ictj briefing

The Potential of Complementarity

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Introduction

Central to the Rome Statute of the International Criminal Court (ICC) is the principle of complementarity. According to this principle, the ICC should assume jurisdiction only when States Parties are unwilling or genuinely unable to carry out their own investigation or prosecution. "It is the duty of every State," the Rome Statute Preamble says, "to exercise its criminal jurisdiction over those responsible for international crimes."

Activists who pressed for creation of a permanent international criminal court saw the provisions on complementarity as a compromise, yielding to state sovereignty. After all, if states themselves had been diligent in exercising jurisdiction over the core crimes outlined by the Rome Statute, the establishment of the ICC would not have been necessary. The prime example of an international criminal tribunal at the time was the International Criminal Tribunal for the former Yugoslavia, which enjoyed full Security Council endowed Chapter VII powers and had primacy over domestic jurisdictions. In shaping a permanent international criminal court, many drafters of the Rome Statute conceived mainly of a "Hague-based" model.

Between the drafting of the Rome Statute and the establishment of the ICC (1998-2002), other international justice developments partially overtook the model of Hague-based trials. They included UN-administered local courts in East Timor and Kosovo, and negotiated hybrid tribunals in Sierra Leone and Cambodia. The international community became more alert to the benefits of conducting trials in the country where the crimes occurred, including the ability to demonstrate to local populations the importance of the rule of law and ending a culture of impunity, as well as the ability to concretely impact the justice sector. There was an increased realization that it is mainly at the domestic level that permanent solutions to impunity must be found.

Along the same lines, when Luis Moreno-Ocampo was elected prosecutor of the ICC, he insightfully declared to the Assembly of States Parties:

> The efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court as a consequence of the regular functioning of national institutions would be its major success.

A System of Law with Global Potential

This vision emphasizes that the Rome Statute created not only a court but also a system of law that has global potential, based on the number of States Parties. This system of law seeks to

strengthen criminal justice as a response to mass conflict. The court itself assumes significance as a "court of last resort," but also as a permanent incentive to act on the domestic level.

The opportunities that derive from conceiving the Rome Statute in this way are worth restating.

- **Strengthening domestic justice systems and building capacity for mass crime prosecution.** All States Parties should work to bring their laws into conformity with the Rome Statute and to build capacity to investigate and prosecute war crimes, crimes against humanity, and genocide at the domestic level.
- **Incentivizing domestic justice in situations where it would otherwise not be pursued.** This important factor is already playing out in several contexts. Even if the motivation is to avoid the ICC, the pursuit of domestic criminal justice conducted to an international standard and the development of new domestic capacities should be seen as overall gains.
- **Strengthening universal coverage and avoiding selectivity.** The more effective pursuit of international crimes at the domestic level will alleviate some concerns that international justice targets only certain situations, such as the African continent. Domestic justice, if enforced to certain standards, can carry a high degree of legitimacy, can escape some of the limitations on jurisdiction that accompany the ICC, and can also be better suited to or framed within the local context. An example of effective domestic trials can be seen in Argentina, in the mid-'80s as well as in the current second round of trials. The expansion of domestic legislation may also result in extra-territorial options that serve to "tighten the net" in respect to perpetrators.
- **Addressing more cases and filling the impunity gap.** International prosecutions are expensive and will always be limited by constraints on resources. The focus has increasingly come to be on those bearing the greatest responsibility. It may be possible to try more cases on the domestic level, to encompass mid-level perpetrators. On the other hand, domestic courts tend to have even fewer resources. Other transitional justice mechanisms will be important to ensure that redress is available for a wider universe of victims.
- **Building better connections between international and domestic justice actors.** This would also entail refocusing international justice efforts away from international tribunals and toward rebuilding domestic justice systems.

Challenges to the System

At the same time, there are also serious challenges to operating this system of law. Some have already emerged and demand attention.

- **Attacks on the legitimacy of the overall system.** There is a risk that controversy over the arrest warrant for President Omar al-Bashir of Sudan will lead some states to reject the Rome Statute and its ideals, or to seek regional alternatives that do not easily fit within a complementarity framework. An emphasis on complementarity and on domestic systems can help to effectively diffuse some of these tensions.
- **Lack of domestic implementation.** Many countries have comprehensive implementing legislation. Technical expertise on implementation is valuable, but quality advice can be difficult to obtain.
- **Legal barriers at the domestic level.** There may also be legal issues that complicate investigations and prosecutions at the domestic level. These include lack of implementation of the definitions of international crimes and forms of participation such as command responsibility; prohibitions on the retroactive application of laws; amnesties; immunities; and statutes of limitation. These issues have come to the forefront in contexts such as Uganda and Kenya. If domestic systems are to be built as a main avenue for the fight against impunity, increased

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effort should be put into addressing these barriers.

- **Pursuit of alternatives to criminal justice.** Some states continue to argue that if criminal justice is in conflict with short-term stability or peace, it may be more appropriate to pursue alternatives that promote healing and reconciliation (such as recently argued in Kenya and Sudan). Sequencing has sometimes been suggested, but the Rome Statute leaves little room for sequencing. If crimes are not investigated domestically, the ICC prosecutor can proceed.
- **Inconsistencies in enforcement of arrest warrants leading to possible "forum shopping."** In the Democratic Republic of the Congo, the government has cooperated with the ICC on some cases and said it could not pursue them domestically, but it refuses to cooperate on another case. This leads to a problematic selectivity in terms of cases tried by the ICC and a manipulation of the complementarity principle. It will be difficult to build a system of law on this basis.
- **Institutional identity of the ICC.** It will be very difficult to consolidate the ICC as an institution if it receives only a small number of cases. This creates tensions in terms of the application of complementarity, as it may make the court more insistent on accepting cases even where they are being pursued domestically. The narrow interpretation of complementarity that has emerged from the jurisprudence of the court makes it easier for the court to conduct cases that perhaps could be prosecuted domestically.
- **Difficulties in assessing domestic situations, especially cases of unwillingness.** In some situations it is difficult to assess domestic authorities' pursuit of cases. Colombia and its application of the Justice and Peace Law illustrate the complexities that can arise in assessing issues such as the appropriate length of the process, or what constitutes a satisfactory outcome.
- **Complex procedures for challenging complementarity.** Even if states wish to challenge complementarity after the ICC has initiated an investigation, the procedure is complex and remains an unknown factor. Article 19 of the statute—the governing provision—refers to one opportunity to mount such a challenge. How long should a state prepare to make a perfect challenge? In practice, a deferral by the Security Council under Article 16 of the statute is sometimes discussed as an alternative to the complementarity framework.
- **International skepticism about domestic options.** Since the international justice sector, including NGOs, has mainly focused on international tribunals, at times it is skeptical about domestic systems. This skepticism can grow into a prejudice and a preference for international trials. This can be dangerous. While there are legitimate concerns regarding domestic systems—such as concerns about independence, security, and capacity—each opportunity should be evaluated carefully and, where possible, justice should be addressed on the domestic level with appropriate international assistance.

The Rome Statute, if it is seen as a system, requires a wide variety of actors to further its goals. The complications are far from insurmountable but require a concerted, deliberate approach.

Conclusion

The Rome Statute provides an unprecedented opportunity to consolidate gains in international criminal law in the last decades. When the statute came into force, many expectations attached to the court as a central actor in bolstering justice efforts worldwide. This may not be realistic. The Rome Statute, if it is seen as a system, requires a wide variety of actors to further its goals. The complications are far from insurmountable but require a concerted, deliberate approach. Significant efforts should be made to assess and strengthen domestic justice and to address challenges that are arising in practice.

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