The ICC and the Yugoslav Tribunal: Upholding International Criminal Law?

Fatou Bensouda
Prosecutor, International Criminal Court

Judge Theodor Meron
President, International Criminal Tribunal for the Former Yugoslavia

Chair: Abiodun Williams
President, The Hague Institute for Global Justice

2 April 2014
This is a summary of a meeting of the International Law Discussion Group addressing international criminal law in the context of the International Criminal Court (ICC or the Court) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). The speakers considered issues including the perception of ICC bias against Africa, challenges encountered by the ICTY and the future of international criminal justice. Their presentations were followed by a discussion in which the audience participated, posing questions and making comments. This meeting was held in partnership with The Hague Institute for Global Justice.

**The International Criminal Court – progress and challenges**

The work of the ICC has steadily increased over the years. Currently, there are 21 cases emanating from eight situations under investigation; nine situations are under preliminary examination. The number of States Parties to the Rome Statute (states parties) has increased to a figure of 122, evidence of growing worldwide support for the Court. The Trial Chambers have delivered three judgments, which have included two convictions. Most recently, Germain Katanga was convicted of committing war crimes and crimes against humanity in the Democratic Republic of the Congo. In March, the national authorities of Côte d’Ivoire surrendered Charles Blé Goudé into ICC custody. The investigations conducted by the Office of the Prosecutor (OTP) into the situation in Côte d’Ivoire will continue – evidence will be collected as warranted and further cases will be brought; all this will be done without fear or favour and irrespective of the political affiliations of perpetrators.

The increase in activity, including judicial activity, at the Court that has marked the beginning of 2014 suggests an increasing demand for intervention by the Court and growing confidence in the Court as an institution designed to fight impunity and prevent the occurrence of mass atrocities. The ICC is operating increasingly well; when considering criticisms of the Court it should be recalled that the international community dealt the ICC difficult cards. The Rome Statute is rich in safeguards and at an operational level can almost be said to create an obstacle course for the delivery of justice. In contrast, the relatively short statute of the ICTY accorded the judges a great deal of authority.

**Criticism of the ICC – selective enforcement**

Criticisms and questions regarding the purpose and efficacy of the Court continue to be voiced. The criticism of selective enforcement of the Court’s jurisdiction in the guise of bias against African states is neither based on credible or truthful evidence nor is it a fair assessment of how the Court operates. African states have lent the Court much support since its establishment and today 34 African states have ratified the Rome Statute. The Statute came into force in July 2002 after its 60th ratification; among these first 60 to ratify were many African states with Senegal being the first country to ratify the Rome Statute. There was a sentiment that, long plagued by conflict, the continent deserved the bringing to justice of those who had perpetrated international crimes. This desire for justice was an impetus behind the push by African states for the establishment of the ICC.

The cases before the Court are from Africa; how this came to pass merits consideration. Of the eight situations before the Court, five were referred at the request of the African state in question and two were referred by UN Security Council resolutions (Darfur/Sudan and Libya). It should be noted that African states were members of the Security Council when these resolutions were passed. Only with respect to Kenya did the former prosecutor, Moreno Ocampo, exercise *proprio motu* powers to initiate an investigation. Further, Kenya was given every opportunity to try the case in its own justice system, in

---

1 This summary was prepared by Shehara de Soysa.
accordance with the Court’s status as a court of last resort, not of first instance. Kenya was able, and had it been willing, to investigate and prosecute the post-election violence of 2007–08, the ICC in conformity with the principle of complementarity would have limited itself to simply observing whether national proceedings were genuine. The cases before the Court emanating from Kenya involve the president and deputy president, creating tension, at times, with Kenya and the African Union.

Accusations have been levelled that the Court only targets African leaders. However, preliminary examinations are being conducted outside Africa in states including Afghanistan, Colombia, Georgia and Korea. It is perhaps inevitable that the Court is criticized for geographic or political bias. Notwithstanding this, neither political considerations nor geographic balance will inform an OTP decision to open an investigation or prosecute. Though the ICC operates in a political environment it is a judicial institution and to remain credible, its actions and investigations must be based exclusively on law and evidence alone.

Full conformity with the law and total reliance on the evidence in the investigation and prosecution of cases are not just mere formalities – they are at the heart of and the essence of the work of the OTP. Investigative and prosecutorial strategies and evidence are under constant review in order to improve the quality and efficiency of investigation and prosecution. There is a need to realize that the processes and practices appropriate in 2003 – when the Court began work – may no longer be in keeping with the realities of today. The clear message of the Court’s Chambers and the legitimate expectation of the states parties and the international community is that after 10 years of operation business cannot continue as usual. There is an expectation on the part of the judges that the OTP be trial-ready at a very early stage in the proceedings and present more evidence from a broader variety of sources in order to prove its cases. Further, the OTP is investigating more complex organisational structures that do not correspond to the model of traditional, hierarchical organizations. To additionally complicate the situation, those most responsible for the commission of international crimes increasingly distance themselves from atrocities on the ground, prompting the OTP strategy of more in-depth and open-ended investigations, building cases upwards by targeting, where appropriate, lower-level perpetrators with the ultimate goal of reaching those most responsible for mass atrocities in the highest echelons of power.

**States’ obligation of cooperation**

These challenges and others associated with the rapidly expanding workload of the Court will test its judicial mechanisms. The OTP is working from the inside to strengthen the investigative and prosecutorial activities of the Court. However, the support of external actors is indispensable. The Rome Statute did not only create a court but a system of international criminal justice which requires the participation of the entire international community. The Court needs to be continuously provided with adequate resources to meet growing demands, and cooperation with the Court in requests for assistance must be more timely and forthcoming.

By ratifying the Rome Statute, states assume the obligation of conducting an investigation into crimes committed on their territory. The ICC will step in only if a state is unable or unwilling to act. The issue of an arrest warrant by the judges of the ICC gives rise to the obligation of states parties to arrest the individuals in question and bring them before the Court, which operates without police and enforcement agencies. If the ICC is to be efficient and effective, if defendants are to appear before the Court and trials are to take place, the individuals in whose names arrest warrants have been issued must be arrested.

---

Arrests are of course sometimes difficult to achieve, for various reasons. There has been a degree of success in the transfer of individuals to the Court by states parties but some individuals remain at large – 12 arrest warrants are outstanding. Without execution of the Court’s decisions by states parties, the efficiency of the Court will leave much to be desired. There is a need for the collective will that characterized the signing of the Rome Statute in 1998 and for states to collaborate in contemplating arrest strategies. The need for the latter is highlighted by the recent travels of President Omar al-Bashir of Sudan to the Democratic Republic of the Congo. This complex situation is exacerbated by the backdrop of the African Union resolution asserting that it would not cooperate with the ICC in the arrest of President Bashir. In this context situations have arisen in which African states find themselves in the difficult position of being required to comply with allegedly conflicting ICC and African Union obligations.

The OTP in its engagements with relevant authorities will insist that indictees be handed over to the Court.

With respect to the situation in Libya, the case against Saif Al-Islam Gaddafi has been declared admissible and he should accordingly be surrendered to the Court. It should be borne in mind, however, that this decision is currently on appeal.

The issue of the execution of arrest warrants highlights that it is only through working together that the Court can be made a more robust institution capable of responding to the needs of victims and a stronger advocate of international criminal justice as intended by its founding treaty, the Rome Statute.

The Court’s relationship with the Security Council

The Rome Statute makes provision for both the referral to the Court and the deferral of situations by the UN Security Council. The OTP does not engage with the Security Council on any such discussions; it waits for a referral to be forthcoming. It is not an automatic consequence that the OTP will proceed to investigate a situation referred by the Security Council. The selection of situations that fall under the Court’s jurisdiction, cases inside the situations, and persons to be investigated is always an independent prosecutorial decision based on the Rome Statute and the evidence collected.

The Security Council power of deferral was put to the test with respect to the situation in Kenya. Its decision not to defer the case, despite the votes of some states in favour of deferral, was based on the concept of a threat to international peace and security, which motivates the Security Council’s powers in this area.

Taking a closer look at referring entities

States parties to the Rome Statute as well as the UN Security Council can refer situations to the Court. Additionally, states may on an ad hoc basis accept the jurisdiction of the Court by lodging a declaration with the Registrar of the Court pursuant to article 12.3 of the Rome Statute. In these situations, there is at times an expectation that the ICC immediately proceeds with the opening of an investigation. However, the OTP will, at all times, assess whether the Rome Statute criteria relating to jurisdiction, admissibility, and the interest of justice apply to establish whether there is a reasonable basis to open an investigation. With regard to the ad hoc declarations, the OTP may be required to address other preliminary questions, such as whether, as a matter of international law, the entity accepting the jurisdiction of the Court may be
5 The ICC and the Yugoslav Tribunal: Upholding International Criminal Law?

considered a state for this purpose, or the individual(s) lodging such declaration may be considered as the representatives of the state in question.

The deterrent effect of the Court’s existence

A deterrent effect was one of the objectives the international community had in mind in establishing the Court. There is much debate regarding the possible deterrent effect of the ICC particularly when observers begin counting the number of convictions and cases before the Court, and considering its total budget. The deterrent effect should not be considered by reference to the number of convictions made or cases heard by the Court but rather by the impact it can have among the 122 states parties and non-states parties. The decisions of the Court, whether final or interlocutory, should have an impact that extends beyond the courtroom. One instance of this is in the context of the Lubanga case, the first trial at the ICC in which the OTP brought charges based solely on the recruitment and use of child soldiers. The move to charge only in respect of this crime and not others attracted much criticism. However, it was felt important that this crime be brought to the fore. As a consequence more notice was taken of the recruitment of child soldiers. The then United Nations Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, made reference to the Lubanga case when engaging with governments and militias. Nepal, which is not a state party to the Rome Statute, was persuaded to demobilize 3,000 child soldiers.

The deterrent effect of the Court is evident elsewhere – it played a role in 2004 in Côte d’Ivoire in reducing the escalation of violence. In 2013, the aftermath of elections in Kenya was characterized by relative calm rather than by violence for the first time in 21 years and it is a widely held view that the deterrent effect of the Court partially accounts for this.

The issue of deterrence should not only be considered in the context of the ICC but in a systemic context in which national jurisdictions and national prosecutors play a major role. Deterrence remains a work in progress and some might regret the lack of evidence that more progress is being made. However, the deterrent effect of international jurisdictions should not be downplayed.

The need for renewed respect for the rule of law

In addition to the need for a better strategy on arrests and enforcement there is a need for a new spirit of respect for the rule of law and a perception that international courts and tribunals are a necessary part of this. These recently established institutions are still fragile and need governments, civil society and the media to be imbued by the spirit of respect for the rule of law; this is not the situation at the moment because the climate in which these institutions operate is politically charged.

Impartial examination and investigation

It is imperative that the political environment in which it operates does not influence the Court. Afghanistan and Georgia are two of the states in which the OTP is undertaking preliminary examinations. In Afghanistan, the OTP is collecting information that is not concentrated on any particular party to the

---


4 See for example: On 8 May 2015, it was announced that the OTP had rejected the purported declaration on the basis that, as a matter of international law, it was not submitted by any person with the requisite authority or “full powers” to represent Egypt for the purpose of accepting the jurisdiction of the ICC - http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1004.aspx.
conflict but on any relevant actors. As in all situations, the OTP will impartially and independently examine the entirety of a situation and make a determination guided by evidence and facts, not by politics. The same is so for Georgia; it is noteworthy that the Court has received many communications from both Georgia and Russia, although the latter is not a state party to the Rome Statute.

### The crime of aggression

The crime of aggression more than any other crime involves action by a state. It is a delicate issue and the hesitation, at least with regard to timing, to include it as a crime which can be prosecuted by the ICC is understandable. While the definition of the crime has been defined, the mandate to investigate and prosecute the crime of aggression has not yet entered into force; it is hoped that it will be forthcoming in 2017. In the meantime, the OTP is seeking to establish and expand expertise on the matter.

### The ICTY – successes and lessons for modern international criminal law

More than two decades after the establishment by the Security Council of the first truly international criminal court since the Second World War, the notion that an individual can be held accountable for international crimes such as genocide, crimes against humanity and war crimes is no longer novel. The ICTY and other international and hybrid courts established since 1993, including the ICC, have made an immeasurable contribution to bringing about an era in which accountability is increasingly the default expectation and not the exception, especially when it comes to senior political and military leaders. Notwithstanding this, international criminal justice and the courts that enforce it remain controversial; the actions and rulings of these courts are often praised but are also subject to criticism.

The ICTY has accomplished much but in some respects not as much as might have been hoped for. Nonetheless, the pioneering role performed by the tribunal along with that of the International Criminal Tribunal for Rwanda (ICTR) has made it possible for the international community to establish other courts and tribunals. The establishment of the ICC might have not come about as quickly as it did without the concrete record of the ICTY and the ICTR. Among the key components for the effectiveness of the ICTY, empowering it to overcome the enormous political difficulties it faced, has been the spirit of commitment to international justice of individual judges, such as the tribunal’s first president, the late Antonio Cassese, and of individual prosecutors.

### Measure of success?

The ICTY has been a tremendous success in terms of bringing to justice all persons indicted before it – all 161 have been accounted for – and in establishing that trials and appeals be conducted according to the entire panoply of due process norms. However, in determining of whether or not the ICTY has succeeded or failed, much depends on what one expects of international criminal justice and what its purposes should be.

Often observers look to international criminal courts to establish the truth of what occurred during an armed conflict or to create a definitive historical record. There is no doubt that the amount of evidence, including witness testimony, collected by international prosecutors and weighed by international judges at the international courts is considerable. The hearing of much of this evidence in the context of a publicly conducted trial can play a valuable role in helping to facilitate a better understanding of events during an armed conflict by all parties and the world at large. However, it is essential to recall the core mandate of an international criminal court such as the ICTY – to try individuals and, in particular, to
determine whether an accused’s responsibility for international crimes has been established beyond reasonable doubt.

Even where a court’s statutory mandate involves truth-seeking, such a function must be pursued in tandem with the court’s obligation to ensure fairness and adherence to the law – considerations that may affect what charges are allowed to stand, what evidence is ultimately considered and the myriad of other issues that can in turn have an impact on the nature of the truth to emerge from proceedings. International criminal justice can contribute in a meaningful way to a broader understanding of a conflict but international criminal courts can only do so within the confines of their mandates.

Similarly, some observers may expect international criminal courts to establish peace or bring about post-conflict reconciliation. Trying those accused of serious violations of international law in a public, fair and careful way may have an important and beneficial impact on restoration and maintenance of peace, as the Security Council itself noted in establishing the ICTY in 1993, but these effects should not be confused with the mandate and purpose of an international criminal court to try those accused and to do so in accordance with the law and evidence.

Other observers expect international criminal justice to bring justice to the victims of human rights abuses. However, international criminal courts are not human rights courts. The ICTY for instance applies international humanitarian law (IHL) as established by customary international law at the time of the commission of the offences. The Rome Statute is premised on, and often said to reflect customary, international law but it too is focused on IHL, not on adjudicating human rights violations as such. However, principles of due process and fair trial developed by the human rights system apply to international criminal trials and appeals and international criminal courts have repeatedly looked to human rights instruments in construing both substantive and due process aspects of IHL.

The idea that international criminal justice is done for victims is at best a highly contested notion and risks pitting the desires of victims to ensure the punishment of those they believe to have committed crimes against them against human rights guarantees of fairness, impartiality and due process. Victims are not alone in looking to international criminal courts to exact punishment. For many outside observers, persons accused by international prosecutors appear before international criminal courts with an existing narrative – a presumption of guilt, not of innocence. The decisions to acquit an accused or to decline to pursue charges are seen by many observers as a failure of international criminal justice. However, it should be borne in mind that acquittal does not mean that crimes did not occur nor does it equate to the innocence of the accused. Rather it simply means that the prosecution failed to prove its case beyond reasonable doubt.

Finally, some expect rulings of international criminal courts to serve as assessments or indictments of the actions of states rather than of individuals. However, international criminal courts do not address state responsibility; they may try cases involving senior government leaders but always and exclusively consider individual criminal responsibility.

In contemplating the success or failure of international criminal justice and working to reduce misunderstanding of the work of the international criminal courts, the conversation must begin by developing a greater understanding of the role of international criminal justice, the mandate of international criminal courts and the rule of law more generally.
Challenges faced by the ICTY

Unlike at the ICC, no public defence counsel structure was included in the set-up of the ICTY and ICTR. However, the ICTY established procedures and funding which partially compensated for this absence.

Initially the inability of the ICTY to arrest indictees and to seize evidence was the principal challenge it faced. Nonetheless, through consistent application of due process norms, the ICTY has increased its international credibility and over time achieved the impossible outcome - by the standard of many national justice systems - of accounting for 100 per cent of its indictees. The ICTY stands in contrast to the Nuremburg Trials, which benefited from police powers in Germany and from an orderly paper trail and well-maintained records. In the present-day countries that composed the former Yugoslavia there are no such records at the disposal of the prosecutor. This is problematic and the tribunal continues to depend on governments.

Although all of the tribunal’s indictees have been accounted for, there is an ongoing need for cooperation with respect to protective measures for victims and for witnesses. The tribunal operates unsupported by ministers of justice and police and the apparatus that in normally functioning states is provided to confer such protection. The fact of the tribunal’s dependence on the cooperation of states created additional problems regarding for instance provisional release and the burden of proof. In contrast to the established standards of the European human rights system, at the ICTY the burden is on the accused to demonstrate that provisional release is warranted by establishing that the individual will not be involved in interference with or intimidation of witnesses and will appear for trial.

In contrast to the ICC, the ICTY and ICTR were created by the Security Council. Many amendments and reforms to the ICTY statute had to be requested of the Security Council. In the context of the completion strategy of the ICTY from time to time there has been encountered an element of impatience on the part of the Security Council for the tribunal to finish its work rapidly and while reforms and efficiency are desirable, shortcuts must not be taken on the issue of due process.

The Tribunal’s jurisprudential legacy

The ICTY has established a substantial body of international criminal law. The issues addressed in the tribunal’s jurisprudence include the elements of crimes. These had to be fleshed out from the provisions of The Hague Conventions and Geneva Conventions, which were drafted with a high level of generality. The tribunal’s judges had the difficult task of clarifying the elements of offences and the contours of the modes of liability so in that respect, despite the Nuremburg Trials, the judges of the ICTY have worked almost from scratch and in doing so have been guided by one major principle – the principle of legality; in clarifying the law, the offences applied had to be offences under customary international law at the time of their commission. When the ICTY began its work there was much uncertainty as to the nature and content of the law and it took much arduous jurisprudence to clarify many of the issues. It is therefore a remarkable feat that the substantive law established and the procedural law elaborated upon is so coherent on the whole. This coherence has been aided by the work of the Appeals Chamber, which is the final arbiter for the ICTY of the substantive law and whose decisions bind the Trial Chambers.

There have been a few decisions marked by disagreement between appeals judges on different panels on the precise contours of the law in a particular case. However, it is a matter of very few cases and in 2014, as the tribunal nears completion of its work, there is essentially only one doctrinal issue of controversy. It should be borne in mind that there may be some legitimate disagreement on the application of the elements of offences and modes of liability in a particular case; all cases are factually different and each
has a focus on a particular element of the offence or mode of liability. The principle that must guide the application of a mode of liability is that the culpable link between the acts of the accused and the crime with which the accused is charged be established beyond reasonable doubt. The cases that have given rise to controversy have each dealt with a different matter, and criminal judges, with their responsibility for the liberty of the accused, have an overarching responsibility to examine the facts, evidence and law in each particular case, which perhaps sets the scene for the emergence of some controversies.

Most rulings have been welcomed, though some have been criticized. Sometimes responses are perhaps founded on a lack of understanding, sometimes from not carefully reading the briefs and entire judgments of the Trial Chamber and Appeals Chamber, which is perhaps inevitable. Nevertheless, judges must not be afraid to make difficult or unpopular decisions and, having done so, must be firm in the knowledge that they have acted in accordance with the law, the evidence, the demands of fairness and their own judicial conscience.