LOOKING FORWARD AND LOOKING BACK: HOW CAN THE INTERNATIONAL CRIMINAL COURT (ICC) NAVIGATE IN A COMPLICATED AND LARGELY HOSTILE WORLD?

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Thank you for the kind introduction. I am glad to be back at the law school and thanks to Diane Amann and the Dean Rusk Center at the University of Georgia Law School for putting together such an interesting program with so many distinguished participants.

My focus today will be on some of the challenges facing the International Criminal Court ("ICC" or "the Court"), in particular, the Office of the Prosecutor ("OTP"), and to reflect on how other international[1] and "hybrid"[2] tribunals and courts have dealt with related issues. I do this with a background

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[1] The international criminal tribunals include two ad hoc international criminal tribunals established by the United Nations Security Council acting under Chapter VII of the United Nations Charter: The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). *See, e.g., About the ICTY,* U. N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/about (last visited May 9, 2019); *The ICTR in Brief*, U.N. INT'L RESIDUAL MECHANISMS FOR CRIMINAL TRIBUNALS, http://unictr.irmct.org/en/tribunal (last visited May 28, 2019).

[2] *See generally Rule-of-Law Tools for Post-Conflict States*, OFFICE OF THE U. N. HIGH COMM'R FOR HUMAN RIGHTS (2008), https://www.ohchr.org/Documents/Publications/HybridCourts.pdf (defining hybrid courts as "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred."). These courts were established by nation states with the assistance of international organizations, such as the United Nations ("UN"). Hybrid courts include the Special Court for Sierra Leone ("SCSL"), the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), the Bosnia State Court ("BiH State Court"), the Special Tribunal for Lebanon ("STL"), and the East Timor Special Panels.

of working in, or on, a number of international or "hybrid" tribunals/courts. These tribunals include the United Nations International Criminal Tribunal for the former Yugoslavia ("ICTY") where I served as, e.g., Deputy Chief Prosecutor, Deputy Registrar, and Chef de Cabinet to the President, and the Special Tribunal for Lebanon ("STL"), where I held the post of Registrar. Moreover, I was the UN Secretary-General's Special Expert on the Extraordinary Chambers in the Courts of Cambodia ("ECCC"). I also worked extensively on setting up the Bosnia State Court ("BiH State Court"),[3] and served as an expert to the ICC discussions and negotiations in New York, The Hague and Rome.[4]

As we think about the ICC, it is important to be specific about which part or organ of the Court (i.e., Presidency, Chambers, Prosecutor or Registry) we are discussing or examining. While the ICC has a mantra of the "One Court Principle",[5] we must recognize that the various ICC organs face very different challenges.

I will make some comparisons and a few suggestions based on the experiences of other tribunals and courts, but I do so with several caveats. The most significant challenge facing the ICC, and in particular its OTP, is that it is working in very adverse circumstances. There are two distinct elements that should be taken into account in this regard. First, the ICC has a much broader geographical mandate than the other international criminal courts/tribunals, as it is currently composed of 122 states parties[6] and the possibility of UN Security Council ("UNSC") referrals.[7] UNSC referrals have included the situations in Sudan and Libya–where the Court has been stymied by lack of cooperation and thus has had little impact.[8] In any event, additional UNSC referrals

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[3] See*, War Crimes Section of the State Court of Bosnia and Herzegovina*, WASH. COLL. OF L., https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/resource-court-information-and-external-links/resources/war-crimes-section-of-the-state-court-of-bosnia-and-herzegovina/ (last visited May 29, 2019).

[4] See David Tolbert, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, arts. 43-50 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

[5] *See, e.g.,* Herman von Hebel, *End of Mandate Report of the Registrar*, INT'L CRIMINAL COURT 1, 3 (Apr. 16, 2018), https://www.icc-cpi.int/itemsDocuments/180416-rep-registrar.pdf.

[6] *See, e.g.,* Jane Onyanga-Omara, *What's the International Criminal Court and Why are Countries Bailing?,* USA TODAY (Nov. 17, 2016), https://www.usatoday.com/story/news/world/2016/11/17/whats-international-criminal-court-and-why-countries-bailing/94017990/ (highlighting the fact that some nations have threatened to, and have succeeded in, withdrawing from the ICC).

[7] See Rome Statute of the International Criminal Court art. 15, July 17, 1998, 2187 U.N.T.S. 90.

[8] *See, e.g., In Hindsight: The Security Council and the International Criminal Court,* SEC. COUNCIL REPORT (July 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php.

appear very unlikely in the near term.[9] There have also been several situations where states parties, on their own volition, requested the ICC to exercise jurisdiction over Rome Statute crimes in their territory. These situations or "self-referrals" have occurred in the Democratic Republic of Congo, Uganda, Mali, and Central Africa Republic II.[10] Moreover, the ICC's processes, which were hammered out in a diplomatic conference, are for the most part considerably more complex and demanding than in the ad hoc or hybrid tribunals.[11]

In my view, an even more important issue for the ICC, and particularly for its Prosecutor, is the dramatic shift in the global context since the Rome Conference of 1998, challenging not only the Court and accountability efforts writ large, but also more broadly, the human rights movement.[12] The current geopolitical climate is much more difficult for human rights generally, and international justice specifically, than when I entered this emerging field in the mid-1990's.[13] There are various origins of this blowback against human rights and accountability,[14] including in my view a failure to address economic rights seriously, which I have addressed elsewhere.[15] While there are steps the human rights movement writ large can take to try to address the move towards reaction, the Court is a judicial actor and has to be careful about putting its toe into advocacy and activism. Thus, the fight against impunity in an age of reaction rests primarily with civil society activists. So, while we tend to think of the Court as a number of organs (such as Chambers, Presidency, Prosecution, Registry), we must bear in mind that without the energy and activism of civil society and some committed governments the ICC would not exist.[16]

In my view, in thinking about the Court and other accountability efforts in these difficult circumstances, it is clear the ICC faces very different problems and challenges than those faced by the ICTY, or any of the other courts or tribunals that have preceded the ICC. Unlike the ICTY (and to a somewhat lesser extent the International Criminal Tribunal for Rwanda ("ICTR"), the

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[9] *Id*.

[10] *See generally Situations Under Investigation*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/pages/situations.aspx (last visited May 9, 2019).

[11] *See, e.g.,* Stojanka Mirceva, *Why the International Criminal Court is Different,* GLOB. POLICY FORUM (Jan. 26, 2004), https://www.globalpolicy.org/component/content/article/164/28450.html.

[12] David Tolbert, *Quo Vadis: Where Does the Human Rights Movement Go From Here?*, 47 GA. J. INT'L & COMP. L. 479 (2019).

[13] Philip Alston*, The Populist Challenge to Human Rights*, 9 J. OF HUM. RTS. PRAC. 1, 1-2 (2017).

[14] Tolbert*, supra* note 12*,* at 480-82.

[15] *Id.* at 485-86.

[16] *See, e.g.*, Heidi Nichols Haddad, *The International Criminal Court was Established 20 Years Ago. Here's How.,* WASH. POST (July 17, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/the-international-criminal-court-turns-20-heres-a-look-at-how-it-got-here/?utm_term=.31a96770a3f5.

SCSL and some national prosecutions of atrocity crimes), the ICC is operating on a much more difficult terrain and faces a very challenging swirl of headwinds. Over the last several years, the rise of authoritarianism, populism and forces of reaction have created significant challenges for international criminal courts and other accountability efforts. These external forces are creating serious challenges for the Prosecutor and the Court for the foreseeable future.[17]

As noted, the current context certainly contrasts with the experience of the ICTY and, to a greater or lesser degree the experiences faced by the ICTR, STL, the BiH State Court[18] and the ECCC (the latter "takes the cake" in terms of difficult externalities and a willfully absurd design).[19] These courts arose during the wake of the fall of the Berlin Wall and seismic changes of the post 1989 period, and during the momentary lessening of tensions on the UNSC. The ICTY in particular benefited from generally strong support (or in some cases benign neglect) from the UNSC in its early days and for some time afterwards.[20]

The ICTY, and to a lesser extent the ICTR and the hybrid courts, also received strong political support from the European Union (EU) and the United States through most of their existence.[21] The European Union, in particular, played a crucial role in creating the conditions for arresting fugitives by tying the carrot of EU accession–with its significant economic and political benefits–to the ICTY Prosecutor's determination that the respective states of the former Yugoslavia were fully cooperating with the OTP. This was a strong inducement for those states to cooperate with the ICTY.[22] I would underline that this was part of a concerted strategy by the ICTY's OTP.[23]

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[17] *See generally,* Kenneth Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values,* HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism.

[18] *See* David Tolbert and Aleksandar Kontić, *The International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the Transfer of Cases and Materials to National Judicial Authorities: Lessons in Complementarity*, *in* THE ICC AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 888 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

[19] *See generally* JOHN D. CIORCIARI AND ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (University of Michigan Press 2014).

[20] *See* David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q. 840, 859 (2012) (discussing the UNSC's support for both Chapter VII courts, but particularly its support for the ICTY).

[21] *Id.*

[22] *See generally* Julie Kim, *Balkan Cooperation in War Crime Issues,* CONG. RESEARCH REPORT FOR CONG. (Jan. 14, 2008), https://fas.org/sgp/crs/row/RS22097.pdf.

[23] *Id.* at 3.

We had diplomats on our team in the OTP, and we worked hard to develop a strategy to tie EU accession, or at least progress towards EU accession, for Balkan states to cooperation with the OTP with considerable success.[24] The ICC Prosecutor simply does not have any such tools at hand.

I do think it is important for the Court, and particularly the OTP, to have a strong relationship with victims and with national civil society. One has to be careful in this regard, but at the ICTY and in the other courts I have worked in, civil society groups have provided some of the best sources of information, evidence and advocacy.[25] Thus, having an open dialogue with victims and affected communities is critically important for the OTP and for the institution as a whole.

One aspect of engaging with victims and other supporters is through Outreach Programmes, which were established to communicate the work of the tribunal or court to affected communities.[26] I worked extensively with President McDonald at the ICTY in establishing the first Outreach Programme,[27] which met some resistance from judges and prosecutors. Over time, outreach activities at the ICTY and the SCSL became more effective, and Outreach Programmes are now an almost universal feature of all international and hybrid criminal courts.[28] In one sense, this is a positive development, in that a court such as the ICC needs to connect with victims and other citizens.[29] Not only is engaging with victims and affected communities important as a matter of principle, Outreach Programmes may also help address and get ahead of propaganda and distortions by explaining the work the Court is actually doing as well as the impact it is having on affected communities. At the ICTY, the Outreach Programme's "Bridging the Gap" events took actual cases that had been fully litigated and explained to victims and affected communities *in situ* what the organs of the ICTY and the respective parties (i.e., OTP, Chambers and defence) did in the investigation stage, at trial and on appeal.[30] This process was powerful and increased understanding of the ICTY's work with victims and the general population alike.[31] SCSL has also received credit for its

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[24] *Id.*

[25] *See* Press Release, United Nations Int'l Criminal Tribunal for the Former Yugoslavia, ICTY Outreach Starts Regular Co-ordination Meetings with NGOs in the Former Yugoslavia, U.N. Press Release MS/MOW/1392e (Feb. 25, 2011).

[26] David. Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 Fletcher F. World Aff. 7, 13 (2002).

[27] *See Outreach Programme*, U. N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/outreach/outreach-programme (last visited May 9, 2019).

[28] *Id*.

[29] *See, e.g.*, Human Rights Ctr., *The Victims' Court?: A Study of 622 Victim Participants at the International Criminal Court,* U.C. BERKELEY SCH. OF LAW (2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf.

[30] *See* DIANE ORENTLICHER, SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA 311-14 (2018).

[31] *Id.*

Outreach Programme, leading that court to have, in the eyes of many, an impact well beyond its weight, with an array of innovative approaches.[32] Moreover, while there are not many positive aspects of the ECCC experience, the readiness of senior officials to go to both the hinterlands of Cambodia and urban areas to describe their work and the horrors of the Khmer Rouge period had a significant impact well beyond, and more important than, the action in the courtroom.[33]

Over time, however, in my view, Outreach Programmes have become, in some instances (and in transitional justice mechanisms more generally) a kind of formulaic approach or a "check the (justice) box" element. That is, if a court has an Outreach Programme that simply operates as a kind of advanced communication department, it allows court officials to claim the court or tribunal is doing "outreach". However, outreach in and of itself should be innovative and very closely tied to the local affected communities. Outreach activities were difficult enough at the ICTY, which had jurisdiction over a number of adjoining countries, but is much more difficult when, as in the case of the ICC, the geographical areas are strewn across continents.[34] Nonetheless, the question of outreach and communication needs to be addressed more effectively and efficiently at the ICC and other internationalized courts.

The Court also faces strong opposition from three permanent members of the UNSC, i.e., China, Russia, and the United States, none of which have joined the court. With respect to the United States, its position is abundantly clear in the wake of the United States' National Security Adviser's recent denunciation of the ICC (and subsequent withdrawal of the Prosecutor's visa to come to the United Nations for official meetings).[35] This is hardly a good place to be in, particularly for the OTP, which has seen a number of acquittals.[36] Nonetheless, while the Court has hardly achieved what its supporters,

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[32] Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny,* INT'L CTR. FOR TRANSITIONAL JUSTICE 1, 35-37 (Mar. 2005), http://hrlibrary.umn.edu /instree/SCSL/Case-studies-ICTJ.pdf.

[33] *See, generally, Performance and Perception, The Impact of the Extraordinary Chambers in Cambodia*, OPEN SOC'Y JUSTICE INITIATIVE (2016), https://www.justiceinitiative.org/uploads/106d6a5a-c109-4952-a4e8-7097f8e0b452/performance-perception-eccc-20160211.pdf.

[34] *See, generally,* Matias Hellman, *Challenges and Limitations of Outreach: From the ICTY to the ICC*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 251 (2015).

[35] *See, e.g.*, Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack,* THE GUARDIAN (Sept. 10, 2018), https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech (quoting Bolton who said "[The United States] will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead.").

[36] *See* Hellman, *supra* note 34, at 257-59.

like myself, would have wished for, the open question is the long-term effectiveness of the Court.

It is clear the ICC, and particularly the Prosecution, "shot itself in the foot" in its early days and has since been ignored or attacked by powerful states.[37] However, the ICC has moved on from some of these early missteps, and recent steps by the current Prosecutor appear to have put the prosecution on a better course. This includes her, in my view, adroit handling of the peace agreement in Colombia—allowing a transitional justice process to proceed despite stringent criticism from some quarters.[38] The Prosecutor was also successful in obtaining jurisdiction over some of the brutal attacks on the Rohingya in Myanmar. In this case, many Rohingya fled from widespread abuses in Myanmar (a non-state party) to Bangladesh (a state party),[39] and the Court held that the ICC had jurisdiction even though part of the crime occurred in a non-state party. Also, in the al-Mahdi case, the prosecution for destruction of cultural monuments in Libya was seen by a number of commenters as a step in the right direction.[40] Other developments, however, have been more troubling.[41]

These are relatively small steps compared to the Milosevic trial or the conviction of génocidaires at the ICTR, but so were the trials of Tadić in the early days of the ICTY and Duch at the ECCC. While they may not have been the

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[37] *See, e.g.*, Marlise Simons, *For International Criminal Court, Frustration and Missteps in Its First Trial*, N.Y. TIMES (Nov. 21, 2010), https://www.nytimes.com/2010/11/22/world/europe/22court.html.

[38] *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations Between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army*, INT'L CRIMINAL CT. (Sept. 1, 2016), https://www.icc-cpi.int/pages/item.aspx?name=160901-otp-stat-colombia (quoting the Prosecutor who said "[she has] supported Colombia's efforts to bring an end to the decades-long armed conflict in line with its obligations under the Rome Statute since the beginning of the negotiations.").

[39] *See* Patrick Wintour, *Myanmar Rohingya Crisis: ICC Begins Inquiry into Atrocities*, THE GUARDIAN (Sept. 19, 2018), https://www.theguardian.com/world/2018/sep/19/myanmar-rohingya-crisis-icc-begins-investigation-into-atrocities.

[40] *See generally* Mark Kersten, *The al-Mahdi Case is a Breakthrough for the International Criminal Court,* JUSTICE IN CONFLICT (Aug. 25, 2016), https://justiceinconflict.org/2016/08/25/the-al-mahdi-case-is-a-breakthrough-for-the-international-criminal-court/.

[41] After these remarks were delivered, the ICC Pre-trial Chamber held that the OTP's investigation into non-state parties actions (e.g. United States) in Afghanistan was not admissible due to the "interests of justice", essentially not allowing an investigation into US forces' alleged violations in Afghanistan, a state party to the Rome Statute. This decision was seen by many commentators as a capitulation to a major power and an undermining of the ICC's credibility and authority. See, e.g., Alex Whiting, The *ICC'S Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/.

most senior level perpetrators, hopefully, these were steps towards the subsequent prosecutions of leaders at the highest levels but there is cause for skepticism, given some of the factors noted above.

From my perspective, the most disappointing aspect of what might be termed the Rome Statute architecture is the failure by a variety of actors, including key governments, to take complementarity[42] or "positive complementarity"[43] seriously. While the term "complementarity" is not in the Rome Statute, it has evolved as a short hand term to describe the relationship between the ICC and national systems, with the ICC being a complement to state jurisdiction and only coming into play when a state party fails to investigate and prosecute a Rome Statute crime.[44] Complementarity lies at the heart of the Rome Statute and the primary responsibility for investigation and prosecution of Rome Statute crimes rest with the states parties.[45] Thus, the ICC is assigned to be, in effect, a court of last resort. For the Rome Statute to be effective there needs to be a much greater investment in national systems to ensure prosecutions of Rome Statute crimes occur on the national level. While there have been many discussions and lip service paid to complementarity/national prosecutions, only limited technical support and political will has been generated. Therefore, very little has been done in ICC situation countries to investigate and prosecute on the domestic level.[46] At the ICTY, we developed a transition team that worked specifically with the national authorities to provide the expertise and material needed to investigate and prosecute a significant number of perpetrators in the Bosnian State Court and other national courts.[47] There was considerable investment from the European Union , other

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[42] *See* Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, INT'L CTR. FOR TRANSITIONAL JUSTICE 1, 95 (2016), https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf (defining complementarity as "[a] subset of admissibility that provides rules to resolve 'conflicts of jurisdiction,' whether the case should proceed before national courts or the ICC").

[43] *See* Robert Cryer et al., *Complementarity and Other Grounds of Inadmissibility*, *in* AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 154 (2d ed. 2010) (defining "positive complementarity" to mean the Court will encourage "genuine national proceedings where possible").

[44] Rome Statute of the International Criminal Court art. 15, July 17, 1998, 2187 U.N.T.S. 90.

[45] Id.

[46] Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375, 376 (questioning whether "discussions on the said principles are no more than an academic exercise without any tangible results").

[47] Tolbert & Kontić, *supra* note 18.

states and development agencies.[48] I hoped that some effort along the same lines would be attempted in other places where the ICC had jurisdiction.

Unfortunately, there has been limited investment and a lack of political pressure to make this idea of "positive" complementarity work in practice.[49] Given the limited capacity of the ICC, serious material and political support for national prosecutions is necessary if the promise of the Rome Statute is to begin to reach its lofty goals, and for the fight against impunity to be taken seriously. This is the responsibility of states parties to the Rome Statute (and their development agencies in particular), as well as all of us who believe in the fight against impunity. Thus far, that has not happened except in quite limited situations. In this sense, the Rome Statute is falling far short of its goals, and until we find a way to address this issue the fight against impunity will be very limited indeed.

I am not a pessimist: despite the many challenges and setbacks, I believe there is much to fight for! I am inspired by the speakers here and by those in the audience today as well as the many activists and supporters of accountability across the planet. I am particularly heartened by the commitment by the younger generation here today as well as their compatriots across the planet – they are never giving up.

Thank you.

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[48] *See Assessing the Legacy of the ICTY – Background Paper*, U. N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Feb. 2010), http://www.icty.org/en/features/legacy-conferences/international-conference-2010/background-paper.

[49] *See, e.g.*, Sascha Dominik D. Bachmann & Eda L. Nwibo, *Pull and Push'– Implementing the Complementarity Principle of the Rome Statute of the ICC Within the AU: Opportunities and Challenges*, 43 BROOKLYN J. INT'L L. 457, 480-81 (2018).