THE INTERNATIONAL CRIMINAL COURT AND THE FUTURE OF LEGAL ACCOUNTABILITY

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With unexpected speed, the International Criminal Court has become a reality. Now that the ICC prosecutor and judges are sitting in The Hague, a careful analysis of the Court's implications for the future of legal accountability for international crimes has become all the more important. At the entry into force of the Rome Statute of the International Criminal Court on July 1, 2002, UN Secretary General Kofi Annan gave his evaluation—claiming that the court would be "a great victory for justice, and for world order—a turn away from the rule of brute force, and towards the rule of law."[1]

He was both right and wrong—right that we have witnessed a significant turn toward the rule of law, but wrong that the court itself will be a powerful and direct means for justice and world order. I do not mean to say that the ICC is not important. In fact, it is extremely important. Rather, I hope to sketch for you today the outlines of a court that, created in compromise, is highly constrained, but has great potential to transform international criminal justice as we understand it today.

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1. Secretary General Kofi Annan, Statement at the Closing of the 9th Session of the Preparatory Commission for the International Criminal Court, Apr. 19, 2002, *available at* http://www.iccnow.org/resourcestools/statements/unbodies/KofiAnnanPlenary19April02.pdf (last visited Oct. 18, 2003).

I will begin by suggesting four reasons why the ICC as it has been created is an extremely limited mechanism and will not itself be the victory for justice the Secretary-General predicted. Then, I will offer three observations about how the ICC will nonetheless transform and greatly strengthen accountability for international crimes. I will conclude with a brief look toward the future.

I. THE WEAKNESSES OF THE ICC

There is probably no weaker court in the world—including the local traffic court down the street—than the International Criminal Court. The ICC was designed to be weak. Its architects feared the effects of a powerful court and throughout the process of drafting the Rome Statute they reached a number of compromises that effectively undercut the Court at every turn. Most of these compromises were pushed by the U.S. delegation at Rome. U.S. Ambassador David Scheffer knew the only hope for U.S. ratification was a court so constrained it would appear impotent to its domestic critics. The Europeans gave way—in part to placate the U.S. and in part because they too could come to fear a strong court. I will hope to explore the limitations of the court by examining four of these compromises—the limitations on jurisdiction, the narrow admissibility of cases, the lack of authority to apprehend, and the Court's limited capacity.

A. Limited Jurisdiction

One of the major compromises reached at Rome was to restrict the jurisdiction of the International Criminal Court. Largely based on pressure from the U.S., the Rome Statute requires that either the state where the crimes occurred or the state of which the accused is a national be a party to the Statute.

This compromise, embodied in Article 12 of the Statute, has profound implications. In short it means that only crimes committed on the territory of a state party to the Statute or those committed by a national of a state party to the Statute can be prosecuted by the Court. Yet, this also effectively defines the two types of states least likely to accept the jurisdiction of the court. States where international crimes occur are often experiencing massive governmental breakdown or are run by tyrants who commit international crimes. These are the very people who wish to avoid prosecution and are unlikely to join the Court. Compounding this limitation, in cases where a dictator commits crimes against his own people, the national and territorial states are likely to be the same. Governments that are likely to commit crimes themselves are unlikely to join the Court and subject their own nationals to prosecution. Thus, the Court is unlikely to have jurisdiction over the very countries where crimes are most likely to be committed and where national courts are most likely to be ineffective. From the perspective of accountability, this is far from an ideal outcome.

Notably lacking in the Court's jurisdiction are the victim state and the custodial state. Including the victim state – the state whose nationals were the victim of the crime—in the Court's jurisdiction would have promoted accountability by focusing on those who were most effected by the crimes. Similarly, giving the Court jurisdiction when the custodial state—the state in which the accused is found—was a party would also have expanded the ICC's reach, allowing it to prosecute when a suspect is apprehended by some third state. Without these jurisdictional provisions, the ICC will have a hard time finding cases in which it is empowered to prosecute.

Admittedly, the picture is not entirely bleak. Already more than 80 states have ratified the Statute. This includes a number of surprising candidates—states in which it is entirely possible that international crimes could be committed. Moreover, it seems that many transitional governments have decided to accept the Court's jurisdiction, in part to lock in future governments, subjecting them to the ICC and thereby hopefully preventing them from committing crimes in the future. Over time more states are sure to join, thus further expanding the Court's reach. However, at least in the short term, the ICC will find these limitations on jurisdiction a significant bar to ending impunity.

B. Complementarity and the limits of admissibility

A second major restriction on the ICC, which renders it a weak institution, is the limit on admissibility of cases before the Court. In another compromise at Rome, Article 17 of the Statute dictates that the cases are only admissible where national courts are unable or unwilling to prosecute. This is the principle of complementarity, which gives national courts a first opportunity to prosecute before the ICC can act. Understanding complementarity is essential to understanding the ICC. In effect, the ICC is designed to be a backstop to national courts, rather than itself on the front lines of prosecution. In fact, all a national court has to do to block the ICC from prosecuting is to conduct a good faith investigation and determine that no crime was committed. Where a national court investigates or prosecutes in good faith, the ICC is rendered powerless.

Note that this is very different from the Yugoslav (ICTY) or Rwandan (ICTR) Tribunals, which have primacy over national courts. The ICTY can take a case away from a national court if it wants to, but that the ICC must defer to national courts. Again, the constraining implications of complementarity are profound. Even if an individual is within the ICCs jurisdiction and the prosecutor wants to pursue the case, if a national court—any national court—investigates or prosecutes, the ICC is effectively stopped in its tracks. Thus, despite the Court's best efforts to act, any national court can prevent it from doing so.

It is yet unclear what will constitute sufficient investigation by a national court to render the case inadmissible before the ICC. An important aspect of the Rome Statute is that it gives the ICC self-judging power in this respect through pre-trail motions. The ICC will itself determine when national court efforts are insufficient and therefore cases are admissible to the ICC. On one end of the spectrum, it could determine that only serious, legitimate prosecutions by national courts are sufficient to deny the ICC the power to prosecute. Conceivably, however, investigation could be defined more broadly to even include investigations by a truth and reconciliation commission that—notwithstanding its impact on reconciliation—does little to combat impunity. One of the most interesting questions the ICC will address in its early cases, then, is what constitutes sufficient investigation by a national court and when such prosecution is legitimate. To some degree, this will be a political question, with the Assembly of States Parties exerting pressure on the Court to either expand or restrict admissibility. However the ICC rules on these issues in its early cases, the Rome Statute makes clear that limits on admissibility will deprive the ICC of any number of cases.

C. The Difficulty of Apprehension

The third limit facing the ICC is the difficulty of apprehending suspects. Indicted war criminals don't generally hand themselves over to courts. They are often in hiding or in places beyond the reach of law enforcement authorities. Despite requirements for national cooperation in the apprehension of suspects, the ICC has no police or military force at its disposal to secure the arrest of indictees. The Yugoslav Tribunal has also suffered from this problem. It was only able to secure its first suspect — Dusko Tadic — by exercising its powers of primacy, a power the ICC notably lacks, and having the German authorities hand over Dusko Tadic who was sitting in a German prison. The ICTY has another significant advantage over the ICC in apprehension. Most ICTY indictees are in Bosnia or Kosovo, areas patrolled by KFOR and SFOR, multinational forces that have the power to arrest. Nonetheless, two of the ICTY's most wanted suspects, Radavan Karadic and Ratko Mladic, remain at large. Most of the ICC's indictees, in contrast, will be in territories without such multinational forces. Moreover, many of the likely target states for investigations have very limited national police forces to arrest suspects themselves or may be undergoing political transition and unwilling to apprehend suspects because of the potential for political destabalization.

The ICC's power of apprehension is ever further limited by the U.S. hostility to the Court. Take, for example, the ICC's first likely case – the crimes in the Ituri region of the Democratic Republic of Congo. The UN Mission in Congo (MONUC) currently lacks the authority and probably also the military

capacity to arrest potential indictees. If a Chapter VII Resolution were put forward in the Security Council to give MONUC such authority, it seems likely the U.S. would oppose the move and exercise its veto. In other regions such as Iraq, peacekeeping forces are largely led by the U.S. Again given U.S. opposition to the Court, it seems highly unlikely that the U.S. military would arrest an indictee and hand him over to the ICC.

Even after the ICC finds a case over which it has jurisdiction and which is admissible, the challenge of apprehension will remain. Just as the first ICTY prosecutor, South African Justice Richard Goldstone, carefully chose his first cases to focus on low-level perpetrators who could be apprehended, so too will Louis Moreno-Ocampo, the new ICC prosecutor, have to chose suspects who can be apprehended. Likely scenarios for early arrests include cases where the government of the territorial state is able and willing to hand over indictees or where such indictees travel to other states that will arrest them. This is, in fact, how Tihomir Blaskic, a Serb general, was arrested when he when to a conference in Vienna. Again, these limits on the power of the ICC to apprehend suspects will undoubtedly shape and restrict the Court's effectiveness.

D. Limited Capacity

The fourth constraint on the ICC is its limited capacity. The ICC is designed to be a small court. At most, it may handle a few trials a year. International justice is, after all, slow and expensive. In its nearly 10 years of existence, the ICTY has issued just over 20 decisions and sentenced only about 30 individuals. The trial of Slobadon Milosevic is already well into its second year. It seems highly unlikely that the ICC could operate more quickly or handle many more cases than has the ICTY. By guaranteeing extensive procedural protections, the Rome Statute has ensured the ICC will hear only a few cases. Yet, each year hundreds, if not thousands, of international crimes are committed around the globe. In its first year of operation the ICC received 499 communications from individuals in 66 countries suggesting possible crimes to investigate and prosecute. The ICC simply lacks the capacity to deal with all, or even a significant proportion, of these alleged crimes. It will have to choose its cases carefully. Consequently, many crimes will go unprosecuted.

II. THE ICC AND THE TRANSFORMATION OF ACCOUNTABILITY

I have just sketched a picture of a weak and circumscribed court. The ICC can only exercise jurisdiction in very few cases. Cases are only admissible before the ICC when all national courts are unable or unwilling to act. The ICC will have a very hard time apprehending suspects even when it has jurisdiction. And it will only be able to hear a few cases. This is not a court that the U.S.

should fear or need actively thwart. In fact, it is a court that is likely to have little direct impact in its early years.

While the ICC is, by intent and compromise, a weak court, it is also a court with extraordinary potential to transform international criminal law and advance accountability everywhere. Let me share with you three ways in which I anticipate the ICC will reshape the landscape of international criminal law in at least the following three ways.

A. An Expansion of Crimes

First, let us consider the case of Ituri in Eastern Congo, where two of the most heinous international crimes are occurring with systematic regularity. In Ituri mass rape is being used as a political tool. There are no accurate reports as to the number of victims. But thousands, if not tens of thousands of women and men have been the victims of mass sexual violence. Similarly, in this region of Congo tens of thousands of children under the age of 15 are being conscripted —kidnapped might be a better word—and forced to serve regional warlords. Even if the children are able to escape, they are rarely welcomed back into their communities for fear that they have become spies and will betray the village. Often they are malnourished, drug addicted and toting AK 47s. The look in their eyes is both heartbreaking and frightening. Before the Rome Statute the perpetrators of sexual violence and crimes against children in internal armed conflicts would probably have gone unpunished.

In fact, before the Rome Statute it is unclear whether their acts would have been subject to individual criminal responsibility at all. Generally, international humanitarian law has two separate regimes—one for international conflicts and for internal conflicts. War crimes committed in international armed conflicts—where two states go to war with one another—are regulated by the four Geneva Conventions of 1949. The ICC definition of war crimes in international armed conflicts moves beyond the Geneva Conventions by including sexual crimes and the conscription of child soldiers. For example, Article 8(2)(b) of the Statute includes the commission of rape, sexual slavery and the conscription of children under the age of 15 as war crimes.

Traditionally, war crimes committed in internal conflicts—civil wars and the likes—have been subject to less regulation and civilian victims have had even less protection. The Rome Statute, however, includes a long list of crimes in internal armed conflicts that are subject to the Court's jurisdiction. For example, the Statute, in its definition of war crimes in internal armed conflicts, includes intentional attacks on civilians, rape, and the conscription of minors. In many ways this is a radical and very important expansion of international criminal law and has been described by some commentators as the greatest achievement of the Rome Conference. Today, the crimes against women and

children in Eastern Congo are for the first time unquestionably subject to individual responsibility. Moreover, as states enact the requisite domestic legislation to implement the Rome Statute, they are modifying their own penal codes to include wider definitions of war crimes, including those committed in internal armed conflicts.

A little-noted paragraph in the preamble of the Rome Statute may also have a significant effect in expanding the substance of international criminal law. The paragraph provides, in a relatively understated tone "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Prior to the Rome Statute, states were authorized to prosecute international crimes. However, with the exception of Grave Breaches of the Geneva Conventions, they were under no obligation to do so. Yet, the preamble to the Rome Statute speaks of a duty for states parties to affirmatively exercise jurisdiction. That paragraph should expand the willingness and ability of national courts to prosecute international crimes. Taken to its logical conclusion, the failure of states to enact the necessary domestic legislation and actually prosecute such crimes could generate some level of state responsibility. If said paragraph were operationalized, it would imply an affirmative duty for states to actively prosecute international crimes. Time will tell whether states parties take that duty seriously.

B. Empowering National Courts

While it is true that according to the pinciple of complementarity discussed earlier, the ICC is constrained to act only when national courts fail to do so, at the same time the principle of complementarity is probably the most important and transformative aspect of the Statute. Rather than thinking of complementarity as a limit on the ICC, we can also view it as a way of empowering national courts. Complementarity fundamentally changes the incentives for national courts and should make them more likely to address international crimes directly. Before the ICC, national courts had the choice of either prosecuting international crimes or allowing impunity. For a variety of political reasons, such courts often chose—or were forced to choose—impunity. With the creation of the ICC, however, the choice is very different. National courts can either prosecute the crimes themselves—ensuring some level of control over the proceedings and possibly greater acceptance by the local population —or the ICC may step in and prosecute. Many national courts would rather maintain control over the prosecution themselves. With these choices, national courts should be far more likely to act themselves and motivated, to clean up their own messes at home in order to avoid ICC action.

National courts are extremely powerful tools. To the degree that the ICC can spur them into action that is a great advancement for accountability. First,

national courts are ubiquitous. Collectively, their jurisdiction covers just about every territory where a crime could occur. Second, they are proximate to crimes and victims. This facilitates the collection of evidence and the involvement of victims. Finally, national courts have police power at their disposal and they can use that power to apprehend and arrest suspects.

The new prosecutor of the ICC, Louis-Moreno Ocampo, understands this fundamental power of the Court to encourage national courts to act. As he observed at his swearing in this past July: "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[2]

The ICC is having its desired effect in empowering national courts. Let me give you an example. The ICC Prosecutor has recently indicated that his first investigation is likely to involve the crimes in the Ituri region of Congo. The war in the Congo over the past decade has caused somewhere on the order of five million deaths, with at least tens of thousands dead since the entry into force of the Rome Statute last year. Yet, there is a new transitional government in Congo and, for the first time in years, there are real prospects for peace. While the ICC should and will have some role to play in ensuring accountability in Congo, after the Prosecutor's announcement that Congo will be the Court's first investigation, the government of Congo has shown new interest in strengthening its failed national judiciary. I will be working closely with the U.S. Department of State to investigate possibilities for developing national judicial capabilities in Congo to deal with these crimes and will present a report to the State Department and the ICC on how the domestic Congolese judiciary and the ICC could work together to provide accountability in Congo as envisioned by the concept of complemetnarity.

Many crimes committed in Congo are outside the jurisdiction of the ICC as they were committed before July 2002 when the Rome Statute entered into force. Even if the ICC does prosecute some of the crimes committed in Eastern Congo, given the vast scale of crimes, there is no way it could prosecute all those responsible. If, however, the threat of ICC prosecution spurs the Congolese government to create domestic prosecutorial mechanisms, it can foster the development of national capacity and promote accountability on a larger scale.

Another way in which the complementarity provisions of the Rome Statute strengthen accountability is by encouraging the exercise of universal jurisdiction by national courts. The principle of universality allows national courts to prosecute international crimes wherever they are committed. A number of states have passed the necessary domestic legislation to do so. For example, Belgium

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2. Louis Moreno-Ocampo, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, June 16, 2003, *available at* http://www.icc-cpi.int/otp/030616_moreno_ocampo_english_final.pdf (last visited Oct. 18, 2003).

and the Netherlands have prosecuted international criminals from Rwanda, Congo, and Surinam. Complementarity gives national courts—even those outside the state where the crimes occurred—the opportunity to prosecute before the ICC. Complementiary may make national courts more willing to exercise universal jurisdiction.

Taken collectively, complementarity should greatly enhance accountability for international crimes. It allows and encourages series of different courts to prosecute international crimes. In so doing, it tends to keep prosecutions close to home, promoting legitimacy and enhancing the reconciliatory effects of criminal prosecution.

C. Backstopping National Courts

The third way in which the ICC may transform the future of accountability is by acting as a backstop for national courts. I have already described the potential power and benefit of national courts. Yet, sometimes national courts will fail. There are countless reasons for such failures—domestic political pressure, lack of capacity, and corruption, just to name a few. A judge in Congo, after noting that judges had not been paid in over five years, told me how to differentiate between a good judge and a corrupt one. He explained the good judge hears the case, decides who has the best argument and shakes down that side for money, effectively his salary. The bad judge demands payments from both parties and sides with the one who pays most. I'm not sure we want even a good unpaid judge enforcing international criminal law.

Even where national courts are not corrupt, they may not be effective. Take, for example, the courts of Chile that could not prosecute Augusto Pinochet due do national amnesty and domestic political pressure. Or, the courts of Rwanda which, for many years after the genocide, simply lacked the resources to engage in meaningful prosecution. One judge in Rwanda complained to me in 1999 that his office lacked pencils and paper to record cases. National courts should and will be on the front lines of international criminal law, but there will be times when they are unable or unwilling to act.

In these cases the ICC will be able to play a direct and meaningful role in prosecution. Admittedly, the ICC could not act in the two cases I have just mentioned—the crimes of Pinochet or the Rwandan genocide—because they occurred before the Rome Statute entered into force. But, looking toward the future, as the jurisdiction of the ICC expands and when national courts fail to prosecute, the ICC will find itself with a meaningful case load. In some of these casers it will step in as a backstop and ensure accountability. Admittedly, some cases will still slip through the cracks. Given the limits on jurisdiction, admissibility, and apprehension, there will be crimes that can not be prosecuted anywhere. But, over time, the ICC will continue to narrow the realm of impunity.

The ICC will have at least one other important function as a backstop to national courts. It will ensure some level of commonality and uniformity of jurisprudence. In the international criminal system there is no general form of appellate review. While individual cases can be reviewed within their own court system, no overarching supreme court exists to ensure commonality of jurisprudence. With the growing number of national and supranational courts enforcing international law this could pose a threat to the system as different standards evolve in different courts. Even though the ICC may handle only a few cases, it seems likely that national courts will defer to its decisions on key points of international criminal law. Just as the ICTY has played this role to date—with national courts frequently referencing ICTY decisions—the ICC will come to be the standard bearer of international criminal jurisprudence. Its comparatively greater resources, its international status, and the expected quality of its staff make it seem likely that the ICC–even acting only as a backstop—will come to be the definitive voice on the rules of international criminal law.

IV. CONCLUSION: TOWARD A SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

In conclusion, let me speculate for a moment on the future of accountability and, particularly, how we can move toward a real system of international criminal justice. As I have argued, the ICC is weak. It will try only a relatively small number of individuals. Where national courts are strong, they have jurisdiction over crimes committed on their territory and by their nationals. Relying on the principle of universal jurisdiction, many states have enacted the necessary legislation to prosecute international crimes committed anywhere. Crucially, national courts have the police power to actually apprehend and arrest suspects. And now, with the complementarity provisions of the Rome Statute, national courts have a new incentive to act. By developing domestic capacity and prosecuting, national courts address crimes close to home and avoid investigation by the ICC. Yet, where national courts are unable or unwilling to act—the ICC will be able to step in. Acting as a backstop, the ICC will help ensure accountability where other courts fail.

For this system to work, the ICC and national courts will have to cooperate. There will be many cases when the ICC will have to rely on national courts. And. there will be times—such as when new law is being developed or where globally known despots are being prosecuted—that national courts may want or need to defer to the ICC. For this relationship to work national courts and the ICC will have to build trust, such that the ICC can count on national courts and national courts will not fear ICC prosecution. Congolese judges, for example, will have to cooperate with their international counterparts and international judges will have to help train and assist domestic judges. Both sides will need to further develop and refine the "unable or unwilling to prose-

cute" language of the Rome Statute so that these two layers of judicial institutions can cooperate.

Most importantly, the ICC and national courts will need to understand that they are part of a common mission—accountability for international crimes—and that both bring different tools and capabilities to that effort. If they succeed, the Rome Statute and the ICC can have a truly transformative impact on the future of international legal accountability. And the perpetrators of the crimes will face justice.