states in order to more clearly outline the requirements of member states to the Court, the Court will have greater capacity to oblige compliance from its member states. Finally, through an amendment allowing the ASP to suspend or expel non-cooperative member states and encouraging it to work with the UNSC to implement sanctions against suspended states, the Court will have greater persuasive power in

compelling states to comply with Court orders and investigations. Through these actions, the Court will improve its standing as an apolitical body and strengthen the its long-term prospect of remaining the world's court for victims of grave abuses.

RECOMMENDATIONS

- Amend Article 98 (1) to explicitly state that heads of state are not immune to prosecution by the ICC in order to eliminate ambiguity between Articles 27 and 98.
- Amend Article 98 (2) to include a mechanism to suspend or expel states from the ASP if they refuse to fulfill said requirements.
- In practice, refuse to cater to the will of the powerful states, namely the US, Russia, and China, and instead, opt to investigate situations based on the Court's mandate as outlined by the Rome Statute.

CHAPTER 1

¹⁵ Rome Statute of the International Criminal Court ("Rome Statute"), U.N. Doc. A/CONF.183/9, July 17 1998, entered into force July 1 2002, art. 53 Initiation of an Investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - a. The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - b. The case is or would be admissible under article 17; and
 - c. Taking into account the gravity of the crime and the interest of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice

¹⁶ ICC-OTP, *Policy Paper on Preliminary Examinations—Draft*. The Hague. Oct 4 2010: 18
http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

¹⁷ Rome Statute, art. 13(a)-(c).

¹⁸ Rome Statute, art. 15(3)

¹⁹ *Supra* note 15, 2

²⁰ Rome Statute, art. 53(1)(c)

²¹ Rome Statute, art. 11 & 12

²² Rome Statute, art. 11(1)-(2) & Article 12(3)

²³ Crime of aggression was adopted by the ASP in 2010 and will enter into force in 2017

Rome Statute, art. 12(1) & Article 5(1)(a)-(d)

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⁴³ *Supra* note 36, p. 793-803.

⁴⁴ *Supra* note 34, 8-9

⁴⁵ *Supra* note 29, 74-80

⁴⁶ *Supra* note 36, 805-811.

⁴⁷ *Supra* note 32, 189-213

⁴⁸ *Supra* note 34, 9

⁴⁹ *Supra* note 15, 2

⁵⁰ Rome Statute, art. 42 (independence)

Rome Statute, art. 21 (impartiality)

Rome Statute, art. 54 (objectivity)

⁵¹ *Supra* note 15, 10

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⁵⁴ ICC NOW, "The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a 'Positive' Approach," Lawyers Without Borders,

http://www.iccnw.org/documents/asf_rapport-anglais-complementarity_and_colombia.pdf

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(1). The jurisdiction of the Court shall be limited to the most serious crimes of concerns to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes

(a)-(d). The Crime of Genocide; Crimes against humanity; War crimes; The crime of aggression

⁵⁶ ICC-OTP, *Second Public Hearing of the Office of the Prosecutor*, The Hague, Interested States, Sept 25 2006: 2.

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⁵⁸ PTC-I. *Situation in the Democratic Republic of the Congo: In the Case of the Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06. Feb 24 2006: 24

<http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>

⁵⁹ *Supra* note 57, 26

⁶⁰ *Supra* note 57, 33

⁶¹ *Supra* note 57, 34

⁶² "The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes" - Luis Moreno-Ocampo letter to The Hague

Supra note 60

⁶³ "After analyzing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed" - Luis Moreno-Ocampo letter to The Hague

Supra note 60

⁶⁴ *Supra* note 60

⁶⁵ ICC-OTP, *Situation in Colombia: Interim Report*. Nov 2012.

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⁷² ICC-PTC-II. *Situation in the Republic of Kenya*. ICC-01/09. 31 March, 2010: 38

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The Prosecutor v. William Samoei Ruto (Former Minister of Higher Education, Science & Technology)

The Prosecutor v. Joshua Arap Sang (Head of operations at Kass FM in Nairobi)

The Prosecutor v. Henry Kiprono Kosgey (Member of the parliament and Chairman of the ODM)

The Prosecutor v. Francis Kirimi Muthaura (Former head of the Public Service & Security to the Cabinet)

The Prosecutor v. Uhuru Muigai Kenyatta (Deputy Prime Minister and Former Minister for Finance)

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CHAPTER 2

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⁸² *Ibid.*

⁸³ Simon Weldehaimanot, "Arresting Al-Bashir: The African Union's Opposition and the Legalities," *African Journal of International and Comparative Law* 19, no. 2 (2011): 208-235.

⁸⁴ Max Du Plessis, "The International Criminal Court that Africa wants," *Institute for Security Studies* August (2010): 25, Print.

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¹⁴⁵*Ibid.* .

¹⁴⁶The issue of Palestinian statehood has often been debated amongst state leaders and scholars throughout the international community, as Palestine's ability to declare itself a state short of international recognition has been questioned. In November 2012, only seven months after the Court refused to investigate the situation in Palestine, however, the UN, effectively ending any debate in regard to Palestine's legal statehood, declared Palestine a state. As this development occurred after the ICC officially refused to investigate the situation in Palestine on the basis of statehood, it cannot be held in consideration when analyzing the Court's decision not to investigate the situation in Palestine, however the development signals the majority of the international community's tendency to view Palestine as a legal state.

¹⁴⁷Office of the Prosecutor, "Situation in Palestine." *International Criminal Court* (2012):1-2.

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SECTION 2

INVESTIGATIONS

CHAPTER 3

ISSUES WITH INVESTIGATIONS

Ryan Gilchrist

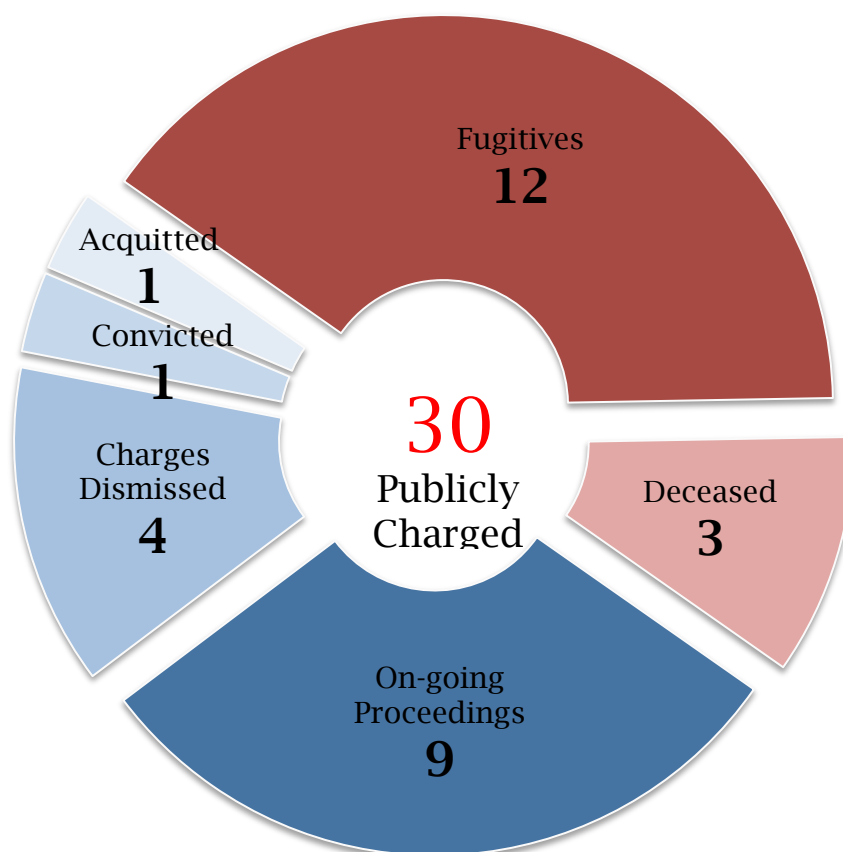
The reputation of the ICC hinges on the ability of the Chief Prosecutor and the OTP to gain convictions in court. This can only be done if the OTP builds strong cases based on evidence obtained through rigorous investigations. The ICC must find a way to strengthen investigations and thus the eventual trials that follow. By looking at past shortcomings and organizational problems within the OTP, this chapter will show that policy changes must be made within the OTP and with the allocation of the Court's budget to ensure that investigations are more efficient in the future.

INTRODUCTION

The OTP and specifically the investigations teams are the means by which the Court constructs its cases and prosecutes criminals. The investigations teams of the OTP provide the foundation on which all proceedings and trials are built. Thorough investigations are critical to ensure that the prosecution presents strong cases. To date, however, the prosecution has faced numerous shortcomings in court. In ten years (2002-2012), the Court has handed down two judgments; one conviction and one acquittal. It has also released four accused for lack of evidence after charges failed to be confirmed during the Pre-Trial stage. This is a poor record by any standard. Much of this can be attributed to failures by the OTP.

This chapter identifies the reasons behind the failures of past investigations. It reviews some past cases, illustrating problems with evidence and the OTP's failure to meet the standards of proof required to confirm charges, showing that the issue falls with the management of the OTP rather than with isolated problems in each case. It then identifies structural obstacles within the OTP, paying specific attention to the organization of the Office and its investigative teams, and lastly analyzes budgetary constraints on the OTP and investigative teams. Finally, it looks at ways that

the OTP can improve investigations and the subsequent cases. These recommendations include: (1) changing the policy within the OTP to internally raise the minimal standard of proof required to go to trial and make investigations more efficient and (2) the reallocation of resources within the Court to give the OTP a larger proportion of the budget.



*As of February 2013

Figure 2. ICC charges Distribution

LEGACY OF THE FIRST CHIEF PROSECUTOR

The OTP's track record, specifically gaining only one conviction, has led to its history over the previous ten years to be characterized by shortcomings and failures. To date, out of the 30 individuals charged by the Court, 15 have appeared before it. Of these 15 individuals, the OTP failed to have charges confirmed against four of them in the Pre-Trial Chamber (PTC), thereby prompting their release from custody (refer to Figure 2).¹⁷⁵ Critics have cited poor leadership as a leading cause for this record. Former OTP employees have said that the Office has felt pressure to prove itself as an effective and legitimate international legal body, which has led to initiating

investigations into situations before sufficient research could be done to prepare the investigators. This, coupled with a lack of resources for investigations teams,¹⁷⁶ has led to certain crimes being overlooked as well as attributing to poor investigations that have resulted in weak cases.¹⁷⁷ The OTP has also instructed investigators to limit the number of charges in certain cases. For example, after a year and a half of investigating killings and other crimes in the Lubanga case, the OTP told its investigators to only focus on child soldiers.¹⁷⁸ While this case ultimately ended in the only conviction in the history of the ICC, many critics felt that the crimes committed by Mr. Lubanga were not accurately reflected by the charges brought against him.¹⁷⁹

The second verdict of the Court, the acquittal of Mathieu Ngudjolo Chui, was a blow to the external image of the ICC. The decision drew harsh criticisms from human rights groups who placed the blame on the OTP for not building a stronger case.¹⁸⁰ The judges cited inconsistent and unreliable witness evidence, the lack of testimony from witnesses that could have played a key role (such as former militia leaders), unfamiliarity with the region in question, and no evidence being collected until three years after the alleged events as causes that weakened the case. Ultimately, the prosecution could not prove “beyond reasonable doubt” that Ngudjolo Chui was commander of the military group at the time of the 2003 killing of approximately 200 residents of the Bogoro village in the DRC and thus that he was not found guilty of his accused crimes and was released from custody.¹⁸¹ Another major point of contention in the case was the interpretation of Article 25(3)(a) of the Rome Statute relating to indirect criminal responsibility.¹⁸² Trial Chamber Judge Christine Van den Wyngaert opined that under her interpretation of the Article, the case could not be supported. She disagreed with the PTC claiming that she found no basis for indirect perpetration because “perpetration through an organization finds no support in the Statute.”¹⁸³ A key aspect in this decision is the fact that the judges found problems not just with the substance of the case, but also with the way it was handled by the prosecution.

During the tenure of the first Chief Prosecutor, Luis Moreno-Ocampo, the OTP came under criticism for its many failures while their one victory even received disapproval from observers. Critics attribute this to both growing pains of a new organization and institutional failures by the OTP and the Chief Prosecutor. Overall, the first Chief Prosecutor’s legacy will be one of missed opportunities rather than success.

ISSUES RELATING TO STANDARDS OF PROOF

As stated earlier, only two verdicts have been handed down, one conviction and one acquittal in the ICC’s first ten years. While it is tempting to examine why an individual case may fail, it serves better to look at the overarching institutional and policy concerns. The prosecution has failed to meet the standards of proof necessary to confirm charges in four cases. This is due to a

reliance on secondary evidence, the prosecution bringing charges before the case is ready, and broad claims being made without substantial evidence to back them up. The OTP must improve its overall management in order to adopt better policies and procedures in the future that will build stronger cases that not only can be won in trial but also represent the complete extent of the crimes committed.

The ICC Statute requires the OTP to meet progressively higher standards of proof at various phases of its investigation. The case can only move forward when each of these benchmarks is met. First, an internal report is generated by the OTP to determine the potential crimes in a situation and their admissibility, if it is determined that there is a “reasonable basis to proceed” a formal investigation will follow.¹⁸⁴ After the investigation has started, the OTP may issue an arrest warrant through the PTC by submitting a “document containing the charges” that meets the lowest standard of proof, proving that there are “reasonable grounds to believe” that the accused person committed the crime.¹⁸⁵ Once the accused is in custody, the next standard of proof must be met to confirm the charges in the PTC, this standard of proof is that there is sufficient evidence to establish “substantial grounds to believe” that the accused committed the crimes, if this standard is not met the accused is released from custody, if it is met the case proceeds to trial.¹⁸⁶ The final standard of proof required to convict the accused in court is to prove “beyond reasonable doubt” that the accused is guilty of the crimes for which they are charged.¹⁸⁷

The OTP has received a lot of criticism during the PTC stage of its cases because the judges have felt that the OTP has not come prepared with specific crimes and evidence. This criticism shows two primary issues; (1) that the former Chief Prosecutor was willing to move ahead before his case was fully developed, and (2) that the investigation team on site was unable to gather enough strong evidence to build its case.

In *The Prosecutor v. Callixte Mbarushimana* from the DRC, the judges noted that in accordance with article 67(1)(a),¹⁸⁸ the defendant must be told of the charges being brought against him prior to the trial. The Chambers then made a point to criticize vague charges made by the Prosecution. These charges were about broad crimes committed in a large geographic area, rather than specific incidents. The Chambers claimed that this appeared to be an attempt by the Prosecution to allow completely new charges to be added at a later date while also questioning why it was unable to present specific evidence regarding specific crimes committed in other regions it may wish to charge.¹⁸⁹ This conflicted with article 67, because in the view of the judges it meant that the OTP did not tell the defendant about all of the charges being brought against him, and article 74(b)¹⁹⁰ which does not allow for new charges without following the procedures outlined in the Statute.¹⁹¹ Due to these issues as well as a lack of evidence or reliance on a single witness in some cases, PTC-I declined to confirm the charges against Callixte Mbarushimana. The Appeals Chamber upheld the decision, and the defendant was released from custody.

Another major problem for the prosecution has been attaining reliable witnesses before it goes to trial. In a number of cases the prosecution has had a hard time proving the credibility of their witnesses before the Court. *The Prosecutor v. Bahr Idriss Abu Garda* from the Sudan is an example of a case in which the OTP went to the PTC before they had strong witnesses prepared. In this case, the judges at the PTC sought to find “substantial grounds to believe” three specific allegations in order to confirm the charges against Mr. Abu Garda. These were (1) that he participated in a meeting to plan an attack, (2) that he participated in a second meeting before said attack, and (3) that he formed a “common plan” with other military leaders to orchestrate the attack.

After citing inconsistent witness testimony, the judges did not confirm the first charge saying that the witnesses presented by the OTP were unreliable and that others, who presented through anonymous confidential statements, were insufficient.¹⁹² The second charge was fully contingent on the testimony of one witness, who once again was confidential, his identity being unknown to the defense. While the Chambers did find that Mr. Abu Garda did control the militant group at some point, the third charge was not confirmed as the judges cited both a lack of and inconsistency in evidence.¹⁹³ The judges concluded that “the evidence tendered by the Prosecution in support of its allegations is so scant and unreliable that the Chamber is unable to be satisfied that there are substantial grounds to believe” the crime alleged against Mr. Abu Garda.¹⁹⁴ While all three judges agreed not to confirm the charges, this case still produced separate opinions as Judge Cuno Tarfusser believed the Chambers went too far in even analyzing why the charges could not be confirmed stating “the lacunae and shortcomings exposed by the mere factual assessment of the evidence is so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case.”¹⁹⁵ The lack of strong, reliable witnesses and the failure to thoroughly assess the evidence noted by the judges shows that this case is an example of the OTP being willing to go to trial once it believes it can prove there are “sufficient grounds to believe” the charges, rather than when it believes its case is fully prepared.

Judge Hans-Peter Kaul noted that the underlying problem that caused the OTP to go to trial before it was sufficiently prepared with weak witnesses in the previous case may be that the OTP is only looking to gather enough incriminating evidence to meet the minimal standard of proof required to advance the case. While the charges against the first two named defendants in *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* of Kenya were confirmed, Judge Kaul offered a dissenting opinion that criticized the procedures of the OTP. Part of Judge Kaul’s opinion rests on the fact that he does not believe the ICC has jurisdiction in the case, yet he also criticizes the investigative techniques of the OTP. Judge Kaul first noted that the OTP must present its allegations with “sufficient evidence”¹⁹⁶ in accordance with article 61(5) of the Rome Statute.¹⁹⁷ He proceeds to explain how in pursuit of this

“sufficient evidence,” he believes that the Prosecutor violated article 54 of the Statute.¹⁹⁸ Judge Kaul then explains that the Prosecutor is a truth seeker, rather than a partisan lawyer and by simply trying to make sure that charges are confirmed, he is proving to not investigate exonerating circumstances as equally as incriminating, thereby violating article 54.¹⁹⁹ He adds that in his opinion it would be “risky; if not irresponsible” for the Prosecutor to go to the PTC with only sufficient evidence to believe while hoping to find new and stronger evidence to satisfy Article 66(3) in trial, in which the “beyond reasonable doubt” threshold is required.²⁰⁰ This is a criticism of the policy and approach of the OTP as a whole, claiming that its very methods of investigation are what is causing him to lose confidence in the cases presented by the Prosecution.

The acquittal of Congolese warlord Mathieu Ngudjolo Chui brings up many of the same issues for the OTP. The judges reached a unanimous decision in acquitting the accused; they stated that after seeing all the evidence and hearing the witness testimony, they did not feel that the prosecution could prove “beyond reasonable doubt” that Ngudjolo Chui was guilty. They did make a point however that this does not mean they do not believe crimes were committed in the DRC nor that this necessarily means the accused is innocent. Yet, the Statute says that in order for an accused to be convicted, the prosecution must prove its case to the highest standard of proof. Because they could not prove beyond reasonable doubt that Ngudjolo Chui was guilty, he was acquitted.²⁰¹ Although the judges only need to make a determination on the charges based on the Statute, they made a point of stating that they did not declare Ngudjolo Chui innocent, but they acquitted him based on the OTP’s failure to meet the standard of proof necessary for conviction.

The Lubanga case also drew criticism from the Chamber at various points throughout the investigation for other different reasons. The main point of contention revolved around the use of intermediaries by the OTP. It was alleged that four of the intermediaries either gave false testimony or helped cultivate false testimony from the witnesses they interviewed. For this reason the defense sought a permanent stay of the proceedings. While the judges eventually ruled in favor of continuing the case, they concluded that the testimony from these intermediaries and associated witnesses could not be relied upon.²⁰² The intermediaries were seen as biased activists who wanted to push their own agendas rather than obtain impartial witness testimony. While the Prosecution argued that the use of intermediaries was necessary for security reasons, the Chamber found that the OTP gave them too much leeway. The Chamber ruled that a number of witnesses in the trial could not have their testimony safely relied upon because of the “essentially unsupervised actions of three of the principal intermediaries.”²⁰³ Despite the fact that Lubanga was convicted, the OTP was criticized for using unreliable evidence, a lack of evidence, and inconsistent witness testimony; in addition to a general feeling that the crimes for which Lubanga was charged did not accurately reflect the damage he caused in the region.

The numerous instances in which the Chamber has criticized the OTP for weaknesses in its cases before the PTC shows that the unstated policy of the former Chief Prosecutor was to take a case to Chambers as soon as he felt there was sufficient evidence to establish “substantial grounds to believe” that the person committed the crime.²⁰⁴ The OTP has shown it is willing to advance cases when it feels it can meet a minimal standard of proof without foresight as to whether or not it will be able to meet the more rigorous standards required later in the case. In addition to potentially violating certain articles of the Rome Statute, this policy requires the OTP to continue to formulate its case as the trial begins. This puts added pressure on the Prosecution and the investigations teams to find enough evidence to continue on with the trial and prove “beyond reasonable doubt” that the accused is guilty in order to gain a conviction.²⁰⁵ This makes it more difficult for the OTP as it is trying to gather more evidence while also proceeding with an active trial.

Each of the examples outlined above has similar problems and demonstrates the difficulties consistently faced by the OTP. The Prosecution has often struggled during Pre-Trial hearings to get charges confirmed let alone develop strong enough cases to gain a conviction. While the OTP has stated that one of its goals is to move quickly to get to trial, this strategy has not been effective. It is likely that this strategy is used for two reasons, the first is that the OTP does not have a large enough budget and they want to get to trial as quickly as possible to save resources, the second is that the former Chief Prosecutor felt a large amount of pressure to hold actual court cases and wanted to move as quickly as possible.²⁰⁶ As mentioned earlier, the Chambers declined to confirm charges against 4 of 15 people, or 26.7%, who have appeared before the Court thus far and the OTP boasts a 50% conviction rate, a poor record by any standard.²⁰⁷ The combination of a lack of resources, moving too quickly, inconsistent investigations teams, and a reliance on meeting only the lowest standard of proof necessary to proceed with trial has created the problems that the OTP still faces today.

Approach to Investigations

Investigations teams have remained relatively small throughout the history of the ICC. Former Chief Prosecutor Moreno-Ocampo claimed to install the “small team” approach as a result of the economic constraints placed on the OTP.²⁰⁸ The budget for 2012 asked for only 44 professional staff members on investigations teams, that number is actually three fewer than the previous year despite the OTP’s ongoing investigations in seven active situations for both years.²⁰⁹ The OTP says that all of its staffing resources amongst investigations teams can be met by rotating staff that had been investigating cases that are now moving to trial and moving staff to other investigations based on which needs it most.²¹⁰ The number of staff members in the OTP has remained largely unchanged despite a fluctuating workload; in 2009, 218 professional staff members were investigating four situations, monitoring six others, and prosecuting eight cases.

In 2011, the same number of professional staff within the OTP was investigating seven situations, monitoring eight, and actively working on 18 cases against individuals.²¹¹ While the Chief Prosecutor found this number of staff sufficient, this feeling was not always shared by his employees. During the trial of *The Prosecution v. Thomas Lubanga Dyilo*, lead investigator Bernard Lavigne testified that he had at most 12 staff members working under him and that this number was insufficient.²¹²

While the “small team” policy of the former Chief Prosecutor drew criticism, so did his policy of attempting to move to the trial stage as quickly as possible. One of the stated goals in the *Prosecutorial Strategy 2009-2012* created by the OTP is for “focused investigations and prosecutions.”²¹³ This goes on to explain that the Rome Statute only grants the OTP permission to investigate and prosecute “the most serious crimes of concern to the international community as a whole.”²¹⁴ Only the upper echelon perpetrators will be selected for prosecution, specifically those ordering, financing, or organizing crimes and cases will be prosecuted in a situation based on their gravity.²¹⁵ The former Chief Prosecutor said that this would allow the OTP to conduct “short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization.”²¹⁶ Despite the apparent noble reasons for wanting short investigations some former investigators believe these ideas have failed, particularly in regards to representing the entire range of victimization, the most prevalent example being the Lubanga investigation that ultimately chose to only focus on child soldiers. Limiting the scope of the charges has frustrated investigators.²¹⁷ This can lead to damaging moral of investigations teams, which is a great risk for the OTP due to the fact that they operate with so few investigators as is. In recent years there has been consistent turnover, especially amongst the employees of the OTP, many citing “burn out” and dissatisfaction with the way in which their opinions are valued as causes for this turnover.²¹⁸ Losing experienced investigators can stall investigations, as new employees need to take time to familiarize themselves with the situations under investigation.

The stated policy of the former Chief Prosecutor was to have small teams that could work quickly to get cases to trial. Then, as cases moved to trial or as resources were needed, investigators could be moved among cases to support the teams as necessary. Despite the change of leadership with Fatou Bensouda succeeding Moreno-Ocampo as Chief Prosecutor, it does not appear the OTP policy will change. It is unlikely investigations teams will become larger this year; the budget for 2013 calls for 46 professional staff members, only two more than in 2012.²¹⁹ Furthermore, OTP policy under Moreno-Ocampo called for specific cases focusing only on certain crimes in a region. This frustrated investigators as they felt they did not have a large enough framework to work within and important crimes were being overlooked. Another problem created by focusing on certain crimes is that it did not seem to really solve any problems. For example, focusing on Lubanga proved to gain a conviction, but there was a feeling that even though he was convicted, there will be somebody new to take his place and he is a

relatively low rung on a low ladder. By simply settling for him the real problem of why these serious violations are occurring is being overlooked.²²⁰

Another impact has been outside influences on OTP investigations. Due to the fact that teams are relatively small and the Chief Prosecutor wanted to move to trial so quickly, the OTP relied significantly on secondary sources at times.²²¹ These include documentation and reports from organizations such as the UN and Nongovernmental Organizations (NGOs). It also included intermediaries used to identify witnesses. Relying on such sources presents risks to the prosecution as individuals and organizations presenting such data are unlikely to scrutinize the material to ensure its accuracy and reliability. Furthermore, such organizations may have their own agendas that do not align with the interests of the OTP. During testimony in the Lubanga case, the same lead investigator testified that “one must concede that the procedure of investigation of humanitarian groups, in my opinion, is more a sort of a general journalism rather than legal-type activities of investigators.”²²²

ORGANIZATION OF THE OFFICE OF THE PROSECUTOR

One major obstacle with the OTP is its organization. The OTP is divided into three divisions, the Investigation Division, the Prosecution Division, and the Jurisdiction, Cooperation and Complementarity Division (JCCD), each of which has its own division head that answers to the Chief Prosecutor. Likewise, investigations teams assigned to active cases are made up of a combination of these three divisions. The problem is that the organization of the teams leads to inefficiencies that have delayed and possibly damaged investigations. One former analyst stated that each division represented in the investigations teams felt like a separate entity, operating with its individual goals in mind rather than working as a team.²²³

When a situation comes under investigation, the OTP sends a team to gather information. These teams are comprised of at least one member from each of the three divisions within the OTP and it reports directly to the Executive Committee (ExCom), made up of the Chief Prosecutor and the heads of each division.²²⁴ The JCCD is responsible for examining initial evidence in a preliminary stage to determine if there are grounds to proceed with an investigation and provide ExCom with recommendations as to whether or not a case is admissible. Staff in the JCCD also coordinates information sharing networks and other matters that need cooperation, as well as negotiating agreements.²²⁵ The Investigation Division is primarily responsible for the provision of investigative experts, organizing field deployment of OTP staff, and analyzing information and evidence gained through investigations.²²⁶ The Prosecution Division is responsible for legal advice on issues arising during investigations that may have an effect on future litigation, preparation and implementation of litigation strategies to be recommended to ExCom, and the conduct of prosecution and litigation before Chambers during trial.²²⁷ The size of the teams

varies depending on the stage of the investigation and the resources needed for it. The divisions are supposed to work together to form investigations units and build cases that can be used in court. Yet, there have been problems with a lack of cooperation among the different units that has led to inefficient investigative practices.²²⁸

Some former staff members of the ICC have criticized the structure of the teams saying that having all three divisions represented “divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic, likening it to a three-headed dragon.”²²⁹ One former analyst interviewed for this paper also mentioned a duplication of investigative practices and a lack of communication and cooperation as problems. He said that by the time the Investigation Division got to the site to interview witnesses, they found that witnesses had already been interviewed by the JCCD and did not understand why they needed to be interviewed again.²³⁰ He also mentioned an unwillingness to share information among the three divisions even though they were supposed to be working together.²³¹ Improving cooperation and communication within investigations teams could help streamline the process and make things faster while using fewer resources.

BUDGETARY MATTERS

Budgetary concerns are also a problem for investigations run by the OTP. Even though the active caseload has grown over the years of the ICC’s existence, the budget and number of staff employed by the OTP have not grown with it, making it difficult for the OTP to create investigations teams that are large enough to be effective.²³² The 2011 budget of the OTP was 36.98 million USD, 4% greater than the budget in 2009.²³³ From 2009-2011 the OTP opened investigations into three more situations and took on ten more cases; yet it did not significantly increase their budget to account for the added workload.²³⁴ Additionally, the Court added situations and more cases in Mali, Kenya, Ivory Coast, and Libya from 2010-2013, however the 2013 OTP budget is only 1.04% greater than that of 2010.²³⁵

Over the first ten years of its existence, the amount of money given to the OTP in the ICC averaged 24.1% of the total budget. This number is low in comparison with the budgets of the OTP’s in the ICTY and the ICTR, which averaged 30.8% and 27.7% respectively of their tribunal’s total budgets over their first 10 years.²³⁶ A large proportion of the budget compared to ICTY and the ICTR is being allocated to judges and the Trial Chambers (refer to Chart B). However, until there are more cases progressing from the investigations to the trial level, the Trial Chambers may not warrant this significant portion of the budget. The same former analyst believes that some of these resources should be used to help investigations teams deal with their expanding caseloads rather than being allocated to the Trial Chambers.²³⁷ At this point there are

far more cases being investigated than in trial; the Court's budget should more accurately reflect the workload of the area's most in need of money to move forward.

In 2012, the ICC requested a 19.6% increase in the overall budget to deal with the expanding caseload; however some of the biggest donors of the Court, specifically Japan, Germany, France, the U.K., and Italy, insist on zero growth.²³⁸ Requests for additional funds in 2013 have been met with similar resistance by members of the ASP, meaning that the workload of the Court and the OTP will continue to grow while finances lag.²³⁹

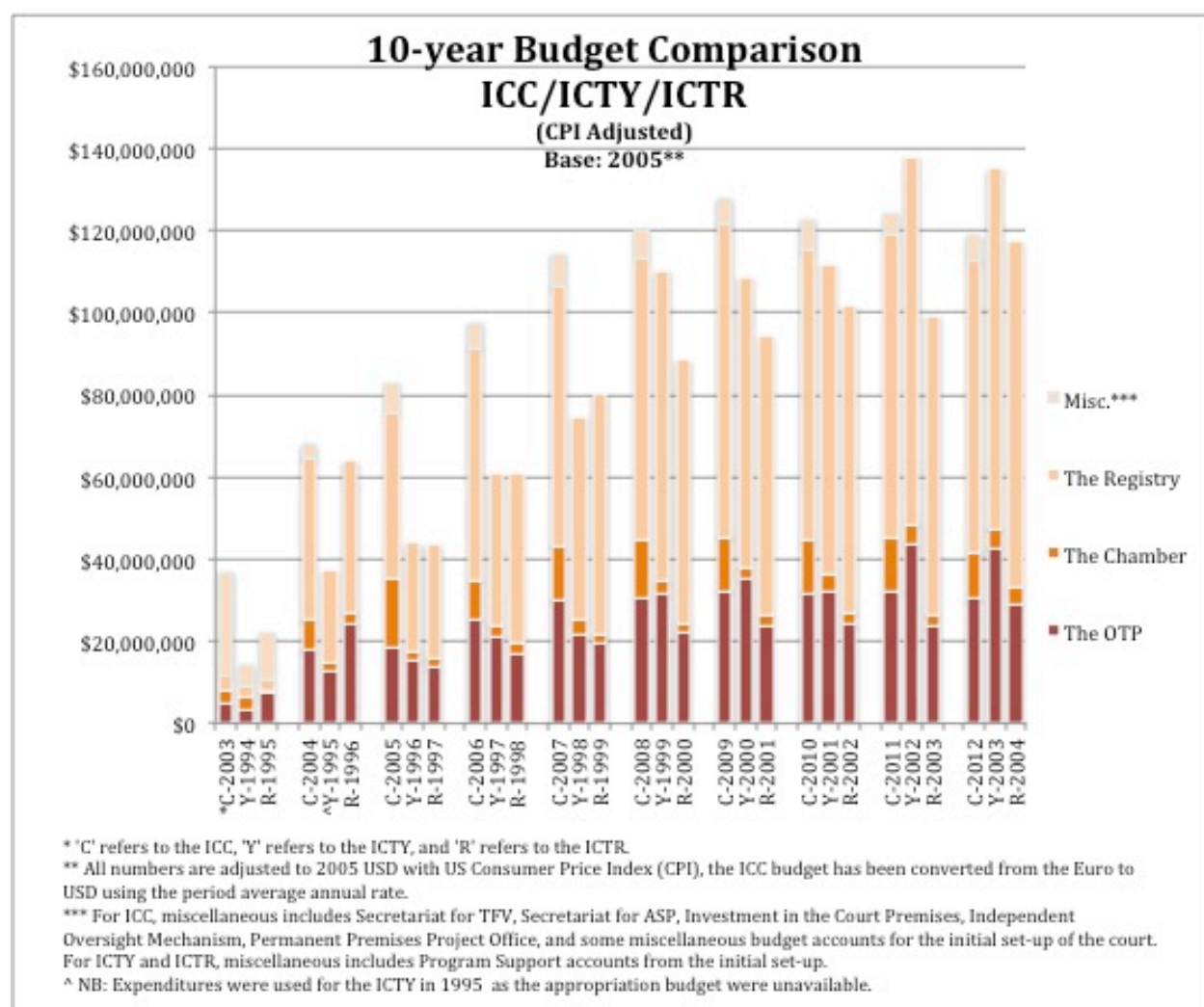


Figure 3. Ten-year budget comparison of the ICC, ICTY, and the ICTR.

CONCLUSION

The Court relies on the success of the OTP as a direct measure of the Courts overall success; without it the ICC cannot achieve its mandate or prove itself as a credible, non-biased, truth finding institution. The OTP cannot serve as a successful organ of the ICC until it resolves a number of problems. While some of these problems are concrete and structural, many pressing issues have to do with the policy, leadership, and motivation within the Office. Both the tangible and intangible problems within the OTP must be resolved to create an environment in which it can operate effectively.

Judges in both the Pre-Trial and Trial Chambers accused the OTP of sloppy work, in some cases claiming that it had little or no factual basis for its allegations. This is largely a reflection of poor leadership within the Office. By working too quickly and inconsistently investigations teams have made mistakes (such as failing to supervise intermediaries in the case of Lubanga) or not produced enough evidence (such as the lack of evidence against Abu Garda) at various stages of proceedings. As such policy changes must be made from the top down to ensure future cases will be stronger.

First, without amending the Statute, the OTP must internally raise its standards of proof. It has become commonplace for the OTP to go to PTCs as soon as it believes it has sufficient evidence to meet the minimally required standard of proof. Meeting only the lowest standard of proof is risky because this means the OTP will need to continue to look for more evidence to meet the subsequent standards as the case progresses to trial. This is more likely to be avoided if the OTP raises its standard to proving “beyond reasonable doubt” or close to it before approaching the PTC.

Secondly, the OTP must change its policy away from small team and short investigations through reallocating the resources of the Court. While all investigations should be carried out with a sense of urgency, none should be rushed to Chambers before being ready. Continuity amongst investigative teams is important; rather than rotating investigators between conflicts, the size of teams should be planned based on the scope of the conflict and remain consistent throughout the duration of the investigation. This can be achieved by reallocating the resources of the Court. As it stands, certain divisions within the ICC appear to receive a disproportionate amount of the budget, specifically the Chambers. The Court should reallocate some of this money away from divisions where it can be spared to focus on investigations. This will allow the OTP to create larger and more in depth investigations that will help them build cases that stand a stronger chance of being successful. The ICC’s success will be defined in part by its trial record and strong, focused investigations are required to yield results.

These two recommendations aim to increase the likelihood of charges being confirmed in PTCs by producing better and more substantial evidence. By having cases further along at the point of PTCs, it will make it easier for the OTP to add supporting evidence to its cases and proceed to trial. Lastly, having continuity and stability amongst larger investigation teams will ensure investigators gain a deep contextual knowledge of a conflict and the ability to gather more reliable evidence that will stand up to scrutiny in court.

Recommendations

- Change OTP policy to internally raise the standard of proof necessary to begin a trial and to create larger investigations teams to carry out detailed and thorough investigations.
- Reallocate the budget within the ICC to give a larger proportion of the total resources to the OTP.

CHAPTER 4

THE OFFICE OF THE PROSECUTOR: CHARGING STRATEGY

Erika Murdoch

This chapter explores the debate about which charges the ICC brings against alleged perpetrators of the most serious international crimes, as well as who is brought to account for these crimes. Following an effective and fair charging strategy is critical for the OTP to maintain credibility. Charging relatively “insignificant” perpetrators can contribute to perceptions that the Court is not effective and leaves victims unsatisfied. Additionally, only charging individuals who represent one party to the conflict risks undermining perceptions of the Court’s impartiality. In regards to which crimes are charged, the OTP has tended to bring a select few charges in the interest of time and cost cutting. The charges that the OTP has chosen have not always reflected the scope of crimes committed or represented the main types of victimization. This has left gaps in the justice served to victims, and has undermined perceptions of the Court’s legitimacy in much of civil society and the international community.

THE IMPORTANCE OF UPHOLDING A LEGITIMATE CHARGING STRATEGY

If the ICC is going to be successful in carrying out international justice in the future, the OTP’s work must build perceptions of the ICC as a fair, credible, and important institution for holding the perpetrators of the most serious international crimes accountable. Though the Rome Statute does not specifically mandate it, the OTP has established a policy of conducting “focused investigations and prosecutions,” meaning that it will focus on prosecuting “those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation.”²⁴⁰ Generally, “those most responsible” are considered to be the highest-ranking individuals in the chain of command that was responsible for the alleged crimes. The OTP clarifies that it will focus investigations on those in the “highest echelons of

responsibility” for selected incidents that compose a sample that is “reflective of the gravest incidents and the main types of victimization.”²⁴¹ However, the OTP has not always followed this stated policy in practice.

While the official charging strategy of the OTP as explained in its Prosecutorial Strategy reports is adequate, the charging strategy in practice has been too narrow both in terms of who is indicted and which crimes alleged perpetrators are charged with. In order to achieve justice, the charges brought against alleged perpetrators of the most serious international crimes committed in any given situation must be a representative sample of the scope of the most grave crimes. The case of Thomas Lubanga Dyilo, for example, which did not include charges of sexual violence, murder, pillaging, etc., even though these crimes were allegedly committed, has resulted in many victims’ resentment toward the ICC since they were excluded from the justice process as a result of the narrow charging strategy. ICC investigators must also conduct investigations that encompass various parties to the conflict. The policy of focusing on “those most responsible” is ideal because this tactic more directly addresses the root of the conflicts, but the OTP must target “those most responsible” not only from rebel groups, but also from other parties to the conflicts. Situations in which the OTP has only prosecuted one side, such as in the DRC, Ivory Coast and Uganda, have damaged perceptions of the Court’s credibility by generating ideas that the cases reinforce “victor’s justice” and are therefore politically biased. If members of the losing party in a conflict are the only ones punished for crimes they have committed, and the winning party goes free even after committing equally egregious crimes, then the process is perceived as merely a political extension of the conflict—a “victor’s justice” rather than a true justice guided by an independent pursuit of truth.

To maintain widespread support of the ICC throughout the international community, the Court needs to maintain political neutrality. Avoiding perceptions of victor’s justice will help the ICC in the future by making states more willing to cooperate with and assist Court proceedings, and if they want to serve a real purpose in terms of helping achieve peace and justice in conflict situations, their investigations and indictments must be perceived as fair and representative. Given that the ICC depends on funding from states parties, and countries are more likely to support the ICC and its work if it is perceived as impartial and independent, maintaining political neutrality is critical.

If the OTP does not adhere to its policy of investigating and charging “those most responsible” *and* bringing charges for crimes representative of the scope and gravity of criminality in each situation, justice will not be fully served and the legitimacy of the Court will be jeopardized. The ramifications this would have in terms of decreasing the level of local and international support that the ICC requires will create serious problems for its future unless the OTP’s charging strategy is improved in practice. At stake in the success of the ICC is not only the survival of the institution itself, but also the legacy of international criminal law as a fair and effective method to deliver justice and promote post-conflict peace. If the ICC wants to achieve its overall goals of

upholding “quality of justice” and developing as a “well-recognized and adequately supported institution,”²⁴² the OTP’s charging strategy must be fair, unbiased and representative.

This chapter begins with a discussion of which individuals and which groups the OTP’s charging strategy targets. I will explain the detrimental consequences that charging only one side to conflicts has had in past cases for perceptions of the court’s impartiality and credibility, and offer suggestions for how the OTP can remedy this in current and future situations. Next is an exploration of the charging strategy in terms of which crimes individuals are charged with, considering the effects that past cases including only narrow charges not representative of the scope and gravity of the conflict situations have had for perceptions of the Court’s effectiveness in serving international justice. The chapter concludes with recommendations for the OTP in executing its charging strategy to prevent further damage to the Court in terms of its credibility and effectiveness, and a discussion of how these recommendations can be applied to the current situation in Mali.

CHARGING “THOSE MOST RESPONSIBLE”—AVOIDING PERCEPTIONS OF “VICTOR’S JUSTICE” AND MAINTAINING POLITICAL NEUTRALITY

“Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them... Even when they were judged -- as happily some of the worst criminals were in 1945 -- they could claim that this is happening only because others have proved more powerful, and so are able to sit in judgement over them. Verdicts intended to uphold the rights of the weak and helpless can be impugned as ‘victors’ justice’.”
 – Kofi Annan²⁴³

“Victor’s Justice”

As previously discussed, upon establishment of the ICC, there was hope that its creation would be a “turning point” for international criminal justice, in which a new era of fair and thorough justice would bring perpetrators, even those who are in positions of power, to account for their crimes.²⁴⁴ Critics of the ICC’s investigations claim that OTP cooperation and partnership with state governments led investigations to be biased against rebel groups or other political opponents, letting state officials off the hook regardless of whether they were also responsible for equally grave crimes. In fact, every situation that has been self-referred has resulted in charges only against members of rebel groups,²⁴⁵ leading to perceptions that the ICC is biased and only serves “victor’s justice.”

The situation in Ivory Coast is an example of charges targeting only one political faction and thereby undermining perceptions of the ICC’s credibility. To date, arrest warrants have only been issued against former president Laurent Gbagbo and his wife, despite widespread

allegations that current president Alassane Ouattara and his supporters – members of a rival political faction – committed equally serious crimes, such as the massacre of hundreds of people in the Ivorian town of Duékoué²⁴⁶. The people of Ivory Coast “generally recognize that members of the FRCI [Republican Forces of Ivory Coast] and other elements of Ouattara’s military coalition committed crimes and deserve to be prosecuted.”²⁴⁷ Signaling a hopeful step forward, in February 2012 the ICC judges approved Ocampo’s request to expand investigations to include potential crimes committed between September 2002 and November 2010, covering the time period in which Ouattara and supporters allegedly committed international crimes.²⁴⁸ However, the OTP has still not made any further progress yet in attempts to bring Ouattara to court. In order to avoid further damaging perceptions of its credibility in the Ivory Coast, the ICC must prove “its ability, or willingness, to indict some of the president’s allies.”²⁴⁹ Many people in the Ivory Coast now suspect that “the sole objective of the ICC has been to remove Ouattara’s rival from the country.”²⁵⁰

Similar circumstances have played out in Uganda. Although the former Chief Prosecutor officially stated that investigations of the various parties to the conflict would be impartial,²⁵¹ the OTP has only charged members of the Lord’s Resistance Army (LRA), despite calls for investigations of state forces as well.

Targeting only alleged perpetrators in rebel groups is not only misguided but also it has serious consequences for perceptions of the ICC’s credibility. The ICC was supposed to pave the way forward in a departure from past cases that upheld “victor’s justice,” but as Shyamala Alagendra, a former ICC prosecutor, suggests, this skewed selectivity of suspects to indict actually contributes to a precedent of victor’s justice. She explains that furthermore, it *is* possible to investigate and charge all sides of the conflict (those which were most responsible) as it was done in Sierra Leone, for example. A desire for government cooperation should not bar the Prosecutor from investigating “the referring party for equally egregious crimes.” In order to prevent self-referral from becoming a “political tool” used by governments who want to undermine opposition, the Prosecutor needs to investigate the various responsible sides of the conflict equally and be guided by evidence only,²⁵² rather than by political influences and outside pressures.

This narrow focus has led to perceptions of the Court – in victim communities and the international community at large – as being politically biased and not serving justice. Furthermore, charging only people on one side of the conflict and letting others get away with it sets the stage for future conflict and thus does not adequately serve justice.

The current situation in Kenya offers some that the ICC is making progress in following the above principles more closely than it has in past cases. It is the first situation initiated by the Prosecutor. As a result, some believe that the OTP may feel less beholden to the Kenyan

government. The suspects for whom charges were issued are members of the two rival political parties, signaling the OTP's independence in these cases.

External factors influencing the selection of who to investigate

In a 2004 press release regarding investigations in the DRC, the ICC announced that the Chief Prosecutor “underscored his intention to focus the investigation on the perpetrators most responsible for grave crimes under the jurisdiction of the ICC”²⁵³ in accordance with the prosecutorial strategy. However, the disproportionate focus on investigations of Thomas Lubanga did not reflect the intention expressed in his statement. Furthermore, it did not align with the OTP's own guiding principle of targeting those most responsible. Lubanga and the *Union des Patriotes Congolais* (UPC), as well as other groups in the DRC conflict, were allegedly “heavily backed by Uganda and Rwanda...”²⁵⁴ Thus, in accordance with the OTP policy of prosecuting those in the “highest echelons of responsibility,”²⁵⁵ many have suggested that Museveni and Kagame, the presidents of Uganda and Rwanda, respectively, should have been indicted for their central role in instigating the crimes in Congo.²⁵⁶ An analyst who worked on the DRC case with the ICC reiterated this idea. He referred to Lubanga as “a relatively low rung on a relatively low ladder” and said that his “symbolic indictment” was not an example of “real justice,” as neither he nor the crimes he was charged with represented the reality of the situation in the DRC.²⁵⁷ Congolese civil society and media echoed this sentiment, as many did not perceive that Lubanga was one of the persons “most responsible” for the “most serious” crimes that occurred there. In reaction to case proceedings against Lubanga, the director of the Congolese newspaper *Le Phare* stated, “we criticize the work of the Court for only targeting the small fish.”²⁵⁸

The OTP officially stated that it has narrowed investigations to certain regions and then certain groups based on evidence, but this ignores other influences that may have factored in. A possible explanation for this focus on Lubanga is that he was already in the custody of the DRC; thus the OTP believed it would be easier to have him handed over and transferred to The Hague than others who were largely out of reach.²⁵⁹ In the context of pressure from the top to get a quick indictment in order to move forward with the court case, the investigation was narrowed to Lubanga,²⁶⁰ even though he was a relatively “small fish.” The OTP explained that it narrowed its investigations because it had assessed the situations and determined that “the gravest crimes had allegedly occurred in Ituri.” The OTP further narrowed its focus to investigate “those militias allegedly responsible for the most serious crimes.”²⁶¹ Similarly, in Uganda, the OTP claimed to have assessed “the gravity of crimes allegedly committed by different groups in Northern Uganda and found that the crimes allegedly committed by the LRA were of higher gravity than alleged crimes committed by any other group.” Thus, the OTP focused investigations of the LRA.²⁶² In later cases, the OTP has attempted to target higher-level perpetrators, as with the arrest warrant issued for al Bashir, but the ICC has not been able to apprehend him. However, the difficulty with apprehending high-level commanders should not influence the justice process.

The fact that it is challenging to apprehend high-level officials should not guide prosecutorial strategy.

The OTP's quick turnaround from investigating an entire situation to investigating an isolated incident, group, or individual in past cases has also compromised the ICC's legitimacy. As one former ICC analyst said in an interview, investigations should not target specific individuals or groups initially – rather, investigations should broadly cover the crimes and only later be narrowed down to identify alleged perpetrators.²⁶³ The same analyst said that when he worked on the DRC situation, he was surprised at how quickly the investigation became focused on Lubanga. He suggested that instead, the focus should first be on determining the scope and severity of crimes and then determining to person(s) believed to be most responsible.²⁶⁴ Alagendra also cited this as a problem. She commented that it is a flaw of the OTP's charging strategy that it is often centered “around individuals rather than events” and therefore the investigations target these alleged perpetrators rather than the full scope of crimes.²⁶⁵

BRINGING CHARGES REPRESENTATIVE OF THE CRIMES AND TYPES OF VICTIMIZATION

Beyond the selection of individuals to indict, the appropriate selection of crimes to charge them with is also critical. While the OTP aims to select only some incidents to prosecute in each situation under investigation, their policy is to prosecute a sample of incidents that reflect the scope and gravity of criminality. Alagendra suggests that crimes that represent the scope of the criminality in each situation “must be charged.” Such an approach sends an important signal to victims and “puts the conflict into perspective.”²⁶⁶ Yet the OTP has not followed its own policy in many cases. In both of the two cases in which the ICC has reached a verdict, the charges against the defendants were very limited and not representative. It is clear that the charges against Lubanga – the conscription, enlistment and use of child soldiers – are not truly reflective of the “entire range of criminality” that was present in the DRC, or even of that which Lubanga and the UPC were responsible for. Mathieu Ngudjolo was charged with a broader spectrum of crimes, but they were isolated to one attack on the village of Bogoro in February 2003. This also was clearly not representative of the range of criminality in the DRC.

The undue pressure on investigators to perform quickly has been an obstacle to gathering thorough, unbiased evidence sufficient for issuing a representative sample of charges. The OTP states that in the face of challenging investigative environments, it is required, “whenever possible, to present expeditious and focused cases while aiming to represent the entire range of criminality.”²⁶⁷ The former ICC analyst stated in an interview that he believes that Lubanga was only charged with the use of child soldiers due to the interest of time; and that the intention was to bring additional charges later. The pressure to act quickly in this case was due in part to the Prosecutor's fear that Lubanga would soon be released from detention in the DRC.²⁶⁸ This resulted in a hurried process, and Lubanga was only charged on three counts involving the

recruitment, conscription and use of child soldiers. As Beatrice Le Fraper du Hellen, Legal Counselor of the OTP, defended its investigative strategy, claiming that investigators did thoroughly analyze the situation. She said, “the idea was [that] if we want to get the court started... Once we have sufficient evidence, we have to move.”²⁶⁹ But regardless of if the OTP had gathered sufficient evidence for the few crimes it charged Lubanga with, it still ignored other major international crimes that were allegedly committed, such as murder and sexual violence. Judge Fulford stated that “the prosecutor failed to charge Mr. Lubanga with sexual violence... even though Mr. Moreno-Ocampo made repeated public claims that the militia was responsible for widespread rape.”²⁷⁰ Thus, while Lubanga was ultimately convicted and sentenced to 14 years imprisonment, the case left out thousands of victims of other crimes, and justice was not fully served. While the interest of time is important, it should not impinge on the quality of investigations processes or affect which charges are brought against suspects.

In addition to the pressure to act quickly, many former ICC investigators have stated that their expertise was disregarded at times by leadership in the OTP. Some former investigators that worked on the DRC case have remarked that at one point during investigations, they were directed “to drop a year and a half of investigative work and focus solely on the use of child soldiers,” despite a growing collection of evidence for other crimes as well. One investigator said “he thought this might have happened because the investigation had already taken a long time, and prosecutors wanted something to present at court as soon as possible.”²⁷¹ Another former ICC analyst said that it was very difficult to get OTP permission to conduct field investigations. He explained that many felt that OTP leadership repeatedly second-guessed investigators decisions and at times hindered the investigations process by re-directing investigative directions based on outside influences.²⁷²

In Kenya, the OTP cited government obstruction of access to evidence and threats to witnesses as a major obstacle in gathering sufficient evidence.²⁷³ Nonetheless, many Kenyans felt that the Prosecutor could have conducted investigations more effectively to ensure that charges against the six initially charged were upheld.²⁷⁴ As it was, charges were dropped against two and confirmed for four. That said, charges in the Kenya cases have been more representative of the nature of the crimes committed during the country’s 2007-2008 political upheavals, with charges of rape and other inhumane acts being confirmed for two of the four individuals charged, in addition to charges of murder, deportation and persecution.²⁷⁵

The appeal of a “narrow approach” (i.e. charging Lubanga only with crimes relating to the use of child soldiers) is that it appears to be clean, simple and more effective for obtaining a conviction. Prosecuting limited charges is clearly a less daunting task than prosecuting for charges that address the breadth of crimes committed. Thus, using this narrow approach appeals as a potentially effective way to get through investigations rapidly and secure a conviction. However, the pressure to reach a conviction should not outweigh the importance of discovering the truth and serving justice in a fair and representative manner. Furthermore, it is not necessarily true that

prosecuting on limited charges will make it easier to secure a conviction, as Ngudjolo of the DRC was acquitted even though he was only charged for crimes committed during the attack on the Bogoro in 2003.²⁷⁶ The OTP's narrow charging strategy in the past has been very damaging to perceptions of the Court's credibility. For example, a 2006 conference of several NGOs released a statement known as the Beni Declaration, saying that they were "surprised by the limited charges brought and feel that, if no improvements are made, these charges risk offending the victims and strengthening the growing mistrust in the work of the [ICC]."²⁷⁷ André Kito, a Congolese human rights activist, stated that he "regretted that crimes like 'sexual violence, summary executions and pillage' were excluded from the trial."²⁷⁸ To improve these perceptions and support for the ICC, the OTP must follow in practice its policy of charging crimes that represent the entire range of criminality and main types of victimization.

LOOKING FORWARD

As shown above, the OTP's charging strategy in practice needs to be improved. According to the OTP's own principles as dictated by the Prosecutorial Strategy, those most responsible must be indicted⁴ for crimes that are representative of the scope and gravity of the conflict based on solid evidence. For this to happen, investigators must cooperate with and investigate the various parties to each conflict and do so in a fair and balanced manner. This will help maintain the Court's independence and political neutrality. Furthermore, investigators need to be given the flexibility and autonomy to use their time efficiently to conduct investigations in the field and follow the evidence they obtain. This way, investigations are more likely to produce charges that are reflective of conflict situations and target those that are truly most responsible for the crimes. As previously mentioned, in the Kenya situation, the OTP has made some improvements in regards to investigating and charging those most responsible from multiple parties to the conflict. The OTP must continue to adhere to this method in investigations of all situations, including those that are self-referred by state governments. Following the above principles in current and future situations will help to ensure that justice is served and bolster the international community's support of the ICC.

Mali

The situation in Mali will be an important test of the new Prosecutor's charging strategy moving forward. Given that the case was self-referred by the Malian government,²⁷⁹ the OTP must take caution to ensure that investigations include an examination of incriminating and exonerating evidence not only for crimes committed by opposition groups, but also for government officials.

Available information at the time of the OTP initial report on Mali indicated that "there is a reasonable basis to believe that war crimes have been committed in Mali since January 2012" These crimes include murder, mutilation, torture, rape, pillaging, passing of sentences and

carrying out executions without due process, mutilation, cruel treatment and torture and intentionally directing attacks against protected objects.²⁸⁰ Places of the alleged commission of the crimes include the regions of Gao and Timbuktu and to a lesser extent in Kidal (northern Mali).²⁸¹ As of now, the OTP attributes most alleged crimes to various militias.²⁸²

Thus far, the OTP appears to be committed to a fair investigation of the various groups involved in the situation in Mali, as Prosecutor Bensouda stated in a press release on January 28, 2013 stating that her Office “is aware of reports that Malian forces may have committed abuses” and reminded all parties to the conflict of the ICC’s “jurisdiction over all serious crimes committed within the territory of Mali, from January 2012 onwards.” Bensouda reaffirmed the OTP’s commitment to bringing justice on all sides of a conflict with a statement in the same press release that “All those alleged to be responsible for serious crimes in Mali must be held accountable.”²⁸³ The OTP must ensure that investigations adhere to this apparent commitment and bring charges against those most responsible, irrespective of which political group they belong to.

In addition to maintaining political neutrality in investigations and charging of those allegedly most responsible for the crimes in Mali, the OTP must charge crimes that represent the range and gravity of criminality there. Judging by tendencies in the past, the OTP may be tempted to bring narrow charges, for example for the destruction of cultural property. However, although attaining a conviction such as this may appear to be a success for the Court, the implications for the victims of the crimes that go unaddressed means that this kind of justice is incomplete at best.

Given the scale and volume of situations under ICC investigation, it is appropriate for the OTP to be selective and focused in investigations and charging. But to fully serve justice in a fair and inclusive manner, the OTP must ensure that the charges are reflective of the range of criminality in each situation, and that the individuals truly most responsible for these crimes are indicted. Following this policy and ignoring external pressures to secure quick convictions or cooperate with state governments will enhance perceptions of the Court’s impartiality, credibility and importance to the pursuit of international criminal justice.

RECOMMENDATIONS

- Investigate and cooperate with all involved political, military, and ethnic groups in a fair and representative manner to prevent self-referrals from being used as a political tool for governments to undermine their opposition.
- OTP leadership must give investigators increased flexibility and autonomy to conduct investigations that will lead to charges that represent the full scope of criminality and target those most responsible.

CHAPTER 5

INVESTIGATING GENDER CRIMES

Madison Miller

Gender crimes have been overlooked in the first ten years of investigations in the ICC. This is due to a lack of proper handling of cases under investigation. The investigations of the OTP have not focused on gender crimes nor have the investigators been adequately trained to deal with victims of such crimes appropriately and effectively. Consequently, steps need to be taken to ensure that investigators go through a training program to prepare them for conducting investigations that will provide necessary evidence for trial. This training should also include a focus on dealing with gender crimes so that investigators know how to appropriately handle these serious crimes given their traumatic nature.

INTRODUCTION

Currently, the investigators of the ICC lack proper and consistent training for investigating gender crimes, making it difficult for them to correctly handle the cases and help the victims associated with them. Investigation teams are not investigating correctly because they are not reaching convictions that reflect the gravity of gender crimes and sexual violence. Other international tribunals have set precedents for cases regarding gender crimes, proving that properly executed investigations are feasible in international criminal law. The ICC has yet to measure up to the investigations of the tribunals.

The Rome Statute defines gender crimes in Article 7(1)(g) and Article (8)(2)(b)(xxii) as crimes against humanity and war crimes including “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”²⁸⁴ Gender crimes may also be charged under genocide with acts such as “imposing measures intended to prevent births within the group.”²⁸⁵ Although the descriptions were included in the statute from the beginning, gender crimes have not been a priority in the investigations of the

ICC to date. For that reason, improvements in the investigations must occur in the immediate future to prove the legitimacy and effectiveness of the ICC.

This chapter will discuss the gravity and severity of gender crimes, including the effects that gender crimes create for victims and the surrounding communities. It will describe the investigations of gender crimes carried out by other international criminal tribunals and the record of the ICC in comparison. It will then discuss the efforts made by the ICC to remedy its issues regarding gender crimes, as well as present the changes needed in the investigations area of the ICC, particularly training for investigators of gender crimes.

WHY GENDER CRIMES MATTER

The frequency of gender crimes during conflict merits attention by international justice systems such as the ICC. Currently in the Court, “charges for gender-based crimes have been brought in six of the seven situations, and in 11 of the 16 cases.”²⁸⁶ Despite their prevalence in the majority of cases and situations, gender crimes are not adequately investigated to the point where the Court is reaching convictions on gender crime charges, making the investigations of gender crimes a major issue in the ICC. With improved investigations, it is possible that the gravity of gender crimes can be internationally recognized.

Gender crime victims also deserve justice due to the severe physical abuse they suffer. Victims experience rape, genital cutting and mutilation, enforced pregnancy, beating, kidnapping, forced labor and sexual slavery.²⁸⁷ Women in the DRC situation admitted to being held as sexual slaves, whose captors referred to them as “food,” making it difficult for them to return to their former lives following the pain they had experienced.²⁸⁸ Another teen girl from the DRC described being raped many times a day, and when she became pregnant, they cut her genitals during the delivery, leading to fistulas - - openings between the vagina and bladder or vagina and rectum that causes urinary or fecal incontinence.²⁸⁹ The problem of fistulas is a particularly disturbing physical consequence of gender crimes because it is not only painful but also leads to ostracization of the women for various reasons such as the smell associated with the condition or simply that it becomes obvious to society what has happened to them.²⁹⁰ Other physical problems associated with sexual violence include unwanted pregnancies or sexually transmitted diseases such as HIV/AIDS.²⁹¹ Despite the fact that the women had no control over developing the health conditions that occur after crimes of sexual violence, they still face humiliation within their societies, making the crimes of sexual violence something that they must carry for the rest of their lives.

The psychological effects that accompany the physical repercussions of gender crimes are often worse because victims must face stigmatization while attempting to cope with not only their

traumatic experiences but also those of their loved ones. Victims often face severe stigmatization when returning to their society. In some cases, husbands treat their wives poorly because they are more concerned with reputation and honor than the well-being of their wives and the protection of their families.²⁹² Consequently, wives are forced to leave their homes after what they have already faced.²⁹³ Unlike the response to other crimes, female victims of gender crimes are considered impure as a result of cultural stereotypes associated with sex, making the crime destructive to their lives.²⁹⁴ The psychological aspects of gender crimes are only heightened by the fact that many victims of sexual violence have also suffered from other crimes such as losing their husbands and children due to the conflict or being forced to flee their homes for safety.²⁹⁵ The crimes of sexual violence worsen an already painful situation because the stigma associated with the acts prevents the victims from being comforted or accepted by their communities after their traumatic experiences. Given the difficult circumstances of the victims, it is essential that any investigator looking into these cases is trained to deal with gender crimes, so that victims are not forced to endure more pain than what they had already suffered during the conflict.

Moreover, gender crimes, more than other acts of violence, affect not only individuals but also the community as a whole. These crimes happen during conflicts and as a result, usually victimize a certain group and “create enduring, communal scars that can undermine long-term national stability.”²⁹⁶ Crimes of sexual violence are used as weapons to establish control in a territory and to punish victims and those associated with them for their lack of support in a conflict.²⁹⁷ In some cases, perpetrators attack “women and girls as representatives of their communities, intending through their injury and humiliation to terrorize the women themselves and many others.”²⁹⁸ In this way, gender crimes are used in conflicts as a way to harm an entire society because of the stereotypes that accompany these acts. Unlike crimes such as torture, it is not something that is suffered only by the individual but also their families and communities.

Sexual violence requires attention because it is a crime that leaves a severe impact on males as well. In such cases as the DRC, men have come forward as victims of sexual violence, and while there may be fewer crimes attributed to male victims, it does not make them any less serious or destructive.²⁹⁹ In many cases, male sexual violence is more painful and destructive to the victim because it threatens the cultural expectations of men in society. These various crimes include genital violence, enforced nudity, enforced sterilization, enforced masturbation, rape, or the forced rape of other victims.³⁰⁰ The post-election conflict of Kenya is a situation in which male gender crimes have come to light. The reported acts include genital amputation as well as forced circumcision and rape simply because the men were supporters of an opposing group.³⁰¹ The problem is that while these accounts have come to light, many others go “unreported due to the trauma caused by such crimes and societal stigma.”³⁰² Crimes against men in particular become a weapon against the community. By showing the men - leaders of the community - in such a vulnerable position, it insinuates that they are unable to protect their communities and therefore

the perpetrators have control.³⁰³ In this way, crimes of sexual violence affect the societal and cultural expectations of men, which lead to lasting trauma and suffering for victims.

Gender crime investigations are also unique in that successful investigations are an opportunity to provide a voice for victims that have largely been ignored.³⁰⁴ If victims are given the opportunity to tell their story and provide information that will bring those responsible for their pain to justice, they feel a sense of empowerment that may not be the same in the investigations of other crimes.³⁰⁵ Gender crimes are “intensely personal, the injuries [are] often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity, and grave injustice.”³⁰⁶ As of now, the investigations of gender crimes are not treated as a priority, but if the ICC equips the investigators to deal with victims of gender crimes, they will be empowered to receive the justice they deserve.

THE TREATMENT OF GENDER CRIMES BY OTHER TRIBUNALS

Gender crimes have been an issue in international courts since the Nuremberg Trials following World War II. During the Nuremberg Trials, gender crimes were ignored in the Charter of the International Military Tribunal (IMT) as well as in the prosecutions, despite “extensive evidence” of sexual violence.³⁰⁷ Fortunately, the creation of the ICTR and ICTY changed the dismissive attitude toward gender crimes by international tribunals. These tribunals face similar challenges while investigating gender crimes, but they provide an example for the ICC of the actions necessary to ensure an effective and successful conviction of perpetrators of gender crimes.

The ICTR, for example, is known for its conviction in 1998 of Jean-Paul Akayesu, the mayor of the Taba commune in Rwanda.³⁰⁸ Accused of various charges of genocide and crimes against humanity, including rape and outrages upon personal dignity, the case of Akayesu is known as the “first time in international history” that rape “was recognized as an instrument of genocide and as a crime against humanity.”³⁰⁹ It appeared that the Akayesu case made gender crimes and sexual violence a priority for international justice. However, the subsequent cases revealed that the investigations of gender crimes remain a problem. In the following cases of the ICTR against Musema and Kajelijeli with various charges of rape and murder, the ICTR did not procure convictions because the evidence was not adequate to prove the guilt of the accused beyond a reasonable doubt.³¹⁰ Without proper training in gender crimes, investigators do not have the ability to succeed in providing sufficient evidence for a conviction, making gender crimes seem less of a priority for international criminal law.

The ICTY has provided a better example for the ICC to emulate its investigation practices of gender crime cases. Initially, gender crimes were clearly made a priority for the ICTY, which

was not the case for the ICTR. “The UN resolution establishing the ICTY specifically referenced sexual violence against Muslim women, although the resolution creating the ICTR made no mention of the topic.”³¹¹ The ICTY has further shown its commitment to investigating gender crimes because “more than seventy individuals have been charged with crimes of sexual violence” since 1995, and “almost thirty have been convicted” as of 2011.³¹² Through its investigations and prosecutions, the ICTY set precedents for the way gender crimes should be viewed internationally. The Tribunal has even taken on cases of sexual violence against men, such as those of Džsko Tadić, a local board president of the Bosnian Serb Democratic Party, and Zdravko Mucić, a commander of a prison camp.³¹³ Given the work of the ICTY and its effective investigations into gender crimes, it is possible for the ICC to make gender crimes a priority by completing better investigations, which have yet to be accomplished.

As well as making gender crimes a priority from the beginning, the ICTY uses different strategies in an investigation to make sure that the evidence is comprehensive. The ICTY attempts to avoid placing the full burden of proof on a victim’s testimony by using forensic evidence, investigating crime scenes, and interviewing other witnesses.³¹⁴ According to the Women’s Initiatives for Gender Justice, the interview strategies were a problem for investigators in Rwanda because the interviewers were sent without gender training or training in the culture.³¹⁵ Consequently, they were too direct when asking questions, and it scared the witnesses, making it impossible to gain useful evidence from the interviews.³¹⁶ The previous experience with gender crimes by other tribunals provides examples of both successes and failures in the investigations for the ICC to consider in its own work to make gender crimes a priority. Without proper training, it is unlikely that the investigators will be able to collect the evidence they need to bring a proper case against a perpetrator, and it will follow in the footsteps of the ICTR with its failed attempts in dealing with these crimes.

THE COURT’S RECORD

Following the work of the ICTY, the ICC has attempted to deal with sexual violence crimes but has not had the same success, revealing the need for improved investigations. The majority of the cases investigated by the OTP have included charges of gender crimes under both war crimes or crimes against humanity. Despite the prevalence of these crimes in the charges of the ICC, the record of the Court in both the investigations and prosecutions of gender crimes is far from ideal. In the two cases for which judgments have been rendered, one was not charged with gender crimes, and the second was acquitted of all charges including rape and sexual slavery. While the OTP’s charging record for crimes of sexual violence has improved, much work remains.

To date, the ICC has not set a positive precedent for the prosecution of gender crimes to reach an adequate judgment. In the first case, Thomas Lubanga Dyilo, the leader of the UPC in the Ituri

region of the DRC, was convicted solely on charges of conscripting child soldiers while charges of sexual violence were dropped despite ample testimony about his involvement in such crimes.³¹⁷ The Lubanga case caused uproar from various groups such as the Women's Initiatives for Gender Justice for its use of narrow charges. The group claimed it was "unimaginable" that the OTP did not include charges of gender crimes because the investigators had a period of almost three years to conduct interviews and gather evidence before the trial began.³¹⁸ Further, the Women's Initiatives for Gender Justice conducted and submitted 51 victim interviews to the OTP concerning sexual violence from the Ituri region.³¹⁹ It also raised concerns that gender crimes were not being properly investigated.³²⁰ In spite of the evidence presented, the OTP neglected to respond to the group's concern.³²¹ Then Deputy Prosecutor, Fatou Bensouda gave a statement in 2012 claiming that one of her main goals as the new Prosecutor was to put an emphasis on gender crimes and yet continues to describe the Lubanga case as a positive accomplishment for the Court.³²² Although there seems to be an effort to show the international community that more is being done to address gender crimes, the OTP's decision to narrowly focus on one category of crime when it was within reach to include evidence of murder, pillaging, and gender crimes including rape and sexual slavery is still an issue.³²³

Another example of improper investigations surfaced with the acquittal of Mathieu Ngudjolo Chui, a leader from the Front for National Integration (FNI), also from the Ituri region of the DRC. Ngudjolo was acquitted on December 18, 2012 of various charges of war crimes and crimes against humanity associated with an attack on the town of Bogoro including "the rape of women and girls, torture, and the forced recruitment of children."³²⁴ The reason for this acquittal was not that the judges perceived Ngudjolo to be innocent but that the Prosecutor could not prove "without a reasonable doubt" that he was involved in the attack.³²⁵ Once again, the decision was met with disapproval over the investigative process of the case. Despite work done by the Women's Initiatives for Gender Justice and their interviews with women who described their stories of rape and enslavement, the investigators of the OTP were not able to provide sufficient evidence of Ngudjolo's guilt.³²⁶ For a second time, the improper investigations were not able to support the charges of gender crimes, and this case was seen as an important precedent because it was the "first case to come to judgment in which crimes of sexual violence including rape and sexual slavery had been charged."³²⁷ With failures in the investigations such as the Ngudjolo case, there is a clear need for a training program focused on gender crimes to ensure that investigators collect adequate evidence in order to provide justice for the victims of these crimes.

The ICC shows some positive changes however, in the case of a former officer of the FPLC and current general in the DRC Armed Forces, Bosco Ntaganda from the Ituri region. In 2006, the original arrest warrant was issued, and Ntaganda was charged for the conscription of child soldiers, similar to Lubanga.³²⁸ However, in July 2012, the OTP submitted a second application charging Ntaganda with further crimes committed in the Ituri district including murder,

persecution, attacks against civilians, pillaging and more importantly rape and sexual slavery.³²⁹ This is an important step for the OTP. It seems to show a willingness to positively respond to input from those outside the Court as well as prove the efforts of the Court to make gender crimes a priority in the case investigations.

Similarly, the case of Jean-Pierre Bemba Gombo from the situation in the CAR could be another chance for the OTP to change the way it regards gender crimes in its investigations. This case is described as “the first case before the ICC to be focused almost exclusively on sex crimes.”³³⁰ Considering Bemba is the former vice president of the DRC, “the charges are against the highest level accused to go on trial before the ICC.”³³¹ A successful prosecution and conviction in this case could demonstrate that the OTP is willing and capable of investigating and trying such cases.

POSITIVE EFFORTS BY THE OTP

The ICC has only reached two judgments in the past 10 years, both of which have not shown a priority toward investigating or prosecuting gender crimes. Despite this poor record, the ICC is now taking steps to change the way it deals with gender crimes as well as making gender crimes a priority. In the 2010 Conference on the Rome Statute in Kampala, Uganda, gender crimes were a major topic of discussion in regards to the new efforts of the ICC and the Rome Statute.³³² Though no decisions were made, the discussion is an important step for the recognition of gender crimes as an issue that needs to be addressed by the ICC.³³³

The OTP has also been commended on its strategies of appointing advisors focused on gender crimes. In August 2012, the OTP announced Brigid Inder as the Special Gender Advisor to the Prosecutor given her experience as the Executive Director of the Women’s Initiatives for Gender Justice.³³⁴ In this position, Inder is responsible for promoting gender justice issues and advising the OTP on its work of gender crimes.³³⁵ As well as using advisors, the OTP has put more of a focus on its Gender and Children Unit. This area of the OTP is “comprised of advisors with legal and psycho-social expertise to deal specifically with these issues”³³⁶

In addition to these efforts, the new Prosecutor Fatou Bensouda shows a necessary change in attitude towards gender crimes. In an interview with the Coalition for the International Criminal Court, Bensouda claims she “will guarantee that the primacy given to the gender related crimes will stand and will even be furthered.”³³⁷ She goes on to say that the OTP is in the process of creating a gender policy and will focus on working with local gender groups as well as continue providing gender-related training to both investigators and prosecutors.³³⁸ For this training, the Women’s Initiative or Gender Justice created a Gender Training Handbook for the investigators of the ICC, providing them with better approaches to gender crimes, in order to both obtain the

required evidence for the case as well as protect victims from any further harm or traumatization. However, while the handbook is positive in theory, it was created specifically for dealing with “women affected by sexualized violence and gender based crime in times of armed conflict and war.”³³⁹ There is merit in a handbook to prepare investigators for dealing with gender crimes, but it is flawed in the fact that it ignores important information such as dealing with all victims of gender crimes including men.³⁴⁰ Comprehensive training continues to be a necessary step for the ICC to avoid perpetuating stereotypes of gender crimes and to ensure justice for victims of these violent acts.

With these strategies, it appears the OTP has embraced efforts to prioritize gender crimes, but it is not sufficient. Some may say that the use of advisors and a gender unit is enough to show that investigators do not neglect gender crimes.³⁴¹ While it may show progress, the Court has yet to substantiate its efforts with results, as shown by the fact that “as of 17 June 2012, 50% of the charges for gender-based crimes sought by the Office of the Prosecutor had been dismissed before the trial stage of the proceedings.”³⁴² Advisors that bring attention to gender crimes are useful, but if investigators are not properly equipped to handle the cases, bringing attention to the crimes will only go so far.

CHANGES TO IMPROVE INVESTIGATIONS

In an interview in May 2012, the Prosecutor stated that the OTP would continue to provide training for investigators and prosecutors dealing with gender crimes.³⁴³ The OTP has yet to substantiate these claims with action, shown from the lack of required training for investigators. There is no description of the training included in the interview or any specific plan provided to show that the investigators are truly being trained to effectively handle gender crimes. If the investigators receive sufficient training in gender crimes, investigations in this area would not be an issue, and the ICC would be reaching convictions. According to an investigator in the ICTY, it is assumed that investigators from the ICTY, as well as the ICC, have previous training and experience in handling these cases when they are hired.³⁴⁴ Additional training is something that they must seek out on their own rather than a mandatory requirement.³⁴⁵ Even if an investigator has had previous experience with domestic cases, it does not mean that they are equipped to deal with international crimes because of the larger scale of the crimes, and they require searching for not just the specific perpetrator of a crime but those in charge and giving orders.³⁴⁶ Additionally, investigators must understand the way to react to victims who have been witnesses to more than one type of crime. A witness interviewed on specific war crimes could also be a victim of sexual violence, and if the investigator is not prepared to deal with victims of sexual violence, it is more difficult to obtain the evidence needed for trial.³⁴⁷ For that reason, untrained investigators dealing with sexual violence in an international setting will lead to poor investigative work that does not reflect the gravity or magnitude of gender crimes.

Training for the investigators is necessary to avoid wasting time and resources of the investigation as a whole. An experienced investigator understands how to conduct “investigations in different contexts” as well as “quickly identify and pursue leads linking crimes committed on the ground to senior officials who ordered them.”³⁴⁸ A lack in proper training results in investigators that are uncomfortable asking necessary questions or that are unaware of the correct questions to ask in order to gain all of the necessary information.³⁴⁹ These issues then lead to problems of requiring a second interview with victims who may not want to talk again or cannot be found.³⁵⁰ Therefore, a training program in the OTP would help in dealing with gender crimes because investigators need to understand this type of crime to know how to best document the information and interview victims given the difficult atmosphere that comes along with gender crimes.³⁵¹ Mistakes and oversights harm the case because the evidence gathered is insufficient to prove charges against a perpetrator and waste the minimal time that the investigators have to gather evidence. Moreover, without proper training, the investigators may assume that victims will not want or be willing to talk, leading to more problems in gathering evidence.³⁵² Simply put, trained investigators “can improve both the quality and efficiency of investigations overall.”³⁵³

Further, one of the aspects of a successful investigation is the protection of the victims and witnesses by the investigation team.³⁵⁴ Without this feeling of protection, there would be no reason for victims to come forward and speak about their experiences and consequently, there would be no evidence to bring charges against those responsible. Thus, the importance of trained investigators is undeniable. The investigation teams need to include experts on gender issues so that the team as a whole understands “what evidence is necessary for such prosecutions” as well as “how to obtain the evidence.”³⁵⁵ The protection of witnesses needs to be a priority and includes preparing them for questions during a trial to simply using sensitivity when gathering evidence.³⁵⁶ If the investigators go through a specific training program for dealing with victims of gender crimes, the witnesses would feel more comfortable and the investigations themselves would be more successful.

In Article 54 (1) (b), the Rome Statute specifically mentions the investigations of gender crimes, emphasizing that one of the roles of the OTP is to “respect the interests and personal circumstances of victims and witnesses,” and it is responsible for “tak[ing] into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.”³⁵⁷ If the OTP intends to follow the Rome Statute, a training program needs to become a priority to “increase all of its staff’s competency in gender issues.”³⁵⁸ With a training program focused on dealing with gender crimes and crimes of sexual violence, it is more likely that the investigators will understand the best way to obtain evidence needed to ensure a conviction as well as protect and provide a safe environment for the victim as they come forward to testify.

CONCLUSION

In order to prioritize gender crimes and appropriately investigate these acts, it is essential that the investigators of the ICC receive training for dealing with gender crimes and crimes of sexual violence. Without training, the OTP faces “shoddy investigative work [that] later contributes to rape charges being withdrawn by trial attorneys that are not interested or able to rectify the investigative shortfalls.”³⁵⁹ By requiring a training program for investigators of gender crimes, the ICC can validate its claims of making gender crimes a focus of the OTP. Moreover, the ICC would be able to change its strategies to become more successful in its future gender crime cases, which is possible as shown by the success of other tribunals. Consequently, a training program is needed to prove that the ICC understands the gravity of gender crimes, and if the investigators are able to better handle these cases, it will bring credibility to the Court as a whole.

RECOMMENDATION

- I recommend that the OTP provide a training program for all investigators so that they are prepared to respectfully and properly deal with victims and gain substantial evidence that is needed to gain a conviction, specifically for gender crimes and crimes of sexual violence.

Chapter 3

¹⁷⁵ Individuals accused by the ICC have the option to appear before court voluntarily or not. If they come voluntarily they are doing so by their own free will and are not technically in custody.

Washington College of Law, American University. "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor." *War Crimes Research Office* (2012).

¹⁷⁶ Former ICC Analyst, interview by author, online, February 8, 2013.

¹⁷⁷ Glassborrow, Katy. "ICC Investigative Strategy under Fire." Global Policy Forum.

<http://www.globalpolicy.org/component/content/article/164/28571.html> (accessed February 3, 2013).

¹⁷⁸ Ibid Glassborrow

¹⁷⁹ Ibid Glassborrow

¹⁸⁰ Simons, Marlise. "Congolese Rebel Leader is Acquitted of War Crimes." *The New York Times*, December 18, 2012.

¹⁸¹ Sane, Jelja. "Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal." *Opinio Juris*. <http://opiniojuris.org> (accessed February 4, 2013).

¹⁸² Article 25: Individual Criminal Responsibility: 3: In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

Article 25(3)(a) of the Rome Statute

¹⁸³ *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, Judgement Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van Den Wyngaert, ICC-01/04-02/12 (ICC, 2012)

¹⁸⁴ Article 53(1)(a) Rome Statute

¹⁸⁵ Article 58(1)(a) Rome Statute

¹⁸⁶ Article 61(5) Rome Statute

¹⁸⁷ Article 66(3) Rome Statute

¹⁸⁸ Article 67: Rights of the accused: 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality;

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

Article 67 Rome Statute

¹⁸⁹ *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber 1, Decision on the Confirmation of Charges, ICC-01/04-01/10 (ICC, 2010)

¹⁹⁰ Article 74: Requirements for the decision: 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

Article 74 Rome Statute

¹⁹¹ *Prosecutor v. Mbarushimana* Supra

¹⁹² *The Prosecutor v. Bahr Idriss Abu Garda*, Pre-Trial Chamber 1, Decision on the Confirmation of Charges, ICC-02/05-02/09 (ICC, 2010)

¹⁹³ Ibid.

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on the Confirmation of Charges, Dissenting Opinion by Judge Hans-Peter Kaul, ICC-01/09-02/11 (ICC, 2012)

¹⁹⁷ Article 61(5) Rome Statute: Article 61(5): Confirmation of charges before trial: At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call witnesses expected to testify at trial.

¹⁹⁸ Article 54: Duties and powers of the Prosecutor with respect to investigations: (1)(a): In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; Article 54 Rome Statute

¹⁹⁹ *Supra* note 195, 185-186

²⁰⁰ *Supra* note 195

²⁰¹ "ICC Trial Chamber II acquits Mathieu Ngudjolo Chui," ICC Press Release, December 12, 2012, on ICC website, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr865.aspx, accessed February 2013

²⁰² *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber 1, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06 (ICC, 2012)

²⁰³ Lubanga *Ibid*

²⁰⁴ Rome Statute, art. 61(5)

²⁰⁵ Rome Statute, art 66(3)

²⁰⁶ *Supra* note 175

²⁰⁷ Washington College of Law, *Supra*

²⁰⁸ Flint, Julie, and Alex de Waal. "Case Closed: A Prosecutor Without Borders." *World Affairs* Spring (2009).

<http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders> (accessed February 3, 2013).

²⁰⁹ ICC. Assembly of States Parties. *Proposed Programme Budget for 2012 of the International Criminal Court*. Tenth Session, December 12-21 2011.

²¹⁰ *Ibid*

²¹¹ Hamilton, *Supra* 16

²¹² Washington College of Law, *Supra* 1

²¹³ ICC. Office of the Prosecutor. *Prosecutorial Strategy 2009-2012*. February 1, 2010.

²¹⁴ *Ibid*, 5

²¹⁵ *Ibid*, 6

²¹⁶ *Ibid*, 6

²¹⁷ Glassborrow, *Supra* 2

²¹⁸ Human Rights Watch, *Full Text of the secret Human Rights Watch Letter to the ICC OTP*. Letter. September 15, 2008 <http://www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf>. ?

²¹⁹ HRW *Ibid*, pg. 31

²²⁰ *Supra* note 175

²²¹ Washington College of Law, *Supra*

²²² *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Deposition of Witness DRC-OTP-WWWW-0582, ICC-01/04-01/06 (ICC, 2010)

²²³ *Supra* note 175 with former investigator

²²⁴ ICC. Office of the Prosecutor. *Regulations of the Office of the Prosecutor*. Regulation(32)(1-5).

²²⁵ ICC. Office of the Prosecutor. *Regulations of the Office of the Prosecutor*. Regulation(7)(a-d).

²²⁶ The Investigation Division is also responsible for preparing security and protection policies for victims, witnesses, staff members, and all those put at risk through contact with the Court.

ICC. Office of the Prosecutor. *Regulations of the Office of the Prosecutor*. Regulation(8)(a-d).

²²⁷ ICC. Office of the Prosecutor. *Regulations of the Office of the Prosecutor*. Regulation(9)(a-d).

²²⁸ *Supra* note 175

²²⁹ Townsend, Gregory . "Structure and Management." In *International Prosecutors*. Oxford: Oxford University Press, 2012. 292.

²³⁰ *Supra* note 175

²³¹ *Supra* note 175

²³² , Rebecca J.. "Closing ICC Investigations: A second bite at the cherry for complementarity?." *Human Rights Program* 12, no. 001 (2012). <http://www.law.harvard.edu/programs/hrp/documents/Hamilton.pdf> (accessed February 2, 2013).

²³³ The 2011 OTP budget number in chart B is different as it is adjusted to 2005 USD.

²³⁴ Hamilton *IBID*

²³⁵ *IRIN Africa English Service* (Global), "Analysis: Cash-Strapped ICC Takes on Mali," January 29, 2013. <http://www.irinnews.org/report/97359/Analysis-Cash-strapped-ICC-takes-on-Mali> (accessed February 1, 2013).

²³⁶ Refer to Figure 3

²³⁷ *Supra* note 175

²³⁸ Corey-Boulet, Robbie. "Concern over ICC Funding." *Inter Press Service News Agency*, September 28, 2011. <http://www.ipsnews.net/2011/09/concern-over-icc-funding/> (accessed February 3, 2013).

²³⁹ *Supra* note 234

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²⁴⁰ ICC-OTP. *Prosecutorial Strategy, 2009-2012*, 1 Feb 2010, The Hague: 6.

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²⁴² ICC-OTP. *Outlining the Prosecutorial Strategy – Fatou Bensouda, Deputy Prosecutor for Prosecutions*. Second public hearing, Session 3, 18 Oct 2006, New York.

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²⁴³ "Secretary-General says establishment of international criminal court is major step in march towards universal human rights, rule of law," United Nations press release, L/2890, 20 Jul 1998, <http://www.un.org/News/Press/docs/1998/19980720.l2890.html>

²⁴⁴ Julie Flint and Alex de Waal, "Case Closed: A Prosecutor Without Borders." *World Affairs Journal*, Spring 2009, <http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders>

²⁴⁵ "Mali: Cash-Strapped ICC Takes on Mali." *UN Integrated Regional Information Networks*. 29 Jan 2013, <http://allafrica.com/stories/201301291237.html?viewall=1>

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²⁴⁸ "Cote D'Ivoire: the ICC Judges expand the scope of the investigation to the 2002-2010 period," ICC-CPI-20120223-PR768, Press Release, 23 Feb 2012, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/press%20releases/pr768>

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²⁵¹ ICC-OTP, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*, 14 Oct 2005, The Hague, <http://www.haguejusticeportal.net/Docs/Press%20releases/Statement%20by%20the%20Chief%20Prosecutor%20on%20the%20Uganda%20Arrest%20Warrants.pdf>

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²⁵⁶ Mahony, Chris. "Victor's Justice: What's Wrong With Warlord Charles Taylor's Conviction." *The Atlantic*, 30 Apr 2012, <http://www.theatlantic.com/international/archive/2012/04/victors-justice-whats-wrong-with-warlord-charles-taylors-conviction/256522/>

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²⁵⁸ Kambale, Pascale. "The ICC and Lubanga: Missed Opportunities." *African Futures*. 16 Mar 2012, as quoted by Desire-Israel Kazadi in "Proces Lubanga – la CPI critique par les medias congolais." *Le Phare* (daily), Kinshasa, 15 Apr 2008. <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/>

²⁵⁹ *Supra* note 256

²⁶⁰ *Supra* note 256

²⁶¹ International Criminal Court – The Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003 – June 2006)*, 12 Sep 2006, The Hague, p. 11. http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf

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²⁶⁴ *Supra* note 256

²⁶⁵ Shyamala Alagendra, email to author, 15 Feb 2013.

²⁶⁶ *Ibid.*

²⁶⁷ *Supra* note 260, 8

²⁶⁸ *Supra* note 260, 2-3

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²⁸² *Ibid.*, 13-14.

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Chapter 5

²⁸⁴ Rome Statute, art. 7(1)(g), art. 8(2)(b)(xxii)

²⁸⁵ Rome Statute, art 6(d).

²⁸⁶ Cases of the ICC: Uganda, *Prosecutor v. Kony*; DRC, *Prosecutor v. Katanga & Ngudjolo*, *Prosecutor v. Ntaganda*, *Prosecutor v. Mbarushimana*, *Prosecutor v. Mudacumura*; CAR, *Prosecutor v. Bemba*; Sudan, *Prosecutor v. al-Bashir*, *Prosecutor v. Harun & Kashayb*, *Prosecutor v. Hussein*; Kenya, *Prosecutor v. Muthaura & Kenyatta*; Ivory Coast, *Prosecutor v. Gbagbo*;

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SECTION 3
VICTIMS' VOICES

CHAPTER 6

VICTIM PARTICIPATION IN THE JUDICIAL PROCESS

Heather Nunan

In victim participation, the ICC has attempted to pursue both punitive justice and restorative justice for victims. Participation lacks a formal framework making its application in investigations and trial proceedings difficult. The unprecedented approach to victim participation is fraught with bureaucratic, logistical, and communicative hindrances including: accessibility for victims, inefficiencies in processing the applications by the Court, and unrealistic expectations of victim participation. These issues weaken the Court's ability to achieve representative, restorative, and swift justice. This chapter explores modifications the Court can make to address these issues and focus on the fundamental objective of the ICC—to obtain justice.

INTRODUCTION TO VICTIM PARTICIPATION

The ICC is meant to bring justice to those harmed by crimes under the jurisdiction of the Court as well as prevent future crimes of its nature. In this mission, the Court found it imperative to include those victims who are not victim-witnesses in trials to “ensure that proceedings are relevant” to those most affected by the alleged crimes.³⁶⁰ The ICC extended its reach beyond punitive justice to include the concept of restorative justice with a unique victim participation mechanism outlined in the Statute and RPE.

Restorative justice, also known as reparative justice, relies on the premise that a victim's ultimate resolve relies on their ability to influence the extent of, and eventually receive, reparations. It is a dedication to involve victim's personal interest in the pursuit of justice by actively participating in the process to influence reparations by offenders.³⁶¹ In participating, victims obtain the conceptual rights to: an acknowledgement of their harm, incorporation in the judicial process to pursue truth-finding, and access to reparations that consider protection, compensation, restitution, and rehabilitation. While victim participation surfaced in 2006, the first decision on

reparations has yet to be rendered. “Victims in cases before the ICC hail from poor underdeveloped countries with weak economies and poor social safety nets”³⁶² and thus this delay is harmful to the prospect of restorative justice, challenging the credibility of the Court. The application process additionally strains the Court’s finite resources and contributes to trial inefficiencies. In practice, victim participation has not had the effects intended by the ICC. It has been costly, in turn affecting the availability of resources for reparations, which are needed to give meaning to victim participation.

The ICC has conceptualized victims’ rights and participation in an unprecedented way. The Court regards their participation, security, protection, and rehabilitation as pertinent to the judicial process, but does not have the capacity to ensure that these rights are realized. This chapter will explore the arising issues of victim participation in the Court and provide subsequent recommendations to improve a faulty, but nevertheless integral, aspect of ICC proceedings. To understand the need for these changes, this chapter will address the process to reach victim status as well as its alleged benefits. Following will be a discussion on constructive modifications to the main problems that have surfaced since the scheme was implemented in 2006, namely: (1) obstacles victims face in applying, (2) the Court’s difficulties processing victim applications and participation, and (3) victim’s false expectations of participatory rights.

AS A VICTIM BEFORE THE COURT

The nature of crimes reviewed at the ICC are the “most serious crimes of concern to the international community” including genocide, crimes against humanity, war crimes, and crimes of aggression. These crimes result in a massive number of victims, and victim participation aims to extend participation in the trial beyond witness testimony to acknowledge this mass amount of people affected. Distinct from witness statements, victim participants include those that either are not eligible or do not wish to serve as a witness the opportunity to submit their testimonies. In theory, this benefits both the Court and victims. The intended benefit of the Court is to facilitate “truth finding” in a trial. Victim participation is meant to expand the Chamber’s perspective of the situation and facilitate a fair verdict. The intended benefit of victims includes: (1) facilitating empowerment and closure in their judicial participation, (2) awarding restorative justice, and (3) enabling healing and rehabilitation and facilitating community reconciliation through reparations.³⁶³

The definition of a victim was carefully formulated to achieve these aims while also maintaining impartiality. Rule 85 of the RPE identifies victims before the ICC as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”³⁶⁴ This natural person must be someone whose “safety, physical and psychological well-being, dignity and privacy”³⁶⁵ have been harmed “individually or

collectively” by the crimes which occurred in a situation identified by the ICC.³⁶⁶ A victim can also include organizations or institutions with humanitarian facets.³⁶⁷ To be recognized as a victim, one must meet these requirements of victim status upon review of their application.

Victims of alleged crimes are encouraged to submit an application to the Victim Participation and Reparations Section (VPRS) within the Registry with their personal accounts of harm. In the application they can elect to apply as a participant or as a victim seeking reparations. The Registry is required to log all potential applicants before passing the applications on to Chambers, which then decides if victims will receive victim status to either participate or to be considered for reparations. If the victim is admitted as a participant they are also eligible for reparations.³⁶⁸ Still, participation is the overwhelming draw because it is framed in a way that artificially elevates the prospect of influencing the extent of reparations, a dilemma that will be expanded further in coming sections.³⁶⁹

A victim can qualify to participate in two capacities. First, victims can be admitted to a situation under investigation or to a particular case. Victims participating in the trial stage must have to specify the aspect of the proceeding in which they wish to participate. When a victim is admitted in one of these capacities, Chambers refers their approved application back to the Registry, which then assigns legal representatives. In practice, Common Legal Representatives (CLRs) have been the norm. Through their legal representative, participants are allegedly given the “right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.”³⁷⁰ Following a trial, victims recognized before the Court are also eligible for reparations. Victims may also “challenge the admissibility or jurisdiction of a case” in the investigation phase by “submit[ting] observations to the Court.”³⁷¹ These rights seem supremely advantageous in the ability to influence reparations. However, the current reality of victim participation is not as rewarding as these privileges allege.

OVERCOMING FUNCTIONAL OBSTACLES OF VICTIM PARTICIPATION

There are four underlying obstacles of victim participation, two pertaining to limitations of the court mechanism itself and two pertaining to the nature of crimes pursued by the Court. The obstacles within the Court include maintaining impartiality in a case and the limited resources and budget at the ICC. The obstacles of crimes in the Court’s jurisdiction pertain to the massive number of victims affected and their cultural and geographic inaccessibility. By addressing these obstacles without a formally streamlined framework the Court has created logistical, bureaucratic, and communicative issues harming the prospect of a fair and impartial trial as well as its own credibility. These key issues include: the difficulty requirements for victims in applying, the inefficient evaluation of victim applicants at the Court, and the mismanagement of

false expectations in victim participation. These issues are not irreconcilable and thus can be amended with appropriate attention.

Victims' ability to apply

The Court will never have the capacity to recognize the countless victims of a situation. Lubanga was brought up on very narrow charges of conscripting, enlisting and using child soldiers, despite having been accused of committing other serious crimes, including murder, torture, and sexual crimes.³⁷² Though Lubanga was not charged with these crimes, they undoubtedly occurred, resulting in the accumulation of thousands upon thousands of victims. Of these victims, whose total count can only be guessed, 2,228 applied to become victim participants in the trial and only 129 were admitted as participants.³⁷³

Naturally, not all victims are able to participate but it is crucial to understand that the 129 victim participants were not necessarily the victims who were most significantly or unjustly harmed in that region under investigation. Instead, they were the people who were most able to access the Court and meet its requirements for applying, submitting, and articulating their personal harm and interest in the investigations of a situation or relevant proceedings of a trial.

A victim's ability to participate in an ICC proceeding should not be determined by their proficiency in applying, but the current application process does just that. Applications are both difficult to access and their requirements for identity and submission are unreasonable given the reality of most victims' circumstances.

Victims of the Court are spread over vast areas of a region under investigation, often in remote areas, making both access and submission a difficult feat. The application for victim participation is currently only available online on the ICC website and at field offices that are 'infrequent in regions under investigation.'³⁷⁴ Furthermore, in order for an application to be considered it must be sent to the Court in hard copy.³⁷⁵

Additionally, the application process is frustrating for victims because of identity requirements.³⁷⁶ Under Rule 89 of the RPE victims are required to "provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm."³⁷⁷ In Uganda, "many areas have been...ravaged by an on-going conflict and communication and travelling between different areas may be difficult."³⁷⁸ This is not an uncommon circumstance for victims of situations. Additionally, victim participants have to apply individually and so have to undertake these obstacles individually. Even family members are required to submit applications of their own.³⁷⁹ Considering the obstacles victims of crimes investigated by the ICC face, these requisites are extremely challenging.

Application evaluation and review

The ICC operates on a fixed budget that has to provide for every arm of the Court. State Parties have requested shrinking the Registry's budget³⁸⁰ and in response the proposed budget reports for 2013 forecast reductions to the Registry, which directly affects the budget of victim participation.³⁸¹ There are almost always shortcomings in budgetary resources that translate in to restraints on human resources. The Court cannot afford to staff hundreds of people to deal with the innumerable duties of the VPRS, Office of the Public Counsel for Victims (OPCV), and Chambers that have developed in regards to victim participation – particularly in the application process. There has been a waste of time, paperwork, and valuable human resources in processing applications. In effect, trial efficiency can be put at risk, which in turn may impair impartiality.

Victim interest has grown since the implementation of victim participation in 2006, but mechanisms in the Court to process and fairly include victims has not. The precedent for reviewing victim participant applicants was devised upon the reception of applications for the first six victims in 2006 to the situation in the DRC.³⁸² In the years since, the Court has increased its workload both in regards to situations and specific cases, and the desire for victims to participate has understandably grown as well. The Court has failed to modify its evaluation procedure in conjunction with this growth.

The limit on resources has become a problem because of the inefficient use of available resources for processing applications. In 2006, Chambers personally reviewed and evaluated the first six applications and admitted them to the situation in the DRC.³⁸³ The depth of assessment for each victim was acceptable at the time considering there were so few applicants. However, this rigorous and individualized evaluation of applicants has become ironically disempowering because of the amount of time and resources the process requires.

This wasteful precedent has both contributed to trial delays and compromised restorative justice. Reviewing applications can take almost a year to process and in turn slows cases.³⁸⁴ The start date for the *Lubanga* case was “postponed from March 31, 2008 to June 23, 2008” in order for Trial Chamber I (TC-I) to process victim applicants.³⁸⁵ As of 2012, total victim applicants reached over 12,000.³⁸⁶ It is unreasonable to assume Chambers can continue to evaluate in this “elaborate and costly”³⁸⁷ manner. Additionally, in the case of *Lubanga*, Trial Chamber I decided that the Court would pursue reparations only for those deemed most significantly affected by the crimes.³⁸⁸ This exclusivity is necessary if financial resources are tied up in the application process, but could be avoided if the application process was managed properly.

In an effort to resolve the unfair requirements of victims and reduce resource strains from Chambers when evaluating applicants, victim participants in the Kenya case *Ruto and Sang* were broken in to two distinct categories: (1) individual participants and (2) participants through

CLRs.³⁸⁹ All victims must still qualify as a victim under Rule 85 of the RPE,³⁹⁰ but victims interested in a more intimate individual participation will apply separately from those appeased by a more symbolic role in investigations and proceedings. In the Ruto and Sang case, individual participants were victims that intended to participate in person (transportation by the Court not provided) or interject their testimonies and insight in proceedings by video or their personal legal representative. These applicants had to abide by the extensive requisites for victim applicants outlined in Rule 89.³⁹¹ Those victims who simply wish to be recognized by the Court as a victim to gain a more symbolic participation in the trial – having their stories heard, truth acknowledged, and represented in a collective manner through a CLR – did not have the same extensive requirements in applying. Victims registered by submitting personal data, including a statement of their “harm suffered,” with the Registry. The Registry, required to log all submitted applications, acknowledged these victims before the Court. These victims were then assigned collective legal representatives by the OPCV within the Registry. This successfully removed a step from the bureaucratic process to become a victim before the Court while still maintaining that those who would be most intimately involved – the individual participants – were held to higher standards in proving their relevance to an investigation or proceeding when applying.

There is a concern that creating a “secondary” group of victims may create “an issue as to whether the effectiveness of the voice of the second category would be significantly diminished.”³⁹² However, considering the Lubanga case, CLRs are already being used; two legal teams collectively represented the 129 victims admitted to participate.³⁹³ Additionally, considering there are thousands of victims affected in the *Lubanga* case, 129 is a low count for admissions. Therefore it would be in line with current practice to reorganize victim participant groups. This could lift barriers to broaden the scope of victim participation while also providing depth for individual participants.

Setting this framework as precedent to distinguish victim participants to all cases of victim participation in situations reviewed by the ICC will reduce logistical constraints and bureaucratic burdens on the Court. It will alleviate pressures from both victims applying and Chambers that review applicants while also addressing the intensity of the application process by allowing a group to avoid the strenuous application requirements. While this is only for the secondary group, with a more realistic vision of what participation can be for victims that will be explored in coming sections, this will be a most appealing group. In effect, this modification will endorse a more efficient, and thus judicious, trial.

This will support more efficient and effective participation of victims. Eliminating the bureaucratic and logistical burdens the Court created for itself will ideally free up resources allotted to victim participation for reparations, the primary advantage for victims in participating, making victim participation more meaningful.

False expectations

Reconfiguring the logistics of participation eliminates some restrictions in victim participation, but certain obstacles will always bind it. Dealing with massive numbers of victims in remote locations while minding the finite resources of the Court and impartiality naturally results in a highly selective group of victim participants. Therefore, the number of actual participants in relation to the number of victims will remain low. The difficulty in achieving access to the selective victim participation scheme contributes to the high expectations victims expect from that participation. In reality, their participation is limited due to the underlying obstacles of victim participation. To reiterate, these obstacles include partiality, limited ICC resources, massive numbers of affected victims, and inaccessibility to those victims.

- **Limits due to partiality:** For victims, the desire to participate is primarily fueled by the prospect of reparations and their ability to influence the extent of those reparations, which is conditional to the outcome of a trial. This creates an inborn bias in victim participant representatives to have the accused party convicted. The Court's primary interest is the "protection and assertion of collective interests," not just victim interests; this can require the Court to overlook victim submissions.³⁹⁴ Though the Court values victims' interests and the inclusion of victims, the Court restricts some aspects of their participation to ensure impartiality. The Court's need to ensure a fair trial in which a victim's rights do not outweigh the rights of the accused results in restrictions in victim participation. Victims may challenge evidence, but these challenges are not always relevant to the Court and may frequently be ignored.³⁹⁵ The Defense Counsel is a body of the Court unique to the ICC that ensures the representation and protection of Defense rights "to reinforce the equality [between the Defense and Prosecution] and to enable a fair trial." The Defense is permitted to object to victim participant applicants and the submissions of approved victim participants. Ideally the Court would endorse the personal interest of victim's in their participation, as restorative justice contends, but their primary function is to reach a decision on a case with a fair and impartial trial.
- **Limits due to available resources and massive number of affected victims:** The obstacles in the massive number of victims can also impair the extent of participation. Recalling the numbers of the *Lubanga* case, of the 2,228 victims applicants to the situation in the DRC, 129 were admitted to trial, represented by two legal teams.³⁹⁶ Inclusion of all victims is impossible, and for those who are admitted individual representation is an impossible prospective. To resolve this dilemma, the Court most frequently elects collective representation for victim participants. For instance, in the *Lubanga* case two legal teams, V01 and V02, represented the 129 victim participants. Collective representation can dilute meaningful Court-victim relationships to symbolic levels. For some, symbolic participation is satisfactory. However, for others, this is

extremely *disempowering* and can create a “secondary victimization,” in which the Court contributes to a victim feeling helpless and vulnerable. This can be partially reconciled by the distinguished participation framework, but will remain a limitation for those who cannot meet the requirements to apply as individual even if they desire to.

- **Limits due to Geographic Inaccessibility:** Even those victims who are successfully admitted to participate are often difficult to access, possibly because of remote locations, and possibly because of security concerns, which creates obstacles in realizing their rights in participation. Compromised communication impairs the victim’s right to be informed of trial proceedings and public decisions in order to make their relevant submissions.

These constraints can both confuse and frustrate victim participants that are unfamiliar with the legal process. Field research has indicated “people in countries suffering mass violence have little knowledge of the Court and its role, unrealistically high expectations of its potential impact.”³⁹⁷ Endorsing the impossible expectations of participation in affected communities that are unfamiliar with the Court has in effect translated to “low levels of trust and goodwill toward its staff.”³⁹⁸ It is cruel for victims with little knowledge of the Court or legal proceedings and who have already suffered so severely to be given the false expectation of meaningful participation and reparations.

The Court has clearly acknowledged the impossible feat of resolving the underlying obstacles of victim participation by its attempts to work around the problems in application requirements and limited participatory rights, but is ineffective at communicating this reality to victims themselves. A victim’s desire to be a participant in a trial may arise from the desire to have their suffering acknowledged to influence the restoration of their psychological state and their community.³⁹⁹ The ICC appreciates this interest of victims in a limited, but necessary, way.

This breach in communication has diluted meaningful participation, which compromises restorative justice and contributes to a deflated perception of the Court on the ground. “In Uganda...some victims oppose ICC involvement...[for] fears that prosecutions will prolong the bloodshed, as well as the sense that foreign models of retributive justice will not bring reconciliation to their communities.”⁴⁰⁰ Restorative justice relies on communication with victims to incorporate them in the pursuit of justice in order to adhere to their personal and community rehabilitation. If this communication is polluted with misgivings and fallacious promises, the premise of restorative justice is compromised. Hence, it is unwise of the Court to continue to allow misconceptions to discredit their mission to provide justice.

The disconnect between rights and reality cannot be resolved by expanding victim rights, but instead by the Court ensuring a victim’s comprehension of those conditions and limitations. A

large emphasis needs to be placed on circulating the reality of victim rights in an international proceeding. While participation outlined in the Statute and RPE should not be stymied, there should be a more realistic grasp on the ability to participate and the subsequent capacities of a participant – both legally and in reference to eligibility for reparations.

Damaging misconceptions can be overcome by ensuring victims understand that their intervention will be limited to “appropriate” stages of proceedings and in a way that is “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”⁴⁰¹ Allowing victim communities to appreciate their involvement with the Court provides the basis needed to empowering victims for restorative justice effectually rededicating the Court to their intentions in victim participation. This can be achieved by modifying outreach to potential victims and current victim participants.

The information the Court circulates to victim communities should include their work and the limits to participation as well as options for victims. Disseminating the realities of participation in a manner that is comprehensible for victims is also essential, and this includes avoiding legal language. This can be done through victim outreach, methods for which will be addressed in the following chapters, but may include circulating information via radio, television, and/or by intermediaries that are already locally established in the area of a “situation” under investigation.⁴⁰²

CONCLUSION

The victim participation scheme has not proved sufficiently meaningful when measured against its time and resource requirements. In the last ten years the cumbersome application process has damaged the credibility of the victim participation process, slowed trials, and arguably compromised Court’s objective to bring timely justice through a verdict. This chapter advises the Court to streamline the victim participation scheme and create framework to increase the efficiency and impartiality of the court proceedings.

In order to encourage meaningful participation and both efficient and fair trials, the Court needs to consider adjustments to the framework for victim participation. In summary this includes two essential recommendations. First, differentiating between victim applicants with an intention to be present in a trial (either by video or in person) and those who only want recognition. Second, distributing realistic visions of victim participation to eliminate false hope and ensure victims find their participation reasonably meaningful.

Victims are people who have suffered unimaginable atrocities and deserve to have their interests acknowledged, their stories heard, and reparations served. The ICC is limited by

legal, geographic, cultural and resource related constraints. Thus far, the reality of victim participation is that victims provide a service to the Court by conveying their knowledge and understanding of a situation and yet receive little, if anything in return. The improvements to victim participation in the judicial process do not entirely reinstate the concept of restorative justice on behalf of victims. While the Court's ambition to be a "victim-friendly"⁴⁰³ court is admirable, it is not entirely realistic to the pursuit of justice for all and the end goal of a swift verdict. Victims will not achieve the full potential of restorative justice through participation due to impartiality, the ICC's finite resources, and inability to reach and represent all victims. Achieving restorative justice should instead rely on the Court's collaboration with local communities to provide effective and accessible reparations for victims.

RECOMMENDATIONS

- Distinguish victim participants before the Court to broaden and deepen victim empowerment and alleviate the victim evaluation process by the Chambers.
- Reevaluate outreach to victim applicants and participants by disseminating the realistic limitations of victims' rights before the Court

CHAPTER 7

FROM THE COURTROOM TO THE FIELD: ICC OUTREACH STRATEGIES

Allie Ferguson

Outreach serves a critical function for the ICC in developing a network of communication between the Court and victims on the ground, far from The Hague. By spreading accurate knowledge of the judicial proceedings within situation countries, the outreach unit increases the scope of justice for victim communities, eases the investigation process, and strengthens the legitimacy of the court. The Court faces three main challenges to effective outreach: low levels of awareness, misconceptions, and the process of leaving countries post-trial. It is important the ICC develop clear strategies to combat these issues in order to fulfill the court's mandate on the ground.

INTRODUCTION

As an international body representing a large group of nations and their citizens, the ICC is obliged to uphold a level of transparency. Clear and effective communication is crucial to gain support from the international community. The Court identifies three key targets as a part of its communications strategy: external relations with state actors, public information on judicial processes, and outreach with victim communities. Much of this report has examined the top level and institutional relations of the ICC. However, this chapter will focus on the importance of outreach in the field as a means of establishing legitimacy and effective justice. In the following sections, this chapter will give a brief background on the importance and mechanisms of outreach at the ICC. Then, it will explore three main challenges of the ICC's outreach work: awareness, misconceptions, and exit strategies. Finally, this chapter will propose recommendations to strengthen the communication and understanding between the ICC and affected communities.

The Court defines outreach as “a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings.”⁴⁰⁴ Essentially, it is a dialogue between victims and the Court, emphasizing understanding, support, and accurate knowledge of the ICC’s judicial process on the ground. Outreach operates under the umbrella of the Registry through the Public Information and Documentation Section (PIDS). The administration oversees field offices in Uganda, CAR, and DRC with local operators who facilitate outreach projects such as community events, radio programs, and informational pamphlets in local languages.⁴⁰⁵ Sudan is not a signatory to the Rome Statute and therefore has refused to allow outreach staff to visit Darfur. However, offices operated in Chad from 2005 to 2011 where an estimated 300,000 Sudanese refugees currently reside.⁴⁰⁶

The types of crimes investigated and prosecuted by the ICC affect large numbers of victims. Though, due to the Court’s limited resources, the proceedings are not equipped to provide a sense of justice for all, whether through reparations, participation, or prosecution. Even mere awareness of the court is very low in affected communities due to limited education and financial resources. Indeed, poverty rates are high in every situation country. Therefore, outreach serves a critical function in increasing the scope of justice for the many victims of these severe crimes by simply spreading accurate knowledge of the proceedings. It allows the Court to include many victims at least peripherally in the process of justice.

More pragmatically, by increasing awareness and understanding of the ICC, outreach is fundamental in garnering support for the Rome Statute among civil society in affected communities. A greater civilian demand for legitimate justice and governance will increase logistical and financial support for the Court by member and non-member states. Outreach can also increase the cost efficiency and overall effectiveness of the Court’s work by creating a knowledgeable and receptive environment on the ground for investigation.⁴⁰⁷

Although the ICC began outreach projects in Uganda and the DRC as early as 2005, it did not establish an official outreach strategy until 2007.⁴⁰⁸ This strategy is largely built on lessons learned from the ICTY and Special Court for Sierra Leone (SCSL). The ICTY did not launch an outreach program until 1999, six years after the court’s founding. This allowed the Serbian media and political elite, convinced of the court’s bias against Serbs, to disseminate negative views and misconceptions of the court without any organized opposition.⁴⁰⁹⁴¹⁰ Croats too had a low public opinion of the tribunal due to propaganda. In 2002, only 21 percent of those surveyed in Croatia viewed the ICTY in a positive light.⁴¹¹ When the ICTY finally established an outreach program, it struggled to reverse these negative attitudes and communicate clearly with the local community.⁴¹²

The SCSL, however, prioritized outreach from the beginning of the court. It worked heavily to engage with local communities through town hall meetings and radio broadcasts. The SCSL found that a strong outreach campaign greatly increased victim understanding of the court's proceedings.^{413,414} Despite a primarily rural population with little formal education, a 2006 survey found that 79 percent of respondents understood the role of the SCSL.⁴¹⁵ Though the SCSL benefited from being located in country, its outreach work was an impressive example of establishing a sustainable two-way dialogue between affected communities and a foreign institution.

Since its inception, the ICC's outreach program has largely drawn on the successes of the SCSL such as utilizing local media and town hall style events, as well as prioritizing a meaningful dialogue with victims.⁴¹⁶ The ICC has also established a local presence through field offices and connections with civil society. However, the past ten years have proved difficult for the Court's outreach, especially considering the ICC's limited financial resources and the poverty of many victim communities.⁴¹⁷ The rest of the chapter will explore the three main challenges for the ICC outreach program in the next ten years: low level of awareness, misconceptions and misinformation, and exit strategies.

LOW LEVEL OF AWARENESS

The Berkeley Human Rights Center conducted evaluations of outreach efforts in Uganda (2010), CAR (2010), and the DRC (2008). The rate of awareness and understanding remains low for all countries. In the 2010 survey of CAR, only 32 percent of people reported having heard of the ICC and only 27 percent of that 32 percent felt they had a "good" knowledge of the court.⁴¹⁸ In the 2010 survey of an affected region in Uganda, only 59 percent of the community was aware of the ICC. Of those, only 6 percent rated their knowledge as good or very good.⁴¹⁹ The center's 2008 survey of eastern DRC also proves disheartening. Only 27 percent of the respondents had heard of the ICC and of that group only 28 percent had heard of the case against Thomas Lubanga.⁴²⁰

The level of knowledge and awareness correlated highly with the participant's level of income and formal education in all three countries.⁴²¹ The studies identify communities without access to common information technology or news sources as "information poor." This is often due to a lack of education or wealth within such communities.⁴²² Though all eight ICC situation countries experience extreme poverty, there is also disparity within the borders of these nations. For example in CAR, the level of awareness differs drastically between the capital, Bangui, and the rural hinterland. In Bangui, where formal education and wealth are concentrated, the level of awareness is 63 percent. That is compared to several rural regions where awareness ranges from 7 to 35 percent.⁴²³ Uganda and DRC

feature similar trends. Information poor communities tend to be located in rural areas, where the population has less access to resources and information. They also often include marginalized groups like women or ethnic minorities. In CAR, 42 percent of male respondents had heard of the ICC, whereas only 21 percent of female respondents had heard of the Court.⁴²⁴

The numbers presented in these surveys are the starkest example of the failures of the ICC's outreach program. Though it has mobilized resources in affected areas, the Court continues to face low levels of awareness and knowledge, especially among information poor groups. Such low levels of mere awareness undermine the Court's efforts to bring justice to victims as well as establish global legitimacy.

Currently, the ICC's field offices target local journalists, legal professionals, academics, and victims, but the Court needs to reach out to information poor communities specifically.⁴²⁵ Such communities tend to be most affected by serious crimes due to their low status in society. They lack sufficient resources to deal with the destabilizing forces of violent conflicts such as forced migration or suspended food production. Therefore targeting these communities would increase the scope of justice significantly. It would also help the investigation process by creating a more receptive and understanding environment for ICC staff.

A lack of security, limited financial resources, and poor transportation pose a challenge to communicating with information poor communities. Yet, identifying information poor communities as a specific target group allows more attention and resources to be allocated to their awareness within the outreach budget. Additionally, the ICC outreach program should work to engage more with local networks of civil society that reach these groups. Emphasizing outreach to information poor communities within the official ICC strategy but outsourcing through NGOs would increase awareness in a fiscally responsible way. Independent NGOs pose a risk to the ICC's control over communication, especially if new charges affect civil society alliances. However, by carefully selecting partners from a wide range of society, the ICC can assert more control over the outreach campaign.

MISCONCEPTIONS AND MISINFORMATION

Despite the lessons learned from the misperceptions that grew out of poor outreach by the ICTY, the ICC continues to deal with misinformation in affected communities. Such misinformation includes overblown expectations, perceptions of bias, falsities about the judicial process, or questions of credibility. They often lead to negative attitudes towards the Court, poor cooperation with the ongoing investigations, and weakened legitimacy.⁴²⁶

Problems with misinformation are largely due to delayed outreach efforts and poor messaging by the ICC.⁴²⁷

It must be reiterated that the outreach unit operates with a very strict budget. In the last ten years, it has worked hard to save resources by reallocating outreach to priority countries. However, this oftentimes only creates more problems for the ICC. For example, prior to the confirmation charges for former Ivory Coast president, Laurent Gbagbo, in February, resources were transferred from outreach projects in Uganda to the Ivory Coast.⁴²⁸ This has ultimately created an information vacuum in Uganda in which local media and stakeholders have filled misperceptions and misinformation about the Court.⁴²⁹ It will cost the Court to reverse such negative attitudes. Meanwhile, in the Ivory Coast, supporters of Gbagbo, including local media outlets, portrayed delays to his trial as evidence of his innocence.⁴³⁰ Even those who do not support Gbagbo are questioning the legitimacy of the Court due to claims of bias and victor's justice by local news reports.⁴³¹ With only six in-country outreach meetings in 2012, the outreach unit has been slow to combat these impressions thereby delegitimizing the ICC in the eyes of many in the Ivory Coast.⁴³²

The situation in Kenya has also wasted the Court's valuable outreach resources. When the Prosecutor received approval for investigation in 2010, many Kenyans believed that an investigation had already begun and that criminals would be arrested in December 2010.⁴³³ Through later outreach, the ICC was able to change people's views of the Court. However, it was costly to combat false information and inflated expectations. In CAR, the ICC was slow to begin outreach as well; the field office did not begin operating until a year after the investigation officially began.⁴³⁴ The delay in outreach along with the slow judicial process has influenced local views of the Court.⁴³⁵ Although people in CAR generally support the ICC's work, the slow pace has left many victims disillusioned with the idea of legitimate international justice.⁴³⁶ One female victim in Bangui expressed her frustration in 2007, saying, "Is it true that the ICC will do a trial for me? I don't think so. Because the white people always come to collect testimonies and they go . . . But I pray God that the rape trial really occurs."⁴³⁷

These many examples of misperceptions and misinformation illustrate the need for a more efficient communications strategy. In the face of tough financial constraints, communication efforts could be better maximized through earlier implementation of an outreach strategy and more targeted messaging. Currently, the ICC limits outreach efforts to situation countries. However, it is clear that the earlier they engage with the public, the easier it is to combat false rumors.⁴³⁸ The ICC should extend its outreach strategy to preliminary analysis areas. Though it may seem financially imprudent to conduct outreach in areas that may not move forward to investigation, it is still cost effective in the long term. It would significantly ease the transition from analysis to investigation by creating a receptive

environment for ICC staff; clarify any initial misconceptions or misinformation; identify key local contacts for future outreach; and establish a sense of legitimacy on the ground.⁴³⁹ Even if these preliminary analysis areas do not go to trial, outreach efforts would increase understanding and awareness of international justice in countries where a greater civil demand is clearly needed.

It is not necessary to establish full field offices in these countries but it would be cost effective to identify early on key civil society leaders, points of common concern, and messaging strategies for later in the judicial process, if the court decides to move forward with the proceedings. To save money, much of the actual outreach could be outsourced to local NGOs. However, the ICC needs to initiate and oversee the larger communications strategy in these areas in order to ensure correct messaging. NGOs could negatively alter the ICC's message if new charges change alliances within civil society. The Coalition for the International Criminal Court and the International Bar Association have both recommended that the ICC begin outreach in preliminary analysis areas.⁴⁴⁰

Outreach could be further maximized through specific messaging campaigns that respond to common concerns or misconceptions of the Court. For example, many affected communities question the Court's impartiality; they perceive the fact that all eight cases are located in Africa as evidence of the Court's bias in favor of the West and against Africa.⁴⁴¹ Specific defendants have also triggered mistrust of the court. Most notably, political elites have used the charge against Sudanese president Omar al-Bashir to portray the Court as politically motivated and a possible threat to the peace process.⁴⁴² On the ground communication could be made more efficient if outreach focused campaigns on the specific concern of impartiality, explaining the reasons behind specific case selection and charges. Affected communities also often have mistakenly high expectations of the Court. Many victims expect proceedings and a sense of justice to occur more quickly. A female rape victim in the CAR conveyed her dissatisfaction with the Court this way:

“With regards to the trial’s delay, we are really not pleased. Because many of us contracted the disease, the AIDS virus, and some women who were raped were abandoned by their husbands. For us, for example, our husbands died, we have children who are not yet schooled . . . the length of the trial, it really impedes us. It brings us handicaps into our lives. Related to what we lived, we lost our high spirits, we lost many things in our lives so we are reduced, we became destitute and we want justice to be done immediately. It’s too long. And the delay, it’s already a lot. Many years have passed already. So we want justice be done immediately.”⁴⁴³

A messaging campaign that worked to limit expectations and explain the pace of ICC proceedings early on would limit disillusionment and frustration like this further down the road. Specific messaging campaigns would reallocate funds from general outreach efforts within the outreach budget. This would be cost effective and establish a more honest dialogue between the Court and affected communities.

EXIT STRATEGY

As the Court moves forward into the next ten years, it must tackle a new challenge to outreach: its exit strategy. Though it may seem like a straightforward process, leaving situation countries after trials end poses a threat to ICC legitimacy and global standing. As previously mentioned, the outreach unit has reduced efforts in Uganda given that no fugitives from the Lords Resistance Army have been arrested since they were charged in 2005. This has left an information vacuum; the local media has been able to disseminate more misconceptions and misinformation about the Court.⁴⁴⁴

It is important to the Court's legacy that they maintain a good relationship and level of communication after proceedings. In the post-trial phase, many of these countries will continue to process the idea of justice and reconciliation. The outreach unit is integral in communicating the ICC's work and therefore establishing a narrative of the Court's history in each country. Though court records document its history, outreach can help communities interpret the facts. These perceptions of the ICC after the trials combine to generate the global legacy of the Court. Collective understanding of how the Court operates, fulfills its mandate, interacts with victims, etc. is indicative of the ICC's overall legitimacy.⁴⁴⁵ Though national government may express official state policies on the ICC, locals have the power to support and, therefore, validate those policies.

It is important for the Court to develop an exit strategy for outreach as cases wind down in the next ten years. This first approach to leaving a situation country will set precedence for the cases to follow. Despite fiscal restraints, the outreach unit can adhere to several basic guidelines. First of all, it is important that the ICC administration maintain basic relationships with key communications contacts in civil society through the PIDS after the field office has closed. This would allow in-country networks to communicate basic messages from the ICC. It would also show that the ICC is committed to a sustainable dialogue with victim communities. The existing PIDS staff would manage this work so that no additional employees must be hired.

Secondly, it is important that this relationship between the Court and the community is indeed a "two-way conversation." When leaving the country, the Court should administer

evaluations of the success and failures of its outreach unit. It is important the affected communities have the opportunity to give feedback on the Court. This “exit interview” could communicate the end of the ICC’s work in these countries. To work within the existing budget, a third party, such as the Berkeley Human Rights Center, which already conducts evaluations of the victim communities, could conduct evaluations.

Finally, though each situation country faces very different challenges in terms of outreach, it is important the ICC develop a somewhat standardized exit strategy. That means following a similar methodology and procedure to ensure the legacy and legitimacy of the Court are not negatively affected by a quick or chaotic end to ICC work. Developing a clear and thoughtful exit strategy is crucial for the next ten years of the ICC.

CONCLUSION

As the Court moves forward into the next ten years, it is necessary that the ICC administration and state parties recognize the importance of outreach to the Court’s goals. The ASP should emphasize outreach at assembly meetings to ensure its continued funding and support. They should also maintain the same funding levels for outreach despite zero growth overall. Adequate resources are essential to raise awareness among information poor communities, combat misinformation and misperceptions, and develop a standardized exit strategy.

Ultimately, outreach plays an invaluable role in the work of the Court. The future of the ICC hinges on its ability to obtain global legitimacy among states and their people. Outreach serves a critical function in expanding understanding and demand for international justice, especially in these critical countries where the rule of law is weak. By making the outreach unit more effective and efficient, more communities will support the role of the ICC thereby increasing its international legitimacy.

Moreover, it establishes and fosters a sensitive relationship with victims on the ground. Although the ICC is mainly a punitive organization, victims are central to the Court’s mandate. It is obligated to provide restorative justice through trial participation, reparations, and the Trust Fund for Victims. Yet this obligation runs deeper, for as identified in the ICC’s official outreach strategy, “justice must be both done and seen to be done.”⁴⁴⁶

RECOMMENDATIONS

- Increase overall awareness and knowledge of the ICC's work by targeting information poor communities who lack access to common news sources.
- Combat misinformation and misperceptions of the ICC's work by establishing outreach strategies in preliminary analysis areas and developing messaging campaigns that target concerns of impartiality and high expectations.
- Develop a standardized exit strategy for post-trial situation countries to manage the Court's legacy and national relationships.

CHAPTER 8

TRANSITIONAL JUSTICE FOR THE FUTURE

Katerina Henshaw and Eunbi Cho

The ICC has achieved significant advancements concerning victim redress efforts learned from lessons of previous ad hoc tribunals such as the ICTY and ICTR. Although the Court has struggled to achieve legal justice for victims, the establishment of certain mechanisms has been critical for promoting transitional justice. The Trust Fund for Victims (TFV) has been instrumental in terms of helping victims rebuild their lives. The TFV has two mandates: (1) implementing Court-ordered reparations and (2) providing general assistance to victims. The Court orders reparations awards against a defendant and the TFV cooperates with the Court in investigating the situation and allocating reparations. When a defendant is declared indigent, the responsibility to pay for restitution falls on the TFV. Improving transparency of the units that investigate the defendant's resources would lessen the TFV's responsibility as well as produce a sense of restorative justice for victims. General assistance projects benefit those victims who do not qualify for Court-ordered reparations by offering transitional support to rebuild their lives. To maintain adequate funding for both mandates, the TFV must capitalize on key fundraising methods such as lobbying for earmarked and multi-annual donations.

INTRODUCTION

One groundbreaking aspect of the ICC is its commitment to transitional justice for victims. Transitional justice provides a way for a community to transition from a period mass violence to stability by rebuilding its society and community, addressing redress for victims. To achieve this purpose, mechanisms were integrated into the Rome Statute that secure essential rights to victims of mass atrocity crimes unlike the previous *ad hoc* tribunals for the former Yugoslavia and Rwanda. According to Article 75, one of these mechanisms is to distribute reparations awards to

victims to rebuild their lives after mass violence. Another key mechanism is the TFV, which has two principal mandates: (1) implementing court-ordered reparations awards and, (2) using voluntary contributions from various sources to provide general assistance to victims in situations within the Court's jurisdiction. Whereas legal mechanisms of the court may have failed these victims, the TFV promotes transitional justice by restoring the lives of victims through the implementation of these individual reparations awards and collective assistance projects. When allocating reparations awards, the OTP and the Registry investigate a defendant's resources through asset-tracing. Through this investigation process, if the defendant is declared indigent, then reparations fall under the responsibility of the TFV. For this reason, it is crucial that the TFV increase its funds to pay for Court-ordered reparations as well as its many humanitarian projects. In order to increase funds over the next several years as the ICC grows and more reparations awards are ordered, it needs to continue lobbying for earmarked and multi-annual donations.

First, this chapter will present examples of problems from previous *ad hoc* tribunals to demonstrate the shortcomings of victim redress in international criminal justice. Subsequently, the organization and management of the TFV will be described to offer background on its creation and function in relation to victim redress. Afterward, the current process used to implement Court-ordered reparations awards at the Court will be outlined. It will then be argued that to ensure the defendant's ability to pay for reparations, more effective and transparent asset-tracing strategies are required by the Registry and OTP when investigating the defendant's assets. This new standard of transparency will decrease the pressure on the TFV and produce a sense of transitional justice to victims.

Next, this chapter discusses the second mandate of the TFV—general assistance for victims. After describing the type of projects undertaken by this mandate and its successes so far, this chapter will examine the biggest problem facing the TFV, namely funding. The TFV struggles with issues such as sustainability and increasing its donations, especially as the global financial crisis has restricted donors' budgets. It is imperative that the Fund improve its fundraising capabilities in order to maintain a sustainable, legitimate TFV. The necessity of fundraising methods such as lobbying for earmarked and multi-annual donations will then be explained. Lastly, potential concerns about transparency and the ways in which the TFV is positively handling this issue are addressed.

SHORTCOMINGS OF *AD HOC* TRIBUNAL COURTS

The ICC has been able to establish a more effective reparations system based on lessons learned from the *ad hoc* tribunals of the ICTR and ICTY. Victim redress efforts in international justice have gradually developed over the last decade. The ICC has played a significant role in

compensating victims by establishing the TFV and the Victim Participation and Reparations Unit (VPRU).⁴⁴⁷ However, prior to the ICC, the *ad hoc* international tribunals did not properly fulfill victims' rights for restitution. The shortcomings of the *ad hoc* courts are attributed to the fact that they were designed as a traditional punitive mechanism and therefore did not focus on victim redress. These shortcomings include limited mandates for reparations awards, the lack of enforcement by the national courts, and the lack of outreach to help victims obtain reparations.

Inadequate restitution

Historically, victims of international crimes received insignificant attention before *ad hoc* tribunals, no compensation, and minor assistance from any authorities.⁴⁴⁸ Victims, either individually or as a group, "had no legal avenues to pursue their rights, and no legal capacity to establish legitimate status before *ad hoc* tribunals."⁴⁴⁹ Given that the *ad hoc* tribunals were not designed for victim redress, they had limited and weak mandates for awarding reparations. The RPE of the both the ICTR and ICTY mandated "the return of any property and proceeds acquired by criminal conduct...to their rightful owners." In other words, these provisions limited restitution to the return of stolen property and did not handle physical and mental injuries of a victim.⁴⁵⁰ In contrast, the ICC includes all aspects of restitution, compensation, and rehabilitation when awarding reparations; restitution alone does not constitute full and complete recovery of the victims. Even though the *ad hoc* tribunal courts did have limited mandates of restitution, the provisions were not carried out directly by the ICTR while the ICTY did not make any rulings regarding reparations.

Since the tribunals had no power to award damages directly, except for restitution of property, domestic courts were supposed to take responsibility in bringing compensation claims under Rule 106 of the RPE. This Rule found in the RPE of the ICTR and ICTY states that, "[p]ursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation."⁴⁵¹ Despite its purpose, Rule 106 has not resulted in victims claiming compensation before national courts. Even though survivors in Rwanda are able to rely on judgments from the ICTR for the purpose of civil claims, the enforcement of any potential awards would likely be difficult given the insolvency of perpetrators convicted by the ICTR and the absence of a Compensation Fund.⁴⁵² Furthermore, the decision of whether to award compensation is ultimately left to the discretion of national jurisdictions, and in many cases the national governments are the ones that persecuted the victims.⁴⁵³ At the ICTR, virtually no claimants received compensation even when it was awarded, since perpetrators were unwilling, insolvent or otherwise unable to pay, and no judgments against the state had been enforced when it has been held civilly responsible.⁴⁵⁴ It not only discouraged victims but also showed that the courts lack enforcement. Even though the ICTY did not address victim reparations and has not made a court decision about victim redress, the ICTR attempted to grant limited support by giving national courts the responsibility to

manage victim restitution. Nevertheless, both the ICTR and national courts fall short in fully compensating the victims' loss.

Moreover, no outreach from the tribunal courts was available for victims to apply for reparations. Rule 106 in both the ICTR and ICTY assert that it is a victim's responsibility to claim and bring an action to a national court to obtain compensation.^{455,456} This leaves victims who have often lost their homes and their belongings to seek their own representation and file suit with a domestic justice system that is often devastated by war and atrocities.⁴⁵⁷ These victims often struggle during the application process due to the lack of information and outreach from the courts. In the case of Rwanda, survivors were frustrated with the justice process and their lack of agency. Survivors fear that the closing down of the ICTR could mean that their right to reparation will be ignored forever.⁴⁵⁸ The victims' access to information and applications is a crucial requirement in order to ensure that victims are able to request reparations.⁴⁵⁹ However, the victims in Rwanda who requested reparations under Rule 106 did not have adequate access to information and outreach in the application process. The lengthy, "bureaucratic" forms and the slowness of proceedings discouraged many victims.⁴⁶⁰ Outreach for transmitting information about reparations and trial proceeding is fundamental for clarifying victims' expectations about reparations awards and reducing potential frustration and re-victimization.

In addition to these problems experienced by the *ad hoc* courts, the convict's indigent status and lack of funding are the key factors that have prevented effective victim redress. The ICTR ordered reparations to be paid through the domestic court, but it was unenforced due to the lack of funds in the national court.⁴⁶¹ The ICTR never created a fund that was designed for restitution like the TFV.⁴⁶² Given the experiences of the ICTR and ICTY, international Court-ordered reparations will probably not yield a significant sum of money because the majority of the defendants have been declared indigent, thereby requiring the TFV to implement Court-ordered reparations.⁴⁶³ Without this relatively new institution, there would be no effective mechanism for these victims to receive court-ordered compensation.

CREATION AND MANAGEMENT OF THE TRUST FUND

As a response to the problems experienced by the *ad hoc* tribunals, the ASP established the TFV at its third plenary meeting in 2002. Based on Article 79 of the Rome Statute, the intention of the TFV is to provide assistance to victims of crimes within the Court's jurisdiction. The ASP is required to manage the activities and projects implemented by the Fund and are subject to the decision taken by the Court.⁴⁶⁴ In accordance with Article 79(3) of the Statute, the ASP designed the Trust Fund Regulations to govern the conduct of the Fund, which were adopted by the ASP at its fourth session in 2005.⁴⁶⁵ The ASP is the only body within the ICC that has the power to make amendments to the Regulations. Also at its third plenary meeting, the ASP established a

Board of Directors to directly manage the Fund. To help facilitate the substantial work done by the Board, the ASP formed the Secretariat at its sixth plenary meeting.

Management by Board of Directors

The Board of Directors, comprised of five officials elected by the ASP, are responsible for initiating and directing the activities and projects of the TFV as well as the allocation of available property or money, as subject to the decisions taken by the Court.⁴⁶⁶ Moreover, the Board determines the situations in which the TFV should be active and in what ways. The Board also decides how best to use its resources to pay for Court-ordered reparations awards when the defendant is declared indigent. In regard to its humanitarian projects, Regulation 50(a) states that the Fund can use its other resources – those not reserved for reparations – to start projects when “the Board considers it necessary to provide physical or psychological support for the benefit of victims and their families.”⁴⁶⁷ As long as the Board has formally notified the relevant Chamber of its planned activities and the Chamber has not, within specified time limits, informed the Board that the project would pre-determine any issue to be determined by the Court, the Board is permitted to start its project.⁴⁶⁸ Another central role of the Board is the solicitation of funds; it is essential that the Board develop contacts with governments, NGOs, individuals, corporations, and others to solicit voluntary donations for the TFV.

The Role of the Secretariat

The Secretariat operates under the full authority of the Board of Directors, assisting as is necessary for the proper functioning of the Board in carrying out its tasks.⁴⁶⁹ In practice, the members of the Secretariat are responsible for the administration and implementation of humanitarian projects and activities. This includes creating policies governing the TFV, forming connections with groups of victims and liaising with beneficiaries, states and intermediary organizations through which the TFV is seeking to deliver aid for victims. The Secretariat also oversees the implementation and verification of Court-ordered reparations awards. Its role is crucial to ensure the TFV is run effectively and efficiently.

The Resources of the Trust Fund

According to Regulation 21, there are four main sources of revenue available to the TFV: (1) voluntary contributions from governments, NGOs, individuals, corporations and other entities, in accordance with the relevant criteria adopted by the ASP; (2) money and other property collected through fines or forfeiture transferred to the TFV if ordered by the Court pursuant to Article 79(2); (3) resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 of the RPE; (4) such resources, other than assessed contributions, as the ASP may decide to allocate to the TFV.⁴⁷⁰ Because there has only been one defendant convicted at the ICC so far,

all of the money obtained by the TFV has been through voluntary donations. The main concern for the ICC is how to pay for Court-ordered reparations if the defendant is indigent. Currently, the TFV maintains a reserve specifically for future awards and uses its other resources such as voluntary funds on collective assistance projects.

The limitations of the Trust Fund's resources

Regulation 47 clarifies that the TFV may use its other resources (voluntary donations) to pay for humanitarian projects permitted by the general assistance mandate. Even though the TFV Regulations outline the requirements that determine how to provide support to victims, the Board maintains substantial discretion whether to bring its work in a particular situation under investigation. However, there is one critical limitation that the Fund must consider when starting a project: the necessity to maintain adequate funds to pay for future reparations awards. The current reserve to supplement Court-ordered reparations is €1.2 million (\$1.6 million).⁴⁷¹ In other words, while the TFV is formally free to use its other resources as it sees fit, the scope of that freedom is limited by the Fund's obligation to ensure a reserve adequate to pay Article 75 reparations.⁴⁷² This limitation signifies that the ICC has placed on ensuring that future compensation awards would be awarded to victims through the TFV and not face the same problems that the previous *ad hoc* courts did.

THE CURRENT REPARATION SYSTEMS AT THE ICC

As previously mentioned, the first mandate of the TFV is to implement Court-ordered reparations. Under the jurisdiction of the Court, the Chamber orders adequate reparations awards against a convicted person. The Registry—cooperating with the TFV—allocates these awards to victims who have applied and qualified under Rule 85 of the RPE. According to Rule 85, a victim is defined as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” and includes organizations or institutions that have sustained direct harm to any of their property.⁴⁷³ Victims that fit into this definition may request individual or collective compensation by completing an application. The application is then filed with the Registry and the Court may award the victims individually or collectively. Article 75 of the Rome Statute defines victims’ reparations as: restitution, compensation and rehabilitation for victims.⁴⁷⁴ As emphasized by the ICC, the purpose of restitution is to restore the victim to their original state before victimization occurred, including restoring individual and property rights. Compensation means the financial reimbursement for losses, both pecuniary and non-pecuniary. Lastly, rehabilitation includes “medical and psychological care as well as legal and social services.”⁴⁷⁵

Investigating the harms and losses

The Court assesses the harms of the victims and affected areas with appointed experts from the Registry as well as the TFV. As outlined in Article 75, the Court has jurisdiction over deciding the scope and extent of any damage, loss and injury to, or in respect of, victims.⁴⁷⁶ Additionally, Rule 97 states that “the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury [and] suggest various options concerning the appropriate types and modalities of reparations.”⁴⁷⁷ The TFV cooperates in assessing the damages experienced by the victims in order to seek appropriate compensation from the Chamber. As requested by TC-1 in the Lubanga case, the TFV consults with victims and their communities through assessments of harm by a variety of experts. After investigation, the TFV submits collective compensation proposals to the Chamber for approval.⁴⁷⁸ The Chamber then decides the appropriate amount of reparations awards against the accused.

Allocation of reparations

Presently, the reparations ordered by the Court have not been allocated to the victims because a decision has not been rendered in the Lubanga case. Although allocation has not happened yet, the Court has basic rules and procedures set in its Statute for when this process does occur. Upon receiving approval by the Chamber, the Registry distributes reparations to the victims through the TFV. Rule 98 clarifies that “The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund [...] The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim.”⁴⁷⁹ The role of the TFV is crucial in the ICC’s reparations system because it not only deposits the reparations but allocates them to the victims. Although potentially awarded on an individual or collective basis, the TFV allocates reparations mostly through collective awards because it is impractical and difficult to distribute reparations to each individual victim.⁴⁸⁰

Role of TFV when a defendant is indigent

In 2012, the ICC ordered its first reparations awards against its one and only convict, Lubanga. However, these will be paid by the TFV, not by Lubanga, because of his indigent status. TC-1 found that Lubanga has no assets, and no property has been identified that can be used for the purposes of reparations.⁴⁸¹ Therefore, Lubanga is only able to contribute to non-monetary restitution; any participation on his part would be through symbolic gestures, such as a public or private apology to the victims.⁴⁸² Because Lubanga will not contribute any financial assets to compensate the loss of the victims, this task will be undertaken by the TFV as decided by TC-1. However, although undertaking Court-ordered reparations awards by the TFV are an

improvement over the previous systems of victim redress, there are still problems that the ICC must consider in regard to its current process.

THE ICC'S PROGRESS IN ADDRESSING THE PROBLEMS IN THE LAST TEN YEARS

Based on Articles 75 and 79 of the Rome Statute, the ICC has strengthened its mandate to implement Court-ordered reparations awards as well as prioritized the needs for victim redress through the creation of the TFV. The decision of TC-1 set out important principles for compensation, confirming that victims should be at the center of reparation proceedings.⁴⁸³ However, the Court still faces challenges when a defendant is declared indigent and is unable to pay. Also, it is difficult to find out how the OTP and the Registry investigate the resources of the defendant because public records of the process are unavailable. These on-going problems can be fixed by making the current units that investigate reparations more effective and reporting their process into public records. Improving transparency not only ensures the effectiveness of the investigation since they are being watched by the public and other organizations, but it also prevents corruption and flaws within the internal structure of the Registry and the OTP.

Asset investigations by the OTP and Registry

Improving the units that investigate an offender's resources—the Registry and the OTP—by developing more efficient asset-tracing strategies is a recommendation to minimize the pressure on the TFV. Currently, the Registry of the Court investigates the defendant's funds at all stages of the trial and pre-trial proceedings. The OTP separately investigates the resources for the purposes of the prosecution. The Trial Chamber then declares the defendant's indigent status according to the investigation results by the Registry and the OTP.⁴⁸⁴ Theoretically, improving asset-tracing strategies when investigating the defendant's resources will reduce the possibility of the defendant hiding their resources to avoid paying reparations. This would ultimately lower the pressure on the TFV.

Active and efficient tracing of the defendant's asset will play an important role as trials of more wealthy individuals will be held in a few months. These individuals can afford to pay for reparations awards ordered against them and contribute to victim compensation. Uhuru Muigai Kenyatta, Deputy Prime Minister and former Minister for Finance of Kenya, is currently charged for committing crimes against humanity and his trial will begin on 11 April 2013.⁴⁸⁵ Kenyatta is one of the richest people in Africa who has a net worth of \$500 million⁴⁸⁶ and owns large tracts of lands and business in Kenya.⁴⁸⁷ Another wealthy defendant, Laurent Gbagbo—the former Ivory Coast President—is in the pre-trial proceeding under the charges of murder, rape and sexual violence.⁴⁸⁸ Currently, Swiss authorities have frozen \$81 million in bank accounts linked to him and his ministers.⁴⁸⁹ The trials of these affluent defendants require efficient and persistent

investigation by the Registry and the OTP in order to oblige the accused to pay the reparations awards.

However, evaluating the investigation strategies and progress of the Registry and the OTP have been challenging, since only very limited information about the investigation of the defendant's resources is available to the public. Their investigative results are either unavailable to the public or online, which makes it difficult to find out if the Registry and the OTP investigate the defendant's resources thoroughly. More public records from the investigation process and their results are required to assess the performance of the Registry and the OTP in searching the defendant's assets.

Transparency through more public records

Making the investigation records on convict's resources available to the public will improve the effectiveness and efficiency of the OTP and the Registry's investigation on the defendant's asset. Watchdog NGOs and the public attention ensure the investigation units to carry out their duties to the fullest to avoid public criticism. These watchdog NGOs and other investigating organizations may find mistakes in the investigation results and can subsequently do their own researching to make corrections. Lessening the mistakes in the investigation process and creating more opportunities for the Court to cooperate with other organizations ultimately develops more legitimacy and accountability for the Court.

Even if the public records of the defendant's resources indicate indigence, more accessible public records of the investigation is progress in respect to transitional justice. Presenting the reports to the public is a symbolic representation because it portrays that the Court regards victim redress as a priority and strives to deliver compensation by researching the defendant's resources. The investigation may or may not guarantee that the defendant must pay, but making the investigation results public clearly shows that the ICC puts a significant amount of effort into achieving transitional justice for victims, ensuring they receive the compensation that they deserve.

Reparations and funding of the TFV

Since there is a high likelihood that many of the defendants will be declared indigent, the TFV must be as resourceful as possible. Increasing its funding is essential since it has limited resources that are shared between reparations awards and also used for its humanitarian projects. Therefore, looking beyond the TFV's first mandate, it crucial to examine how the TFV helps victims on the ground through its second mandate, general assistance. Increasing funding of the TFV will further compensate the victims' loss and meet their needs through the humanitarian projects of its second mandate when reparations awards are inadequate.

GENERAL ASSISTANCE PROVIDED BY THE TFV

Community based approach

Based on the philosophy of the TFV, the best approach regarding its second mandate is through local rehabilitation and emphasizing the needs of a community or a group of victims rather than individual victims. The Fund has indicated that there are three main categories of projects that it focuses on: physical rehabilitation, psychological rehabilitation, and material support. In its Annual Programme Progress Reports, the TFV describes the types of activities and projects it has undertaken and supported in disadvantaged areas. These reports assess the work done by the TFV and local organizations in specific areas such as South Kivu in the DRC and in Kitgum District in Northern Uganda. Such activities include: (1) rehabilitating and reintegrating child soldiers -through family reunification, foster placement, and support for independent living; (2) improving access to reproductive health services, counseling and psycho-social support for victims of rape; (3) increasing opportunities to improve household livelihoods through agricultural and microcredit initiatives; and (4) promoting Radio for Justice, a community-based radio approach that focuses on transitional and restorative justice.⁴⁹⁰ These types of projects exemplify the TFV's emphasis on community based projects that benefit many victims simultaneously.

Logistics of projects

When deciding whether to start a project in an area under investigation, the Fund collects information through formal surveys, questionnaires, evaluations, and by speaking with locals and observing the area.⁴⁹¹ This process encompasses consultation with a range of individuals and groups, including victims, experts, local and international NGOs, the international community and local authorities.⁴⁹² These projects and activities are carried out by partner organizations in the field. The TFV works with international NGOs, local grassroots organizations, victims' groups, women's associations, and faith-based groups, all rooted in their local communities. Currently, the Fund has an extensive network of 34 implementing partners: 8 international and 26 local (20 in the DRC and 14 in northern Uganda).⁴⁹³ The Fund will also soon have partners in the CAR. To date, the number of direct beneficiaries of these projects and programs is approximately 83,400 victims.⁴⁹⁴ This figure includes both newly identified beneficiaries and beneficiaries from the previous years who are still benefitting from the humanitarian work of implementing partners in eastern DRC and northern Uganda.⁴⁹⁵

Significance of general assistance

These humanitarian projects and programs implemented by the TFV in areas where the worst atrocities have occurred symbolize the purpose of the Court, to seek not only legal justice but

also transitional justice. The general assistance mandate allows the Fund to carry out its projects in areas where it will benefit victims of crimes as long as they are within the jurisdiction of the Court. This stipulation in Article 79 concerning jurisdiction indicates that the TFV is not simply a humanitarian aid agency.⁴⁹⁶ Trust Fund projects, though often humanitarian in nature, must also achieve an important transitional justice goal; namely, the recognition and acknowledgement of those victimized by war crimes, crimes against humanity, and genocide.⁴⁹⁷ Moreover, this mandate embodies the Court's emphasis on transitional justice, not solely legal justice, because it is not linked to a specific trial and does not require a conviction to take place. In other words, all victims within a situation who suffered crimes under the Statute may benefit from these collective assistance projects, not only those who suffered harm as a result of a crime committed by a convicted person.⁴⁹⁸ Hence, a victim who may not benefit from Court-ordered reparations, which are linked to the specific charges against a perpetrator of the Court, may still be eligible for receiving general assistance.⁴⁹⁹ This enables the TFV to reach a wider scope of victims before the Court has even convicted a perpetrator. For example, the TFV offers assistance in northern Uganda, where it has been impossible to execute the arrest warrants issued by the Court.

Successes of general assistance in practice

One of the largest success stories of group assistance is the work the TFV has done with victims of sexual violence. Due to the stigmatization and shame that many victims of sexual violence are confronted with in certain societies, collective assistance is extremely important and beneficial.⁵⁰⁰ The advantage of a collective approach is that it will reach unidentified victims who, due to their victimization and/or social situation, cannot easily claim compensation through formal procedures. So far, the Court has lacked the ability to achieve legal justice for this particular group of victims. Victims of sexual violence have been largely ignored and unaffected by the Prosecutorial Strategy of the Court since the Prosecutor is primarily concerned with prosecuting the main perpetrators and focusing on certain crimes.⁵⁰¹ The Court's attempt to achieve legal justice for victims, by obligating the defendant to pay restitution to these victims, has not been a reliable or consistent way to attain justice. By emphasizing collective projects, the TFV can reach many more victims of sexual violence than the Court can through its narrow scope of reparations.

Furthermore, the TFV's capacity to attract funds by appealing to the interests of potential donors through coordinated campaigns is exemplified by the impressive response it has generated for victims of sexual violence. During the fifth ASP plenary meeting in 2008, the Board of Directors launched an appeal for 10 million euros (\$13.3 million USD) to assist 1.7 million victims of sexual violence in the four countries under investigation by the ICC. In response, the government of Denmark publicly announced its donation of €500,000 (\$664,000 USD) - the largest donation the TFV had received at the time.⁵⁰² Even more recently, on February 12, 2013, the U.K. donated €500,000 (\$664,000 USD) specifically for victims of sexual violence. Kristin Kalla, Senior

Programme Officer of the Secretariat commented that the Fund has made significant progress in helping over 5,000 survivors of sexual and gender-based violence in the DRC and Uganda. She believes the UK's contribution will allow the Fund to expand its projects to situations such as the CAR.⁵⁰³ These examples highlight the dedication that the TFV has placed on collective projects and the success it can achieve. Because many victims of sexual violence have been ignored by international criminal law until recently, the TFV must advance its solicitation strategies to increase funds, thus enabling it to implement these vital projects.

Fundraising strategy: earmarked donations

One way to capitalize on a donor's particular interests and increase funding is through earmarked donations — a process that allows donors to choose how their donation is spent. As illustrated in the previous paragraph, large donations earmarked for specific groups such as victims of sexual violence show how earmarking is an essential fundraising strategy. At the eleventh ASP plenary meeting in 2012, Pieter de Baan, the Executive Director of the Secretariat, explained that the current global financial situation has made the solicitation of donations very challenging; countries have been hesitant to allocate voluntary contributions. Although the TFV has encountered increased willingness and engagement by states parties, the current financial outlook still constrains the TFV's ability to expand its humanitarian projects into other ICC situations, such as Kenya and Ivory Coast.⁵⁰⁴ Nevertheless, lobbying for earmarked donations has become a popular modern fundraising strategy during this time of global financial crisis.

Since the initiation of the TFV in 2002, its regulations regarding earmarked donations have changed as the ASP recognized the growing necessity to embrace earmarked donations. Initially, Regulation 27 insisted that voluntary contributions from governments shall not be earmarked. This Regulation further specified that voluntary contributions from other sources may be earmarked by the donor for up to one-third of the contribution for a Trust Fund activity or project, so long as the allocation, as requested by the donor, benefits victims and their families as defined in rule 85 of the RPE.⁵⁰⁵ Likewise, earmarked donations cannot result in discrimination on grounds of race, color, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status.⁵⁰⁶ The restriction on prohibiting earmarked donations by governments was amended at the sixth ASP plenary meeting in 2007. The state parties at the meeting acknowledged the fundraising reality that donations of unrestricted funds that are not earmarked are hard to obtain, given that overwhelmingly donors want to know how their funds will be used.⁵⁰⁷ The amendment proposed at the sixth plenary meeting makes an exception, permitting earmarked donations by governments, as long as “the funds have been raised at the initiative of the members of the Board of Directors and/or the Executive Director.”⁵⁰⁸ This amendment improves the TFV's ability to adapt to the reality of donors' programs, who most frequently can only donate funds for specific projects or activities.⁵⁰⁹

On the other hand, the danger with earmarking is that if not put in check, it may affect the neutrality of the TFV and its ability to reach eligible victims more broadly. In the interest of transitional justice, it is critical that the TFV preserve the freedom to choose projects that will distribute assistance equitably among multiple victim populations.⁵¹⁰ For this reason, it is important to maintain some cap on the portion of a donation that can be earmarked for a specific purpose. Hence, Regulation 27 allows up to one-third of a voluntary contribution that is not initiated by the Board of Directors or the Executive Director to be earmarked by the donor.⁵¹¹ This cap permits the remaining portion of the voluntary contribution that is not earmarked to go toward the general Fund to be used by the TFV as it sees fit, thus potentially being used for a multitude of projects as opposed to one specific cause. With that in mind, earmarked funding has been effectively used by the TFV by aiding victims of sexual and gender-based violence, former child soldiers, and for building the institutional legal capacity of the Trust Fund's Secretariat. Earmarked funding may also be useful as a way to earn donations specifically for the reparations reserve of the TFV, thus coming up with a solution to the problem of inadequate funds for the TFV's first mandate. Germany's announcement in 2012 of earmarking a voluntary contribution of € 300,000 (\$398,406) for reparations awards is setting an important precedent.⁵¹² Ultimately, the TFV relies heavily on voluntary donations and given that funds may be inadequate to meet the need to cover Court-ordered reparations, it is essential to maximize the TFV's fundraising potential through emphasizing and lobbying for earmarked donations.

Fundraising strategy: multi-annual donations

Lobbying for multi-annual donations is another method that would substantially strengthen the TFV's fundraising capacity. By generating a predictable flow of resources, these types of donations offer a consistency that is essential for the efficiency and legitimacy of the TFV. According to the Executive Director of the Secretariat, states parties have expressed interest in multi-annual arrangements, formal or informal. Recently, there is a growing trend towards a greater incidence of high volume contributions to the Fund. In 2012, Sweden set a precedent by announcing its intention to contribute annual funding of 10 million Swedish kroner (\$1.5 million) for 2013 and 2014, implemented through the Swedish International Development Agency (SIDA).⁵¹³ This constitutes the largest donation to the TFV to date. It comes without restrictions or earmarking, meaning it may be used for both of the TFV's mandates.⁵¹⁴ Finland also announced annual contributions in 2012 of €300,000 (\$398,406) over the next three years, to a total amount of € 900,000 (\$1,195,000), earmarked for victims of sexual violence.⁵¹⁵ These examples demonstrate that the TFV is finding interest from states parties to engage with the TFV on a multi-annual basis and the impressive amount of resources that have been raised through this strategy.

As illustrated by Sweden's recent donation, states are increasingly using their official development assistance resources for voluntary contributions to the Fund.⁵¹⁶ This means that

engagement with the TFV fits with the policy priorities of states and is seen as a legitimate institution to trust with their donations. When states see other states' donations used properly, they will feel more comfortable contributing large amounts of money on a multi-annual basis to the same institution. To ensure that the TFV has sufficient resources to fulfil the Court-ordered reparations to individual victims and to conduct projects emphasizing collective assistance for victims, it is crucial to capitalize on this type of strategy to further build legitimacy. Funding strategies such as lobbying for multi-annual donations would improve predictability of revenue for the TFV and, consequently, the quality of programming and results in the years to come.⁵¹⁷

Addressing transparency concerns

Transparency is a major concern for the TFV since it manages large amounts of money and humanitarian projects on behalf of the public and donors. When donors can accurately track the use and impact of their money, they are more likely to continue contributing to the Fund. Based on the brief history of the TFV, it has made a notable effort to address this issue. The TFV is currently undertaking its first comprehensive, external evaluation of programs and projects in the DRC and Uganda and will soon be launching an effort to complete a comprehensive risk management strategy for the future.⁵¹⁸ These types of initiatives will be crucial steps towards producing a multi-annual Strategic Plan to be developed in 2013, so that the Fund can pay for both of its mandates in the future. This will be done in consultation with the Fund's many stakeholders: the states parties (both those contributing to the TFV, and those not), the Court's various organs, NGOs, victims groups and affected communities.⁵¹⁹

In an effort to further demonstrate their dedication to prioritizing transparency, the TFV releases its Annual Programme Progress Reports publicly, which can be easily found on the homepage of its website. These reports present detailed information on future plans for external reviews as well as detailed financial and logistical updates of its active projects in the DRC and Uganda. Some of the important financial information available in these progress reports include: the TFV's Euro account as of October 30, 2012, which had a balance of €736,000.61; the US Dollar account had a balance of \$71,450.55.⁵²⁰ It is clear that the Fund has taken the initiative to publish information publicly and develop its own strategic plans for external program reviews to learn how to improve its own work. These actions show donors that the TFV is determined to demonstrate its ability to effectively disburse earmarked or multi-annual donations, further increasing the legitimacy of the Fund, which is essential to its success for the future.

CONCLUSION

Efforts to advance transitional justice through mechanisms that specifically support victim redress have improved significantly with the establishment of the ICC and particularly the TFV.

A permanent institution like the TFV is innovative since it provides collective assistance for victims when individual reparations awards from defendants are insufficient. A key challenge for the future will be how Court-ordered reparations will be paid for when the defendant is declared indigent. Thus, the role of the TFV is substantial since it covers these awards in situations of indigence. Therefore, developing an effective asset-tracing strategy and transparent records of the investigation by the Registry and the OTP will hold defendants accountable concerning their assets as well as promote a symbolic sense of transitional justice to victims. In addition, because the global financial situation has caused unpredictability of donations, the TFV will continually need to increase their funds. Certain fundraising strategies such as lobbying for earmarked and multi-annual donations will help the TFV increase funds to pay for Court-ordered reparations awards and general assistance projects that benefit thousands of victims in their pursuit to achieve transitional justice.

RECOMMENDATIONS

- Ensure the Registry and the OTP develop more effective asset-tracing strategies for investigating the defendant's resources and publish records of the results.
- Continue to lobby for earmarked donations as this allows donors to have control over their contributions which promotes a sense of security when donating such a large amount of money, thus increasing funds.
- Emphasize multi-annual donations from donors; this will generate a steady stream of resources for the Fund, which will improve its sustainability and legitimacy by proving to donors the TFV has adequate funds to continue projects for years to come.

Chapter 6

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³⁶² *Ibid.*

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³⁶⁵ Rome Statute, art. 68

³⁶⁶ ICC Student Network. *Issues in International Criminal Justice*. 2012 (Central Michigan University: ICCSN) Special Volume: The Lubanga Trial: Lessons Learned

<http://www.iccsn.com/IICJ2012.pdf>.

³⁶⁷ *Ibid.*

³⁶⁸ Legal Representatives of Victims. *Closing Brief of the V02 Group of Victims*. The Hague: ICC, 1 June 2011. ICC-01/04-01/06 Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo. <http://www.icc-cpi.int/iccdocs/doc/doc1301175.pdf>

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³⁷³ ICC. *Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo*. The Hague: ICC, 13 September 2012. Case no. ICC-01/04-01/06. <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>

³⁷⁴ There are field offices in three locations: Kampala, Kinshasa, and Bangui. See International Criminal Court. "Victims: ICC - Forms." Accessed Jan 29. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx

³⁷⁵ International Criminal Court, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, (The Hague: ICC), 19. <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>

³⁷⁶ Regulation 86(2) of the Court stipulates that the applications for participation must contain: the identity and address of the victim and any relevant supporting documentation including proof of self and medical records as well as evidence of the consent of the victim. For the incident, there should be a description of the incident and harm suffered (from a crime within the Court's jurisdiction) and information as to why the personal interests of the victims are affected. The victim must also include the stage of the proceedings desired for participation and information pertaining to their legal representation. See Pre-Trial Chamber I. *Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor*. The Hague: ICC, 7 December 2007. Situation in the Democratic Republic of the Congo, ICC-01/04-417. Public. <http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-417-ENG.pdf>

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SECTION 3

CRITICAL RELATIONSHIPS

CHAPTER 9

INTERNAL RELATIONSHIPS OF THE ICC

Emma Nyland

The internal relationships of the ICC are centered on the ASP and the organs of the Court. However, throughout the start of the ICC, these branches, especially the ASP, have failed to adequately fulfill their responsibilities, which result in the ICC's diminished credibility. In order to raise the esteem of the Court, the ASP needs to take an active role and provide oversight to the organs. Effective and efficient management are essential to improving the ASP, internal relationships and the ICC. Implementation of a series of ongoing practicums for judges, adoption of a Code of Conduct for the OTP and a change to the conditions of the Prosecutor's term will allow the ASP to contribute to increased legitimacy and credibility of the ICC.

It is fundamental to possess the characteristics of credibility and legitimacy in order for the ICC to be an effective and successful international court. These attributes are critical to the ICC because the way people perceive the Court is declining which subsequently affects the Court's work. Achieving credibility means that the Court is acting and functioning in a manner that convinces nations and people to believe in the actions of the Court.⁵²¹ Attainment of legitimacy occurs when the Court acts in accordance with its mandated laws and obligations. It must adhere to the expected standards.⁵²² A lack of these qualities results in the Court's failure as a global establishment of international justice enforcement.

The ICC's first ten years witnessed considerable shortcomings in achieving these ideals of legitimacy and credibility. Although this is due to a variety of factors, the quintessential example is the fact that only two trials were completed and of those two trials only one resulted in a conviction. The failure of the ICC to complete more than two trials over a ten year period is due to multiple factors, including the uneven quality of judges in the Court and the work of the OTP heavily contributed to the diminishment of credibility and legitimacy. The Court's first trial set a

precedent of sloppy work and gave the “impressions that the judges and prosecutor were making the rules up as they went along.”⁵²³ This perception of a seemingly haphazard organization resulted in an inadequately performing and unsuccessful court. Instead of being viewed as a court with the capacity to successfully convict the perpetrators of the world’s most heinous crimes, the ICC is often regarded as a symbolic court rather than a substantive court.⁵²⁴

Therefore, the revitalization of the ICC’s image starts at the core of its internal structure, namely—the ASP and the four organs of the Court. The four organs of the Court, complemented by oversight from the ASP, administer the responsibilities, duties and various functions of the ICC. Even though they are separate branches, they can work both individually and collaboratively to improve their functions and to meet the standards and obligations dictated to them in the Statute.⁵²⁵ Improving the internal relationships within the ICC, specifically the affairs of the ASP with the OTP and judges, will lead to respect, legitimacy, and credibility from both member and nonmember states.

As stated in the introduction and outlined in the Rome Statute, the ASP is the management and legislative body of the ICC. The Assembly’s duties include, but are not limited to, considering matters of budgetary concerns, making appropriate amendments to the Statute and providing oversight management to the organs of the Court.⁵²⁶ In other words, the ASP acts as the check to balance the actions of the organs of the Court. However, in the first few years of the ICC, the absence of effective management from the ASP was a prevalent shortcoming as it failed to efficiently manage and monitor the activity within the organs. It resulted in sub-par output from the OTP and a lack of cohesion division of qualified and knowledgeable judges.

The ASP’s failure to adequately fulfill its oversight obligations has emerged as an important area to modify in order to make the ICC significantly more successful in its next ten years. The achievement of credibility and legitimacy starts when the leadership of the organization initiates the revival of modifying its current actions to adequately fulfill its obligations, duties and mandates. The effects will trickle down to all other divisions.

The ASP can take an active role in the ICC through implementing a series of ongoing training practicums for judges, a Code of Conduct for the OTP, and a change to the conditions of the Prosecutor’s term. This will lead to an overall improvement of the ASP and the Court’s internal relationships because the ASP will be providing the oversight that the Court desperately needs. This chapter will outline brief backgrounds of each issue, shortcomings, solutions, and why these changes are necessary. Successful implementation of these recommendations will contribute to the ICC meeting its full potential and becoming a legitimate and credible court throughout the world.

PRACTICUM SERIES FOR JUDGES

While many qualified, capable, and committed judges have worked at the ICC, the glaring exceptions overshadow them. These exceptions include “judges with little or no trial experience” that have allowed proceedings to drag on and have “made legally unfounded rulings.”⁵²⁷ These practices diminish the integrity of individual trials and create an uncertain future for the Court. As William Pace from the Coalition for International Criminal Court (CICC) succinctly puts it, “there are a number of judges who really shouldn’t be there.”⁵²⁸

Judges are vital to a successfully administered Court. Therefore, it is imperative that judges are qualified and well versed in the processes of the ICC. The Rome Statute outlines that judges shall:

- “...be chosen from among persons of high moral character, impartiality and integrity...
- “...have established competence in criminal law and procedure and the necessary relevant experience... or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights...”
- “...have an excellent knowledge of and be fluent in at least one of the working languages of the Court.”⁵²⁹

Judges that lack these qualifications and requirements significantly undermine the Court. They lead to a loss of confidence in the Court and the fear that criminals will remain unpunished persists.⁵³⁰

The most concerning results of insufficiently qualified judges are trial delays and extremely slow proceedings. As former Judge Adrian Fulford wrote, “The Court will be judged by our ability to dispense international criminal justice at the highest level that means securing those accused of the world’s most egregious crimes before the Court and delivering timely and fair justice.”⁵³¹ The completion of two trials over a ten year span illustrates the extent and gravity of this concern. Cherif Bassiouni, a highly respected and distinguished expert on international criminal law, complements the sentiment of Judge Fulford by stating that the acceptance of the ICC is largely contingent on “the respect and esteem in which its judges are held, of their competence and commitment to the cause.”⁵³² In other words, the legitimacy and credibility of the court directly result from judges and their ability to efficiently and effectively administer trials. Their deficiencies undermine the authority of the court.

Judges Kuniko Ozaki and Miriam Santiago illustrate the subpar quality of judges. Although Judge Ozaki fulfills the technical requirements of the Statute, she does not hold a law degree nor does she have any legal qualifications. Subsequently, the Court faces “the prospect of a defense

lawyer appealing a case on the basis that the judge was not qualified.”⁵³³ The appeal process will only increase trial time which desperately needs a substantial reduction. Judge Santiago, on the other hand, is a judge that fails to meet the requirements of the Statute; she does not speak an official language of the Court.⁵³⁴ Therefore, Ozaki and Santiago not only demonstrate poor quality, but further exemplify the lack of oversight action from the ASP for even allowing such people to assume the roles of judges.

The combination of unqualified judges and the ASP’s failure to provide oversight resulted in the Bureau advising the implementation of the Advisory Committee on nominations of judges⁵³⁵ as outlined in the Statute.⁵³⁶ In 2011 the ASP adopted the recommendations from the Bureau to establish the Advisory Committee,⁵³⁷ and in late 2012, elections decided the composition of it.⁵³⁸ It is premature to determine the success of the Advisory Committee. However, it is an important and significant step forward in the process of assuring qualified judges and the longevity of the Court.

The next step in the process is to create a series of ongoing practicums for judges.⁵³⁹ Such an approach will provide the judges an opportunity to explore protocols and intricacies specific to the ICC. Regardless of the experience one might have had in prior courts, the ICC’s jurisdictional constraints are unique to the Court. Therefore, practicums would enable judges to become familiar with the specific methods of the ICC and to address issues as they arise. In turn, this familiarization will enable smoother, faster, and overall more successful trials which will in turn increase the credibility and legitimacy of the ICC.

In order to demonstrate the need for judge practicums, it is helpful to consider factors that have enabled the ICTY’s accomplishments and adopt some of its methods. ICTY judges have presided over dozens of successful trials. These judges are learned and diligent in their work and few have received the same level of criticism as those of the ICC.⁵⁴⁰ However, considering the relative success of the ICTY, it continues to build and strengthen its trials. One way was through a three day advocacy training session held at The Hague in 2011. Its mission was to brief judges on methods to efficiently run a trial. At the training, Judge Moloto remarked that, “we can eliminate differences in expectations and can agree on what is acceptable and what is not acceptable in the course of presenting the case.”⁵⁴¹ This training fosters cohesion and promotes consistency in the ICTY’s courts and leads to faster trials.

Therefore, if the ICTY held training sessions and is already considered a successful court with highly qualified judges, it stands to reason that this is something that should be incorporated into the ICC as well.⁵⁴² Adoption of a series of ongoing practicum would encourage cohesion and result in speedier trials. Additionally, over the ICC’s initial years the ASP has pursued a relatively passive role. The creation of the practicums is a duty for the ASP to fulfill and would serve to improve the functions of the ASP.

Therefore, ongoing practicums for judges would serve a dual purpose. First, it would familiarize judges with the intricacies of the ICC and enable faster trials. Second, it increases involvement of the ASP which promotes a more productive and smoothly run court. Overall, it will promote the credibility of the Court across the world.

CHANGES WITHIN THE OTP

The OTP is another internal organ that must fall under the oversight of the ASP. It is the pivotal organ within the Court because all situation referrals and conduction of investigations start here.⁵⁴³ The results of its output directly translate into the successes and failures of the Court. As demonstrated by the completion of a mere two trials over the span of a ten year period, the abundance of concern regarding the OTP is evident. Significant internal changes are essential in order to increase productivity and subsequently the legitimacy and credibility of the Court.

A comparison of the output of the ICC to that of the ICTY further demonstrates the extent that the ICC is lagging. Out of the 161 individuals indicted at the ICTY, 67 of those individuals received sentences while 17 of them resulted in acquittals.⁵⁴⁴ In contrast, the trials at the ICC have resulted in 1 sentence and 1 acquittal. Both of these results have received heavy scrutiny. Criticism of the Lubanga case is rooted in its inadequate field investigations and narrow scope of charges,⁵⁴⁵ while the Ngudjolo case scrutiny stems from the prosecution's inability to offer proof beyond a reasonable doubt.⁵⁴⁶ Chapter 3 discussed the criticism with the investigations process of both of these trials in detail. To sum up the disapproval, Mattioli-Zeltner from the Human Rights Watch said, "the prosecutor and the Court as a whole should draw important lessons from this first experience to improve the delivery of justice."⁵⁴⁷

Therefore, to improve internally, the ASP needs to provide oversight to the OTP. As stated in the Rome Statute, the ASP is the only division that has this authority.⁵⁴⁸ It is critical that the ASP exhibits its authority over the otherwise independent OTP or the Court will continue to fail in delivering justice. Two recommendations for the ASP to provide oversight to the OTP are to adopt a Code of Professional Conduct for the OTP ("Code for the OTP") and to change the conditions of the Prosecutor's term.

Code of Professional Conduct for the OTP

Arguably attributing to the ICC's poor record are the first Prosecutor Luis Moreno-Ocampo's erratic leadership and ill-conceived prosecution strategy. His actions are one of the dominant reasons for the lack of success of the ICC and its inability to establish legitimacy and credibility throughout the world. To increase successful investigations and trials, personal and ethical responsibilities are essential improvements for the Prosecutor. To ensure this accountability, the

ASP can fulfill the Statute's mandate of providing management oversight to the Prosecutor through the adoption of a Code for the OTP.⁵⁴⁹

Implementing a Code for the OTP is challenging due to the OTP's ability to function as an independent and separate organ.⁵⁵⁰ However, this is not synonymous with the right to disregard the mandates of the Rome Statute. The rationale for this separation from the ICC is to ensure that politics and external sources will not affect impartiality, investigations or any part of the trial process.⁵⁵¹ While the Statute clearly articulates the independence of the OTP, it is vague and general in the ethical requirements of the Prosecutor. A Code for the OTP would establish a specific threshold of ethical obligations for the Prosecutor to adhere to without infringing on its independence.

The actions and decisions during Ocampo's period in office demonstrate the necessity for the ASP to adopt the Code for the OTP. There is a long list of personal and legal complaints against Ocampo that significantly undermine the credibility and reputation of the Court. For example, in regards to the trial of Lubanga, the Court received scrutiny for its slow proceedings. There were several delays at the start of the trial because Ocampo failed to disclose exculpatory documents.⁵⁵² Additionally, his referral of Libya, a country that is not a member of the ICC, raised many questions regarding the influences from outside sources. The UNSC referred the Libya situation to the ICC. However, there is suspicion regarding the relationship with the UNSC because three of the five permanent members are not members of the ICC. This leads to questioning the OTP's independence and Ocampo's inability to abide by the obligation to avoid external influences.⁵⁵³ These two examples and many others exemplify the need for the ASP, the only entity with this authority, to adopt the Code for the OTP in an effort to hold the Prosecutor personally responsible for his/her ethical decisions.

Even without the lamentable precedent set by Ocampo, the Code for the OTP is still important for the ASP to implement. This is due to the prosecutor's diverse ethical and legal backgrounds, and ways of thinking that challenge the ICC. The Code for the OTP would provide cohesion and a common point for all of the prosecutors. It would help to "provide a common framework for conceptualizing the Prosecutor's obligations under the ICC Statute" and "would lower the likelihood of major ethical disagreements within the OTP."⁵⁵⁴ It would unify the Court and increase credibility, which are fundamental challenges of the ICC.

The fact that both the ICTY and ICTR adhere to the Standards of Professional Conduct for Prosecution Counsel of the ICTY and ICTR ("Standards") strengthens the implementation of the Code for the OTP at the ICC. As previously noted, the ICTY is exponentially more successful than the ICC. Therefore, it would help the ICC to embody some attributes of the ICTY in an effort to increase the success of the Court through prosecutor improvements. The Standards provides specifications regarding the character and personal attributes of the Prosecutor:

- “to serve and protect the public interest...”
- “maintain the honour and dignity of their profession and conduct themselves accordingly with proper decorum”
- “to be, and to appear to be consistent, objective and independent, and avoid all conflicts of interest that might undermine the independence of the Prosecutor.”⁵⁵⁵

It continues listing particular expectations that apply to the Prosecutor’s character. These Standards make expectations of the Prosecutor straightforward and prevent loopholes. Therefore, this would be valuable to use as the model for the Code for the OTP.

The challenges that arose in the ICC under its first Prosecutor demonstrate the need for a Code for the OTP. It is a preventative measure to ensure that future prosecutors do not follow in the footsteps of Ocampo. Further, it holds the Prosecutor to a higher level of accountability. Since the ASP is limited in the interactions that it can have with the Prosecutor, this is one of the few ways that the ASP can regulate the OTP without infringing on its independence.

Change the conditions of the Prosecutor’s term

Adoption of the Code for the OTP alone is insufficient action to combat the lack of productivity and oversight from the ASP. It has been easy for the prosecutor to hide behind the independence of the OTP and escape discipline. To deter this practice, the next internal change is modifying the conditions of the Prosecutor’s term to a five year term with the chance for a renewable four year term. This will motivate the Prosecutor to abide by the Code for the OTP and the mandates from the Statute, which will lead to an overall increased output. A change in the Prosecutor’s term must couple with the adoption of the Code for the OTP.

As dictated by the Statute, the Prosecutor has a term of nine years and is ineligible for re-election.⁵⁵⁶ However, the length of the term and the prohibition from re-election are both problematic. A nine year term is simply too long of a time period for one person to be in charge of the OTP. The Prosecutor becomes too comfortable with his/her position which results in a tendency to slack off. The prohibition of the Prosecutor running for a second term is detrimental to the success of the Prosecutor because without the possibility of a second term, he/she will lose or lack motivation to perform up to the expected standard. Therefore, the ASP needs to amend the conditions of the Prosecutor’s term.

In 2006 during the third year of Ocampo’s term, public dissatisfaction began to arise. Antonio Cassese, first president of the ICTY, harshly criticized Ocampo’s performance and investigation strategy. Louise Arbour, UN High Commissioner for Human Rights, also submitted a report and

although she did not directly mention Ocampo's name, she clearly expressed her discontent with the path of the investigation proceedings and his performance. This was merely the beginning of such reports^{557 558}, complaints and discontent with Ocampo. An article in *World Affairs* states that, "three years into his tenure, any in the Office of the Prosecutor (OTP) were questioning his ability to do the job. A further three years on... a trickle of resignations has turned into a hemorrhage, and cases under prosecution and investigation are at risk of going calamitously wrong."⁵⁵⁹ This proves that contempt for the prosecutor arose at an early stage and remained throughout the duration of his nine year term. While it is impossible to know for sure, the outcome had the potential to be drastically different with a five year term and the possibility of renewal.

Once again, it is beneficial to look to the example of the ICTY to see the term for its prosecutor. The ICTY has a four year term with the potential to renew it, which is contingent upon behavior and success of the Prosecutor.⁵⁶⁰ This keeps the Prosecutor motivated to fulfill his/her duties to the best of their ability in order to potentially be re-elected. As evidenced, the ICTY has a high success rate and it would be prudent for the ASP to amend the Rome Statute in favor of a five year term with the potential to renew for an additional four years.

A change to the conditions to the term of the Prosecutor allows the ASP to check and balance the OTP without infringing on its independence. It motivates the Prosecutor to fulfill the requirements outlined in the Statute and the Code for the OTP. The Prosecutor is the head of the OTP and needs to start acting in a befitting manner. The output of the OTP needs to take significant strides in productivity of successful trials to increase legitimacy and credibility.

Conclusion

Over the initial years of the ICC, the ASP has had a passive and limited impact on the Court. In order for the ICC to gain legitimacy and credibility throughout the world the ASP needs to dramatically increase its participation because it is the voice of the nations. The ASP is the only division of the Court with the authority to provide oversight to every organ, including the OTP. It needs to take this role seriously in order to influence the productivity of the Court. Decisive and assertive actions from the ASP are essential in the contribution to the success and efficiency of the ICC.

Internal productivity and cohesion leads to external results. One of the most common complaints about the ICC is the amount of time it takes to complete a trial, as demonstrated by one sentencing and one acquittal over a ten-year period. Therefore, the ASP can increase its role internally and influence the reduction of time trials take. Implementing a series of practicums for

judges, adopting a Code of Professional Conduct for the OTP, and changing the conditions of the Prosecutor's term are the start ⁵⁶¹of the ASP's active impact on the ICC.

RECOMMENDATIONS

- Create a series of ongoing practicums to familiarize judges with the ICC, enable faster trials, and increase involvement of the ASP.
- Adopt and establish a Code of Professional Conduct for the Office of the Prosecutor to hold the Prosecutor to a high level of personal and ethical accountability.
- Change the condition of the prosecutor's term to a five-year term with the potential for re-election in order to motivate the Prosecutor to meet expectation.

CHAPTER 10

THE ASP AND STATE COOPERATION

Lummy Lin

Without state cooperation, the ICC cannot fulfill its mission. In the past decade, states have exhibited a mixed record of cooperation with the Court. There has been especially issues concerning the prompt execution of Court requests, implementing domestic legislation that recognizes Rome Statute obligations, enforcement of arrest warrants, and lack of funding from the UN. As the collective body of states that are committed to the Court's success, the Assembly of States Parties is the Court's most necessary advocate on cooperation. In the next decade, it is critical that the Assembly prioritizes accountability measures and stronger diplomatic efforts to secure state cooperation.

INTRODUCTION

State cooperation is essential to the Court's success in delivering justice. This chapter will reiterate the importance of state cooperation to the Court's work and make the case that the Assembly of States Parties has a central role in securing state cooperation on behalf of the Court. There will be an examination of the major problems that the Assembly of States Parties must make a priority to address, and a look at the recommended solutions.

IMPORTANCE OF STATE COOPERATION

The Court's lack of its own enforcement agents and the diverse geographic range of its work entail its dependence on state cooperation to carry out its work. Both the Court and figures familiar with the Court's work have emphasized the importance of state cooperation to its success. At the Kampala Review Conference of the Rome Statute in 2010, for instance, Mr. Akbar Khan of the Commonwealth Secretariat proclaimed during an expert panel that the Court

would fail in its mandate with the cooperation of states.⁵⁶² The Court itself has also stressed in reports in both 2009 and 2011 that the lack of cooperation by states impairs the Court's efficiency, performance, and the integrity of legal proceedings.⁵⁶³

In recent years the lack of cooperation by states has emerged as a major problem for the Court, jeopardizing its ability to complete its cases. The most high profile example of this is that of Sudan's president, Omar al-Bashir. After the Court issued arrest warrants for al-Bashir in 2009⁵⁶⁴ and 2010,⁵⁶⁵ al-Bashir visited the territories of multiple states parties⁵⁶⁶ with impunity.⁵⁶⁷ Moreover, the African Union issued a declaration in July 2010 that called upon its members, including States Parties, to disregard al-Bashir's arrest warrant in defiance of Court orders.⁵⁶⁸ States' lack of cooperation in arresting al-Bashir prevents the Court from moving forward in legal proceedings, delaying its mission of delivering justice.

It is likely that state cooperation and lack thereof will remain a major concern in the Court's next decade. Accordingly, there is an urgent need for the Assembly to prioritize this issue in the upcoming decade so that it will not obstruct the Court's work.

ROLE OF THE ASSEMBLY OF STATES PARTIES

Although securing state cooperation is not explicitly designated as one of the Assembly's duties under Article 112 (2) of the Rome Statute,⁵⁶⁹ the Assembly is still in the best position to assist the Court in securing it. For one, the Assembly is a centralized forum for states. This gives the Assembly the opportunity to serve as the locus for sharing information, coordinating assistance, and mobilizing states to advocate for the Court's interests in matters of cooperation.

More importantly, the Assembly represents the aggregate diplomatic capital and resources of 122 States Parties. This is a critical advantage. According to the President of the Court, Judge Sang-Hyun Song, the ICC can be reluctant to take action towards non-cooperative states because it feels that it is "inappropriate for a judicial institution to urge States Parties to take particular actions or recommend ways to exert pressure on other States Parties to execute arrest warrants or enforce other decisions."⁵⁷⁰ Instead, President Song emphasized that it is up to the Assembly to "consider how to best use the political and diplomatic tools at its disposal to foster and enhance cooperation with the Court."⁵⁷¹ Song's statement serves as a reinforcement of the necessity of ASP involvement in state cooperation.

Since 2007, the ASP has taken gradual but concrete steps to promoting state cooperation. At the Assembly's sixth session in 2007, the ASP approved 66 recommendations drafted by the Bureau⁵⁷² for states on enhancing their cooperation in areas such as diplomatic relations, supporting investigations and prosecutions, logistics and security.⁵⁷³ At the same session, the

ASP also appointed a focal point, or a representative, tasked with holding consultations with states on the issue of cooperation during the inter-sessional period. In addition, the focal point coordinates assistance for states with the implementing the recommendations contained in the Bureau's 2007 report.⁵⁷⁴

In 2011, at the Assembly's tenth session, the ASP adopted procedures on non-cooperation to address the failure of states to carry out al-Bashir's arrest warrant.⁵⁷⁵ Finally, in 2012, the Assembly designated cooperation as a formal agenda item for the first time at the eleventh session.⁵⁷⁶ The outcome of these efforts is that the Assembly has provided states with blueprints for how to cooperate with the Court in the most effective manner and engaged states in an ongoing conversation about how to get there. However, these efforts have not always translated into consistent cooperative actions by states.

PROBLEM AREAS

Despite the ASP's actions to promote state cooperation, four main problems have emerged: the lack of timeliness in response to Court requests, the slow pace of enacting implementing legislation, inconsistent cooperation in enforcing arrests, and the lack of funding attached to UN Security Council situation referrals. These four problems constitute major hindrances to the Court's work, and the Assembly must prioritize steps to address them.

Lack of timeliness and responsiveness in fulfilling court requests

The Court makes a range of requests to states for assistance in investigations and prosecutions, arrests, sentences, tracing and freezing assets, witness relocation, and more. An examination of ICC reports on cooperation from 2009 and 2011 reveal that while cooperation with the Court was "generally forthcoming," one trend of concern to the Court was the "considerable number of [cooperation] requests" to which states did not respond.⁵⁷⁷

The table and graph below summarizes the response rate of Court requests for cooperation during the two reporting periods:^{578,579} The data shows that the majority of response rates to Court requests fall below 50%. Even when requests had a high response rate, as did the requests for assistance in investigations and prosecutions, reports from both years noted that timeliness was a problem.^{580,581} Moreover, there is no visible improvement from 2009 to 2011 when comparing the response rates. These results are extremely concerning, as the Court has emphasized before that states' failure to cooperate can compromise its ability to carry out its mandate. The Court has further reported that unanswered requests generate additional costs to human resources.⁵⁸²

Type of Request	Total Requests Issued		Responding/ Completed Request		Not Responding/ Not Completed	
	2009	2011	2009	2011	2009	2011
Agreements on Interim Release	12	N/A	0	N/A	12	N/A
Cooperation with Defense	N/A	12	N/A	4	N/A	8
Agreements of Accepting Sentenced Persons	110	N/A	55*	N/A	55	N/A
Witness Relocation Agreements	97	10	21	2	76	8
Identification, Localization, & Freezing/Seizure of Assets	253	16	71	8	182	8
Arrest and Surrender	124	125	29	8	95	112
Assisting Investigations and Prosecutions	352	312	80% (299)	70% (218)	20% (53)	30% (94)

* Rough estimate.

Figure 4. Response rates to court requests in 2009 and 2011

State Cooperation and The ICC

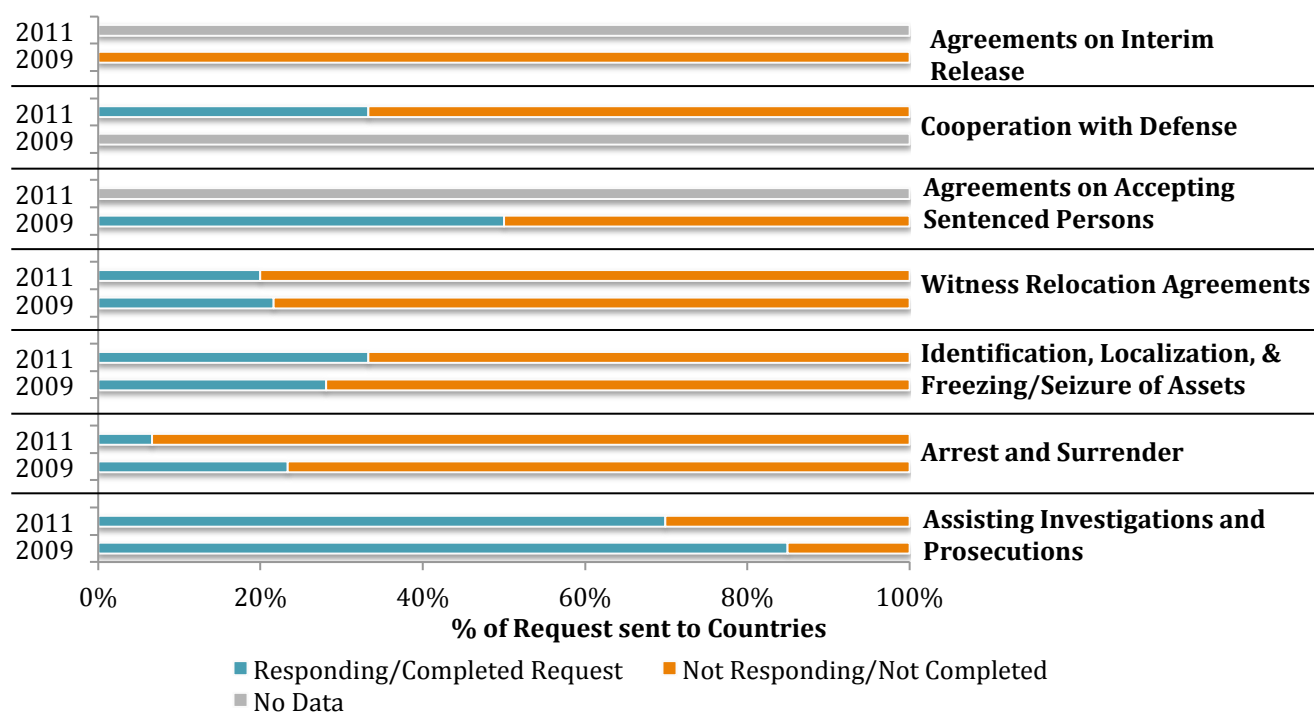


Figure 5. Response rates to court requests in 2009 and 2011

A common response by states that fail to fulfill cooperation requests is that they lack the relevant procedures in domestic laws - known as implementing legislation - to complete the requests.⁵⁸³ However, the Court has stated that a state's lack of implementing legislation "does not absolve them from their obligation to fully cooperate with the Court."⁵⁸⁴

Beyond the lack of implementing legislation, the more fundamental problem here is that the Assembly has not been holding states accountable for fulfilling the Court's requests in a timely manner. In most cases, there are no consequences to failing to respond to or execute a Court request. Under Article 87(7) of the Rome Statute, the Court can refer an instance of non-cooperation to the Assembly of States Parties.⁵⁸⁵ However, the 2009 report stated that the Court had not chosen to exercise that power in any of the cases in which states failed to comply with a request.⁵⁸⁶ The Court has only taken action in 2011 against Chad and Malawi for failing to arrest al-Bashir during his visits to those countries.⁵⁸⁷

It is the responsibility of the Assembly to develop an accountability mechanism in this area, especially considering President Song's observation on the Court's reluctance to pressure states parties on lack of cooperation. Some potential components of this mechanism can include: requiring states to submit a regular report on their cooperation with Court requests, requiring states to submit an explanation to the Bureau in cases in which they are not able to fulfill a request, and setting consequences for multiple failures to comply with Court requests, such as relinquishing voting power during the annual ASP session.⁵⁸⁸ The Assembly can decide the specific details of the mechanism through consultations with member states and civil society.

Implementing Legislation

Implementing legislation refers to domestic legislation that integrates the Rome Statute definitions of crimes prosecuted by the Court and outlines procedures for the fulfillment of state obligations under the Rome Statute. Article 88 of the Rome Statute obliges states to enact implementing legislation.⁵⁸⁹ Articles 86 through 111 outline specific state obligations.⁵⁹⁰ States Parties must cooperate with the Court on a range of matters, including but not limited to: the arrest and surrender of suspects, execution of searches and seizures, transport of witnesses, suspects, and sentenced persons, providing requested records and documents, protection of victims, tracing and freezing assets and property, and production of evidence.⁵⁹¹ The wide range of responsibilities serves as a reminder of the extent to which the Court relies on state cooperation to succeed in its mission.

However, the implementation of Article 88 by all States Parties has been slow to occur. Ten years after the creation of the ICC approximately half of States Parties have still not met one of most critical Rome Statute obligations. In 2012, only 65 States Parties out of 122 total states have enacted some form of implementing legislation.⁵⁹² An additional 35 States Parties have

draft legislation that is awaiting passage.⁵⁹³ However, some States Parties that have enacted implementing legislation have only adopted the Rome Statute definition of crimes, but have not developed procedures for cooperation. When that is taken into account, only 48 States Parties have implemented legislation on cooperating with the Court.⁵⁹⁴

This is a major concern because the lack of implementing legislation poses a barrier to full cooperation with the Court. Registry records from 2009 revealed that one out of three States Parties that provided an explanation for failing to fulfill a Court request cited the “absence or insufficiencies of implementing legislation” as the reason.⁵⁹⁵ Continued delay in enacting implementing legislation has the potential to impede future investigations and trials.

Once again, the problem is accountability, because a wide array of resources, assistance, and guidelines are available to states for developing and enacting implementing legislation. For instance, the Assembly adopted two action plans, in 2006 and in 2007, on the implementation of the Rome Statute and enhancing state cooperation.⁵⁹⁶⁵⁹⁷ Both documents outline specific actions that States Parties can take to move towards the integration of implementing legislation and to assist other states in achieving the same outcome.

In addition, examples of resources and assistance that states can access include: an online database of all the successfully enacted implementing legislation is publicly available,⁵⁹⁸ consultations with the Secretariat of the Assembly and the Assembly’s facilitator on cooperation,⁵⁹⁹ and assistance from civil society organizations.⁶⁰⁰

Despite the continued emphasis on implementing legislation and the efforts of the Assembly provide resource and assistance on this matter, more than 40 states that have not implemented legislation on cooperation procedures have been States Parties since 2005 or earlier.⁶⁰¹ This suggests that many States Parties have not made implementing legislation a priority. The Coalition on the International Criminal Court has noted explicitly that this is the case for Peru, Guyana, and the Dominican Republic.⁶⁰² It is likely that other nations have a similar mindset.

In the absence of more rigorous demands for states to prioritize implementing legislation, there are few incentives for states to speed up the process. Just as with cooperation with Court requests, it is necessary for the Assembly to establish an accountability mechanism in this area. This mechanism could potentially combine regular reporting requirements and deadlines for various stages of the drafting and legislation passage process. Again, the details of the mechanism can be established after more comprehensive consultations.

Lack of Cooperation in Enforcing Arrests

As of 2012, 10 outstanding arrest warrants remain.⁶⁰³ Moreover, state cooperation in this matter has been inconsistent. While France, Belgium, the Democratic Republic of Congo, and Ivory

Coast have arrested and surrendered six suspects to the ICC, the DRC, Sudan, and various other African states have declined to enforce arrest warrants related to the situations in the DRC and Sudan (Darfur) for various political reasons.⁶⁰⁴

It is imperative that the Assembly does not allow states to shield perpetrators from prosecution. While the Assembly has responded to states' failure to execute arrest warrants by adopting procedures on non-cooperation, the experience so far suggests limited efficacy of the procedures, which are mainly aimed at fostering dialogue between the non-cooperative state and the Bureau.⁶⁰⁵

In 2012, for instance, the Bureau took these steps with Chad and Malawi after both states allowed al-Bashir to make visits on their territories. Malawi was willing to engage with the Bureau and ultimately chose not to allow al-Bashir enter its territory again without being arrested, which resulted in the relocation of the 2010 African Union Summit to Ethiopia.⁶⁰⁶ In contrast, Chad reaffirmed its agreement with the position of the African Union and that its actions in not arresting al-Bashir were consistent with international law.⁶⁰⁷

The mixed results that the Bureau encountered indicates that the procedures on non-cooperation need to be further developed and strengthened, particularly to emphasize the role of diplomatic pressure. While Malawi eventually reversed its position after its interaction with the Bureau, it is likely that this decision was also influenced by the fact that the US had frozen \$350 million of Malawi's development aid.⁶⁰⁸ US foreign aid agency Millennium Challenge Corporation specifically highlighted al-Bashir's visit as one of the concerns that led to the suspension of aid.⁶⁰⁹

The experience with Malawi, as well as experiences at other international criminal tribunals, strongly suggests that the Assembly's procedures on non-cooperation should place more weight on diplomatic pressure by states instead of being confined to dialogue with the Bureau. For instance, Tracey Gurd, senior advocacy officer with the Open Society Initiative, observed that the arrests of Slobodan Milosevic and Radovan Karadzic at the ICTY, and of Charles Taylor at the SCSL were made possible because of a coordinated strategy combining "diplomatic support, political pressure, financial leverage, and technical support" and involving multiple states and international actors.⁶¹⁰ In particular, Gurd pinpointed conditionality – such as withholding aid – as the most successful mechanism for galvanizing arrests.⁶¹¹

Nonetheless, the Assembly procedures on non-cooperation do not mention the various ways in which States Parties can be involved in diplomatic efforts to pressure non-cooperative states. The procedures merely direct the President of the Assembly to encourage States Parties to raise matters of non-cooperation with the requested State in bilateral contacts.⁶¹² The provisions do not, however, call upon states directly to take more proactive actions.

While each arrest situation requires a tailored approach, coordinated diplomatic pressure is a proven tool. Updating the Assembly's procedures on non-cooperation to include a stronger mandate for states to contribute their diplomacy and resources can facilitate more successful persuasions of states to cooperate, as in the case of Malawi.

Lack of UNSC Financial Assistance in Referred Situations

To date, the Security Council has referred two situations to the ICC: Sudan in 2005 and Libya in 2011. Both referrals came with a problematic caveat: an identical provision stating that "none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the UN and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily."^{613,614}

In essence, the Security Council's two referrals have set up an asymmetric relationship between it and the Court - the Security Council has the power to make referrals yet bears none of the costs or responsibilities. This is despite the fact that there are no formal agreements between the UN and the ICC that prohibits UN financial assistance. In fact, Article 115 of the Rome Statute envisions the possibility of UN funding.⁶¹⁵

The lack of funding is concerning given the Assembly's imposition of a zero-growth budget on the Court in 2012 despite the Court's increasing caseload.⁶¹⁶ With the Court facing shrinking resources and more work, the Security Council's refusal to provide financial assistance will only stretch the Court's resources and hamper its performance. Without a policy change, Security Council referrals will become a financial burden on the Court.

The Assembly can take action by mobilizing States Parties that are members of the UN General Assembly and on the Security Council to open up a discussion on UN funding for referrals. This can build on States Parties already in the practice of promoting the work of the ICC through statements during the general debate of the UN General Assembly and during UN Security Council debates on "situations, conflict resolution, human rights and the rule of law."⁶¹⁷ It is critical that States Parties build on these efforts to help the Court secure the resources that it needs to complete all of its current work.

CONCLUSION

Ten years after the establishment of the ICC, the Court is still experiencing significant problems with securing the consistent cooperation of states. From the evidence, it is clear that these problems are in part because the ASP is not holding states accountable for executing Court

requests promptly and prioritizing the enactment of crucial implementing legislation. There is also a clear need for stronger diplomatic efforts by states to advocate for the Court's interests their relationships with non-cooperative states and at the UN.

In spite of these pressing issues, the ASP remains in the best position to demand this accountability and diplomatic coordination. The ASP's diplomatic and political resources are unparalleled advantages. Moving forward, the ASP must assume a more proactive role in mediating cooperation between states and the Court. The ability of the Court to successfully fulfill its mandate hinges on these efforts.

RECOMMENDATIONS

- Establish accountability mechanisms for state cooperation with Court requests and the timely enactment of implementing legislation.
- Update the procedures on non-cooperation to emphasize States Parties' role in applying diplomatic pressure.
- Mobilize States Parties in the UN General Assembly and on the Security Council to advocate for funding of Security Council situation referrals.

CHAPTER 11

RELATIONS WITH THE UNITED STATES

Lily Shay

The US, initially a hostile opponent to the Court under the Bush Administration, has altered its current position under the Obama Administration, providing both direct and indirect support to the Court's situations. Due to this change in attitude, it is in the Court's best interest to pursue the limited support offered by the US, as opposed to pursuing full signing and ratification of the Rome Statute. In methods similar to other international tribunals, the US is capable of providing assistance in information sharing, technology, arrests, and witness protection for the ICC. These types of assistance have proved to be valuable to these past tribunals and would act as stepping-stones towards improved efficiency, effectiveness, and overall legitimacy of the ICC.

INTRODUCTION

In the immediate future, the ICC must evaluate its efficiency and effectiveness to elevate itself from its current precarious position in the global arena. In order to do this the ICC must consider its relationship with the US, one of three non-ratified superpowers. This relationship has the potential to be wildly significant because although its involvement in the ICC has been limited, the US has demonstrated its longstanding commitment to international justice, working with ad hoc tribunals in the former Yugoslavia, Rwanda, Cambodia, and Sierra Leone.⁶¹⁸ Specifically in the ICTY, the US provided technology, information sharing, personnel, military presence, and leveraging successful arrests that ultimately contributed to getting 200 individuals into custody.⁶¹⁹ Using US assistance, in any of the previous capacities, could help to propel the ICC to its intended strength as an enforcer of international justice. As expert in international law, Ruth Wedgwood⁶²⁰ states, “effective authority in international politics requires power as well as

legitimacy”⁶²¹ and this highly sought “legitimacy” can be improved by a successful relationship with the US.

The relationship between the ICC and the US has been strained since the establishment of the Rome Statute in 1998, but it did not begin this way. Under the Clinton Administration, the US was supportive of the development of a global institution that would enforce human rights and international justice,⁶²² but as the development of the Statute progressed, with anti-American sentiments in Rome,⁶²³ the US became a hesitant player. The jurisdiction of the Court, the power of the Prosecutor, and the inevitable influence on US foreign policy made President Clinton a wary signatory of the Rome Statute, stating on December 31, 2000⁶²⁴ that,

“In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. . . . Given these concerns, I will not and do not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied.”⁶²⁵

The factors leading up to Clinton’s disappointment in the Rome Statute eventually led the Bush Administration to formally renounce its obligations as a signatory to the Rome Statute all together in 2002.⁶²⁶ A three line letter, also known as the “Bolton Note,” to the UN Secretary General from John Bolton, then Under Secretary of State, indicated that “the US does not intend to become a party to the treaty” and therefore “has no legal obligations arising from its signature on December 31, 2000.”⁶²⁷ This action has often been termed the “unsigned” of the Rome Statute.⁶²⁸ Subsequently the US passed the American Service-Member Protection Act (ASPA), a legislative act that protects American citizens from the jurisdiction of the Court while simultaneously undermining it, reflecting the peak of the US hostility towards the ICC.

Despite this initial hostility towards the ICC, the second Bush Administration adopted a more benign position and finally, under the Obama administration,⁶²⁹ the US has embraced a supportive attitude towards the Court. The US demonstrated a change in its approach by offering indirect aid and explicitly supporting the Court’s existence. This growing positive association suggests the possibility for a brighter future with US assistance that has the power to increase the Court’s legitimacy.

This chapter will outline the initial US concerns with the ICC’s jurisdiction, the power of the OTP, influence over US foreign policy, and the consequential negative legislative responses to the Court. Following this explanation, the chapter will explore the shift to a positive relationship between the ICC and US, as indicated by the US change in language towards the Court and its

active engagement in the ASP. It is because of this new positivity that the **ICC should pursue a relationship that includes information sharing, technological aid, assistance in arrests, and witness protection on a case-by-case basis** to increase the ICC's efficiency and effectiveness, eventually solidifying its legitimacy in the global arena.

BUSH ADMINISTRATION: PROBLEMS WITH THE ICC

From a structural perspective, the US disagreed with foundational aspects of the ICC—problems that stem directly from the Rome Statute. A 2003 Fact Sheet released by the US Department of State identified the following as major concerns:

- The jurisdiction of the Court; specifically “the ICC claims the authority to second guess the actions taken and the results reached by sovereign states with respect to the investigation and prosecution of crimes.”⁶³⁰
- The Rome Statute gives too much power to the OTP.⁶³¹ The OTP does not have enough checks and is enabled by *proprio motu* to initiate investigations,⁶³² thereby risking the politicization of prosecutions.
- With involvement in an international institution, US obligations and restrictions on their foreign policy would be inevitable.

These concerns have prevented the US from reactivating its signature and ratifying the Rome Statute. However, the Court acting appropriately and within its prerogative over the past decade would alleviate some of the concerns of the Bush Administration, slowly allowing the US to give more support to the ICC.

Jurisdiction of the Court

The jurisdiction of the ICC is listed as a primary reason for US hesitation to sign and ratify the Rome Statute. A key facet of the Court's jurisdiction argues that: If a citizen of a non-member commits a crime on the territory of a state party the ICC has the authority to incarcerate and prosecute this individual.⁶³³ It is the US position that this principle violates state sovereignty and subjects non-state parties to the jurisdiction of the Rome Statute, despite the fact that it does not apply within their own borders. For US nationals, this means that they are not guaranteed their due process rights as is laid out in the US Constitution and thereby denied their rights as US citizens.⁶³⁴ Additionally, as explained by the Legal Advisor to the US State Department, Harold Koh, the “unique posture of having more troops and other personnel deployed overseas than any other nation, and that we are frequently called upon to help ensure global peace, justice and

security” infers that US troops or other service members are in a more vulnerable position to have their actions scrutinized and targeted by the Court.⁶³⁵ Not only does the US aggressively stand against this due to its “illegality,” but also, as stated in the ASPA, that the US will use “all means necessary and appropriate” to retrieve any US citizens detained under such circumstances.⁶³⁶

Although it appears as if the US has legitimate concerns regarding the invasion of sovereignty through the jurisdiction of the Court, it actually seems to be a false claim used to avoid becoming party to the ICC. The US issues with the jurisdiction of the Court are directly addressed through the principle of complementarity⁶³⁷; the principle was implemented during the development of the Rome Statute to put countries wary of the jurisdiction of the Court at ease. It provides that cases brought against any individual have the option to return to the individual’s home country for trial so long as the nation is capable of holding trial and the individual is not being “shielded from criminal responsibility.”⁶³⁸ As articulated in Article 17(a), “...Unless the State is unwilling or unable genuinely to carry out the investigation or prosecution,” the case is admissible by the ICC to be “investigated... by a State which has jurisdiction over it.”⁶³⁹ In fact, it is unlikely that the ICC would claim primacy over the US judicial system, since it is adept at processing criminal cases. Additionally, the US concern would eventually be answered by actions of the Court, as it exercises appropriate jurisdiction to pursue criminals, as opposed to US service members.

Office of the Prosecutor

The US perceives the amount of power exerted by the OTP as an obstacle; the Prosecutor has the authority to recommend situations to the Court through *proprio motu*⁶⁴⁰ and able to rule a case as admissible if he/she deems that there is not enough evidence to pursue prosecutions or that it is no longer in the interest of justice.⁶⁴¹ A three-judge panel in a PTC, in which two judges must approve each investigation opened evaluates the investigations initiated by the Prosecutor, is the sole check on the Prosecutor’s power to open investigations.⁶⁴² Due to these limited checks on the OTP, a main concern of the US was the threat of an unchecked, rogue prosecutor pursuing “politicized prosecutions.”⁶⁴³

A suggested remedy to this concern was to give the UNSC a veto power to cases in the Court,⁶⁴⁴ but this is not a viable option for the Court. The veto power was proposed during the development of the Rome Statute, but was adamantly refused due to the potential politicization of cases pursued by the ICC, as members of the UNSC could veto cases brought against its own citizens.⁶⁴⁵ Much like the US concern with jurisdiction, during the existence of the ICC, the OTP has not overstepped their prerogative during investigations, quieting the criticism of the OTP’s wielded power.

Influencing obligations and foreign policy

In the same way that the US does not wish to have its sovereignty impeded by the ICC's jurisdiction, it does not wish to have its foreign policies and obligations limited by the Court; the US does not wish to be a part of an entity that may pursue cases that may interfere with its national interests. The US desire to maintain its sovereignty, as explained above by the US concerns about the jurisdiction of the Court and the OTP, acts as an implicit deterrent for US support of the ICC. However, as the Court continues, the US has been able to evaluate its proceedings critically and develop a more balanced opinion on the actions of the Court.

NEGATIVE LEGISLATIVE RESPONSES TO THE ICC

As early as 2002, the US reflected its initial hostility towards the ICC in legislative policy. From bilateral agreements made between nations that undermine the jurisdiction of the Court to legislative policies that prevent funding the ICC, the Bush Administration made its negative position towards the ICC strong and clear.

American Service-Member Protection Act and Bilateral Immunity Agreements

In an attempt to protect US nationals, specifically Foreign Service members and military personnel, from the jurisdiction of the Court, the US passed the ASPA⁶⁴⁶ under the Bush Administration in 2002. The ASPA took an aggressive stance against the jurisdiction of the ICC and stated the following:

- Authorized the President to use “all means necessary and appropriate” to retrieve incarcerated Americans and “allied persons” who had been detained on behalf of the ICC.
- Prohibited any cooperation of US agency or Court on the federal, state, or local level with the ICC.
- Limited US to participation only UN peacekeeping operations that “exempt” members of the US Armed Forces from the jurisdiction of the ICC.
- Prohibited information sharing, whether direct or indirect, of classified information to the Court was prohibited.
- Prohibits military assistance, including financial,⁶⁴⁷ to the States party to the ICC, unless waived by the President due to the importance of “the national interest of the US to waive

such prohibition” or the State had signed a Bilateral Immunity Agreement/Article 98 agreement with the US.

This aggressive legislative response, in addition to the “Bolton Note,” marked the peak of hostility of the Bush Administration toward the ICC by limiting any engagement with or support of the Court.

In conjunction with the ASPA, the US also engaged in creating Bilateral Immunity Agreements (BIAs or Article 98 Agreements) with countries that were party to the ICC. From a US perspective, these agreements made it possible to maintain political and military relationships with ICC members, despite its distaste for the Court’s jurisdiction. Article 98 of the Rome Statute states that the Court cannot force nations to “act inconsistently with its obligations under international law”⁶⁴⁸ implying that the international agreements between nations would take precedence over the Parties’ obligations to the Court.⁶⁴⁹ The US took advantage of this provision by creating BIAs with 46 of the 122 State Parties that dictate “that current or former US government officials, military and other personnel (regardless of whether or not they are nationals of the state concerned, i.e., foreign sub-contractors working for the US), and US nationals would not be transferred to the jurisdiction of the ICC.”⁶⁵⁰ Meanwhile, many State Parties that resisted signing BIAs opted for economic repercussions, in the form of withheld financial aid from the US.⁶⁵¹ The nature of BIAs is coercive and has questionable legality,⁶⁵² but more importantly, its existence directly undermines the legitimacy of the Court by limiting their jurisdiction as an international institution.

The Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act

It was not only military funds that were withheld due to BIAs,⁶⁵³ but also the 2001 and 2002 fiscal year’s budget legislation dictated that all money towards certain organizations, including the ICC, would be withheld. Specifically, the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act prevented any funds from the Foreign Affairs Authorization Act or any other act:

“...from being used by or for the support of the ICC, or to extradite a United States citizen to a foreign country obligated to cooperate with the ICC unless the US receives guarantees that that person won’t be sent to the ICC.”⁶⁵⁴

This legislative response not only limits funds directly from the US, but also simultaneously restricts funding from the UN, as the US contributes to the UN budget.⁶⁵⁵ Due to this, Resolution 1970, that was adopted as a response to the situation and to the unanimous referral of Libya to the ICC, includes the provision that “none of the expenses incurred in connection with the referral...shall be borne by the UN,” but the costs will be covered by “the parties to the Rome

Statute and those States that wish to contribute voluntarily.”⁶⁵⁶ While this act is operating, the current administration is limited to provide only “in-kind support to the Court.”⁶⁵⁷

OBAMA ADMINISTRATION: PROBLEMS WITH THE ICC

The Obama Administration has had the opportunity to see the ICC in full operation for the past decade, which has eliminated some of the concerns of the Bush Administration, but illuminated other concerns—primarily the issue of “crimes of aggression.”

Crimes of aggression

During the initial development of the Rome Statute, “crimes of aggression” were included as “one of the core crimes under the Court’s jurisdiction,” but did not enter into force “as the Statute did not define the crime or set out jurisdictional conditions.”⁶⁵⁸ In order to address the complicated nature of crimes of aggression and to move towards adoption into forcible jurisdiction of the ICC, in 2002 the Court created the Special Working Group on the Crime of Aggression (SWGCA).⁶⁵⁹ The SWGCA functioned specifically to explicitly define this type of crime and the ICC’s role in prosecuting these crimes.⁶⁶⁰

In his address to the American Society of International Law in 2010, Legal Advisor Harold Koh, articulated the US problems with adopting “crimes of aggression” into the jurisdiction of the ICC as the following⁶⁶¹:

- The definition of crimes of aggression, “including the degree to which it may depart from customary international law of both the ‘crime of aggression’ and the state ‘act of aggression.’”⁶⁶²
- The UN Charter calls on the UNSC to determine when aggression has taken place. To also allow the Court to pursue these crimes would result in two different definitions and prosecutions of the same crimes of aggression.
- Encompassing crimes of aggression into the jurisdiction of the Court could lead to politically charged prosecutions since threatened countries could possibly use the Court as a retaliatory political war tool.
- Adopting crimes of aggression into the Rome Statute may “hinder the key goals... of promoting complementarity, cooperation, and universality” by alienating potential and current member states.⁶⁶³

These sentiments reflect similar concerns as under the Bush Administration, but as the US has moved towards positive involvement, the response to its concern was less severe and more productive. Instead of a negative legislative response against the Court, US representatives were present during the 2010 Review Conference in Kampala, Uganda to voice their concerns and assist in implementing appropriate safeguards for all nations party to the ICC.⁶⁶⁴

During the 2010 Kampala meeting, the ASP established the explicit definition of crimes of aggressions as “the planning, preparation, initiation or execution by a person in a leadership position” while simultaneously, violating the UN’s Charter definition of crimes of aggression.⁶⁶⁵ These amendments to the Rome Statute will not enter into force until “30 State Parties have ratified or accepted the amendments” and “a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017”⁶⁶⁶ leaving room for any remaining unease to be addressed and “improved in the future.”⁶⁶⁷ Additionally, safeguards were put in place to deter politicization of the Court’s prosecutions. Similarly to the other three crimes, the UNSC and the OTP can recommend these crimes to the Court, but there are more limitations on the investigation selection of the OTP. The articles “establish a unique jurisdictional regime” in which the OTP “would have to offer a reasonable basis for investigating the crime under the definition” and “get a majority vote of six judges of the court’s pretrial division”^{668,669}; this is a slightly more strict restriction on the OTP’s ability to investigate crimes of aggression than the other core crimes under the jurisdiction of the ICC.

Perhaps the most significant aspect the new amendment is that “Non-State Parties have been explicitly excluded from the Court’s jurisdiction into a crime of aggression under this article when committed by that State’s nationals or on its territory.”⁶⁷⁰ The inclusion of the UNSC definition in the ICC’s definition of the crimes of aggression, safeguards against the misuse of this crime, and most importantly, the limitation of the Court’s jurisdiction and puts some of the US concerns at ease. Through its involvement, Legal Advisor Koh recognized that US participation not only worked to improve the Court, but also “worked to protect [US] interest, improve the outcome, and bring [US] to renewed international good will.”⁶⁷¹ These kinds of positive and constructive engagements between the US and ICC has marked a “reset the default on the US relationship with the court from hostility to positive engagement.”⁶⁷²

SHIFTS TO POSITIVE RELATIONS WITH THE US

After the aggressive criticisms of the ICC during the Bush Administration, the Obama Administration has been more supportive of the Court’s actions, although there has been no release of a formal declaration of support of the ICC from the US government. This administration has had the advantage of being able to observe the Court in action and witness that none of the cases or situations pursued impede US national interest—making the US much

more supportive of the Court. Ambassador Steven Rapp stated at a forum discussing the international justice for victims, that despite the US conservative observer status, “[the US has] offered to assist the Prosecutor and Registrar in each of the current cases of the ICC, seeking ways consistent with [its] law to help with witness protection and relocation, information-sharing, and the arrest and transfer of fugitives.”⁶⁷³ Support has also come from the former Secretary of State, Hillary Clinton, who expressed that it “is a great regret that [the US is] not a signatory.”⁶⁷⁴ The US permanent representative to the UN, Susan Rice, has also acknowledged the legitimacy of the ICC, stating that the Court “looks to become an important and credible instrument” for pursuing international criminals guilty of committing serious atrocities.⁶⁷⁵ The shifts in attitude have not been limited to opinions, but have also been reflected in changes in both foreign and domestic policy relating to the Court.

Engaging the with the ASP

After many years of being absent from ASP meetings, the Obama Administration has taken a more proactive role in the ASP. The presence of the US alone demonstrates the shift in attitude towards the Court, but the interactions between the US and ASP have been very positive. Despite its observer status, the US has consequently adopted a role in further developing the Court’s strength and legitimacy, as demonstrated by the US involvement in the development of crimes of aggression. Legal Advisor Koh and Ambassador Rapp, representatives to the ICC on behalf of the Obama Administration, were present at the two-week review conference of the ASP in Kampala, Uganda, where they “engaged in countless hours of conversation in plenary private meetings” regarding strengthening the Court.⁶⁷⁶ At this meeting, the US was the only non-member nation of 112 countries that pledged to strengthen the Rome Statute.⁶⁷⁷ Additionally, in another ASP meeting in December 2011, Ambassador Rapp addressed the ASP on behalf of the US observation delegation, commending the “tireless efforts” of the ASP and the “concrete steps” that the ICC and US can take together “to continue to advance this common cause” of international justice.⁶⁷⁸ By finally engaging with the ASP, the US has begun to develop a new, productive relationship with the Court that places a premium on the “promotion of justice” and “the end of impunity.”⁶⁷⁹

Positive foreign policy shifts: UNSC referrals

This changing relationship between the US and the ICC can also be marked by the UNSC’s unanimous referral of the situation in Libya on February 26, 2011.⁶⁸⁰ This, as opposed to the UNSC’s previous referral of the situation in Darfur, Sudan in which the US abstained from voting,⁶⁸¹ marked a shift in which the US gave a nod, acknowledging the existence and possibly necessity of this international entity.

Additionally, while the US has no active role in the Court, there have been resources and personnel deployed to assist in the Uganda situation regarding the arrest of Joseph Kony. According to the State Department, the US has provided more than “\$560 million in humanitarian assistance specifically benefiting LRA-affected populations in Uganda, CAR, the DRC, and Sudan, in addition to countrywide assistance in the affected countries that could benefit individuals affected by LRA violence.”⁶⁸² Not only has there been financial support for countries affected by the violent presence of the LRA, but military personnel have also been deployed to in-country bases, offering the United State’s military technology and experience to assist local law enforcement and military.⁶⁸³ There have even been legislative responses to the Kony situation, as Congress approved expanding the State Department’s “rewards for justice program to target the world’s most serious human rights abusers.”⁶⁸⁴ Despite the indirect nature of its assistance, US support provided to ICC situations and investigations that are in need of aid, demonstrates the evolution of a more active relationship between the US government and the ICC.

Positive legislative shifts: The slowing of Bilateral Agreements

Despite the existence of the BIAs, it is worth noting that no new agreements have been signed or have come into affect since 2007⁶⁸⁵ and the US has faced some unintended consequences of the BIAs which have been regarded as detrimental to development of countries that did not enter into these agreements with the US. The slowing of BIAs may mark the very beginning of the shift in the relationship between the US and the ICC, as early as 2006.

The creation of new BIAs were drastically reduced by some of the detrimental unintended consequences. It came to the attention of US officials that by restricting financial assistance to countries that did not enter into BIAs with the US, 22 countries have been negatively affected by these sanctions—11 of which are in Latin America.⁶⁸⁶ In 2005, General Bantz J. Craddock, a US Southern Commander and representative for the Department of Defense before the House Armed Services Committee, testified that the ASPA,

“...has the unintended consequence of restricting our access to and interaction with many important partner nations. Sanctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute... We now risk losing contact and interoperability with a generation of military classmates in many nations of the region.”⁶⁸⁷

In this manner, the BIAs limited important US military relationships with State Parties, especially in Latin America. Consequently, these limitations actually obstructed US national interests, even though BIAs were created to protect them. The former US Secretary of State

Condoleezza Rice stated on her visit to Chile in 2006, that limiting funding to countries that are battling terrorism and drug trafficking was “sort of the same as shooting ourselves in the foot.”⁶⁸⁸ The exposure of the BIAs weakness slowed the creation of new BIAs and eventually resulted in an amendment of the National Defense Authorization Act⁶⁸⁹ in 2007 repealing the restriction on IMET funding to ICC State Parties⁶⁹⁰ and waiving the Nethercutt Amendment, which had previously restricted Economic Support Funds (EFS) to ASP members that had not signed BIAs.⁶⁹¹ The elimination of financial incentives to sign BIAs has rendered them essentially irrelevant in US foreign policy and simultaneously indicated the beginning of the shift in US policy, from hostile to benign, towards the Court.

Additional Legislative Responses

Despite the US desire for autonomy, there have been recent legislative acts implemented to bring the US up to similar standards to the ICC. The Genocide Accountability Act in 2007 and the Child Soldiers Act in 2008 were significant steps by the American government to close gaps between the US justice system and the ICC standards regarding criminal and military law.⁶⁹² These acts further represent the US obligation to international justice and support of the ICC’s pursuit of international justice.

Perhaps one of the most notable shifts in US position has been reflected in the Department of State Rewards Program that was updated in 2012 to include that,

"the Secretary [of State] may pay a reward to any individual who furnishes information leading to ... the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal."⁶⁹³

This update to the State Rewards Program alludes to an acknowledgement of the ICC as a legitimate entity, as the arrests and/or convictions listed are given legitimacy through the ICC (or any internationally recognized tribunal) and that the US will support in assisting in arrests. Republican Representative Ed Royce, a sponsor of the legislation, stated that “this bill responds to the need to develop more tools to pursue the world's worst [criminals],” but that is not its only function.⁶⁹⁴ The language in this law marks a shift in future policy towards the Court; instead of supporting specific cases undertaken by the Court, future US policy may shift perspective, giving full support to the Court in all situations and cases, except with US national interest is obstructed. These critical shifts in overall attitude and legislation bring the US closer to reactivating their signature of the Rome Statute and taking a more substantial role the ICC.

THE WAY FORWARD WITH THE US

Due to this clear shift in the relationship between the US and the ICC, this chapter recommends that the Court pursues the most realistic course of action for more US support and **pursue a case-by-case relationship with the US**, specifically regarding the following types of assistance: information sharing, technology, arrests, and witness protection.

Information Sharing

In the ASPA, the US prohibited the sharing of any confidential information with the ICC, but this does not render the US completely useless for information sharing. If the situation/case is lies within the scope of US foreign policy, the US has shown that it is likely to share any information that can be helpful to the Court's investigations.

Access to Technology

Another reasonable request for assistance from the US would the use of or access to technology. The US involvement with the ICTY meant that there were technological services that the US made available for the investigation teams, specifically the use of aerial imaging to locate mass graves, which were used to strengthen investigations against the numerous defendants.⁶⁹⁵ Access to technology could easily translate into increased efficiency and effectiveness for the Court's investigations, ultimately improving the quality and amount of evidence brought against international criminals.

Arrests

Recently, the US has demonstrated its support in apprehending criminals prosecuted by the ICC. The alterations to the State Department's rewards program indicate that the US will assist, in limited capacities, in enforcing arrest warrants issued by the ICC. The US has also recently renewed its "commitments to support regional efforts to bring the leadership of the LRA to justice," which further illustrates the commitment that the US has to supporting the legitimacy of the ICC's arrest warrants.⁶⁹⁶ If it is appropriate, the ICC may also seek the assistance of US influence in other countries to leverage turning in criminals to be tried by the ICC, as the US has done in the past with other tribunals, such as the ICTY.⁶⁹⁷ Continuing to seek assistance from the US in arrests will improve the effectiveness of the Court by fulfilling more of its arrest warrants and subsequently holding trials for the arrested individuals.

Witness Protection

In Ambassador Stephen Rapp's speech to the ASP in 2011, he addressed the "tangible" ability of the US to assist in protection for witnesses and judicial officers.⁶⁹⁸ The US recently renewed funding for "a witness protection project implemented by the Joint Human Rights Office" in the DRC and support of similar efforts in other "situation countries," not only demonstrates the ability of the US, but also the desire to protect the rights of all humans, namely witnesses to the critical prosecutions.⁶⁹⁹ In Ambassador Rapp's address to the ASP, he indicated that the "US looks forward to continuing to work with the ICC to identify ways in which we can cooperate on witness protection issues."⁷⁰⁰ This US assistance could play a important role in increasing the legitimacy for the Court by allowing witnesses to feel safe in coming forward with critical testimonies, strengthening cases against international criminals.

CONCLUSION

While the US continues to watch the development of the Court, it is deciding whether or not it wishes to join the ranks of the ASP. But it is clear to the world that the ICC is here to stay and the US is simultaneously losing prestige and soft power by abstention, no matter how benign.⁷⁰¹ It also should be noted that US opposition to the Court is not only a political one, but also an ideological one. As all of the official issues, as dictated by the US Department of the State, are in some way addressed in the Rome Statute, the only explanation can be that the US simply does not want to be a part of the Court until the ICC has obtained a certain degree of legitimacy, a realistic and probably trajectory, and proven its effectiveness. In this manner, pursuit of the US resigning and ratification is a waste of resources and energy.

It is in the ICC's best interest to remain an apolitical court in order to operate as a legitimate source of international justice and because of this, there are few recommendations that can be made to make signing and ratification of the Rome Statute more likely for the US. However, as the present administration has articulated and demonstrated, the US will continue to support the actions of the ICC—whether directly or indirectly—so long as these actions remain within their own foreign policy and framework of legality.

With each case and situation, the appropriate type of assistance will vary, but these mark the most reasonable and helpful services to the ICC. As the ICC moves towards desired levels of international legitimacy, it must begin strengthening itself in order to operate effectively, as measured by convictions, and efficiently, as measured by appropriate use of resources, and a positive relationship with the US has the power to help making the next ten years of the ICC successful in delivering international justice.

RECOMMENDATION

- The ICC should pursue a case-by-case relationship with the United States for assistance regarding information sharing, access to technology, arrests, and witness protection.

Chapter 9

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⁵⁸⁰ *Supra* note 577.

⁵⁸¹ *Supra* note 563.

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⁵⁸⁷ ICC-ASP, *Report of the Bureau on non-cooperation*, ICC-ASP/11/29, 1 November 2012, The Hague.

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⁵⁹³ *Ibid.*

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⁵⁹⁵ *Supra* note 577.

⁵⁹⁶ ICC-ASP, *Report of the Bureau on ratification and implementation of the Rome Statute and on participation in the Assembly of States Parties*, ICC-ASP/5/26, 17 November 2006, The Hague. http://www2.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-26_English.pdf.

⁵⁹⁷ *Supra* note 573.

⁵⁹⁸ *Supra* note 577.

⁵⁹⁹ *Supra* note 577.

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⁶⁰¹ *Supra* note 594.

⁶⁰² *Supra* note 594.

⁶⁰³ The outstanding warrants are: Joseph Kony, Okot Odhiambo, Dominic Ongwen, and Vincent Otti in the Uganda situation; Sylvestre Mudacumura and Bosco Ntaganda in the DRC situation; Ahmad Harun, Ali Kushayb, Abdel Rahim Hussein and Omar Al Bashir in the Darfur situation. They have been outstanding since 2005 for the Uganda suspects, since 2006 for Bosco Ntaganda, since 2007 for Ahmad Harun and Ali Kushayb, since March 2009 in the case of Omar Al-Bashir, and since 2012 for Abdel Rahin Hussein and Sylvestre Mudacumura.

⁶⁰⁴ Human Rights Watch. *Human Rights Watch Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties*. New York, (2012): 23.

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Chapter 11

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⁶³⁸ *Supra* note 3, art. 17:1(b).

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⁶⁴⁷ The ASPA threatens to cut International Military Education and Training (IMET) and Foreign Military Funds (FMF) aid to nations that resist signing BIAs, unless otherwise waived by the president. American Servicemembers' Protection Act, 2001, S.857, 107th Cong., (2001-2002).

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⁶⁵⁰ "Status of US Bilateral Immunity Agreements (BIAs)," *Coalition for the International Criminal Court*, last modified 2006, http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf (accessed February 1, 2013).

⁶⁵¹ *Ibid.*

⁶⁵² Many of the BIAs have not been ratified by parliamentary/legislative bodies or have been entered in as executive orders—which do not have to be ratified and therefore are considered by some as unconstitutional. *Ibid.*

⁶⁵³ Additionally, in 2004 the Bush Administration adopted the Nethercutt Amendment as part of the US Foreign Appropriation Bill that restricted Economic Support Funds (ESF) from going to countries that refused to sign BIAs. ESF are not limited to military aid, but also extend to economic development, human rights, and even promoting peace. In 2006, the Bush Administration waived this amendment for some countries, but some countries still have its ESF threatened. "A Bilateral Immunity Agreement Campaign," *American Non-Governmental Organizations Coalition for the International Criminal Court*, Last modified 2013, <http://www.amicc.org/usicc/biacampaign> (accessed February 20, 2013).

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⁶⁶⁶ *Supra* note 658.

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http://www.state.gov/j/gcj/us_releases/remarks/2011/179208.htm (accessed February 10, 2013).

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⁶⁹² Simultaneously, these Acts mean that the US would have primacy over these crimes against humanity committed on American soil. This further marks a response that acknowledges the permanency of the ICC.

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⁶⁹⁴ *Supra* note 684.

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CONCLUSION

Thea Marriott

The establishment of the ICC was a milestone for those pursuing justice on behalf of individuals, families, and communities most affected by conflicts of international concern. It is an institution with a unique platform and set of tools for going after individuals allegedly guilty of committing atrocious crimes—including heads of state. Still, as outlined in the chapters above, there is certainly room for improvement. The Court's expanding caseload shows a growing international demand for justice; however structural deficiencies, a lack of transparency, and questionable approaches to strategic issues within the ICC have crippled its capacity to handle this heavy load.

These issues originate in the initial phase of the ICC's work, specifically with the selection of which situations to pursue. Complications with this process begin with the principle of complementarity, which has, at times, led to inflated expectations of national court participation from governments that lack the capacity to enforce their jurisdictional responsibilities. Given the Court's mandate to pursue only "the most serious crimes of international concern," the process and methodology used by the OTP to select situations requires more transparency and definition. As it stands, the Prosecutor's decision-making process has been called into question, leading to increasing distrust of the Court as a fair arbiter of justice. In addition, politics and the Court's focus on situations in Africa have created a perceived "African bias," undermining its credibility and legitimacy with states and organizations across the globe, and especially in the AU.

This issue is compounded by an inconsistent approach to investigations, stemming from problems within the OTP. Poor leadership during the first Prosecutor's term, a lack of adequate internal oversight, an ill-defined charging strategy, and three-tiered standard of proof, have culminated in meager results for the Court's prosecutorial branch. One result of this is a neglect for gender crimes in investigations, leaving victims of some of the most heinous crimes in a conflict ignored. This has contributed greatly to the Court's diminishing influence, as many see it as a setback in its duty to deliver international justice.

The ICC has also faltered in its responsibility to include victims in the reparations process. This duty is clearly laid out in the Statute, yet the world has yet to see it fulfilled with sufficient inclusivity and vigor. The difficulties victims are required to overcome to be granted victim status, let alone participate in trials and pursue justice, have made achieving this goal impossible for many—leading to widespread disappointment of countless victims. Further demonstrating this is the low level of Court-awareness and accessibility to "information poor" communities targeted by the Court's Trust Fund and its efforts to provide reparations.

The internal and external relationships of the Court are vital to making this a reality. As an institution created through negotiation of many states, the Court's success is highly dependent on outside actors; thus highlighting the importance that it be perceived as legitimate and credible. So far, the ASP's lack of vigorous involvement has resulted in deficient state cooperation, as the politics inherent to conflict have created a cleavage between its performance outcomes and the mandates laid down in the Rome Statute. The poor communication between organs of the Court serves to further undermine its ability to function smoothly, contributing to its eroding image around the globe.

The preceding chapters give recommendations aimed at improving these substantial challenges confronting the ICC in the coming years. The important role played by legitimacy and credibility in strengthening the Court's perception with the ASP and outside actors cannot be ignored. This perception is vital to the Court's success, as its Statute's mandates can only be carried out through state cooperation. Using the recommendations outlined in this report will allow the Court to mitigate political restraints, clearly define its framework, and escalate transparency; thus improving credibility of its internal functions. This will improve perceptions of the Court's legitimacy and eliminate the negative "African bias" perceived of it by states parties. Improved overall state trust in the ICC will lead to stronger, more consistent state cooperation and execution of the Court's responsibilities.

For this to happen, it is imperative that weak leadership and oversight throughout the Court in its formative years be addressed. The ASP must take a more active role in providing a check to balance the power of the OTP, and personnel must be held to higher performance standards. This standard must also be applied to the three-tier standards of proof required by the Court for its investigations. The criteria for meeting these tiers, as they exist now, do not require nearly enough thoroughness of investigations, marginalizing the interests of innumerable victims. This enables the OTP to carry out inefficient investigations, leading to its poor results. Increasing the standards of proof and expanding investigations to include all crimes of a conflict falling under the ICC's jurisdiction will aid in alleviating this issue.

One of the unique facets of the Court is its capacity to include victims in the justice process; a duty which it has yet to adequately fulfill. To do this, the Court must both prioritize and make more meaningful the participation of those affected by crimes under its jurisdiction. This includes concentrated efforts at repairing the lives destroyed by conflicts investigated by the ICC—a responsibility that can be addressed by increasing the TFV's budget through the improved fundraising strategies.

As has been expressed throughout this report, the Court's perception as being both credible and legitimate is imperative to its success. To strengthen its reputation, it is essential that the Court increase efficiency and effectiveness in carrying out the mandate it was created to fulfill.

Therefore, this Task Force offers the recommendations outlined in this report to address the methods, strategies, and critical relationships of the Court, ultimately increasing its legitimacy and credibility in the international community. If the ICC is successful in doing so, it will realize its potential for global justice.

APPENDIX

APPENDIX

GRAPHICS

Regina Widjaya

Ten years after its establishment, the ICC is still struggling with questions surrounding its legitimacy as a result of the issues outline in this report. Research and studies have been made in search for causes and ways to make improvements, however, there has not been a lot of analysis done to the quantitative or financial aspect of the court. To fill that vacuum, the main objective of this section is to use quantitative data comparison and analysis to determine the productivity and efficiency of the court, focusing on both internal and external data comparison between the ICC and other established *ad hoc* tribunals, namely the ICTY and the ICTR.

FI

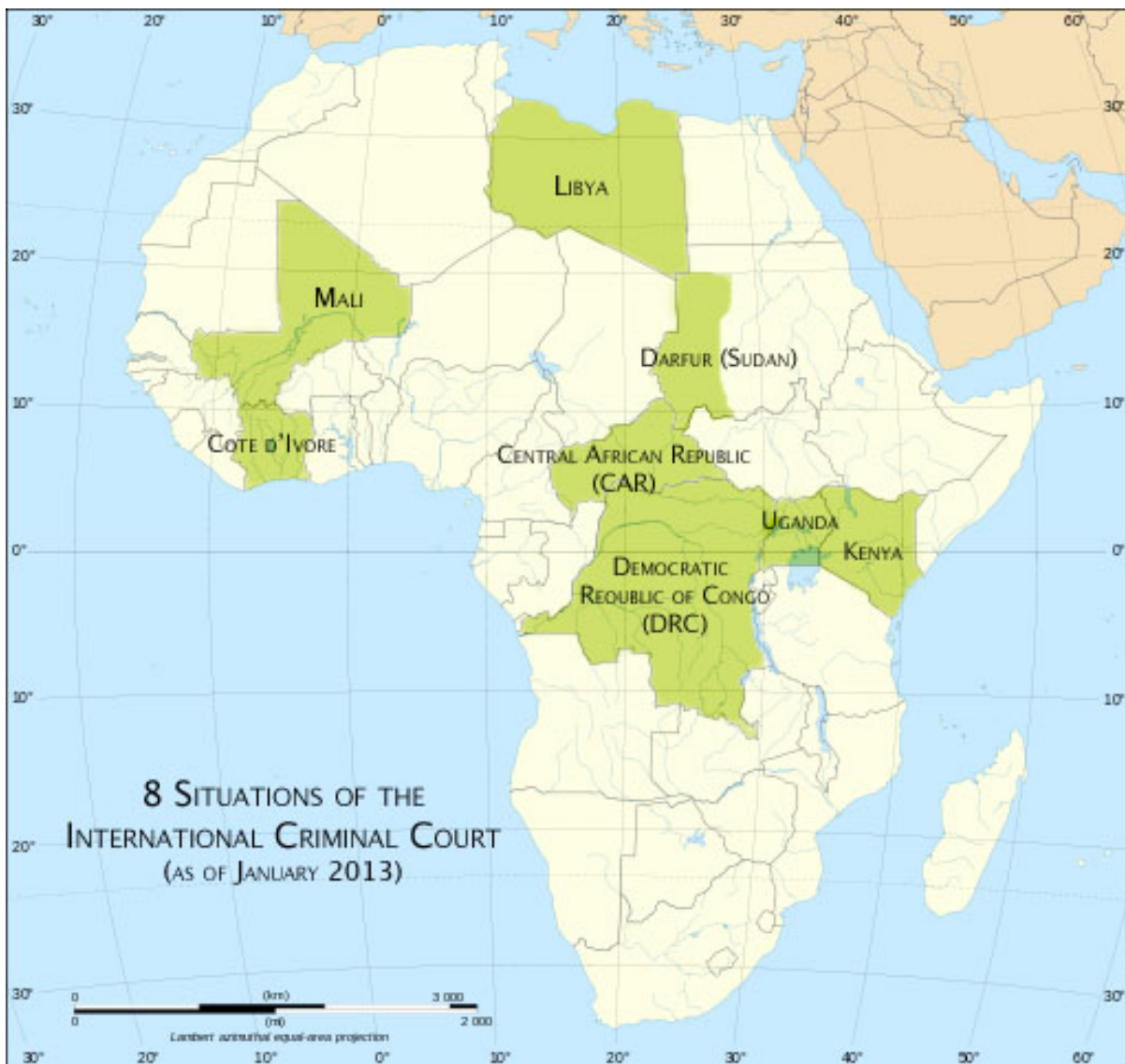


Figure 1. Map of the eight situations of the ICC

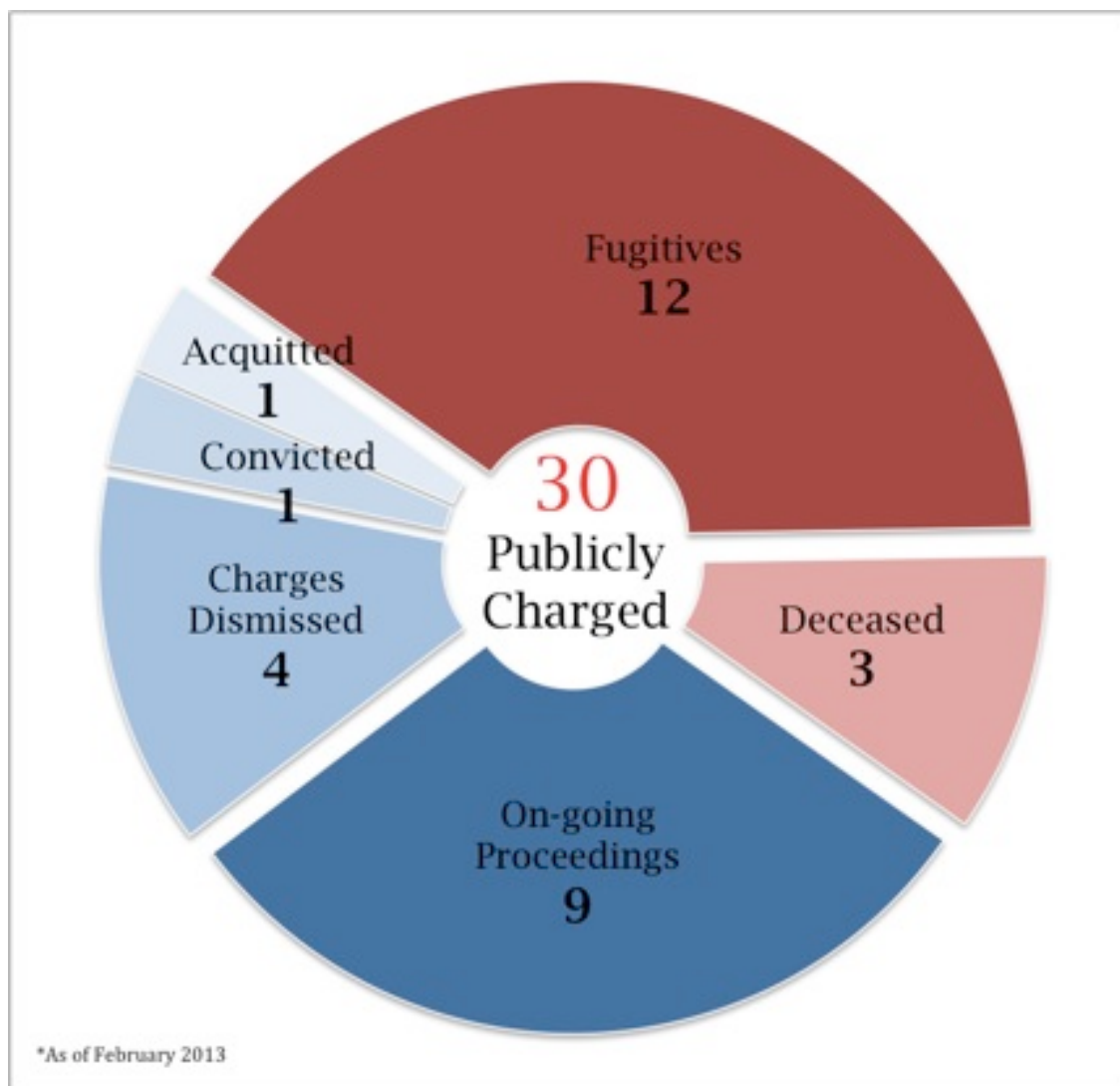


Figure 2. ICC charges distribution

Publicly Indicted⁷⁰²		30
	Fugitives	12
	Deceased	3
	Charges Dismissed	4
	Arrest Warrant	0
	Confirmation of Charges Denied	4
	On Going Proceedings	9
	Awaiting for Confirmation Charges	1
	Pretrial Phase	6
	Trial Phase	1
	Awaiting Verdict	1
	Trial Concluded	2
	Convicted	1
	Acquitted	1

Figure 2.1. ICC charges distribution data