

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AT 20:

LOOKING BACK AND LOOKING FORWARD



HARVARD Kennedy School
CARR CENTER
for Human Rights Policy

SYMPOSIUM REPORT
OCTOBER 2018

INTRODUCTION AND AGENDA



October 26, 2018

Harvard Kennedy School
Malkin Penthouse
79 JFK Street, Cambridge, MA 02138

The adoption of the Rome Statute 20 years ago was a historic achievement in the global quest for justice and peace. This symposium hosted an eminent cross-section of scholars, international leaders, and current and former ICC officials to discuss progress and roadblocks over the past two decades, as well as the future role of the ICC in ending impunity for genocide, war crimes, crimes against humanity, and crimes of aggression.

WELCOME AND INTRODUCTORY REMARKS

Mathias Risse, Director, Carr Center for Human Rights Policy, Lucius N. Littauer Professor of Philosophy and Public Administration, Harvard Kennedy School

Kathryn Sikkink, Ryan Family Professor of Human Rights Policy, Harvard Kennedy School, Carol K. Pforzheimer Professor at the Radcliffe Institute for Advanced Study, Harvard University

Mathias Risse welcomed participants and speakers. Kathryn Sikkink provided an overall framing of the symposium.

THE INTERNATIONAL CRIMINAL COURT AT 20: DIVERSE PERSPECTIVES

A panel discussion that examined the founding of the ICC, some of its accomplishments, critiques, and roadblocks encountered, as well as its future role both as a Court and as an international organization in pursuing justice around the world.

Kathryn Sikkink, Moderator, Ryan Family Professor of Human Rights Policy, Harvard Kennedy School

Luis Moreno Ocampo, Founding Prosecutor, International Criminal Court and Senior Fellow, Carr

Center for Human Rights Policy, Harvard Kennedy School

Karen Mosoti, Head of the New York Liaison Office of the ICC, Mid-Career Student, Harvard Kennedy School

Beth Simmons, Andrea Mitchell University Professor of Law, Political Science and Business Ethics, University of Pennsylvania, Fellow, Radcliffe Institute for Advanced Study, Harvard University

A CONVERSATION WITH JUDGE KIMBERLY PROST

Kimberly Prost is a Canadian Judge on the International Criminal Court who previously served as Chef du Cabinet to the President of the ICC. Alex Whiting, currently HLS Professor of Practice and formerly a Prosecutions Coordinator at the ICC, interviewed Judge Prost and then moderated a Q&A with the audience.

THE OAS, THE ICC, AND THE CASE OF VENEZUELA

In May 2018, an independent expert panel designated by Luis Almagro, the Secretary General of the Organization of American States (OAS), following a design formulated by Luis Moreno Ocampo, found reasonable grounds for crimes against humanity committed in Venezuela. On 27 September 2018, six members of the OAS (Argentina, Canada, Colombia, Chile, Paraguay, and Peru) referred the situation of Venezuela to the ICC, requesting the Prosecutor to initiate an investigation into crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014. On 28 September, the President of the ICC assigned the situation in Venezuela to Pre-Trial Chamber I. Hear from Luis Almagro, Secretary General of the OAS, on the work of the expert panel, and his work to support the referral.



Rodrigo Diamanti, Introducer, Founder, Un Mundo Sin Mordaza, Former Carr Center Student Fellow

Luis Almagro, Secretary General, Organization of American States (OAS)

CLOSING REMARKS: LOOKING FORWARD

This panel of experts with diverse perspectives on the International Criminal Court looked forward to the next 20 years of the ICC. Panelists addressed the key takeaways, future trajectory and priorities of the International Criminal Court in the future.

Sushma Raman, Moderator, Executive Director, Carr Center for Human Rights Policy, Harvard Kennedy School

Martha Minow, 300th Anniversary Professor, Harvard Law School

Luis Moreno Ocampo, Founding Prosecutor, ICC, Senior Fellow, Carr Center for Human Rights Policy, Harvard Kennedy School

Alpha Sesay, Fellow, Human Rights Program, Harvard Law School, Advocacy Officer with the Open Society Justice Initiative

Welcome and Introductory Remarks

Mathias Risse

Faculty Director, Carr Center

Kathryn Sikkink

Ryan Family Professor of Human Rights Policy



Matthias Risse, Faculty Director of the Carr Center, and Kathryn Sikkink, Ryan Family Professor of Human Rights Policy at Harvard Kennedy School, opened the conference with welcoming remarks. Risse noted that 2018 was a year of anniversaries, not only the 20th anniversary of the Rome Statute but also the 70th anniversary of the Universal Declaration of Human Rights, and of the American Declaration of Rights and Duties of Man, an occasion both for celebration and for critical reflection.

Sikkink also noted the 20th anniversary of the Rome Statute was a moment to reflect and remember, looking backward to take stock with an eye toward moving justice forward in the future. Although



some might say that we take the ICC for granted today, Sikkink explained how at the time it was an unexpected development. There was demand for an international criminal court since the 1920s, but it was given more impetus after the Nuremberg and Tokyo tribunals following WWII when the UN International Law Commission was called upon to develop a statute for such a body. This was initially rejected by the General Assembly, however, and demand languished for over 30 years during the Cold War until it was resurrected in 1989 in a much more promising moment. With the creation of two ad hoc international tribunals for Rwanda in 1993 and the former Yugoslavia in 1994, the process of drafting a statute for an international criminal



court began moving quickly. When the statute was adopted at the Rome Conference in 1998, delegates broke out in standing ovation. This gives us a sense for how euphoric and unexpected a moment this was.

Sikkink explained the ICC is part of a larger system, a larger norm for individual criminal accountability for mass atrocity. At the time the Court was established we also saw an increase in domestic prosecutions for mass atrocities. The Rome Statute, with its doctrine of complementarity, embodies this larger system. We should really then be evaluating the whole Rome system, and not just what happens in The Hague with the cases under investigation. The Rome Statute

transformed what Sikkink referred to as a “one level game” to a “two level game”—at one level, powerful leaders resisted prosecution in their own countries, but with the addition of the international level, the shadow of the ICC had a distinct impact on domestic accountability processes.

Sikkink acknowledged that, like all institutions that embody our highest aspirational norms, the Rome system has fallen short. There has been a lot of critique of the ICC in these first 20 years. Now is the time to put aside the initial euphoria, as well as the disillusionment. In the future, people will look back at the creation of the ICC as an institutional inflection point in history, when something new was created.

Panel Discussion: The International Criminal Court at 20: Diverse Perspectives

Kathryn Sikkink

Moderator, Ryan Family Professor of Human Rights Policy, Harvard Kennedy School

Luis Moreno Ocampo

Founding Prosecutor, International Criminal Court and Senior Fellow, Carr Center for Human Rights Policy, Harvard Kennedy School

Karen Mosoti

Head of the New York Liaison Office of the ICC, Mid-Career Student, Harvard Kennedy School

Beth Simmons

Andrea Mitchell University Professor of Law, Political Science and Business Ethics, University of Pennsylvania, Fellow, Radcliffe Institute for Advanced Study, Harvard University

The first panel, moderated by Sikkink, featured Luis Moreno Ocampo, Founding Prosecutor of the International Criminal Court and Senior Fellow at the Carr Center for Human Rights Policy; Karen Mosoti, head of the New York Liaison Office of the ICC, and Mid-Career MPA student at the Harvard Kennedy School; and Beth Simmons, Andrea Mitchell University Professor of Law, Political Science and Business Ethics at the University of Pennsylvania and a Fellow at the Radcliffe Institute for Advanced Study at Harvard University. The panelists examined the founding of the ICC, some of its accomplishments, critiques, roadblocks encountered, as well as its future role both as a court and as an international organization in pursuing justice around the world.

Karen Mosoti began by reflecting on her personal experience of working at the ICC in New York and used the case of Kenya, her home country, to examine the currently contentious relationship between African countries and the ICC. Mosoti began working as a legal advisor to Kenya's permanent mission in New York in 2003, when

the ICC had just been established, and Kenya was facing intense lobbying efforts from European and Latin American countries to ratify the Rome Statute. Kenya had just elected a new government in 2002, and ratifying the Rome Statute was eventually welcomed as a move that would align the country with international standards. Kenya was a very active member after ratifying in 2005, but support for the Court changed around 2007 in the wake of a disputed national election that ended in violence. A peace agreement established a commission

“The impact of the ICC is not just what happens in court, but also its deterrence impact.”



to investigate the post-election violence. This commission led to the referral of the case of Kenya to the ICC to investigate potential crimes amid concerns among parliamentarians that Kenyan courts could not be impartial.

As the ICC investigation process moved forward and senior government officials were implicated, however, the Kenyan government became less supportive of the ICC process. When a new government was elected in 2013, Kenya began what Mosoti referred to as “open war” against the ICC, mobilizing other states in the African Union to support their efforts to try to stop proceedings of the Kenyan case and calling for ICC member states to amend Article 27 of the Rome Statute to allow immunity for sitting heads of state. When these efforts failed, the African Union encouraged its members to withdraw from the Rome Statute; in 2016, Burundi, South Africa, and Gambia signaled their intention to withdraw, but only Burundi carried through, becoming the first country to leave the ICC. Both South Africa and Gambia reversed their decisions. However, Mosoti noted that after the ICC

dismissed the case and dropped charges against the two Kenyan leaders in the same year, criticism of the ICC in Kenya began to decrease noticeably.

On Mosoti’s view, the case of Kenya illustrates the journey of African countries from being actively involved in the evolution of the Rome Statute in 1998 to openly and publicly criticizing the ICC today. She rejected the view that African countries are resisting the ICC across the board or in principle, however. Instead, there is a pattern that when senior leaders are being indicted, like in Kenya and then in Sudan, support for the ICC among African governments decreases, and when charges are dropped support rises again. Despite threatening to withdraw, African countries are still generally active and cooperative members of the ICC. While leaders may oppose the ICC when they feel threatened by it, there is generally strong support among African people and particularly from victims.

Luis Moreno Ocampo followed Mosoti’s remarks highlighting the interaction of the Rome Statute and the ‘War on Terror.’ He began by exploring the



idea of the ICC as an institutional innovation, and how this contributes to some of the controversy around the Court. The ICC is a disruptive innovation including individual criminal responsibility in an international legal system that regulates relations between sovereign national states as the UN system. It is difficult for political leaders to adjust to the new legal limits enforced by an independent Court. With the establishment of the ICC, for the first time international justice decisions about atrocity crimes were in the hands of international prosecutors and judges and no longer decided in the political realm within or among states. The ICC is also an innovation because it is a new legal system that is actually enforcing and implementing international justice, not just talking about principles.

Ocampo argued that today there are two innovations to manage violence crossing borders: the Rome Statute (i.e., an international criminal justice system), or the War on Terror. States have traditionally defined perpetrators of violence as criminals (at home), or enemy combatants (abroad). However, this approach does not work for all cases

“The ICC is a disruptive innovation including individual criminal responsibility in an international legal system that regulates relations between sovereign national states as the UN system.”

of terrorism and cross-border violence. For example, the US characterizes terrorists in Iraq as enemy combatants, but for Iraqis these people could be considered criminals. Therefore, there is a “fierce urgency” to get people to understand the innovation in institutional technology that the ICC represents and its ability to help nation states manage complex issues like international terrorism. The ICC is not the only solution, but it is a powerful one.

The impact of the ICC is not just what happens in court, but also its deterrence impact. Ocampo gave the example of Sudan: President Obama used the threat of ICC prosecution to successfully make a deal with Sudanese President al-Bashir for the independence of South Sudan, and for cooperation in the war on terror. Today, there is still violence in Darfur. This illustrates that what happens with the ICC is not just about the Court itself, but also how national leaders manage the implementation of the Court decisions. Justice demands are very powerful, but they do not always result in justice delivered—that depends on the political leadership. For Ocampo, this is the main issue that needs to be discussed at the political science level.

Ocampo finished by calling for continued institutional innovation. The ICC is a part of the Rome Statute system, but also exists within the system of the UN Security Council. It may be the case that neither the nation state based UN system nor the Rome Statute is the perfect system to address terrorism. We can invent something new, perhaps connecting these two systems, to realize a world in which massive atrocities can be stopped.

Beth Simmons gave a presentation focused on the findings and frontiers of social science research on the ICC. This research can be divided into three clusters: deep dives into specific cases, research on the general consequences of the ICC (where Simmons places her own work), and research placing the ICC in a broader system of law, norms, and institutions. She began by presenting data on the occurrence of global violence against civilians over time to show that the ICC was established after a period of terrible violence against civilians, leading to a belief in the need for a system to address that violence. Expectations for the ICC were very high at the beginning, which may account for some of



the disillusionment about the ICC today. Simmons noted that it was important to keep in mind that this is not just African disillusionment; there is also disillusionment coming out of populism in Western states.

“With the establishment of the ICC, for the first time international justice decisions about atrocity crimes were in the hands of international prosecutors and judges and no longer decided in the political realm within or among states.”



Some of the consequences of the ICC Simmons has examined in her research are deterrence, institutional and legal development, broader normative support, and satisfying justice. She has focused in particular on deterrence, which is a function of the likelihood and severity of punishment. One hypothesis is that the ICC jurisdiction deters because it raises the likelihood of punishment compared to what existed in its absence (e.g. immunity, highly biased justice processes, or strong modes of domestic justice). Simmons has found evidence that expansion of the ICC jurisdiction leads to the reduction of intentional violence against civilians. Specifically, joining the ICC and adopting domestic legislation consistent with the ICC reduces state attacks on civilians, but not rebel attacks. When the ICC starts investigations, attacks on civilians by both the state and by rebels fall. Simmons noted this illustrates the importance of preliminary investigation, which might be used more intentionally as a tool to influence conflicts. Using an example of the conflict against the Lord's Resistance Army rebel group in central Africa, Simmons illustrated that the ICC does not prevent violence—in the past two decades, violence in that conflict has increased—but it has changed the

nature of the violence: the proportion of civilians being intentionally targeted has decreased. On the topic of institutional and legal development, there is data that since the establishment of the ICC the number of states that have made ICC-consistent crime statute reforms has increased dramatically.

Simmons described several areas where further research is needed to measure attitudes toward and the legitimacy of the ICC. We may be able to say that the ICC changes norms. There is evidence that the language rebel groups use in their public statements and documents have become much more rights-related and refer more to humanitarian issues since the establishment of the ICC than previously, for example. However, we have little to no evidence on how or whether the ICC satisfies justice demands on the ground. Another area for further research is on the influence of Western populism and narratives of resistance to the ICC among elites. Finally, Simmons argued that the ICC needs to work on more effective outreach and work hard on the issue of complementarity, acknowledging that the ICC is not the only answer to legal justice, which may help to counter narratives of resistance in Africa and elsewhere.

A Conversation with Judge Kimberly Prost

Judge Kimberly Prost

Canadian Judge, International Criminal Court

Alex Whiting

Moderator, Professor of Practice, Harvard Law School



During the lunch hour, Harvard Law School Professor of Practice Alex Whiting moderated a conversation with Judge Kimberly Prost, a Canadian Judge on the International Criminal Court who previously served as Chef du Cabinet to the President of the ICC.

Judge Prost described the moment when the ICC was created: it was an incredibly emotional time of

great optimism and hope. The Rome negotiations had been an enormous challenge, but there was a real underlying commitment on the part of all states towards establishing the Court. Negotiators didn't think they would get to 60 ratifying states for decades, so no one wanted to think about reigning in expectations at that point.



Prost discussed the relationship between outside actors and the ICC. The Court is an institution that is reliant on the power of states and their sovereignty, which can create problems. For example, the Court continues to struggle with the issue of security cooperation. We have not seen the level of cooperation on extradition and on calling out of bad actors—for example, states calling each other out for corruption—than we expected to see. Prost noted that UNSC referrals of cases to the Court continue to be powerful legitimizers of the system, but the ICC needs more commitment from the UNSC both in terms of funding and helping with extradition of individuals with warrants so that cases are not just referred and then abandoned. Prost argued that the United States' refusal to ratify the Rome Statute—despite many provisions in the statute that were meant to entice the U.S.—continues to be a problem for the international reputation and support for the court.

Asked about how she addresses allegations that the Court oversteps the sovereignty of member states,

Prost retorted that the whole point of the Court is that it is a court of last resort—if states don't wish to be investigated, they should do the investigations themselves. She also rejected allegations that the Court has an African bias, noting that the Court has an African President and an African Head prosecutor. Although the Court's work has been focused on Africa, there is vast regional diversity in upcoming cases.

Finally, Prost discussed some lessons learned by the ICC as an institution that we should consider moving forward. The Court has led to tremendous innovations in international jurisprudence, fact-finding, and investigations. We have learned a lot from procedural reform, and case construction. Another lesson learned is that what was created in Rome was not a stand-alone court, but a system; a system to encourage and motivate states to do what they are supposed to do, which is investigate at the

“There also needs to be an international effort by the UN, regions, states, NGOs, and the legal community to build up national capacity, so that when crimes against humanity occur the ICC is the court of last resort asked to consider the cases.”



domestic level. Prost observed the international community seems to have lost energy for capacity building of domestic institutions to hold leaders accountable for mass atrocity. The ICC can do some of this but there also needs to be an international effort by the UN, regions, states, NGOs, and the legal community to build up national capacity, so that when crimes against humanity occur the ICC is the court of last resort asked to consider the cases.

Prost addressed an audience question about the International Impartial and Independent Mechanism for Syria and their implications for the ICC. Prost argued that these mechanisms are a sign of success for the Court, showing that the General Assembly will not accept crimes against humanity going unchecked, even in cases when the ICC does not have jurisdiction. New mechanisms like the IIIM are positive developments that reinforce the message

of the ICC's mandate to end impunity, and should be encouraged.

Prost also addressed a question about the work of the Trust Fund for Victims and its relationship to the Court. She explained that the trust has a mandate to independently assist victims through projects and programming with affected communities, in particular to fill the gap that often occurs between when the Court goes into a country to make arrests and when a trial begins. There are normative questions about how the Court should remain separate from the Trust Fund politically, however the Trust Fund is incredibly important.

Panel Discussion: The OAS, The ICC, and the Case of Venezuela

Luis Almagro

Secretary General of the Organization of American States

Rodrigo Diamanti

Introducer, Founder, Un Mundo Sin Mordaza, Former Carr Center Student Fellow

Juan Manuel Santos

Guest Speaker, Former President of Colombia



The next discussion featured Luis Almagro, Secretary General of the Organization of American States (OAS) and Rodrigo Diamanti, founder of the human rights NGO Un Mundo Sin Mordaza and a former Carr Center Student Fellow. The conversation focused on the referral of Venezuela to the ICC in September 2018. Former Colombian President Juan Manuel Santos then joined the panel and discussed

the role of the ICC in the Colombian peace process and what lessons could be drawn for the Venezuelan case.

In May 2018, an expert panel designated by Almagro—following a design formulated by Luis Moreno Ocampo—found reasonable grounds that the Maduro dictatorship in Venezuela has committed

crimes against humanity. On September 28, six members of the OAS (Argentina, Canada, Colombia, Chile, Paraguay, and Peru) referred the situation of Venezuela to the ICC, requesting the Prosecutor to initiate an investigation into crimes against humanity allegedly committed in the territory of Venezuela since February 12, 2014. The President of the ICC assigned the situation in Venezuela to Pre-Trial Chamber I.

Rodrigo Diamanti spoke about how, as a student at the Kennedy School in 2016, he wrote a paper for a course on the ICC and mass atrocities taught by Kathryn Sikkink and Luis Moreno Ocampo arguing that crimes against humanity were occurring in Venezuela, and identifying Luis Almagro as a potential ally for a campaign to endorse the idea that the situation be referred to the ICC. A year later, as protests and crackdowns in Venezuela intensified, Ocampo reached out to Diamanti and suggested the two meet with Almagro in DC to put the ideas from his paper into action. Ocampo recommended that Almagro establish a panel of experts who could help to support a referral by establishing what was happening in Venezuela. Diamanti talked about the impact of the expert panel process in putting Venezuela on the international agenda, and the significance of having Almagro be the first international figure of authority speaking about what was happening in Venezuela, and of victims' stories being heard on the international stage for the first time.

Luis Almagro then spoke about the work of the expert panel and OAS's work to support the referral of the situation of Venezuela to the ICC. He began by delivering a critique of the ICC and its failure to act decisively earlier in the face of compelling evidence of crimes against humanity in Venezuela. In his view, the reality is that the ICC does not mean much yet to the victims of the Maduro dictatorship. To change this reality, so that the ICC can symbolize the possibility of some measure of justice to the victims, we it must act in fulfilment of its mandate without being constrained by political pressure. Almagro argued that the ICC—like some other elitist international institutions which were established to protect human rights—has become detached from

“ International leaders and the international human rights community need to call on the ICC and other international institutions to uphold their duties and take a faster, more proactive approach that takes a humanitarian rather than political point of view, focusing on protecting victims.”

the suffering of victims and attached to politics, operating in a “bureaucratic web”.

Almagro criticized international leaders who continue to pursue dialogue with the Maduro regime because this enables the regime to hold off criticism while continuing to violate rights and delays justice to victims. Victims of the regime have no means to seek justice domestically, so in referring the case of Venezuela to the ICC, the OAS has been working to ensure that the ICC is the external force



that is needed to help move towards justice in Venezuela. While several other international human rights institutions and mechanisms—including the Inter-American Court on Human Rights, the UN Working Group on Arbitrary Detention, and the former UN High Commissioner for Human Rights—have taken action in the face of crimes against humanity in Venezuela, the ICC has yet to do so. If the ICC were using humanitarian criteria to make decisions—as it should—then, in the face of evidence of the extreme abuses committed by the Maduro regime, the ICC would have at least announced the start of the investigation by now. International leaders and the international human rights community need to call on the ICC and other international institutions to uphold their duties and take a faster, more proactive approach that takes a humanitarian rather than political point of view, focusing on protecting victims.

Almagro then described the process and findings of the expert panel. The panel's report, which was

formally submitted to the ICC as evidence for the referral, was based on source material provided by witnesses, including oral and written testimonials from victims and family members of victims of the Maduro regime. The facts that establish reasonable grounds of crimes against humanity in Venezuela include that there have been 131 people murdered between 2014-2017 where the perpetrator has been identified as a member of the state security forces; at least 1200 people have been arbitrarily detained or imprisoned and hundreds have been tortured; and there have been 8292 unlawful executions since 2013.

In the question and answer session, Almagro answered an audience question about what would happen if the ICC does not open an investigation. In that case, he would advocate that Venezuelan victims rely on principles of universal jurisdiction and pursue justice in courts in the country where they reside (e.g. the US, Argentina, Brazil). Answering a question about the urgency of addressing the



ongoing crimes against humanity in Venezuela in light of the slow, bureaucratic international justice system, Almagro argued that the best situation would be to make the ICC unnecessary by ending dictatorial rule.

President Juan Manuel Santos was asked to join the panel and gave brief remarks about the case of his own country, Colombia, and how the ICC played a role in the peace process. The Colombian peace process is considered a very unique peace agreement that went much further to put the victims at the center of the solution, and to cement international law including the Rome Statute into the process.

It is important to remember, Santos noted, that the reason the Rome Statute was negotiated was to facilitate the resolution of our conflicts, without impunity. The ICC must contribute and play a role so that there is no impunity, but not prevent peaceful resolution.

With this approach, the ICC played a very constructive role in the peace process that was negotiated in practical terms. The specter of the ICC was a powerful negotiation tool against FARC and the military, who knew that if they did not agree to cooperate in the peace process the ICC would come in and they would be likely to face harsher punishment.

When considering the role of the ICC in Venezuela, advocates for victims should be asking how the ICC can be used to find a solution to the Venezuelan crisis, like in Colombia, focusing first on stopping the perpetration of crimes against humanity and then on how victims' rights can be repaired and justice restored.

Closing Remarks: Looking Forward

Sushma Raman

Executive Director, Carr Center for Human Rights Policy

Martha Minow

300th Anniversary Professor, Harvard Law School

Luis Moreno Ocampo

Founding Prosecutor, ICC, Senior Fellow, Carr Center for Human Rights Policy

Alpha Sesay

Fellow, Human Rights Program, Harvard Law School, Advocacy Officer with Open Society Justice Initiative



The closing panel, moderated by Carr Center Executive Director Sushma Raman, included Martha Minow, professor at Harvard Law School; Alpha Sesay, Human Rights Program Fellow at Harvard Law School and Advocacy Officer with the Open Society Justice Initiative; and Luis Moreno Ocampo. The panelists addressed the key takeaways, future

trajectory and priorities of the International Criminal Court looking forward to the next 20 years.

Luis Moreno Ocampo spoke about the importance of institutions and of leadership. For him, the significance of the Rome Statute came from the creation of a new institution; unlike previous



international Ad hoc tribunals at Nuremberg, Yugoslavia and Rwanda that were agreements between states, the ICC is an independent institution for which people are employed and are working to actually implement international criminal law.

He also made the point that leadership matters deeply both in the perpetration and prosecution of crimes. For example, Maduro is a very smart leader, who divides the opposition, has appointed a special ambassador at The Hague whose job it is to work with the ICC, and threatens and manipulates Venezuelan judges to incarcerate the opposition leaders and the dissidents in ways that often escape scrutiny because they are less overt methods. On the other hand, Luis Almagro has used his leadership effectively to fight against Maduro. Recognizing that it would not be possible to get the votes within the OAS to take action against Venezuela within that institution, Almagro pursued the panel of experts

route, presenting sufficient evidence to OAS states to get the support needed to refer the situation to the ICC (just one state vote was needed, although he got six). This approach illustrates the importance not only of institutions, but of connecting institutions together for effective action.

Turning to the theme of African resistance to the ICC, Ocampo argued that what we need in Africa is not more courts, but more African leadership to protect African people; it is not a court problem but a political one. He believes we need to give African leaders more space, for example to replicate the OAS initiative for Venezuela, such as by giving regional organizations like the African Union the power to make referrals to the ICC.

Alpha Sesay also spoke about the relationship between the ICC and the African Union. The African states were strong supporters of the ICC in Rome



when the statute was being negotiated. Not only was the first country to ratify the Rome Statute an African state (Senegal), but between 2004–2007 part of the African Union’s strategic plan was the universal ratification of the Rome Statute by African states. Sesay noted that we not only need to remember this history but also need to distinguish the relationship the ICC has had with the African Union from the relationship it has with individual African member states, which is not the same. Even when relations with the African Union have been poor, the ICC has continued to have cooperative relationships with certain African states and with victims and African civil society.

Sesay discussed opportunities he sees for the ICC to more effectively engage with the African continent going forward. There are both legal issues—a lack of clarity on certain aspects of the Rome Statute among some African Union states—and political ones. On the political side, the African Union has proposed reform of the process for reviewing claims of crimes against humanity, for example using a

similar process used by the UN Security Council when it hears complaints by NGOs, or if there is not agreement about the need for a referral to the ICC among member states to move the discussion of those atrocity crimes to a democratic platform that would enable a vote. Sesay also noted there have been some signs of improvement in relations between Africa and the ICC. At the Jan 2017 summit,

“There are ways, in spite of resource limitations, that the ICC itself by being ambitious can shame others, which is an important role.”

the African Union adopted a position towards the ICC called the “withdraw strategy,” however for the first time there was no mention of noncooperation in the position. For the very first time, several member states also officially registered their opposition to the African Union’s position towards the ICC. Sesay echoed Ocampo’s point that allowing the AU to act like the OAS has in organizing countries to refer the case of Venezuela to the ICC is another opportunity for more effective engagement. Finally, he noted that it is important to focus on the issues that the ICC and the African Union are aligned on, rather than just those it disagrees on.

Martha Minow began with a quote, “a civilization advances when what was once thought of as a misfortune becomes thought of as an injustice”, that to her describes the project of the ICC. Minow agreed with Ocampo’s points about the importance of institution-building and leadership, and specifically that who the leaders are when institutions are founded makes a difference. Empirical work like what Kathryn Sikkink has done is also critical. In medicine, research is what has advanced the field; we also need to move to evidence-based practices in institution building.

Minow described several accomplishments of the ICC that she has seen through her recent work focusing on child soldiers. The ICC has been critical in defining and implementing rights for children in this area. Until someone has actually been charged with a crime, the idea that recruiting child soldiers is a crime is just an idea; the punishment of adults for recruiting and using minors in crimes against humanity including through the Lubanga trial was therefore a landmark accomplishment of the ICC. Another accomplishment has been the ICC’s not pursuing minors. There was ambiguity in international law around whether children could be tried for atrocities, but the ICC has made prosecutorial decisions that has clarified this. Minow thinks the US could learn a lot from the treatment of soldiers that has been happening in the shadow of the ICC—ways to put blame on adults and work on reintegrating children into society—for the way that the US handles juvenile justice. Finally, she argued that the innovation the ICC has had on complementarity is perhaps its biggest contribution, conceptually, both to law itself



and to institution-building. It is important that the principle of complementarity has established that it is not desirable for an international institution to take over the justice system, and that the Court has invested in capacity building to strengthen domestic institutions. In her view, complementarity could do more and be made more meaningful by also recognizing other forms of justice—such as truth commissions and other transitional justice mechanisms—as legitimate and not just upholding a single model.

Referring to previous discussions about the limitations of the ICC, Minow agreed that by definition, the ICC’s capacity is limited. However, some ambition within those limits is useful to help push boundaries and the content of the law, for example by taking on cases that may not be as solid as possible. There are ways, in spite of resource limitations, that the ICC itself by being ambitious can shame others, which is an important role. Minow noted that the ICC is about both law and politics. It is about creating a context in which political discussions can be different because of the possibility of law taking a stance. Sometimes that makes for an uncomfortable situation for prosecutors, who have to consider how to encourage the best uses of a legal institution that is frankly beyond the law. In conclusion, she noted that moving from the view of atrocities as misfortune to atrocities as injustice takes institution-building, leadership, norm-building, and empirical study, as well as cross-disciplinary meetings like this conference.

CONCLUSION



The conference illuminated a series of important issues for evaluating the impact of the ICC as we move forward. First, international tribunals do not work by themselves, or in isolation. Thus, the debate about the efficacy of the International Criminal Court, should include an evaluation of the work of the entire Rome Statute system.

As Beth A. Simmons and Hyeran Jo have explained, prosecutorial deterrence is a direct consequence of legal punishment: it holds when potential perpetrators reduce or avoid law-breaking for fear of prosecution and official punishment. Social deterrence is a consequence of the broader social milieu in which actors operate: it occurs when potential perpetrators calculate the informal consequences of law-breaking. A judicial institution is at its most powerful when the risk of these consequences reinforce one another, which happens when social actors threaten extra-legal costs for non-compliance with legal authority. Recognizing this interaction as a possibility, we argue that the ICC's influence may go well beyond the common assertion that the institution has no "teeth." There are multiple mechanisms – legal and social, international and domestic – associated with the authority of the ICC that can potentially deter violence in civil wars.

Secondly, the effectiveness of international criminal justice depends on the continued domestic and

transnational legal and political mobilization to continue pressure for accountability. This is clearly illustrated by the case of the Venezuelan referral, as discussed by Luis Almagro.

Finally, the impact of the ICC depends on its interaction with domestic governments and judicial institutions in transitional and war torn societies. As Kathryn Sikkink has argued in *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, what is emerging is not a new, independent and supranational Court standing by itself. Rather, we see the emergence of a decentralized but interactive global system of criminal accountability in which international tribunals and international criminal law interacts with domestic institutions and national and transnational civil society groups to help deter future crimes.

Moving forward, the Carr Center will continue to research the functioning of the Rome Statute and of the International Criminal Court, and work to examine the central question of how we can make real the promise of ending impunity for genocide, war crimes, crimes of aggression, and crimes against humanity.

More information at:

www.carrcenter.hks.harvard.edu

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AT 20:

LOOKING BACK AND LOOKING FORWARD



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SYMPOSIUM REPORT
OCTOBER 2018