

Roundtable Discussion

**Approaching the Review Conference in Kampala:
The International Criminal Court – Achievements and
challenges**

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Informal summary

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Eight years after the establishment of the ICC, what have the Court and the Assembly of States Parties achieved and where have they fallen short of their designated goals?

There has been significant progress by the ICC in the last six, almost seven years of operations. It is clear just from basic facts about the Court: four investigations, a request to open a fifth investigation, 13 arrest warrants, one individual that came voluntarily to The Hague to present himself to answer charges, increasing numbers of victims participating, all three different trigger mechanisms having been used (state referrals, a Security Council referral and now in the Kenyan case an article 15 request).

Something less tangible is the observation that the ICC has become an element of the international order . In addition to what Mr.Schneider has listed, victim communities from all around the world are now petitioning the ICC to bring them justice. Many of these petitions fall completely outside of the ICC's jurisdiction, but it shows that the ICC has helped to give voice to the expectations of victims for justice.

But there have been also some serious mistakes and missed opportunities. One of the most important missed opportunities is the need to have the greatest impact possible in affected communities. The first constituency for the ICC is the community where the crimes have taken place and the ICC

so far has been slow to take steps that would maximise its impact on those communities. One reason is the Court's slow start to conduct activities in those communities to explain what is happening. The Hague is very far away from all of the situations that the Court is currently investigating. Judicial proceedings in The Hague may be fascinating and interesting to international lawyers, but for the average person anywhere in the world it requires some explanation. It requires some concerted effort on the part of the court to go into these communities and explain what is happening and to bridge that gap from The Hague. "Outreach" activities by the ICC have expanded and made progress in the last couple of years. There is still room for further improvement, and the need for states parties to commit additional resources to this essential aspect of the court's effective operation.

On the decisions the Prosecutor has made in terms of what charges to bring and who to prosecute: Those decisions have not always had the necessary resonance in the affected communities. The charges brought against Thomas Lubanga in the first trial at the ICC are very serious charges of child soldiering, but people in those communities where Lubanga's militia was active know that many other crimes were committed. While it is important to highlight child soldiering as a serious crime, the ICC's proceedings failed to connect with victims of other crimes.

Similarly in Northern Uganda where many people are asking: There were two sides of the conflict – why have there only been charges brought against one side of the conflict, the Lord's Resistance Army? The same question is asked in Eastern Congo; why have there been no charges against government officials.

There may very well be entirely legitimate reasons why there have not been charges brought either against Ugandan or Congolese government officials, but the Prosecutors Office has not done what it needs to do to explain that and to make it clear that it is acting impartially.

As a result, questions have been raised about the legitimacy of the ICCs interventions.

On the role of States: Assessing the performance of the Court, it is important to bear in mind how important the States Parties and the entire international community are. The Court needs the States Parties, it needs the international community to carry out arrests, to relocate its witnesses. While cooperation has been forthcoming from many different corners, there is a lot of room for improvement. There are very few agreements that States have signed with the ICC, there is not enough implementation of the Rome Statute in domestic law. This is the big opportunity of the Review Conference: The Review Conference provides a platform for States to re-

commit to the ICC, to re-invigorate that commitment and to show that the commitment to the global fight against impunity remains as strong, even stronger, than at the time of the Rome Conference.

Positive complementarity

Complementarity is about where the duty to prosecute lies. But positive complementarity is addressed to this practical reality that prosecutions at the national level are very difficult. There might be a lack of appropriate national legislation, or a lack of expertise within the national judicial profession. The system may have been weakened by conflict and sometimes crimes are committed by people in positions of power that have an interest in preventing national prosecutions from going forward. So the idea of positive complementarity has evolved as a way of reflecting on how can we encourage and support national prosecutions to take place.

The ICC has limited capacity and is meant to be a Court of last resort. Often you observe an impunity gap between those who are prosecuted by the ICC and many others who participated at a lower level in the same crimes. To address that impunity gap, you need to strengthen the ability of national jurisdictions to bring their own prosecutions.

There are at least two parts to positive complementarity: One part is what the Court itself can do. This idea goes back to some of the first statements of the Prosecutor coming in in 2003, that the Court itself through its own activities can help to encourage national prosecutions. This does not require additional resources on the part of the Court; it is the natural outgrowth of the fact that the Court staff is interacting on a daily basis with national authorities and so have a sense of what the needs and challenges are. So by doing their work, Court officials can, for example, help to transfer knowledge and share expertise, so as to strengthen the system from inside out.

There is another part of positive complementarity which is more recent and has come about in connection with the Review Conference and that is what States can do. How can States assist each other to strengthen national capacity to prosecute serious international crimes? There are many ways in which this can be accomplished, everything from help with legislation to training, to generating the political will and the pressure needed to have these prosecutions take place. But the duty remains with the States; it can not be made contingent on receiving assistance. On the other hand, reality has shown that you need greater assistance, international support and increased mainstreaming of the idea of encouraging prosecutions of serious

international crimes in existing rule of law programmes. A surprisingly small number of rule of law programmes have a focus on prosecution of serious international crimes.

This commitment amongst States Parties in Kampala to positive complementarity will help to mainstream support for the ICC across administrations and across development agencies. The ICC can play a role here too by pointing donor states toward areas most in need of assistance particularly in country situations under ICC investigation.

Cooperation of African States

Today the situation looks better than in July 2009 when the African Union decided not to cooperate in the ICC's case against al-Bashir. Civil society in Africa was quick to condemn that decision and also some African States Parties like South Africa, Botswana and Uganda disapproved the July decision. The most recent African Union summit in February 2010 does not restate that decision.

In the November Assembly of States Parties session the decision was taken to establish an office of the ICC in Addis Ababa and the drive to establish that office came out of the Africa regional grouping within the ICC.

There is certainly still a very strong opposition from some within the African Union particularly to the arrest warrant against President Bashir and there are also many legitimate concerns of African States Parties and Non-States Parties that need to be addressed. One of these is the unevenness of the landscape on which the ICC operates. At this point in time many powerful countries and those who ally themselves with powerful countries remain outside of the reach of the ICC. This unevenness is something that we all have to grapple with; blame does not lie with the ICC. Rather we need to continue to press for universal ratification of the Rome Statute. In the meantime, the answer is not to deny justice to some who have access to it now through the ICC just because it is not available to all, but rather to work to make sure that it is available to all.

The Review Conference is an opportunity for African States Parties to provide a very effective rebuttal to the decision of last July and to some of the rhetoric that comes out of the African Union by making a strong show in Kampala; by attending at a very high level and by reclaiming the driving force that the African States have been in the ICC from its very beginning.