The ICC's Potential for Doing Bad When Pursuing Good

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The International Criminal Court (ICC) seeks to end impunity for the atrocity crimes of genocide, crimes against humanity, war crimes, and, eventually, crimes of aggression. My contribution to this discussion takes a consequentialist view to outline ethical hazards confronting the court. Since the ICC has only recently begun to operate, with its first suspect, Thomas Lubanga Dyilo of the Democratic Republic of Congo, arriving in The Hague in 2006 and his trial completed only in the fall of 2011 (and awaiting a verdict in 2012), it is too early to reach a general appraisal of the court's effects.

Much of the discussion about the court examines the tension between law and politics, with contention over the degree to which the court should consider political and contextual factors when making decisions about which cases to pursue. In this roundtable, Kenneth Rodman argues that the court and particularly its prosecutor must take political, conflict management objectives into account as it reaches decisions about prosecutions. Michael Struett argues for a similar understanding by the court but calls for it to pretend to be solely legally motivated while actually taking contextual factors into account.

I have little disagreement with these two positions. They flow from the contradictory compulsions that press upon the court, and are efforts to reconcile these pressures. In this essay I outline three possible negative consequences that could, if they constitute preponderant outcomes, indicate that the court is failing to serve an ethical end. These are: (1) the court's operations are creating moral hazard, (2) they are creating false expectations, or (3) they are promoting the shifting of responsibilities from the UN Security Council or other international organizations in ways that outweigh the court's positive accomplishments. I am not arguing that the court *is* unethical or that it must be, but that—like other organizations—its ethical qualities depend on outcomes as well as on intent, structure, and process,

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and such outcomes need to be evaluated and considered by its member states for their continuation, reform, or termination.

Background

The normative framework in which the ICC operates, international criminal law (ICL), has been evolving since World War II and, particularly after the end of the cold war, at high speed. The quest for a forum in which to carry out trials of ICL violators has a long and honorable history, culminating at the 1998 Rome Conference that produced the ICC Statute and led to the construction of the court. The ICC, even hedged as it is by the doctrine of complementarity and limited in action by the necessity of state cooperation, is a milestone in the institutionalization of ICL norms. To the extent that the quest for the "legalization"[1] of human rights and for international humanitarian and criminal law continues, the creation and functioning of the court is a hopeful sign of continued progressive development.

However, the implementation of altogether laudable objectives could conceivably result in consequences that are at least partially antithetical to the ICC's normative quest. Opponents of the court have accused it of such shortcomings, but so far these have not been convincingly demonstrated, and there is some evidence that they are not arising.

For example, under the Bush administration the United States was opposed to the Rome Statute and later to the court's operation, and argued that a prosecutor not subject to effective oversight could pursue a political agenda that could thwart the desirable uses of U.S. military force for promoting peace.[2] This does not appear to have happened. Statute party and nonparty states have participated in peacekeeping forces apparently without inhibitions caused by fears of the ICC; and the United States has, through UN Security Council resolutions, gained immunity for its citizens when involved in UN-sponsored military activities. Chinese objections to the court appear to hinge on its challenge to state sovereignty, although this appears to correspond more to a political-ideological position than to a practical cause for concern.[3] So far, the court has responded either to state requests for assistance (as in Uganda, the Democratic Republic of Congo, and the Central African Republic) or to Security Council referrals (Sudan and Libya), or with extensive opportunities for the state in question to proceed domestically (Kenya). Thus, territorial sovereignty has been respected except when overridden by the Security Council under the UN Charter.

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In one situation where national jurisdiction has been considered—in which British soldiers accused of carrying out crimes in Iraq were considered subject to the court (while Iraq is not a Rome party, the U.K. is)—the court declined to proceed on the basis of its evaluation of the gravity of the alleged crimes. Overall, the prosecutor appears to have been quite cautious in bringing cases other than those referred by states and the Security Council to the pretrial chambers, and to have avoided situations where great powers were involved, such as charges against Russian nationals for their actions in (Rome Statute party state) Georgia, or actions by U.S. personnel in (statute party) Afghanistan.

Less powerful states and their organizations (in practice, so far, the African Union) have argued that powerful states will be operationally immune to the ICC even if they join, while weak states will be those that attract ICC attention and possibly intervention, thus presenting the ICC as inherently discriminatory.[4] This charge is substantial, but does not differentiate the ICC from other international organizations, including the United Nations.

One cannot imagine a completely nonpolitical or nonpragmatic ICC: pursuing cases against major powers would likely be fruitless and, as long as they remain outside the statute and protected by the capacity of the five permanent members of the Security Council to veto a referral resolution, crimes on their territories will not come under the court's scrutiny. Given the capacity of major states to thwart such efforts, only a very brave (or foolish) prosecutor would pursue their nationals without their acquiescence.

But discrimination in practice, conceding to practicality, is not a fundamentally unethical attribute. The court needs to do as much good as it can, given its limitations, and it will necessarily exercise some discretion in the conflict situations and cases that it chooses to prosecute. While the court may be pragmatically discriminatory, its effects could nonetheless be salutary if it brings to justice perpetrators of major crimes under its jurisdiction, even if its purview is formally (limited by statute ratifications) and practically (limited by nonlegal considerations) less than universal. As Rodman argues in this roundtable, there is room for some pragmatism in the prosecutor's office, taking into consideration overall likely outcomes of conflict management efforts; and, as Struett argues, the court should strive for an appearance of legalism even if taking practicalities into account. Nonetheless, as with other organizations whose operations should be subject to evaluation, it is conceivable that the ICC could, on balance, turn out to be ethically indefensible—much as some observers have charged that, for instance, the International Monetary Fund

and World Bank have at least at times operated to the detriment of the objectives they are mandated to uphold, thus making continued similar operations unethical.[5]

Ethical Pitfalls

When do good intentions produce such bad outcomes that the whole exercise becomes something that should not be pursued; that is, when does continued pursuit become unethical? The intentions behind the creation of the ICC—to counter impunity, support the rule of law, and deter atrocity crimes—are good, and thus the overall mission articulated in the statute is desirable. But good intentions and the statute do not, and cannot, fully spell out how the court's means can attain the Rome Statute's ends, nor can they ensure that outcomes will be ethical. As is the case with any other international organization, if the court's involvement in a situation produces outcomes that result in the aggregate deterioration in the conditions of the people whose welfare it is mandated to consider as a vital part of its responsibilities—in this case potential and actual victims of atrocity crimes—continued operation of the court in the same way would be unethical. With the court, as with many actors in complex events, attributing cause and effect—that is, organizational responsibility—is a difficult task. What is proposed here is not so much a formula for determining absolutely if and when the court has failed to perform ethically as it is a call to be aware of the pitfalls it faces and to be aware that the mandate and intentions of an organization do not alone determine its ethical qualities. Outcomes count.

For how long would negative outcomes be acceptable if, over a longer period, desirable consequences could still be imagined? This question perhaps points to the subjectivity of the assessment more than to an absolute criterion for evaluation. The court should be given time during which to develop its operations and for its effects to be assessed. Still, the period should not be endless. If negative outcomes accumulate (for example, if despite statute provisions promoting the rights of victims to participation and to reparations, victim populations preponderantly suffer more from local retribution against court involvement than their victimization is ameliorated or recompensed through the court's proceedings), the idea that the court's mandate, structure, or processes prevent it from being an ethical actor should be considered.

Balance is an evaluative challenge. How deleterious to victims can the court be while still ethically pursuing laudable ends? How is the balance (sacrifice on the

ground versus achievement in the abstract) to be struck? To evaluate this balance, a clearer picture of possible costs of operation needs to be drawn. Aside from the basic practical difficulties of carrying out what it is supposed to do—to identify, investigate, try, and punish atrocity crimes, with due consideration for victims and including a reparational mission in addition to the retributive one—the court could prove on balance to produce deleterious outcomes for victims in three ways that, if consistent, pervasive, and overwhelming, would result in its being unethical in effect. This would be the case if the court's actions were to: 1) lead to the creation of moral hazards; 2) the raising of false expectations; and/or 3) the disingenuous shift of responsibilities from the Security Council or regional organizations to the court.

Moral Hazard

As soon as the ICC becomes involved in a conflict situation, it becomes part of the conflict dynamic, as does any intervener. In particular, participants to a conflict may view the ICC as a potential resource to be exploited or an adversary's asset to be countered. Conflict parties will attempt to direct the court's attention toward others, and parties whose adversaries appear to be the subject of the court's investigation might feel less incentive to seek conflict resolution, believing that ICC involvement will strengthen their positions. Conversely, those targeted by the court may believe that the attractiveness of peace or conciliation has receded, since they may be subject to arrest, and may pursue their criminal actions with renewed vigor. UN peacekeeping fell subject to this dynamic in Bosnia and elsewhere; and some observers claim that this has already happened with ICC involvement in Darfur, where antigovernment organizations have become more rigid in their attitude toward the government.[6] If ICC involvement prolongs conflict and/or makes life more difficult for the people involved, its continued operation would appear to be unethical from the standpoint of its obligation to work in the interest of victims.

False Expectations

When the ICC becomes involved, it may seem to victims that their situation is about to be ameliorated and their cries for justice answered. It is too early to tell how this will play out in practice in the specific cases before the court, but so far conflicts have not abated due to ICC involvement (though sometimes they have shifted elsewhere, as in northern Uganda), and justice has been slow

in coming. This will likely lead to disillusionment among both victim populations and those who thought that the advent of the ICC would help to alter governments' relationships to their citizens. Increased disillusionment could motivate searches for alternative solutions to victimization and for providing justice, which could lead to violence and summary justice rather than greater conciliation or alternative means of reconciliation. If this were to happen, then the societies in question would have not been aided by the court and may have been served negatively.

The court's slowness in initiating trials, its lengthy trial processes, the narrow range of perpetrators investigated, and its limited jurisdiction could perhaps be compensated for by the deterrent effect of the court's mere existence and declaratory policies of worldwide scrutiny. Indeed, court officials argue that while trial outcomes are important measures of success, deterrence is also important, and that there is some evidence that deterrence is taking place. Deputy Prosecutor Fatou Bensouda argues that ICC scrutiny in Côte d'Ivoire and Guinea, for example, has had "an impact," and that the Lubanga case may have raised awareness of the crime of conscripting child soldiers, leading to the demobilization of children in Nepal.[7] Measuring the ICC's deterrent effect is extremely difficult, however, and another possible outcome of ICC scrutiny is the entrenchment of perpetrators' policies, such as in Darfur, where the Sudanese government responded to ICC warrants for President Omar al-Bashir by ejecting humanitarian nongovernmental organizations, thus exacerbating the conditions of victims, many of whom hoped that the court's involvement would improve their situations.

Outreach is one way to manage expectations. Nongovernmental organizations (NGOs) have pressed the court since its inception to amplify its outreach activities, sometimes in conflict with the ICC Assembly of States Parties' Committee on Budget and Finance, given the limited funds available to the court. Outreach has expanded significantly, with the court carrying out informational projects—often in conjunction with NGOs in the states in which it works—that seek to explain to victim groups, local judicial officials, and community leaders the scope and potential of its operations. The budgetary tension, however, demonstrates the inherent difficulties facing the court: the budget for investigations, prosecutions, victim and witness security, outreach, and all the other functions of the organization is finite, and allocation is an exercise in trade-offs. If there is more outreach, then there will be less of what? Given the difficulties of outreach—especially into areas of limited electronic media penetration and high illiteracy—spreading awareness about the

nature of the court and its capabilities in a manner that helps prevent both excessive optimism and cynicism is a tremendous challenge.

Responsibility Shifting

The International Criminal Tribunals for the former Yugoslavia and for Rwanda (the ICTY and ICTR, respectively) were seen by some observers as a palliative response by the UN Security Council to cover for a lack of commitment to intervention, which could possibly have saved significant numbers of lives.[8] One could similarly claim that the referral of the Darfur situation to the ICC, while perhaps well motivated, shunted to a legal arena a conflict that continued to be inadequately dealt with by international peace-enforcement and peacekeeping machinery. The referral demonstrated the concerns of Security Council members regarding Darfur (although with the U.S. and Chinese abstention, even this message was weak) without committing them to actions beyond those already initiated under previous resolutions. While the referral may have alleviated the appearance of Council paralysis on Darfur, the shifting of attention from the Council to the court could still be seen, as with the ICTY and ICTR, as a late and weak response for political purposes rather than a practical response to atrocity crimes.

Part of the ICC's mandate under the Council referral regarding Darfur was for the ICC prosecutor to report back to the Council on Darfur every six months, which he has done.[9] While the reports have chronicled conditions on the ground and the court's efforts in the area, they are notable for the prosecutor's increasingly strident calls on Council members to uphold their responsibilities and assist in apprehending those for whom warrants have been issued, including Sudanese president al-Bashir. In light of the prosecutor's efforts to call to account Council members, and the lack of response to those calls, the Council's intentions for the referral remain suspect. While this is perhaps more an indictment of the Council's ethical qualities than it is of the ICC's, an ICC subordinated to the political machinations of the Council (which the court was explicitly designed to avoid by its creation under the Assembly of States Parties and its independent prosecutorial capacity) could not be an autonomously ethical actor, but only ethical to the extent that the superordinate Council behaved in an ethical way in its referrals.

The referral of the Libyan situation to the court, twinned as it was with resolution paragraphs calling for sanctions, avoided the appearance of responsibility shifting, since invoking the ICC was not the only action taken.[10] Moreover, shortly

after the referral and sanctions, Resolution 1973 authorized the use of "all necessary means" to protect civilians in Libya from government attacks, and so the ICC cannot be seen in this case as an after-the-fact substitute for serious involvement. If the Darfur pattern, as opposed to the Libya pattern, proves to be the rule, then the ICC will indeed have become a smokescreen for Council inaction. In such cases, unless the ICC manages by mobilizing Rome Statute signatories to bring significant pressure against states in which atrocity crimes are taking place, the court will constitute a merely symbolic adjunct to a failing Security Council and thus not improve either perpetrator accountability or victim welfare. If the ICC becomes primarily a convenient way for the Council to say it is doing something when stronger action would be more helpful, then the existence of the court would be counterproductive from the standpoints of truth and victim welfare, and thereby it would be unethical.

Conclusion

Overall, if ICC involvement tends to harden and prolong violent conflicts, if ICC outreach fails to explain to victim populations the limits of the justice system, or if the court becomes the dumping ground for a stymied Security Council, then it will have failed crucial consequentialist tests of ethics. In such cases, proponents of international justice will only be able to call for more time, argue that the ICC is a good idea but perhaps an organization in need of reform, or look for better ways to implement the ideals of international criminal law. Moral hazard, false expectations, and responsibility shifting are syndromes against which the court's officials and supporters must remain vigilant. Short of proclaiming the court ethical or unethical in the aggregate, nuanced evaluations should consider the consequences of its actions in order to enlighten decision-making by court officials and those organizations—such as NGOs and the Security Council—that interact closely with it. Other contributors to this roundtable, Struett and Rodman in particular, suggest ways that the court can act ethically. The tensions among transparency, legal/judicial decision-making, and political pragmatism, however, ensure that maintaining the court's ethical standing, salutary effects, and wide legitimacy will remain a continuing challenge.

NOTES

[1] Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization* 54, no. 3 (2000), pp. 401–19.

[2] Compare Lee Feinstein and Tod Lindberg, *Means to an End: U.S. Interest in the International Criminal Court* (Washington, D.C.: Brookings Institution Press, 2009), chap. 3.
[3] Jing Guan, "The ICC's Jurisdiction over War Crime in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?" *Penn State International Law Review* 28, no. 4 (2010), pp. 703–754.
[4] Ramesh Thakur, "International Criminal Justice: At the Vortex of Power, Norms and a Shifting Global Order" (Pretoria: Institute for Security Studies, forthcoming).
[5] See, e.g., William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2006).
[6] Sarah Nouwen, comments to the International Law Association 74th Conference, The Hague, August 15–20, 2010, ICC Panel "Peace vs. Justice: Friends or Foes"; ila2010conference.blogspot.com/2010/08/international-criminal-court-panels.html.
[7] Thijs Bouwknegt and Richard Walker, "Fatou Bensouda: ICC Crimes Monitor," *International Justice Tribune* 128 (May 25, 2011), p. 6.
[8] For example, Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 1999), pp. 73, 285–89.
[9] UN Security Council Resolution 1593 (2005).
[10] UN Security Council Resolution 1970 (2011).