

The International Criminal Court at 10: where do we stand now?

Statement delivered by Marek Marczyński – International Justice Research, Policy and Campaign Manager – during the international conference entitled the *10th Anniversary of the International Criminal Court: Achievements to Date and Prospects for Future* organised by the British Institute of International and Comparative Law and the University of Nottingham Human Rights Centre

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Ladies and Gentlemen

It is a great pleasure for me to be here with you today to discuss the first 10 years of the International Criminal Court.

I would like to start this presentation by emphasizing how tremendous achievement for the victims and the global civil society the establishment of the ICC was. This first global, permanent international criminal court came into being in a very particular period in history.

The fall of communism and the end of the bipolar world brought a lot of hope for people across the globe and many foresaw the world moving towards a global system based on democratic values and universal respect for human rights. While those hopes materialised in some parts of the world in other what happened was quite contrary. The new, post-cold war era of international relations started at the beginning of the 1990s with deadly conflicts in Rwanda, Chechnya and other parts of the Soviet Union and in the former Yugoslavia. Hundreds of thousands of people lost their lives, millions were displaced and the number of victims of mass rape will probably never be established.

But what happened at the beginning of the 1990s was also the birth of a global civil society movement which united victims across borders and continents in their struggle for human rights and in fight against impunity. What initially started as a relatively small initiative grew over the years into the Coalition for the International Criminal Court which today includes 2 500 organisations from 150 countries across the world.

Amnesty International has been part of this initiative from the very beginning, contributing with its expertise to the development of the Rome Statute as well as lobbying the governments to ratify it and support international justice.

It took 8 years from the moment when the International Law Commission presented to the UN General Assembly its final draft of, what later became the Rome Statute, until the establishment of the ICC.

On 1 July 2002 the ICC became a central part of a new emerging system of international justice. This new system is composed of domestic investigations and prosecutions of crimes under international law; it includes states exercising universal jurisdiction over those crimes on behalf of the international community and international and internationalized criminal courts.

Successes of international justice

Looking back to where we were at with international justice in the 1990s when the whole idea received a new dimension and momentum and where we are now, one cannot conclude differently than by stating that international justice is a crucial, new characteristic of the global system of international relations.

What at the beginning of the 1990s what unthinkable now is the reality. The global system of international justice is indeed functioning. Only this year Charles Taylor was convicted by the Special Court for Sierra Leone, Ratko Mladic and Radovan Karadzic are now on trial in the International Criminal Tribunal for the former Yugoslavia and many others have already been prosecuted there.

The ICC itself is doing its job too. It is now a fully functioning institution.

On 14 March 2012, the ICC delivered its first judgment, convicting Thomas Lubanga of recruiting and using child soldiers in the Democratic Republic of the Congo. The reparation proceedings in the case are supposed to start shortly.

The ICC has begun investigating and is seeking to prosecute crimes in the Central African Republic, Cote d'Ivoire, Democratic Republic of the Congo, Kenya, Libya, Darfur and Uganda. It is also determining whether to open new investigations into alleged crimes in other places including Afghanistan and Colombia.

Several serving or former heads of state including Omar Al-Bashir, Muamar Gaddafi and Laurent Gbagbo have been the subject of ICC arrest warrants, something which even 20 years ago was completely unthinkable.

Although Omar Al-Bashir is still to be surrendered to the ICC more and more states are refusing to host him in their territory. The change of venue earlier this month of the African Union Summit to Addis Ababa following Malawi's refusal to offer President Bashir safe haven is an indication that the ICC and international justice are becoming more and more important also in Africa.

With 121 states already parties to the Rome Statute and with several more states which have announced their intention to ratify shortly, the ICC is becoming a truly global court. As part of their obligation under the Rome Statute states are adopting implementing legislation which criminalises crimes under international law in their national legal frameworks and which also allows for better cooperation in judicial matters. In this way it gives legal framework for the creation of the global system of international justice.

What are the challenges ahead of the ICC?

Despite its tremendous successes the International Criminal Court, as many other international justice mechanisms before, faces also several challenges which need to be addressed so that the court could effectively deliver what it was created for which is - justice, truth and reparation for the victims of the most serious crimes.

To be able to respond to new situations, as well as conduct its current work, the ICC requires strong budgetary and political support as well as cooperation from states which is however sadly lacking at this time.

The first and the biggest challenge comes from the ICC's largest financial contributors - France, Germany, Italy Japan and the United Kingdom - who are determined to impose a zero-growth on the Court's current budget. The resources requested by the ICC last year were cut significantly at their insistence. If they succeed in turning the ICC into a "resource driven" not "crime driven" court, the ICC will struggle to meet its current workload, let alone to respond to more situations when needed.

The Court came into existence at a time when crimes are still being committed at an alarming rate around the world.

Although the ICC is active already in the seven African locations, there are legitimate expectations it will step into other situations where there are serious doubts about the

authorities' ability and willingness to act, including Afghanistan, Colombia, Georgia and Palestine, which will obviously cost money.

The second challenge is the role of the UN Security Council.

Pending universal ratification of the Rome Statute, the UN Security Council has a crucial role to play in referring further crimes outside the ICC's immediate jurisdiction and by doing that allowing victims to see justice.

As we speak crimes against humanity are being committed in Syria however any initiatives to refer the situation to the ICC Prosecutor have so far been blocked by Russia and China who are also the main exporters of weapons to Syria. The inaction of the UN Security Council apart from denying justice to the victims of those most terrible crimes also negatively impacts on the perception of the ICC and on international justice in general which is often seen as politicised and one-sided. With the death toll between 10 000 and 15 000 women, men and children and very little response from the UN Security Council some have been asking if the Council is still fit to its role of ensuring international peace and security.

The UN Security Council also needs to stand firmly behind the ICC and make sure that states cooperate with it fully. The issue is especially crucial when it comes to situations like Libya and Darfur which were referred to the ICC Prosecutor by the Council itself.

On Darfur, the UN Security Council has until today not taken any action on the two non-cooperation decisions issued in December 2011 by the Pre-trial Chamber I against Chad and Malawi - both of which are States Parties to the Rome Statute and which have failed to arrest and surrender to the ICC Omar Al-Bashir upon his visits to both countries. The silence of the UN Security Council can have a long-term, detrimental effect to the ICC but it also sends a very negative political message and undermines the role of the UN Security Council itself which seems to be unable to vigorously enforce its own resolutions based on Chapter VII of the UN Charter.

The third challenge relates to the relationships between the ICC and African countries.

African countries played a very important role in establishing the ICC and now 33 countries from the continent are States Parties to the Rome Statute. In addition to this, Cote d'Ivoire which is not a State Party accepted the exercise of jurisdiction by the ICC based on Article 12 of the Rome Statute.

The first three situations which came to the ICC were self-referrals from African countries, namely the DRC, Uganda and the Central African Republic.

Against this background, the relationship between the African Union and the ICC in recent years has been far from satisfactory.

As I have mentioned earlier in my presentation one of the areas of tension has been around the lack of cooperation of African states with the ICC in the arrest and surrender of Omar Al-Bashir. Several African countries - some of which are States Parties to the Rome Statute - have hosted President Al-Bashir during his visits and have failed to fulfil their legal obligations under the Rome Statute. In its decisions the African Union has called on its members not to cooperate with arresting and surrendering him to the ICC.

Similarly the current already advanced proposals to provide jurisdiction over crimes under international law to the African Court of Human and People's Rights appear to be driven by efforts to establish an alternative jurisdiction to the ICC.

While on the surface the idea seems positive, the complex challenge of transforming the African Court into a part regional criminal court, the cost impact for an already underfunded human rights system and the lack of any clarity about its relationship with the ICC –including the potential for duplication and conflict – all raise serious question marks about the initiative.

While vigorous discussions are taking place in Africa now about the new approach to international justice the ICC is fully functioning and able to investigate and prosecute crimes under international law up to the highest standard. The relationship of any regional criminal

courts with the ICC must be defined in such a way that does not undermine the jurisdiction of the ICC or states obligations to cooperate with it. African States Parties to the Rome Statute have a crucial role to play in this regard.

On the other hand the ICC should engage and respond better to the concerns which underline the African Union proposals. They are based on the assertion that the ICC seems to be prosecuting only situations in Africa and by doing so targeting only African leaders. While those arguments are neither fair nor accurate, the ICC needs to play a more proactive role in challenging some of those assumptions and championing justice for African victims.

The new ICC Prosecutor Fatou Bensouda who herself is from Africa is already playing a very positive role in challenging some of the negative perceptions of the Court in the continent. It is encouraging that ahead of taking office, the prosecutor set out a number of important priorities which, if implemented, may lead to increased support for the ICC, including in Africa. They include reviewing the quality and efficiency of investigations and prosecutions, developing a strong gender policy and clarifying the process through which the OTP conducts preliminary examinations.

Especially the last element, which deals with the question of preliminary examinations and decisions in which situations to investigate, is of the highest importance and will be closely followed by African states.

It is beyond any doubt that there are plenty of situations related to countries outside of Africa which have ratified the Rome Statute and where crimes under international law have been committed. The situations like Afghanistan, Colombia, Georgia or Honduras seem not to be receiving too much public attention from the OTP so far. Addressing them in a transparent way may send a positive message that the Prosecutor is looking beyond Africa and championing justice for victims around the world.

Other priority areas highlighted by Fatou Bensouda are also important. Among them is the need to ensure that gender-based crimes receive more prominence in investigation and prosecution of cases. In the past Amnesty International has expressed its concerns that for example in the Lubanga case gender-based crimes against girls were not included among the charges. As a result it left victims of those terrible crimes without access to justice and reparation.

Another issue which exposed the Office of the Prosecutor to criticism has been the failure to submit sufficient evidence needed to satisfy the threshold to confirm the charges and enable prosecutions to be initiated against four persons. The rulings in the Kenya and Mbarushimana cases highlight what appears to be the approach of Office of the Prosecutor to present only the minimal amount of evidence to achieve the low threshold of establishing "substantial grounds to believe that the person committed the crime charged." As noted in one of the cases "the Prosecutor relied on one anonymous and insufficiently corroborated witness."

The new prosecutor would need to address these concerns in order to ensure confidence in the international justice process.

Conclusion

On the 10th anniversary of the International Criminal Court there are many reasons to celebrate. What once was a distant dream now is the reality which brings hope to victims of genocide, crimes against humanity and war crimes. The first truly global, permanent international criminal court exists and is ready to bring justice, truth and reparation to the victims.

What is needed is the strategic, political and financial support from the international community for the Court including the strong leadership of the UN Security Council.

The ICC itself should also improve in some areas and the new Prosecutor may play a very positive role in building greater trust and support for the Court.