Roundtable Discussion

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

March 12, 2010

Embassy of the Federal Republic of Germany, Madrid.

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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?

The ICC has experienced multiple successes and shortcomings, most of which can be used as learning experiences for the future. The Court's shortcomings are characterized by a lack of universality, cooperation and efficiency. In terms of a dearth of universality, there are currently 110 States Parties and yet important and populous States like China, India, Russia and the US are still missing. Less than half the world's population is protected through the Rome Statute.

The next shortcoming is the issue of cooperation. While a national court has its own instruments of enforcement (for example, the police may arrest people) the ICC does not have similar means of enforcement and must rely on cooperation by States. To this day, the Court has issued 12 arrest warrants and only four of them have been executed. To increase efficiency, the ICC has to learn what States can and cannot do, while States Parties need to pass the message to their national administrations about what cooperation really means.

The final shortcoming has to do with the efficiency of the Court itself. The procedures are far too long as they are now. For example, the

Lubanga trial started more than one year ago and only the prosecutorial part has been completed. The case of Mr.Bemba was once again postponed until July. The accused remain in detention for long periods of time, causing human rights concerns to arise. Although there have been these shortcomings, the ICC is still in its initial stages and continues to set precedents with each new action. It is an ongoing process and with time there will be a great deal of routine, which will help to streamline the procedures of the ICC.

The Court's successes are characterized by its mere existence as an established, international legal force, recognized by a growing number of nations. The Courts sheer existence should be considered an achievement on the international stage because there is finally an institution that sends a strong signal that there is no impunity for the most serious crimes and that accountability cannot be overestimated.

The ICC has already managed to establish itself as an element of the international order. First, in 2005 the Security Council referred the Darfur case to the ICC, demonstrating international willingness to use an additional instrument to maintain peace and security. Next, the 2008 conflict between Georgia and Russia was brought to the ICC. Immediately the two sides remembered the Court and supplied evidence and materials to the ICC. Georgia and Russia were mindful of the new institution they have to take into consideration. Finally, the Goldstone Report, a fact-finding mission of the UN with regard to the military operations in the Gaza strip more than a year ago, has as one of its recommendations to the Security Council the possibility to refer the case to the ICC. This shows that the ICC is now a well-established and important factor in international relations.

The question remains, however, if the ICC already has a deterring factor or deterring impact for crime prevention. This is something that cannot be empirically proved or established, but according to grassroots groups and the NGO community, some warlords have started to think about this fact and have modified their behaviour. Some dictators may also realize that there is now a real instrument for accountability for serious crimes. This can slowly but surely have a very important impact on policy making in sensitive areas, and this is basically what the entire Rome Statute is about—decreasing the number of crimes overall.

Finally, on the issue of victims: The Spanish State Secretary emphasized this point more than once in his opening remarks. Victims now receive a voice. They are part of a legal procedure, they are taken care of and their stories are told and the injustice against them is named. This is a very important point, which is clearly an achievement of the ICC.

In terms of politization of the ICC, the fact that there is an indictment against President Bashir is already considered a political interference. That is something the Court certainly has to live with. Yet within the 110 pages of the arrest warrant against Bashir, there is not a single political consideration. The Court first and foremost wants to make sure that there is no political consideration in its activities and that its activities are based purely on judicial considerations. The ICC knows precisely that if it becomes a political court, it is dead.

Positive Complementarity

This term remains relatively undefined. Phakiso Mochochoko mentioned the principle of complementarity as a well-established principle of the Rome Statute, but positive complementarity is not. The Office of the Prosecutor used the term to mean a "positive approach to complementarity"; he would encourage national proceedings but without involving his office directly in capacity building or financial or technical assistance. In other publications, positive complementarity means precisely that: building capacity and giving technical assistance. It is important to create a clear definition for the future and universal usage of this term.

It is also important to make sure that the Court can focus on its core judicial functions. To entrust the Court with further functions like brokering or mediating would create an additional burden. It should be established that national proceedings are within the responsibility of States and States must not claim a shared responsibility with the Court. States must not have recourse to that excuse.

Peace and Justice

The UN Secretary General has said there must be no peace without justice. Peace and justice go hand in hand. There is no sustainable peace without justice because you cannot rebuild a post-conflict society if you refuse accountability and if you leave the victims alone with the injustice they have suffered.

His Excellency the Ambassador of Sudan has said that the African Union and the Arab League asked for postponement of the indictment of President Bashir because there were peace negotiations under way. Who should

make the decision to defer a legal procedure? It cannot be the Court because it should not act on the grounds of political considerations. The Court has to fulfil a judicial mandate. The only institution that could make this decision is the Security Council, which has triggered the jurisdiction for the situation in Darfur. Those who advocate for action of the SC should not forget what the SC has already decided. One of the decisions was to oblige Sudan to cooperate fully with the Court. So if asked for an SC action, the Security Council recommendations should not be followed in a selective way.

Who determines if a prosecution hinders peace or if it contributes to peace? Many people who claim that the Court is obstructing peace are those who have a problem with justice. At least for the most serious crimes of concern to the international community there must be no impunity. Prosecution has to take place. Peace is threatened by crimes, not by prosecution.

Crimes of aggression

There have been numerous aggressions since the Second World War. Sixty years ago the Nuremberg trial created a law saying that waging an aggressive war is a punishable crime. Where is that law today? Isn't it time to fulfil the promise of the Rome Statute, which already incorporates the crime of aggression? The only thing missing now is the clear definition.

The Working Group debated on the definition of the crime of aggression for six years, and there is finally some consensus amongst States Parties about this matter. There are three hurdles before the Court arrives at the conclusion that somebody has committed a crime of aggression. In terms of the threshold, an act of aggression must be a manifest violation of the Charter with regard to character, gravity and scale.

The situation in Kosovo serves as a good example of the necessary three-pronged violation of the Charter. The first point of examination is the character of the intervention. When Germany participated in that operation, it was not to disturb the peaceful relation between Germany and Serbia. Apparently at that time there was a human catastrophe, which forced the neighbouring states into action. By the character of this intervention it is clear to say that this was not a crime of aggression.

On the problem to put the Court in an awkward position because it has to decide between two sides: With all respect, that is what any court has to do. It has to decide. The same decision on whether an act of aggression has

occurred could be made by the International Court of Justice. That is another court that would have the authority to make such a determination.

Finally, the international community, in particular the States Parties, have invested tremendous energy into the issue of the crime of aggression. It seems as if they are almost there. The international community has to decide: Are they going for it or are they not? If they will not make it this time, they will loose momentum for a long period of time.