

# International Criminal Justice: Growing Pains or Incurable Contradictions?

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## I. Introduction

*W*hen the Rome Statute of the International Criminal Court (ICC) was drafted in 1998, it represented a signal moment in the history of human rights. Here, finally, was a document that not only enunciated humanitarian protections, it also offered a means to punish individuals guilty of violating them. United Nations Secretary-General Kofi Annan called the Statute “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.” Drafting Committee Chairman Cherif Bassiouni stressed that the world would never again be the same. This was the last step of a history that had started at the end of the First World War and meant that impunity for the perpetrators of grave crimes of international concern was no longer tolerable. It would not eliminate all conflicts or bring victims back to life, but it would bring justice.<sup>1</sup>

A permanent court to prosecute grave crimes against humanity, with jurisdiction over violators powerful and weak, would help create a “culture of accountability”; it would serve notice to sovereigns, warlords, generals, and soldiers that their actions would be scrutinized by the international community and, even if condoned by their compatriots, would be subject to a higher standard: international justice, administered with an even hand by the international community. As Diane Orentlicher, then the U.N. independent expert on combating impunity, reported to the Human Rights Commission in 2005, “Seemingly impregnable barriers to prosecution have been dismantled in countries

that have endured the depredations of dictatorship; a new breed of court, combining national and international elements, has entered the lexicon of institutions designed to render justice for atrocious crimes... Governments and civil society have acquired an expanding repertoire of tools for combating impunity."<sup>2</sup>

The performance of the International Criminal Court, whose statute came into effect in 2002 and which made its first arrest in 2006 and initiated its first trial in 2009, has proven a disappointment to many. Since 2002, humanitarian abuses have gone on unabated. Conflicts continue in Afghanistan and Iraq; Burundi, the Democratic Republic of Congo and Uganda; Israel and Palestine; the Russian Republic of Chechnya; Sudan; Myanmar; and Somalia. These and many others flash through the news periodically when another massacre has taken place. When peace has lifted its glorious arm, it has often been the result of an appalling loss of life, as when the Sri Lankan military defeated the Tamil Tigers. In addition, governments no longer have a monopoly on violence. Paramilitaries, militant extremists, and even criminal organizations commit mass murder in the name of a cause or simply for profit. During this time, the ICC has opened a mere five cases, has detained five accused criminals, and has brought only one case to trial.

It is hard to talk about a culture of accountability or impunity in such circumstances. How has the ICC become a device by which powerful states punish their lesser associates while remaining immune to its jurisdiction? How is it that the brutal regimes of other states punish their opponents without scrutiny of their own actions? Many critics point to chief prosecutor Luis Moreno Ocampo. If the ICC is to become a reliable tool for fair and equal justice, the prosecutor must operate impeccably and even-handedly. Yet even strong supporters of the ICC, such as Human Rights Watch, have expressed dismay over Moreno Ocampo's management of his staff, and there are serious allegations of misconduct in his own professional and private life.<sup>3</sup> More worrisome are the allegations of politicization. Legally accountable to the Assembly of States Parties, and independent of the Security Council, the ICC arouses deep suspicions of politicization among a broad range of critics. Mahmoud Mamdani accuses the court of being a Western puppet and claims that, "the United States used its position as the leading power in the Security Council to advance its bid to capture the ICC...[This] makes a complete mockery of the ideals that informed the setting up of a permanent international criminal court... ." <sup>4</sup> We find

similar sentiments expressed by Sir Geoffrey Nice, chief prosecutor at the International Criminal Tribunals for the former Yugoslavia (ICTY) Milosevic trial: “Domestic courts have governments, democratic parliaments and the media supervising them, and barristers and judges are very vulnerable to making a big mistake, which can ruin their careers. But the UN created this court for political purposes—nothing wrong with that, per se—and then set it loose. That meant that the chief prosecutor of the Tribunal has huge powers: ask any government for anything, make large claims, get publicity around the world.”<sup>5</sup>

Yet it might be more useful here to look at the institution itself, the Rome Statute that created it, and at the very notion of *international* criminal justice, to see how this situation came about and whether it can be remedied. It is not unusual for human rights instruments to have little effect at their inception. That does not mean that they are useless or empty. It simply means that the mechanisms evolve more slowly than the ideals that inspire them. If, as the critics charge, the problem with the International Criminal Court lies with its prosecutor, this would be good news. Prosecutors can be replaced. What I propose to examine is the less optimistic possibility: that *international* criminal justice, itself an infant concept, is so riddled with contradictions, so at odds with the foundations of international society, that it is an idea with a distant prospect of realization.

## II. What is International Justice?

We must first ask ourselves: what is justice? Is it vengeance, righteous retribution, deterrence, reconciliation, reparation, or simply a way to uncover the truth? In his 1971 publication *Theory of Justice*, John Rawls posited the essential foundations for a just society. For Rawls, “most reasonable principles of justice are those everyone would accept and agree to from a fair position.”<sup>6</sup> This presupposes that all individuals and institutions are in a position to assert their notion of what is reasonable and fair, and that they are bound together by a broadly consensual social contract. Rawls does not suppose that all parties to this contract will equally enjoy the fruits of a just society, only that they will share basic liberties and have access to justice. Justice on a global scale, where differences in power render consensus problematic, demands that we create institutions whose benefits are available to the least advantaged people. Once we have seen to it that global society has been organized around a set of fair rules, we can set about freely “play-

ing the game.” This is not a laissez-faire position. Rawls accounted for the contingency that some societies would not adhere to the rules of fair play and might violate the rights of their own citizens or behave aggressively toward other societies. He termed such societies “outlaw states,” as opposed to the well-ordered or decent societies that observe the dictates of justice. Quite controversially for the time, he even suggested that violations of rights by outlaw states could legitimate military intervention by the well-ordered states.

While in a domestic context we can talk about a social contract and suppose that there are reasonable principles of justice acceptable to all, the international community is comprised of wholly diverse cultures and societies that can agree broadly on some—but not all—principles. Systems of government are so disparate that even if societies can agree on reasonable principles, not all governments will wish to bind themselves to observing them. There are few actions indeed that are so heinous as to be universally indefensible, and whose criminality is apparent to most, if not all, human beings and societies. These include genocide, crimes against humanity, and war crimes, long accepted by custom and treaty to violate international law. Institutions of international justice have confined themselves to policing those principles.

The imbalances of power so acute in the international arena have given primacy to politics over justice in international affairs. Why would a great state surrender the ability to do what it likes simply to adhere to rules formulated by others? When, at the dawning of the age of the United Nations, Eleanor Roosevelt stated the truism that “Justice cannot be for one side alone, but must be for both,” she was also making a radical statement that, if implemented, would have threatened the international order. A world order in which states surrender their political prerogatives—their sovereignty—to the even hand of law has taken many years to conceptualize, and is a creation of the post-war era of the United Nations. First with the Universal Declaration of Human Rights in 1948, then with international human rights covenants and the humanitarian principles of the Genocide and Geneva Conventions, the international community has etched a boundary beyond which its members cannot lawfully cross. Until recently, however, there has been little progress on holding states and individuals accountable in courts of law.

Without a functioning international community, true international justice could only remain a dream. Fifteen years ago at this very International Roundtable forum, at the dawning of this great experiment,

former United Nations Under-Secretary-General Brian Urquhart noted, "The reality of the international community is more elusive, and never more so than when you consider the basic characteristics of a community as normally understood. Taken at their simplest, those characteristics are the following: accepted rules of conduct and effective institutions; common responsibility for all members of the community; and a shared view of the future."<sup>7</sup> The radical notion that the international community should not just enunciate but enforce its rules was realized in 1993–1994, as Urquhart spoke, when the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were brought into being. These ad hoc tribunals were the creation of the Security Council, acting under its Chapter VII powers, and the shadow of that supremely political body hung over them from the start. The first defendants of the ICTY, shocked to find themselves answering to foreigners for actions taken within the borders of their homeland in defense of its territorial integrity, protested that the proceedings were simply a political show trial. The Tribunal dismissed the contention. Responding to the objections of Dusko Tadic, a leader of the Bosnian Serb militia, that it was meddling in political affairs, the Tribunal noted:

The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty,' 'national honor,' etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law...The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.<sup>8</sup>

The tribunal was saying, in effect, that sovereignty had become obsolete as a concept of international law, and that with its demise concern over politicized legal proceedings had disappeared. This was a court representing the international community, in fact making the vague notion of the international community into a real constituency, embodied by a judicial power that could enforce its core prohibitions and bring violators to justice.

The International Criminal Court, a child of the United Nations but theoretically independent of its politics, was intended to make the judicial embodiment of the international community permanent. It would reach beyond sovereignty and politics to institute a truly international justice. But as noted above, equal justice is a radical notion

that would demand a reconstitution of the international order. Is the very idea of global justice, in particular global criminal justice, possible? Can we simply embed the “general principles of law recognized by civilized nations” in the foundation of the international community and expect them to operate as they do in domestic settings? Does the nature of justice change when it becomes globalized? From whose viewpoint, or what Rawls would call an “original position,” is the quality of global justice evaluated and measured? If it is from the point of view of the “international community,” what constitutes that community? Can global justice be equal justice, to which states powerful and weak are equally accountable, or will the principle of sovereignty, declared obsolete by the ICTY, undermine reciprocity and remain its greatest enemy?

For advocates of international justice and human rights, there are few words more offensive than *sovereignty*. Sovereignty would be the anachronistic Westphalian principle that allows outlaw governments to abuse their own citizens without interference from other states. A recent issue of the *European Journal of International Law* welcomed the ousting of sovereignty as the primary principle of international law. Such confident statements have been appearing in law journals and human rights advocacy reports for at least twenty years. This particular article, by Anne Peters, chair of public international and constitutional law at the University of Basel, asserts that, “conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled on the basis of a presumption in favor of humanity.” While decrying unilateral humanitarian intervention, Peters asserts, “the [Security] Council has under very strict conditions the duty to authorize proportionate humanitarian action to prevent or combat genocide or massive and widespread crimes against humanity. The exercise of the veto by a permanent member in such a situation should be considered illegal or abusive.”<sup>9</sup> Precisely who would make this determination is unclear.

Few heads of sovereign states have repeated the sentiment. In fact, the roster of sovereign states has experienced one of its most robust periods of growth during the last twenty years, as peoples who had never achieved statehood attained the dream of self-determination. This is the paradox: international justice can only be built at the expense of self-determination, which is the first right enshrined in both the ICCPR and the ICESCR. Although the principle was conceived as a means

to combat colonialism, it was later identified with sovereignty by the General Assembly in its 1970 Declaration on Friendly Relations. Notably, the primary supporters of the Declaration were the small and weak states of the Global South, many of which had only recently gained sovereignty, and saw it as their greatest defense against the global powers. They continue to be the most dogged defenders of the principle because their sovereignty is most commonly jeopardized by the new world order and the principle of humanitarian intervention. Their sovereignty is the capacity that allows them to preserve their traditions and unique ways in a globalized world that can seem an unquenchable engine of homogeneity. Human rights, in their universality, can also seem to be an attempt to deprive disadvantaged cultures of their singularity. Though created in the spirit and discourse of universalism, human rights are perceived by many to have a distinctly Western cast. New states emerging from colonialism have signed human rights conventions as part of their project to join the community of nations, but they have often done so conscious of signing a document created by others, whose universality they must join.

Maintaining a credible impartiality and a commitment to global justice will be crucial to the future of the ICC. To justify the claim that it is humanity's tribunal, the court must represent the sort of global consensus that would give it the appearance of the rule of law. This has been the most telling critique of the court's detractors. To Mamdani, the court represents what he calls "human rights fundamentalists" who, working in a legal regime freed of political supervision, will "turn the pursuit of justice into revenge-seeking, thereby obstructing the search for reconciliation and a durable peace." The root cause of this unfettered zealotry is that the "content of human rights law is defined outside a political process—whether democratic or not—that includes [victims and perpetrators] as formal participants."<sup>10</sup> Of course, it is precisely the liberation from politics that many human rights advocates seek.

The need to maintain the appearance of rule of law has animated international criminal tribunals from the start. Robert H. Jackson, United States Chief Counsel at Nuremberg, began the prosecution's case with words that still set the standard for international justice:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant,

and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>11</sup>

The power of these words belies the fact that Nuremberg was nonetheless a court of victor's justice, convened by the victorious powers, conducted under rules of their creation, with jurisdiction over crimes that had never before been subject to international criminal responsibility, and for which the victorious powers themselves would not face prosecution. Certainly Josif Stalin, whose many crimes included condoning the rape and murder of German civilians during the final months of the war and afterwards, never answered for his crimes.

Modern supporters of the international tribunals who recognize their questionable jurisdiction use similar arguments, sounding as they do much like John Rawls. David Luban of Georgetown writes:

[T]he legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments. Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness...[I]t is essential that the ICTY, ICTR, and ICC deliver champagne-quality due process and fair, humane punishments—which, in most respects, they do. Lacking world government to authorize international tribunals like the ICC, their authority must be largely self-generated by strict adherence to natural justice.<sup>12</sup>

One of the primary guarantees of "adherence to natural justice" or "fair play" in a domestic context is the delicate balance of governmental powers. The legislature defines crimes and their elements, creates procedures for adjudication, and defines standards of evidence. The executive branch investigates and prosecutes crimes and enforces judicial decisions. The independent judiciary adjudicates innocence and guilt, and sentences the guilty. At the international level, there is no authority that can be compared to a state, no equivalent balance of power. Thus upon its creation, the Yugoslav Tribunal was immediately subject to charges that it was another example of "victors' justice." It was essential for the court's credibility that it be seen as an impartial tribunal founded in the rule of law. Faced with the issue of whether it



was a court “established by law,” a principle enshrined in Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR), the Tribunal gave an authoritative, if not fully satisfactory, answer:

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the ‘principal judicial organ’...There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.<sup>13</sup>

The Tadic court was conceding that it was not a court established by law as traditionally understood. It did not, however, concede that it functioned in violation of international human rights. Rather, the Court drew a distinction between domestic and international criminal law. It noted, “an international criminal court could [not] be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be ‘established by law.’”<sup>14</sup>

This does not seem to answer the question and there is another interpretation possible here. The ICTY, and its sister court for Rwanda, were established by Security Council resolutions. The Security Council can, in its various functions, act as a legislature, when it creates a tribunal and gives it a statute; as an executive, as it did when it ordered humanitarian intervention; and even as a judiciary, as it did through the ad hoc tribunals. “The [Security] Council, through its resolutions, effectively decides what the law is, not just how to implement it: because it requires no other source to validate its legal authority.”<sup>15</sup> The absence of a balance of powers creates a large potential for conflicts of interest, which made it vital that the ad hoc courts maintained the appearance of independence from the Security Council and its politics.

### III. The Selection of Cases

The focus on fair procedure ignores the absence of mutuality in ICC jurisdiction. Powerful nations, particularly the five powers with the veto prerogative on the Security Council, can use the court to bring cases against smaller countries. For the United States, Russia, and China, which have not ratified the Rome Statute, this means that they can refer states to the ICC, regardless of the fact that they themselves are not accountable to the Tribunal. Through the Security Council, they can even bring before the Court states that have not ratified the Rome Statute or accepted ICC jurisdiction. The imbalance of power is written into the Rome Statute, albeit in a way that was not immediately visible to many states-parties upon signing. The mechanism is the system of referrals by which cases are brought to the court, described in Articles 13–15 of the Statute; those articles that were intended to be the bridge that would overcome sovereign immunity and place humanitarian protections beyond politics.

Cases can be referred to the court through three procedures: referral by a state party; referral by the Security Council under its Chapter VII powers; and referral *proprio motu*, on the initiative of the prosecutor, against a state party. The final form of referral, on the initiative the prosecutor, caused the greatest contention in the negotiations leading up to the signing of the Rome Statute, and the greatest fear of a prosecutor “gone mad with power.” The first cases that came to the prosecutor were by state-party referral. This can be the simplest and least contentious form of referral when it is a self-referral, as in the cases of Uganda and the Democratic Republic of the Congo. Although that notion might seem paradoxical, it in fact makes sense for states that cannot control their own territory against rebel militias.

The first referral came in December 2003 from Ugandan President Yoweri Museveni to investigate the activities of the Lord’s Resistance Army (LRA). Arrest warrants were issued in 2005 for LRA leader Joseph Kony and four of his lieutenants; but the investigation stalled because the ICC has no police of its own, and the Ugandans have not been able to apprehend Kony. The hunt for Kony took a particularly bizarre twist in 2008, when the United Nations sanctioned a covert operation to capture or kill him.<sup>16</sup> Joseph Kony is surely a vicious and murderous insurgent and his ability to elude capture is the source of great frustration for officials of the ICC and UN. But for the ICC to rely on a “dead-or-alive” military operation to arrest its suspects cannot

possibly correspond to any notion of international justice. Yet the operation was perfectly within the boundaries of the ICC and Rome Statute. Article 59 of the Statute makes apprehension of the accused solely the responsibility of the member states and obliges them to cooperate with investigations as fully as possible. The ICC has no judicial review of the arrest so states are practically invited to use any means possible to deliver the accused to the doorstep of the ICC, where no questions will be asked.

Self-referrals can also become a means by which the ICC ceases to be an impartial tribunal and becomes a partisan instrument that governments use against their opponents and insurgents. Uganda cautiously referred the Lord's Resistance Army to the prosecutor, whose investigation has ignored a catalog of Ugandan government abuses that includes, according to the U.S. State Department, "arbitrary and politically motivated killings; vigilante killings; politically motivated abductions; mob and ethnic violence; torture and abuse of suspects and detainees; harsh prison conditions; official impunity; arbitrary and politically motivated arrest and detention."<sup>17</sup> Musaveni was able to negotiate an advantageous referral with Moreno Ocampo because the prosecutor can investigate crimes within the country only with the cooperation of the state. As an anonymous employee of the ICC has written:

This kind of situation demonstrates how a State can use the Court as part of its political strategy, which in this case is essentially internally oriented. Requesting the Court to prosecute crimes committed in northern Uganda allowed the government to crystallise the support of the international community while gaining a legal weapon against the rebels. This worked so well that, as of today, (known) arrest warrants have only been issued for the rebels even though there is evidence of wrongdoing within the Ugandan government's armed forces. It is up to the Court to distance itself from this predictable strategy of States or groups that approach the Court. Without this distance, the credibility of the institution will be damaged.<sup>18</sup>

The self-referrals of the "situations" in the DRC and Central African Republic (CAR) were phrased in ways that would allow the prosecutor to investigate and bring charges against both rebels and government, but the fact is that cases have been initiated only against rebels. The Central African Republic referral resulted in the arrest and detention of Jean-Pierre Bemba, and a warrant for the arrest of former presi-

dent Ange-Félix Patassé. The investigation stemmed from events of 2002–2003, when Patassé invited the Congolese Bemba to the CAR to help put down a coup attempt led by François Bozizé. When the Bozizé coup triumphed, Bemba returned to the DRC and Patassé to exile in Togo. One of the first actions of the Bozizé government was to refer the case to the ICC, whose investigation led to the warrants for Bemba and Patassé. No charges or investigation have been launched against Bozizé for his actions during the coup or the serious human rights and humanitarian failings of his government. He continues to rule the CAR, suggesting that the ICC can indeed prove an effective tool against political opponents. Although the interests of impartial justice would suggest that the prosecutor should evenhandedly investigate sovereign authority and its opponents, the politics of referral militate against this. If it became known that a government referring cases against its opponents might soon find itself facing charges, the ICC might soon find itself without cases.

This structural bias towards partisanship makes it all the more important that the judiciary of the ICC patrol the borders of impartial justice. Indeed, there is a good deal of evidence that it has; and it has roundly criticized Moreno Ocampo when it has found that he is working in an unfair and partisan fashion. The partisanship, however, is embedded in his operations by the rules of the Rome Statute, not only in the rules governing referral, but also in the limits that have been placed on his ability to investigate crimes.

The case of Congolese rebel leader Thomas Lubanga Dyilo was referred to the ICC by the Congolese government, which arrested him in 2006 and transferred him to ICC custody. It has since become a focus of attention primarily due to problems in the prosecutor's conduct of this, the first ICC trial. In his preliminary investigation on the war crimes charge of recruiting and deploying child soldiers, Moreno Ocampo relied on information obtained under confidentiality agreements signed under Article 54(3) of the Rome Statute. Such agreements enable the prosecutor to obtain information from parties who must maintain their ability to operate within a war zone, but might otherwise become the target of militias or governments if they become a source of information—United Nation officials, non-governmental humanitarian or human rights organizations, even journalists. Such information cannot be used in court, avoiding serious due process issues; it can be used "solely for the purpose of generating new evidence." In other words, the prosecutor is responsible for investigating

such leads and generating new evidence that can be used in court. Furthermore, he is obliged to share any exculpatory evidence that his investigation might reveal. Moreno Ocampo relied heavily on confidential field reports of the U.N. Mission in Congo, but when the court ordered him to share the reports with the defense, he refused. In doing so, he was respecting the confidentiality agreement he had signed with the U.N.—a procedure authorized by Rome Statute Article 54(3). The U.N. was adamant that the prosecutor must not disclose the information demanded by the Court, placing the prosecutor in an impossible position between the U.N. and ICC.<sup>19</sup> Ultimately the Trial Chamber determined that “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial,” and ordered Lubanga released.<sup>20</sup> This latter catastrophe was narrowly averted by an appeal and agreement to share the documents with the defense.

Moreno Ocampo was roundly criticized for his actions, although they were dictated by the rules of the Court and created under the sponsorship of the United Nations. The conflict between the due process need to provide the defense with access to evidence, while respecting the confidentiality agreements that made it possible for the prosecutor to get that evidence, continues. Moreno Ocampo has been slow to provide redacted copies of the confidential reports, and new allegations have surfaced that his investigators are coaching or even bribing witnesses to purport to have been child soldiers. Moreno Ocampo has refused to provide the court with the names of his investigators on the grounds that this would endanger those operating in a combat zone. Thus the Court has again ordered Lubanga’s release, on the grounds that “an accused cannot be held in preventative custody on a speculative basis, namely that at some stage in the future the proceedings may be resurrected.” In a withering criticism of the prosecutor, the court wrote:

No criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations. The judges, not the Prosecutor, decide on protective measures during the trial, once the Chamber is seized of the relevant issue, as regards victims, witnesses and others affected by the work of the Court, and the prosecution cannot choose to ignore its rulings.<sup>21</sup>

Once again, we see how the prosecutor has become the lightning rod for criticism, but that his actions are embedded in the protections of sovereignty integral to the Rome Statute. The prosecutor must rely on organizations that are not subject to ICC jurisdiction to obtain initial investigatory materials. He must respect their demands for confidentiality, having little to no negotiating leverage behind his requests for information. He cannot, under the Statute, use the information in building his case for trial. For that, he must rely on the cooperation of States-Parties, primarily the state that has been referred to the Court. Of course, the state under investigation will be highly cooperative when the investigation concerns its opponents and enemies while not at all cooperative when the investigation concerns its own crimes.

No method of referral arouses greater fears of prosecutorial power than the Article 15 power to open a case on his own initiative, *proprio motu*. This power in fact holds the greatest promise to eliminate the culture of impunity and to breach the walls of sovereignty. As has been noted widely in the press and scholarship, Article 15 was the most fervently debated provision of the Rome Statute. It allows the prosecutor to bypass any sovereign entity or the Security Council to initiate a case (although the Security Council can still defer the investigation indefinitely under Article 16). This potentially dangerous and unconstrained power is ultimately checked by the provision that an Article 15 investigation requires the confirmation by a pre-trial chamber that there exists a "reasonable basis to proceed with an investigation."

The prosecutor recently exerted his Article 15 powers for the first time to initiate a case for crimes against humanity by the Kenyan government, based on the violence surrounding the 2007 elections. The tension between the principles of accountability and sovereignty came to the fore in the decision of the Pre-Trial Chamber to allow the investigation to continue. While there was no doubt that massive violence had occurred during the 2007 elections, there was considerable debate as to whether the violence constituted a crime against humanity as defined under the Rome Statute. Under Article 7, attacks against a civilian population must be committed in "furtherance of a State or organizational policy." Chaotic and anarchic violence with multiple antecedents, causes, and agents (as occurred in Kenya) might not conform to the definition of an "organizational policy." The majority of the Pre-Trial Chamber, while authorizing further investigation, did note the lack of clarity of the statute. "Whereas some have argued that only State-like organizations may qualify, the Chamber opines that

the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."<sup>22</sup> In a spirited dissent, Judge Hans-Peter Kaul went to the heart of the dispute: sovereignty and the institutional capacity of the ICC. He noted that, "the general argument that any kind of non-state actors may be qualified as an 'organization' within the...Statute on the grounds that it has the capability to perform acts which infringe on basic human values...may expand the concept of crimes against humanity to any infringement of human rights." He asked facetiously, "Would that be the case if, for example, the mafia was to commit crimes, be it on a large scale, warranting the international community to intervene?" Pointing to the greater underlying dangers, he continued:

It is neither appropriate nor possible to examine and explain in this opinion all the potential negative implications and risks of a gradual down-scaling of crimes against humanity towards serious ordinary crimes... . [S]uch an approach might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, into a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility.<sup>23</sup>

This dissent, which could well exert a significant influence on future decisions to authorize *proprio motu* investigations, criticizes the prosecutor for threatening the sovereignty of national legal institutions—which is precisely the purpose of an Article 15 referral.

#### IV. The Role of the Security Council

Although the prosecutorial referrals aroused the greatest controversy among the most powerful parties negotiating the Rome Statute, it is the Security Council referrals that provoke the wrath of the weaker states of the world, once the greatest supporters of the ICC. These referrals are a grave danger to the legitimacy of the ICC. The recent Security Council referral of the situation in Darfur has brought these fears to the foreground. Again here, the court's most strident critics are perhaps the most accurate as well. As Mamdani writes:

If the ICC is accountable, it is to the Security Council, not the General Assembly. It is this relationship that India objected to when it—like the United States, China and Sudan—refused to sign the Rome Statute. India's primary objection was... that 'granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if its members were not all signatories to the treaty, for it 'provided escape routes for those accused of serious crimes but with clout in the U.N. body.' At the same time, 'giving the Security Council power to refer cases from a non-signatory country to the ICC was against the Law of Treaties under which no country can be bound by the provisions of a treaty it has not signed.'<sup>24</sup>

Article 14(b) of the Statute allows for referrals "by the Security Council acting under Chapter VII of the Charter of the United Nations." The Article is silent as to whether the state referred to the ICC must have ratified the Rome Statute. Thus there was a great deal of surprise and outrage in March 2009 when the Court issued an arrest warrant for Omar al-Bashir, President of Sudan, which is not party to the Rome Statute. The case went to the ICC on a Security Council referral. Using the same logic that it had used with the former Yugoslavia, the Council declared the Darfur situation to be a threat to international peace and security because of the refugee crisis it had precipitated in Chad.<sup>25</sup> This placed the situation under the Chapter VII jurisdiction of the Council, which then referred the case to the ICC in its Resolution 1593. The Resolution also obliged Sudan to cooperate with the prosecution and Court in its investigations, and created similar obligations for other non-states-parties.

A Chapter VII Security Council referral, which can be directed at any state, including non-states parties, would seem to violate a long-standing principle of international law that no state can be held to a treaty to which it did not agree.<sup>26</sup> Article 13(b) of the Rome Statute does not specify whether Security Council referrals can be directed at non-signatory states. However, since the creation of the Yugoslav Tribunal in 1993, it has been an acknowledged principle of international law that, under Chapter VII, the Security Council can bring sovereign leaders without their consent before a criminal tribunal for grave crimes against humanity and international peace. Sudan is a member of the U.N. and has signed the Charter; it is subject to the Chapter VII powers of the Security Council. Thus it is a settled matter that the Security Council can bring the Sudanese leadership before a criminal tribunal for judgments of individual responsibility. It is not settled that this tri-



bunal can be the ICC, or that the rules under which these cases will be tried are the rules of the Rome Statute.

The most troubling conflict of rules concerns whether other states must honor the arrest warrant against al-Bashir, which would violate longstanding international laws concerning the immunity of heads of state from arrest. While Article 27(1) of the Rome Statute lifts the shield of immunity from heads of states and allows for the lawful issue of an arrest warrant, Article 98(1) partially reaffirms the immunity by requiring the Court to obtain the cooperation of third-party states for the waiver of the immunity. Thus even if Resolution 1593 places all states under the obligation to cooperate with the ICC in its pursuit of al-Bashir, it is not at all clear that that these states are obliged to arrest and hand him over to the court. A spirited scholarly debate on this issue has ensued, showing a split between those who believe that it would be unlawful to arrest and surrender al-Bashir to the ICC versus those who believe that the Security Council Resolution, which itself creates international law, has also created an obligation to surrender the Sudanese president if captured.<sup>27</sup>

The provision for Security Council referrals against non-party states creates in essence two classes of sovereign states. Rather than the division that the Rome Statute would seem to create (non-states parties, over whom the court has no jurisdiction, and States-Parties, who have ceded jurisdiction to the Court for certain crimes committed against them or by them), Article 13(b) referrals divide states, whether parties to the Statute or not, that are subject to the jurisdiction of the Court on condition of referral from those powerful states that have not ratified the Statute and whose veto powers in the Security Council render them immune from the reach of the court. These states include not only the United States, Russia, and China, but they also include any non-signatory allies that those powers might choose to protect from the Court.

Thus one of the primary features of justice, reciprocity, is absent from international criminal justice, and it does not seem likely to become part of the system in the foreseeable future. When Gary Bass writes, "it is victory that makes justice possible but the fairness of the process is what makes it justice," he ignores the lack of reciprocity embedded in the structure of international justice.<sup>28</sup> Weak states that are subject to international justice have no way to bring powerful states to justice. They can be punished, but they do not receive protection in return. While we can blame this on the prosecutor, who has elected to focus on African cases in the early years of the court, we must note that

the inequity is written into the Rome Statute and could well become a permanent feature of its justice. Even the elaborate powers of oversight given to the Pre-Trial Chambers of the ICC cannot act as a counterbalance. The Chambers have the power to block cases, but they do not have power to demand cases be brought that would equalize the power differential.

These considerations will determine the perceived legitimacy of the ICC as a court of international justice, and have already led to a serious decline of the Court's credibility. Although African states were once the strongest supporters of the ICC, they are having second thoughts. The cases against al-Bashir in Sudan, Bemba in the Central African Republic, and now the Kenyan case have aroused concerns that the court has been turned into a selective political instrument. Libyan leader Muammar Gaddafi has called the ICC a politicized tribunal that will allow the West "to recolonise their former colonies."<sup>29</sup> Al-Bashir attracts considerable sympathy in his homeland and the continent when he claims, "We have refused to kneel to colonialism... That is why Sudan has been targeted... because we only kneel to God."<sup>30</sup> His accusation that the ICC is acting as a tool of Western colonialists who are after Sudan's oil reserves strikes a familiar chord. The Assembly of the African Union has adopted a resolution not to cooperate with the ICC investigation or to honor the arrest warrant for al-Bashir. Much to the embarrassment of the ICC, the Sudanese president has been able to travel throughout Africa to countries that have elected not to honor the warrant.

## V. Conclusion

When the Rome Statute was signed, the then-Foreign Minister of Italy, Lamberto Dini, said the Statute of the Court introduced radically important innovations into relations between States, affecting their sovereign prerogatives, and establishing a new relationship between the national courts and international jurisdiction.<sup>31</sup> Yet such euphoria is, at best, premature. While we can all acknowledge the benefits of removing mass murderers and the perpetrators of unspeakable crimes from the international community, we should be cautious about speaking of international justice just yet. Justice, as Rawls reminds us, is founded on fair play. The ICC has the power to make previously sovereign powers outlaws, placing them outside the protections of international law. Yet we must also note another class of outlaw—those powerful states that have not deigned to subject themselves to this new

form of international law. They do not enjoy the protections offered by the ICC, but they probably do not need them, sheltered by their own political and military might.

To repeat a thought with which this essay began, international human rights and humanitarian law have always begun as an aspiration rather than an enforceable reality. Certainly this has been the case with international criminal justice. The hope is always that a declaration or convention will serve to raise consciousness amongst states that they are responsible for their people, and among citizens that they have rights that nobody can take from them without the protection of law. The concern here is that a promising body such as the ICC, deprived of the mechanisms to fulfill its promise, will become politicized and a source of cynicism, much like the U.N. Human Rights Council. In any event, talk of international justice is premature. If there is a rule of law, it is a rule of law that applies to some, and a rule of law that will outlaw some bad people. But it will not apply to all.

To repeat the other thought that began this essay: This does not mean that international criminal justice is empty or useless. It asserts that there is a growing consensus within the international community that humanitarian principles are more important than sovereignty. It provides names and definitions for those crimes that place states and their powerful leaders outside the boundaries of the law. It will create records of atrocities that would otherwise have passed out of history unnoted, and will develop a body of case law that helps us understand precisely when sovereign actions become unacceptable. For many of the powerful nations that have exempted themselves from the jurisdiction of the court, it alerts them that they *should* follow its rules. Since the truest way to avoid the arm of the International Criminal Court is to bring one's own citizens before a domestic court for their crimes, a nonparty state can, in fact, adhere to the letter and spirit of the Rome Statute without ever ratifying it. There is significant evidence that the Statute has already had this effect. Perhaps party and nonparty states, knowing that they will be shamed before the international community if they do not police their own crimes, will be more likely in the future to empower their judiciaries to punish their own criminals. If so, then we might find that international justice will come into being at precisely the moment it is no longer needed. ●

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## Notes

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