



International Criminal Court (ICC)

Global Governance Institute, University College London

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Subject: How can the ICC be strengthened?

Significance: the ICC is an extraordinary development in regulatory human rights governance. The apex international enforcement venue for mass-atrocity crimes, the ICC represents a significant ceding of authority to independent judicial structures. The Court has made important contributions to human rights promotion. It nevertheless confronts significant challenges in fulfilling an enforcement mandate. ICC limitations reflect a regulatory problem structure defined by 'principal moral hazard' over cooperation, with important implications for effectiveness.

Analysis: The ICC responds to a collective and longstanding desire to end impunity for mass-atrocity crimes. However, since activation the Court has faced significant opposition from state parties subject to its proceedings and other governments, notably the United States. This is due to the distinct problem structure posed by human rights regulatory governance. Unlike security or trade, human rights regulation in principle does not privilege the interests of the authorising principal (state parties), but rather the individuals at risk of abuse by those same principals or their allies. This raises the spectre of 'principal moral hazard', whereby the effective functioning of the Court is reliant upon the cooperation of those who stand to gain least from an effective global human rights watchdog. Key controversies include:

- **Iraq.** The first ICC Prosecutor signalled to the US Government that he would not pursue violations committed by allied forces during the Afghanistan and Iraq wars. However, in 2014 an investigation was reopened into mistreatment of detainees by British forces based on new information.
- **Darfur.** Following referral by the UN Security Council (UNSC) and investigation into alleged crimes, arrest warrants issued for President Al-Bashir and other indictees remain outstanding.
- **Libya.** Following referral by the UNSC, the Libyan government has failed to fulfil its obligation to extradite Saif Gaddafi to the ICC.
- **Kenya.** Prosecution of President Kenyatta collapsed in December 2014 due to non-cooperation by the Kenyan government. A contempt of court investigation is ongoing.
- **Palestine.** In January 2015, Palestine acceded to the Rome Statute and accepted ICC jurisdiction. A preliminary examination into the Gaza 2014 conflict has been opened.
- **Syria.** The UNSC failed to refer Syria to the ICC in 2014 following vetoes by China and Russia.

A relationship-based analysis of the ICC is critical to understanding the opportunities and limitations of its authority. The ICC political ecology includes:

- **African Union.** The AU is deeply divided on the ICC. Some African states have denied entry to President Al-Bashir and state referrals to the ICC continue (with EU donor support). However, cases involving sitting heads of state have provoked significant pushback, leading to efforts to have the African Court of Justice and Human Rights override ICC jurisdiction.
- **Assembly of State Parties.** The ASP comprises 123 state parties to the Rome Statute. ICC judges can refer instances of non-compliance to the ASP. Diverse strategic interest calculations among States have thwarted collective compliance action. In 2014 the ASP did agree to avoid non-essential contact with individuals subject to ICC arrest warrants.
- **Civil society.** The NGO Coalition for the International Criminal Court (CICC) played a pivotal role in the Rome Statute negotiations. NGO delegations, alongside the legal and scholarly community, attend ASP meetings and advocate their priorities. They provide an important counterpoint to obstructive constituencies within the ASP.



- **Office of the Prosecutor (OTP).** The verdict on the first Chief Prosecutor, Luis Moreno-Ocampo is mixed. Some observers suggest he succumbed to politicisation. Others contend that an accommodation strategy was necessary to ensure ICC survival. Current ICC Prosecutor, Fatou Bensouda, has begun to probe the outer bounds of the ICC cooperation regime. However, no trial-stage prosecution has commenced in her first three years in office.
- **UN Security Council.** Referral by the UNSC is a principal compliance mechanism and binding under Chapter VII authority. However, the UNSC has proven ineffectual in enforcing arrest warrants. The UNSC has been reluctant to even acknowledge non-cooperation by Sudan and Libya.
- **United States.** The Bush administration was openly hostile to the ICC, it 'unsigned' the Rome Statute and waged a campaign to undermine ICC jurisdiction through bilateral immunity agreements. However, the Obama administration has overseen a modest shift towards engagement with the Court.

Principal moral hazard raises the possibility of the ICC being 'designed to fail'. Notwithstanding conflicting interests among its architects, the ICC – and in particular the OTP – is not a paper tiger. However, states retain control over core governance functions, the most visible of which being enforcement of judicial orders. Key design features include:

- **Jurisdiction.** The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes and – from 2017 – crimes of aggression.
- **Complementarity.** The ICC will only prosecute an individual if states are unwilling or unable to prosecute.
- **ASP and UNSC referral.** Situations can be referred to the Court by a state party to the Rome Statute and the UNSC. The ICC can refer situations of non-cooperation to the ASP and UNSC.
- **Investigation.** The OTP can initiate an investigation through a *proprio motu* power. The Court may then exercise its jurisdiction over the matter if either the state in whose territory the crime was committed, or the state of the nationality of the accused, is a party to the statute.
- **Fact-finding.** The Prosecutor may receive and seek information from reliable sources s/he deems appropriate. The ICC has the power to compel witnesses to appear before it.
- **Preliminary examination.** A process undertaken by the OTP of examining available information to reach a determination on whether there is a reasonable basis to proceed with an investigation.

The ICC is inevitably a challenged institution and much attention is focused on its shortcomings. Indeed, for some observers the institution is in crisis. However, it is important not to underestimate the positive impact of ICC action in its 12 years of operation:

- **Judicial proceedings and investigations.** The ICC has received complaints alleging crimes in 139 countries. Investigations have been opened into 22 cases in eight situations. 36 individuals have been indicted with judicial proceedings begun in the cases of DRC, Darfur, Central African Republic, Kenya, Libya, Ivory Coast, Mali, and Uganda.
- **Monitoring and fact-finding.** The OTP has opened preliminary examinations into a number of situations, including Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, Palestine, South Korea, and Ukraine. These may proceed to a formal investigation.
- **Independent and impartial conduct.** Contrary to critics' claims, extensive due process guarantees are afforded to ICC defendants. Some have criticised a lack of checks and balances on the authority of ICC judges and the Prosecutor. However, the fear that the ICC would morph into a 'star chamber' has not materialised. The long-term credibility of the ICC is likely dependent upon the quality of justice it delivers, not the status of those it prosecutes.



- **Deterrent effect.** Evidence suggests that ICC referral by African states has been employed as a credible deterrent against internal belligerents. ICC involvement in Kenya likely contributed to a decline in violence in the 2013 presidential election. Observers believe Colombia and Guinea may have brought forward criminal prosecutions to prevent ICC intervention.

Criticism of the ICC reflects the severe challenge of enforcing international human rights and criminal law within a non-cooperative regulatory domain. ICC effectiveness is a collective action dilemma currently defined more by power differentials than absolute gains, and contestation over interest alignment. Nevertheless, some of the criticism is also directed at strategic deficits on the part of ICC agents:

- **Delays and inaction.** The current Prosecutor has not initiated a trial in three years. In the ICC's 12 years of existence, trials have resulted in only two convictions and one acquittal. Stalled investigations and prosecutions have resulted from non-cooperation by the target state.
- **Imbalance and selectivity.** All prosecutions have so far targeted African states. However, many were referrals to the Court by African governments themselves. Numerous situations outside Africa are now under preliminary examination and may proceed to investigation. Selective UNSC referrals (Libya, Syria) have also been subject to robust criticism.
- **Mishandling of investigations.** Some observers claim ICC indictment of Lord's Resistance Army leaders in Uganda goes against victims' wishes for peace over justice. They suggest outstanding arrest warrants have obstructed the peace process.
- **Funding by ex-colonial powers.** The largest funders of the ICC are (in descending order) Japan, Germany, France, Britain, Italy, Australia and Canada. The ICC President has acknowledged the need to diversify the ICC's funding base and explore cost-sharing arrangements.
- **Public outreach.** The ICC's outreach to a public advocacy constituency remains poor with criticism focused on the ICC website and non-existent social media activities. ICC has been described as dependent on INGOs to perform outreach work. INGOs have begun to explore how to best facilitate an effective ICC. Few local NGOs appear to engage directly with ICC procedures.

Moving forward, the ICC will continue to generate controversy. Some of the key factors and trends which will inform its future trajectory include:

- **OTP agency.** The current Chief Prosecutor has proven more willing to exercise bureaucratic autonomy in pursuing findings of non-cooperation. She has also begun to probe the outer limits of the cooperation regime, in particular focused on witness summonses and initiating contempt of court proceedings. In late 2014 the Prosecutor suspended investigation of Darfur, criticising the inaction of the UNSC.
- **More focused investigations.** In response to criticism, the OTP issued a new strategic plan in 2012 to guide its investigations, emphasising independence, impartiality, objectivity and transparency. This is intended to counter criticism that current cases have been selected for their high profile rather than on the strength of their evidence. Implementation, however, remains the crucial challenge.
- **Greater NGO involvement.** NGO reports have played an important role in spurring investigations in the DRC and elsewhere. UK and German-based NGOs were central to the OTP's decision to reopen investigation into violations committed by British forces in Iraq. There is evidence of OTP more actively coordinating activities with civil society.
- **Tensions between the US and ICC.** The US has begun to support the ICC with respect to particular cases – Darfur Congo, Libya, and Uganda. However, it recently reaffirmed the immunity of its troops operating in Mali. There is no formal strategy. It appears that the US will



cooperate on matters deemed to be in the national interest and vigorously challenge those deemed a threat (e.g. ICC jurisdiction over crimes of aggression).

- **Pending investigations.** With the recent accession of Palestine, the OTP has announced its intentions to examine crimes that may have occurred during the war between Israel and Hamas in Gaza last summer. Legal commentators urge the OTP to exercise caution in getting involved in Israel-Palestine conflict. In December 2014, the UN General Assembly exhorted the UNSC (in a non-binding statement) to refer North Korea to the ICC following the Kirby report. It is unlikely that China will support ICC UNSC referral.

Institutional design is of critical importance to avoiding regulatory capture. It also underpins ICC capability in determining the range of mechanisms available to apply its authority effectively. ICC future effectiveness is likely to hinge on its ability to combine and connect with other organisations and actors at all levels in the construction of a legitimate global justice system. Design reform should be directed towards strengthening third-party enforcement, as well as fostering ICC coalition-building:

- **Strengthen law enforcement apparatus.** The ASP and UNSC compliance procedures are insufficient. Enforcement measures in the Rome Statute require review. Key areas requiring attention include access to evidence and territory and witness protection. ICC state parties have an obligation to pursue compliance with ICC decisions, but actual precision on ASP procedural obligations is lacking. So far the Assembly has failed to test its enforcement powers. In 2014 the ASP agreed to review its compliance procedures.
- **Clarification on UNSC referrals.** The OTP and ICC should elaborate a protocol to guide action when UNSC referrals include political considerations which run counter to the spirit of the Rome Statute, such as the exclusion of non-member states citizens from ICC investigation and prosecution.
- **Issue-linkage strategies.** The ICC is increasingly called upon to expand its gaze beyond investigating African leaders, but also to link its mandate to other issue-areas including arms-trafficking, exploitation of natural resources, and systematic land expropriation. Notably, John Ruggie has recently proposed extending the Rome Statute to apply to corporate, as well as natural persons.
- **Forum-coordination.** ICC should develop coordinated strategy with regional judicial venues in Africa, Europe and Latin America. Complementarity may apply also to regional jurisdictions, contingent on the regional mechanism recognising ICC complementarity judgements on forum allocation as binding. This proposal is most advanced in relation to the African Court, with controversy surrounding immunity waivers for sitting heads of state.
- **National focal points.** ICC should seek to formalise relations with national-level investigative mechanisms. Some states have specialised war crimes units. Orchestrated activity could take the form of international-domestic partnerships, whereby joint investigations are commenced between the ICC and local pro-accountability structures.
- **Enhance outreach to pro-accountability networks.** Demand-side NGO ICC advocacy efforts have recently incorporated supply-side service support as well, including outreach. The ICC should seize this opportunity to scale up information dissemination and enable local NGO networks through intermediate actions. The European Court of Human Rights has a track record of working effectively with NGOs, including in the execution of Court judgments.

CONCLUSION: It is impossible to take the politics out of ICC design or operation. A mandate to pursue justice on behalf of the most politically disadvantaged groups in society is a deeply challenging policy goal. Advocates for design reform must be attentive to the political environment and give the Court the tools to navigate this landscape as effectively as possible.