

Perceptions, Politics, and Peace: The Limits of Globalization in Legitimizing the International Criminal Court

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I. Introduction

In a globalizing world, the field of human rights has attempted to reach a universal moral consensus that transcends state sovereignty. The creation of the International Criminal Court (ICC) in 1998 provided a new mechanism to support these efforts. Although the jurisdiction of the Court extends across the globe, so far all of the investigations have taken place on the continent of Africa. This fact, along with the details of the cases the Court has taken up, has sparked questions concerning neocolonialism and the political independence of the Court. In order for the Court to improve its reputation in the global community, it must acknowledge, address, and work toward remedying these genuine concerns in a just and open manner. The inability of the ICC to overcome accusations of neocolonialism and the continual obstacle of state sovereignty evidence the complex impact that globalization has had on international criminal law. The ICC has the potential to bring violators of international criminal law to justice, but in doing so it must avoid promoting impunity among the politically powerful and recognize that there are some situations in which arrest warrants and criminal prosecution cannot bring peace.

Organizationally, I will begin this essay with a brief history of international criminal law along with the role of the ICC. Next, I will describe the theoretical background framing three main challenges facing the Court. After explaining the theory, I will include a section of case studies, which show concrete manifestations of the challenges to the Court. Finally, I will discuss how the lessons of the theoretical framework and case studies reveal the inability of globalization to supersede the paradigm of a state-centered world order. In light of these lessons, I will make suggestions as to how globalization can be used moving forward to reform the ICC.

The first challenge facing the International Criminal Court is the furtherance of the paradigm that diminishes Africa as a continent full of victims and perpetrators who cannot function independently of ex-colonial powers. The second challenge I will discuss is the use of human rights language to depoliticize and conceal power dynamics both on the international and national levels. Finally, I will explain how the failure of the Court to apply its jurisdiction evenly increases the risk of furthering human rights abuses in the long term.

The case study demonstrating the first challenge will be an examination of the rhetoric constructing the 2010 “ICC Outreach Programme Report.” Next, in order to demonstrate the politics lying behind the depoliticized language of human rights, I will examine the role of the United States in referring cases to the ICC, as well as U.S. military interventions that coincide with interests of the Court. In order to address the final challenge, I will explain how national political alliances have negatively influenced peace processes in Uganda and the Democratic Republic of the Congo.

Each of these challenges jeopardizes the legitimacy and effectiveness of the Court and injures its chances “to put an end to impunity for the perpetrators of these crimes and thus to contribute

to the prevention of such crimes.”¹ Achieving this aim must not be carried out in a maladaptive manner. The world ought not to passively accept that even with the creation of the ICC, perpetrators are able to evade prosecution due to their nationality or political clout. This essay is not meant to discount the work that is being done by the Court, but to highlight improvements that can be made.

II. Contemporary History of International Criminal Law

To understand the need for the International Criminal Court, one must look back at the recent history of international criminal law. After World War II, the drafting of the Universal Declaration of Human Rights gave birth to a new era of international human rights. In the wake of this movement, the Allied Powers established the Tokyo and Nuremberg Tribunals to bring war criminals from imperial Japan and Nazi Germany to justice.² After these two tribunals, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague and the International Criminal Tribunal for Rwanda, which is located in Arusha, Tanzania.³ A disadvantage to these temporary courts is that they each have to draft charters upon establishment and this lengthy process takes time during which the cases cannot be tried.⁴

A number of mixed tribunals that combine an international tribunal with a national court have also been established to prosecute crimes in East Timor, Cambodia, Kosovo, and Sierra Leone, as well as the special tribunal for Lebanon located in The Hague.⁵ Aside from the special tribunal for Lebanon, the fact that these tribunals are located in the countries in which the crimes were committed allows the people affected by the crimes to feel much closer to the process.

While the previously mentioned courts were created in response to a specific breach of international law and are temporary in nature, the International Criminal Court is the first permanently established court for trying war crimes, crimes against humanity, genocide, and acts of aggression. The ICC is meant to be less partisan than the preceding courts and able to punish each side of a conflict. *The Rome Statute*, which established the Court, went into effect on July 1, 2002, and is a treaty nations can choose to sign.⁶ However, the Court has a complementarity jurisdiction, which means it will only act when the state is unwilling or unable to prosecute the alleged perpetrators.⁷ The Court can only try crimes that occurred after the *Rome Statute* went into effect. It is also limited to crimes that occurred on the territory of a member state or by a member state’s nationals.⁸ The only exceptions are if a country accepts the jurisprudence of the Court regarding a specific crime or if the United Nations Security Council refers a situation that occurred in a United Nations member state.⁹ The ICC also cannot breach treaties between two states.¹⁰

In the Court’s nine years of functioning, all of the cases that have been formally investigated have been against people from Africa. This would be acceptable had no crimes that fell under the *Rome Statute* been committed outside of Africa. However, potential cases could include Israel’s bombings in Lebanon, particulars of the United States’ involvement in Iraq, Russia’s actions in Chechnya, and abuses in Sri Lanka.¹¹ The Court has not formally investigated any of these cases. However, the Office of the Prosecutor has started preliminary examinations in the non-African nations of Afghanistan, Colombia, Georgia, Honduras, the Republic of Korea, and Palestine.¹²

Underdevelopment may be another factor contributing to the fact that every case has been located within Africa. Decades of outside intrusion have left many African nations without strong central governments capable of ending internal impunity. Some countries have admitted their inability to prosecute cases for themselves by referring internal situations to the Court. For

example, Uganda's government recommended the situation in Northern Uganda to the Court in order to increase international efforts to disarm the Lord's Resistance Army.¹³ Alternatively, the United Nations Security Council (UNSC) found an unwillingness to prosecute in Sudan, as that government had not taken sufficient action against perpetrators of crimes against humanity and genocide, and therefore recommended this case to be investigated by the Court.¹⁴

The Chief Prosecutor can also open investigations on his or her own volition within states party to the *Rome Statute*, without a recommendation from a state party or the Security Council. This *proprio motu* power aims to remove the ICC from political pressure and makes it less dependent on state action.¹⁵ This power is limited by the fact that any case can also be deferred for unlimited one-year periods by the UNSC.¹⁶ The ICC also relies on state funding in order to function.¹⁷ If the Court acts in opposition to party states, then it risks not having enough funding to proceed. Although the Court has tried to establish safeguards against politicization, the issue of funding remains contentious. In light of the structural hindrances to the ICC's ability to enforce its global jurisdiction or overcome international power dynamics, the article will now examine how rhetoric surrounding the concept of international human rights perpetuates neocolonialism. The term *neocolonial* refers to the influence of a world power over another state through political, economic, or cultural pressures. After the formal end of the colonial era, many colonial powers continue to exert their influence over former colonies through neocolonial methods, which challenge the sovereignty of the newly formed states.

III. Theoretical Background

A. Destructive Perceptions

The ICC operates within a context of international criminal law in which there is discourse that tends to oversimplify complex conflicts by replicating the illusory dichotomy between the "innocent victim" and the "heartless criminal." This rhetoric surrounding victims often brings to light neocolonial undertones.¹⁸ The act of discussing the inevitability of the International Criminal Court as a necessary step in international law sounds hauntingly like colonial discourse demanding "progress" for the good of conquered peoples.¹⁹ Likewise, victims are shaped as being helpless if not for the necessary intervention of this external mechanism for justice. Rhetoric surrounding perpetrators likewise reveals remnants of colonial rhetoric. Strikingly, the words "barbaric" and "savage" continue to be used to describe acts of rape and sexual violence in the context of human rights violations. These terms "otherize" and degrade perpetrators to a subhuman level.²⁰ A search on the ICC's website turns up fifty-five separate documents containing the word "barbaric"; the descriptor "savage" similarly turns up forty-seven entries.

The present time is not so far removed from the colonial past that these terms do not hearken back to rationalizations of colonialism. In the eyes of the global community such negatively connotative words do not legitimize human rights as a form of universal respect and understanding. This rhetoric instead strengthens the argument that the ICC is a form of neocolonialism institutionalized through international criminal law. In order to increase the legitimacy of international human rights norms and the ICC, the assumptions this rhetoric makes and the dehumanizing effect it has must be evaluated.

B. Disguised Politics

In the human rights field, universality is a key principle. There is a general consensus that genocide and grave human rights violations must be prevented and punished. One danger of rhetoric placing too much emphasis on universality, however, is that it can conceal political motivations behind international interventions under the guise of promoting human rights.²¹

Often conflicts in the Global South are explained by ethnic tensions and are not given sufficient political or economic analysis. One example is the genocide in Darfur, which is often described as mainly an ethnic conflict, while ignoring the environmental and economic struggles.²²

Simplifying the conflict into ethnic terms will not foster a long-term solution, but only produces a dichotomy of good versus evil in which one side is considered to be the victim needing outside assistance while the other acts out of hateful irrationality. However, this dichotomy does have some strategic usefulness. In cases in which good and evil are defined so bluntly, the ICC can deceptively appear to be fulfilling the duty of prosecuting violations of human rights in a non-political fashion.²³

Here the question becomes one of definition and who has the power to define war crimes or genocide and initiate investigations by the ICC.²⁴ In many cases brought before the ICC, only one side of a violent conflict is being prosecuted.²⁵ Indictments perceived as being politically charged can challenge the Court and offer evidence to its opponents that it is swayed by power and partisanship. The Court depends upon being apolitical in order to retain its legitimacy. The case studies will shed light on whether it has been successful in this regard thus far.

C. Compromising Peace

Along with the political motivations behind which cases are taken by the ICC, it is also important to review the impacts Court cases have had on the countries in which the crimes were committed. After a decade of existence, the Court has the opportunity to reflect upon whether the ways in which it has acted have begun to end impunity and prevent international crime. Issuing an arrest warrant for Sudanese President al-Bashir, for example, may have actually worsened the humanitarian situation. In reaction to the issuance of the warrant, al-Bashir expelled dozens of humanitarian aid groups from the Darfur region of Sudan, leaving many internally displaced people without resources.²⁶ In this way, the arrest warrant, without a means of enforcement, had an initially negative impact on Darfuris. The warrant also disrupted peace talks between rebel groups in Darfur and the Sudanese government.²⁷ Similarly, the arrest warrant forces al-Bashir to retain power.²⁸ If the government would be handed over to an opposition leader, he could be turned over to the Court. This could lead al-Bashir to commit even more grave violations of human rights to repress opposition. Because one of the goals of the ICC is to end violations of human rights, a warrant without the means to arrest al-Bashir may be counterproductive.²⁹

Another negative impact of the Court is that one-sided indictments may lead to future conflict, obstructions to the peace process, and further impunity. While arrest warrants have been issued for heads of state, there are cases in which the effects of national politics on the ICC have been questionable. In terms of inter-state diplomatic relations, it would also be less risky to prosecute a perpetrator who does not hold national power than one who does. This temptation to take the less risky political step of only prosecuting those with little relative power must be avoided in order for the Court to retain legitimacy. The following section will include specific instances in which these theoretical challenges have been manifested in the first decade of the Court's existence.

IV. Case Studies

A. Rhetoric within the “ICC Outreach Programme Report”

The *problematique* of using neocolonial language that casts the ICC as a savior for the helpless victims in the developing world can be found within the “ICC Outreach Programme Report.” The description of the Court’s interactions with affected communities through its Outreach Programme reveal the dynamics in the interactions between people most affected by the Court and representatives of the Court. As of 2010, the Outreach Programme had active units in Uganda, the Central African Republic, Kenya, and the Democratic Republic of the Congo, along with units in Chad and Europe to speak about the situation in Darfur with members of the Sudanese Diaspora. In each country report, people ask why there have only been cases taking place against African nationals, revealing the popular perception that the Court can only try Africans.³⁰ The Outreach Programme aims to cultivate a level of awareness and understanding of the ICC’s mandate and mode of operations, promote access to and understanding of judicial proceedings, and foster realistic expectations about the Court’s work. This in turn will engender greater local community participation in Court proceedings by addressing the concerns of those in affected communities and by countering misperceptions.³¹

In most countries, the Programme’s initiatives focused on women’s involvement, along with educational, legal, and media outreach. While outreach efforts to inform victims of their rights and engaging legal professionals are valid, some outreach techniques seem to question the intellectual capacity of the local participants. In Uganda, “in light of the low level of education of most women,” the Outreach Unit used “drama performances enacted by local drama groups that have been trained on the mandate and functions of the Court.”³² Of course it would be irresponsible of the Court to use esoteric legal jargon in trying to explain the functions of the Court to lay people, but one can doubt that a drama performance could capture the nuances and complexities of an entity like the ICC in a way that a lecture or group discussion could not. Evidently, Outreach has found tools of this kind to be valuable. For 2011, Outreach planned on creating an ICC board game along with more “theatre and songs about the ICC.”³³

These outreach activities differ substantially from those of the International Criminal Tribunal for the Former Yugoslavia, which are categorized as “conferences, roundtables and training sessions.”³⁴ When visiting a group of girl and boy scouts, the Outreach team employed the use of a professional lecturer, not a board game. Even in a rare instance when the Outreach Programme used “dramatic reenactment of rescuer narratives performed by professional actors,” it was only in a conference to educate youth “how to use various forms of artistic expression as a tool for peace-building and social action.”³⁵ The stark contrast between the methods employed by the two Outreach Programmes reveals how much more the ICC could be genuinely engaging the affected communities in dialogue and participatory events rather than superficial instruction on the functions of the Court.

Along with methods of literally using songs and games to describe a tool that is meant to end impunity and bring perpetrators of grave violations of human rights to justice, the language of the report shows that the ICC promotes one perception of itself and labels anything else as misinformation or misunderstanding. The Court’s relationship to the media reveals this goal. As described in the report, when a journalist reports “inaccurately” on the Court, the Unit will “visit such a journalist in order to address the inaccuracies, explain the processes before the Court and clarify any confusion.”³⁶ While the Court has an interest in making sure that the public is not actively misinformed, it is problematic for it to censor legitimate concerns. Certainly the people

that are affected by the Court should be able to give their opinion of how the process has influenced the situation on the ground.

The report fails to include specific questions or opinions, but rather lists categories of questions discussed and generalized statements. When the Court informed the UNSC that Chad and Kenya had allowed President al-Bashir to visit their countries, Outreach generalized the reaction by affected communities, stating that they “welcomed these decisions and expressed the hope that these decisions would result in actions to ensure that States comply with their obligations.”³⁷ While it is likely that some, and maybe even a majority, shared this opinion, it is clear that the Court promotes the image of itself as largely supported by affected communities. This perception is seen throughout the report, and there is not one mention of a specific concern that is deemed legitimate. While the Outreach Programme has the opportunity to investigate how the trials are affecting communities, they instead choose to create one-sided plays and board games to “sell” the Court to the people and change their “misperceptions.”³⁸ According to the Outreach Programme Report, the ICC is an international force that knows what is best for the people on the ground. It just has to help them come to that same understanding.

B. Selective U.S. Support

The influence of global politics on the ICC can be seen through the relationship between the Court and the United States. Under President William Clinton, the U.S. signed, but did not ratify, the Rome Statute. President George W. Bush later withdrew the signature.³⁸ When the Rome Statute was first instituted the U.S. attempted to sign bilateral agreements with 187 countries, making them pledge that they would not surrender U.S. citizens to the Court should warrants be issued for their arrest. The consequence of not signing would be withdrawal of U.S. military aid.³⁹ These measures pressured 100 countries into signing the agreements, creating relative immunity for U.S. citizens. This is just one example of how the United States has tried to avoid being under the jurisdiction of a court that might prosecute its citizens.

However, the U.S. has not remained uninvolved in Court functions. The participation of the U.S. in cases that the U.N. Security Council refers puts the Court in a complicated position. The United States, Russia, and China are among the permanent members of that body and thus have influence over who is referred, while at the same time not being parties to the Statute. In the case of al-Bashir, the U.S. abstained from voting (did not veto) to refer the situation in Darfur to the Court. Paragraph 1593 of that resolution, however, grants U.S. citizens immunity from prosecution regarding the situation in Sudan.⁴⁰ The resolution included another paragraph that stated the U.S. will bear no costs regarding the case in Sudan, even indirectly through the U.N.⁴¹

In Spring 2011, the U.S. participated more directly by voting on the UNSC to refer the situation in Libya to the ICC.⁴² Actively participating in the referral process could mean that the Obama administration has made positive strides in further cooperation with the ICC. However, like the case in Sudan, the referral of the situation in Libya to the ICC also includes an article that grants immunity to all “nationals, current or former officials and personnel” of states not party to the Rome Statute other than Libyans.⁴³ This shows that the United States is still not willing to sacrifice its sovereignty for the furtherance of international human rights. U.S. cooperation regarding both the cases of Libya and Sudan is complicated further by the fact that neither country is a party to the Rome Statute. Although it is legal for the Security Council to refer the cases of Sudan and Libya because they are U.N. member states, it creates a precedent that citizens of non-party states will be prosecuted. However, citizens of UNSC member states may still be protected by their state’s veto power and remain outside of the ICC’s reach.

While world powers have immunity from the ICC's jurisdiction, this has not been a possibility for all states. As mentioned above, after a referral by the U.N. Security Council, the ICC issued arrest warrants for Sudanese citizens.⁴⁴ The particular case that has garnered the most attention has been that of Sudanese President Omar Hassan Ahmad al-Bashir. In 2009, the Court issued a warrant for his arrest on five counts of crimes against humanity and two counts of war crimes. Additionally, in July 2010, the Court issued a second arrest warrant including three counts of genocide.⁴⁵ This was the first time the ICC issued a warrant of arrest for a sitting head of state.

The African Union, Arab League, Organization of Islamic Conference, and the G-77 quickly condemned this action.⁴⁶ Al-Bashir articulated his objections by saying that the ICC could "eat" the warrant.⁴⁷ Countries, such as Kenya, Chad, and Djibouti, have shown their loyalty to al-Bashir and noncompliance with the warrant by accepting al-Bashir into their countries and not arresting him, as the Rome Statute requires its parties to do.⁴⁸ By defying the Rome Statute, these states have displayed their changed opinion of the Court and diminished trust in its abilities. Non-party states that have likewise shown their disapproval of the warrant and welcomed al-Bashir include China, Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, and Zimbabwe.⁴⁹ Some who reject the legitimacy of the warrant claim that the Global North is targeting al-Bashir because he rejected foreign aid.⁵⁰

Should the Court be unduly influenced by world powers, this could become even more worrisome for people in the Global South as the role of the U.S. military becomes more intertwined with the ICC. In October 2011, President Obama announced he would be sending 100 troops to Uganda to aid in arresting or killing leaders of the Lord's Resistance Army who incidentally have been indicted by the ICC. Admittedly, the Ugandan government agreed to this cooperation and welcomed the troops.⁵¹ A slightly more contentious involvement of U.S. troops, however, took place in Libya. The U.S. participated in the U.N. mission to assist rebel troops in overthrowing Qaddafi's regime in Libya, beginning in March 2011.⁵² In June 2011, the ICC issued an arrest warrant for Qaddafi as well as two other Libyan leaders.⁵³ Had U.S. forces, operating under NATO, arrested Qaddafi, they likely would have delivered him to the Court to face trial.

While the United States has not detained anyone and brought them to the Court, increasing U.S. military action under circumstances of coinciding interests with the ICC does stir up questions regarding its relationship with the Court. The U.S. worries about breaches of sovereignty and protecting its own citizens, while at the same time militarily supporting humanitarian missions in the Global South. In both of these cases it must be noted that the Ugandan government and the new rebel leaders in Libya supported U.S. involvement. Nevertheless, this trend could cause fear in the Global South that human rights will be used as a guise for outside military involvement.

The preamble to the Rome Statute states that, "nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State."⁵⁴ While the order to institute a No-Fly Zone in Libya came in a separate resolution from the referral of Libya to the ICC, these two actions cannot be taken as completely unrelated, as the same body approved each. If the Court wants to uphold its stance of not violating sovereignty, it must do so on more than a rhetorical level.

C. National Politics in Limiting ICC Effectiveness

As the ICC cannot violate state sovereignty in order to make an arrest, those holding political power and their allies can avoid facing the Court more easily than those without national

political power.⁵⁵ In the case of the Democratic Republic of the Congo, political alignment has influenced the ease with which people have been arrested. Jean-Pierre Bemba and Bosco Ntaganda have faced much different fates, largely due to their respective relationships with the president of the DRC, Joseph Kabila. Jean-Pierre Bemba, who the ICC indicted for war crimes committed in the Central African Republic, is Kabila's top political opponent. The 2006 DRC presidential elections came down to the two men, but Kabila emerged victorious. The two remain political opponents as Bemba began a presidential campaign against Kabila from The Hague for the 2011 election.⁵⁶ Kabila attempted to block Bemba's campaign by proposing a 2011 electoral law prohibiting anyone indicted by a court of last resort from running for president.⁵⁷ This law aimed to directly bar Bemba from participating in the election. As his top political opponent, Kabila would not have granted Bemba sanctuary within the DRC. Rather, Bemba was arrested during a stay in Belgium the day after the ICC issued a warrant for his arrest.

Quite differently, Bosco Ntaganda, a military ally of Kabila, has not been arrested since the Court issued a warrant in 2006. Kabila has deployed General Ntaganda to keep Hutu forces at bay in Eastern Congo. In fact, the president promoted him within the army even after the ICC issued a warrant for his arrest.⁵⁸ A U.N. Mapping Report on the atrocities committed in the DRC acknowledges this promotion and the fact that Ntaganda lives a rather public life, but no sanctions have been imposed on Kabila for failing to comply with the arrest warrant.⁵⁹ The warrant for Ntaganda's arrest alleges that he committed the war crime of enlisting and using children under the age of fifteen in his armed forces.⁶⁰ The fact that President Kabila would promote a military leader accused of using such methods, and can do so without international sanctions, does not suggest that the ICC's rulings are taken seriously in the global community.

While the ICC took positive action in bringing cases against both individuals despite their political alliances, the fact that both warrants were not carried out shows the limited power of the Court. The ICC depends upon states to enforce its arrest warrants. It is often unclear to affected communities as to why the ICC only issues warrants of arrest for people on one side of a violent conflict.⁶¹ In sessions held by the Outreach Programme, participants nearly always questioned why some parties were able to avoid arrest.⁶² This concern could decrease the legitimacy of the Court in the eyes of those affected communities that the Court relies on to act as witnesses in the trials.

Along with harming perceptions of the Court, when only one side of a conflict is held responsible for the crimes it commits, that side is likely to feel persecuted and resentful of the side that escaped prosecution. These latent feelings of being wronged do not bode well for permanent conflict resolution. For example, in Sudan, rebel groups have not been targeted for prosecution, while the government has been. Similarly, Ugandan and Rwandan national forces have not been prosecuted for crimes in the DRC, while rebel groups have been targeted.⁶³ The sides that are not prosecuted then feel empowered to act with impunity. Oftentimes, the prosecutor states that investigations start with the most serious crimes, but eventually whole situations will be investigated. The Court must follow through with these thorough investigations if it takes seriously its mandate to end the crimes.

A further concern involving the role of the ICC in Africa is its effect on peace processes. For example, in 2008, the Ugandan government was on the verge of making a peace agreement with members of the Lord's Resistance Army, but it no longer had control over a significant point of negotiation: the arrest warrants issued by the ICC.⁶⁴ The rebels wanted immunity from the Court in exchange for ending their operations in Northern Uganda. The Ugandan government could not ensure the rebels that the charges would be dropped, but in 2010 it passed legislation that offered to try the rebels domestically instead of at the ICC. In this case, the pre-trial chamber will have to

decide if the case is no longer admissible on the basis of complementarity, which states that the ICC will only act if national courts are unwilling or unable to do so.⁶⁵

If the International Criminal Court continues on with the case, the peace process could be significantly challenged. The Ugandan Army has been unable to stop the Lord's Resistance Army from committing war crimes and crimes against humanity or arrest those with warrants from the ICC. This has raised questions among affected communities as to whether or not the ICC has any curbing effect on ongoing crimes.⁶⁶ Thus, even when the ICC issues arrest warrants, efforts to enforce them rely on the ability of the nations in which the suspects are living. In this case, the ICC is seen as more of a hindrance to the peace process in Uganda than an apparatus for ending the violence.

In order to address volatile situations, one alternative to the ICC would be creating more localized courts. In cases of such widespread violence and human rights abuses, the community needs to see that those who perpetrated the crimes will be held accountable in order to find peace. Extensive interviews of Congolese people by researchers at University of California-Berkeley found that 85 percent of respondents would prefer trials of war crimes to take place within the DRC as opposed to seven percent preferring that trials take place internationally (and seven percent preferring no trials at all).⁶⁷ As the ICC is a court of last resort, individual countries can take the lead in establishing justice. Rather than automatically deferring to the ICC when atrocities occur, national and regional solutions should be considered first in order to keep justice as close to the victims as possible. Of course, ensuring that courts are not unduly politicized will remain important.

V. Lessons for Globalization

Globalization's affects on every sphere—politics, economics, the environmental, and culture—also apply to international human rights. The possibility for international cooperation in this field has increased since the end of the Cold War.⁶⁸ When the signing of the Rome Statute created the ICC, the world was in the midst of globalization at levels never seen before. In order to investigate how the previously mentioned imperfections of the ICC reveal globalization's complex impact on international criminal law, I will use the following definition of globalization:

[It is] a historical process which transforms the special organization of social relations and transactions, generating transcontinental or interregional networks of activity, interaction, and the exercise of power...globalization is about connections between different regions of the world—from the cultural to the criminal, the financial to the environmental—and the ways in which they increase over time.⁶⁹

This definition categorizes globalization as a force that increases the level of cooperative power and activity on the world stage. Increased international cooperation is evident in the creation of an international criminal court that has the potential to bring an end to impunity and to create a mechanism that transcends the power of the state in order to ensure that no one is left vulnerable to gross human rights violations. The increased predominance of international law indicates a shift from a world in which states are the central insurers of rights to a paradigm in which there are international regimes that can protect the world's citizens from their own states.⁷⁰

However, states still retain agency. While many states have welcomed increased internationalization, at least rhetorically, individual state actions show that self-interest still impacts attempts at cooperation.⁷¹ There are still a few states, namely the permanent members of the U.N. Security Council, which are able to avoid prosecution by the ICC. While these states are not full parties to the ICC, the increased participation shown in the active referral of Libya could signify a change in their levels of cooperation. The limited participation shows that globalization has not served as a fully equalizing force that leaves state power as insignificant.

State sovereignty has also stood against the forces of globalization in other ways. As an illustration, an individual for whom the Court has issued an arrest warrant can continue to live in security within the bounds of his state, should he be aligned with the politically powerful. This would not be possible if state sovereignty should diminish altogether. While the continuing strength of state sovereignty stands as an obstacle for the Court, the elimination of sovereignty should not be seen as an entirely positive goal for globalization. States are still necessary as the insurers of human rights. Protecting sovereignty makes it the most possible for people to be involved in the democratic process of implementing rights for themselves.⁷²

Following the whims and self-interest of powerful states may be most convenient for the Court, but it will not foster lasting peace. Remedying the uneven vulnerability to the Court's jurisdiction will only take place if powerful states put their trust in the Court and become parties to the statute. The power given to the UNSC also needs to be re-examined in the near future, as this is the main institution that guarantees impunity to powerful states. If these states want to see the Court functioning to put an end to grave violations of human rights, they must acknowledge the harm that double standards of justice have in achieving that goal.

Globalization has aided in the formation of a common international criminal court and universal agreement on crimes that must never be committed. However, it has not been powerful enough to remove the rhetoric of difference and "otherization," even in this supposedly conscientious realm of international human rights. The language of dehumanization still persists throughout human rights discourse as a way of explaining crimes. Perhaps with ever more constant interaction among diverse populations and a deeper understanding of history, this rhetoric will be replaced by more appropriate discourse that can overcome the current ubiquity of otherization. This has yet to be the case, and even as globalization has enabled the creation of the ICC, it has not allowed it to move through its first ten years without stoking fears of neocolonialism.

The Court should be sensitive to the concerns it encounters and address them in a way that gives credit to the intellectual capacity of the people with whom it is interacting. It also must be more completely informed of the historical narratives that shape the context of each situation. This will allow the Court to avoid simplifying complex situations as "ethnic conflict" or misunderstanding how issuing an arrest warrant could negatively affect the situation on the ground. The Court must respond to concerns raised in sessions of the Outreach Programme as well as through media sources. The "misunderstandings" of affected communities may reflect failures of the Court, not lack of knowledge.

In order to remedy past failures, the ICC should begin to exercise its jurisdiction evenly across international and political borders. Trying cases that only target perpetrators on one side of a conflict not only leads to questions of the politicization of the Court, but also creates impunity for parties not tried. Granting immunity to repressive government troops would be especially discouraging to people who might otherwise see the Court as their only hope to punish egregious violations.⁷⁴ Those most harmed by the politicization of the Court are not the accused leaders, but people facing continual human rights abuses without available international remedies.

VI. Conclusion

Although the ICC currently stands as the actor most able to prosecute gross violations of human rights, eventually it would be ideal if this court were not necessary at all. This could happen if violations stop or if each nation has the infrastructure to prosecute the cases independently. Until that happens, the ICC should continue to have a role in implementing international law. It has the potential to end impunity globally and impact the lives of millions. However, if it continues to be politicized and neocolonial, it will lose the legitimacy it needs in order to function. It is understandable that changing an institution that took such a long time to come into creation and required so much agreement from party states will not be easy.

The reform the Court most urgently needs, however, is not a rewriting of the provisions of the Rome Statute; it is the choice, timing, and execution of arrest warrants and summonses. With Fatou Bensouda taking over the role of Chief Prosecutor in 2012, these methods may improve. Her appointment has garnered the support of human rights activists, the African Union, and legal experts alike.⁷⁴ In order to retain this endorsement, Bensouda ought to be diligent in seeking justice based on understanding, impartiality, and cognizance of the impact it will have on the lives of the affected communities. The globalization of international justice may be able to bring an end to impunity, but not if it is restricted by politics and partiality.

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