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The International Criminal Court's Pursuit of Justice and Legitimacy

MARK KERSTEN

After weeks of silence, Karim Khan, chief prosecutor of the International Criminal Court (ICC), showed up at the border between Gaza and Egypt. It had been less than a month since Hamas breached the security perimeters that pen Palestinians into Gaza and committed its litany of atrocities on October 7, 2023. The response from Israel was furious and unrelenting, collectively punishing the people of Gaza for the crimes of Hamas via siege and starvation.

Khan was under tremendous pressure. Since 2021, his office had maintained an open investigation into the situation in Palestine, but the British prosecutor had done nothing to address the long list of war crimes and crimes against humanity allegedly committed by Palestinian and Israeli forces. To target Israeli officials or other allies of powerful Western states was a red line that the ICC had never crossed in its two decades of existence. Yet inaction seemed untenable. Palestinians and Israeli families of Hamas victims alike demanded ICC action.

Finally, the chief prosecutor of the only permanent court set up to investigate and prosecute international crimes traveled to the Rafah border crossing on October 29, 2023. Khan could not make it into Gaza—Israel would never let him in—but he got as close as possible in Egypt. In the days and weeks that followed, Khan warned all sides that if the basic rules of international criminal law were disregarded, he would have no choice but to act—and that those who refused to abide by international laws should not complain when he moved to address their atrocities.

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In May 2024, Khan requested that judges at the ICC issue five arrest warrants: three for senior Hamas leaders Yahya Sinwar, Mohammed Diab Ibrahim al-Masri (known as Deif), and Ismail Haniyeh, as well as two for Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant. All were charged with numerous counts of war crimes and crimes against humanity. The charges against Hamas leaders focused on the events of October 7 and the taking of hostages. The charges against Netanyahu and Gallant emphasized their role in the alleged intentional starvation of Gaza's population.

In November, judges at the ICC approved warrants for Netanyahu, Gallant, and Deif (though there were reports that he may have been killed by Israeli forces, as the other two Hamas leaders had been). The move was hailed by many around the world as a groundbreaking moment for justice and accountability. Others, including Israeli and US authorities, alleged that the court was biased against Israel. The ICC's 124 member states are now under a legal obligation to arrest these indictees if given the opportunity to do so.

In retrospect, Khan's visit to Rafah drew a line in the sand and marked a departure from the ICC's previous work. There is a before and an after for that event, both for the ICC and for the project of international criminal justice more generally. How did the ICC reach this point? Can the court's history and experience prepare it for what happens next? And what future does it have in a world that is as chaotic, divided, and dangerous as ever?

FROM ROME TO AFRICA

To understand where the ICC is going, we need to understand where it came from. The creation of the court was heralded as a landmark victory in the fight against international crimes. The ICC is

a product of the peculiar historic moment in which it was established, reflecting the special brand of liberal, cosmopolitan euphoria that defined international politics in the decade following the end of the Cold War.

But not everyone was convinced of the desirability of a formally independent and permanent tribunal mandated to investigate and prosecute international crimes. During the 1998 negotiations that produced the Rome Statute of the International Criminal Court, the United States argued that the United Nations Security Council should ultimately be the arbiter of who and what the ICC could and could not investigate and prosecute. Ultimately, Washington's efforts failed: although the UN Security Council can refer situations to the ICC (as it did for Darfur and Libya), states can also refer themselves to the court, and the prosecutor retains the power to ask judges to approve the opening of an investigation without state or Security Council approval.

The ICC was thus created despite US opposition to its form and mandate. This contested origin has always affected what the court is able to do. But the very existence of the ICC as an institution capable of independently prosecuting international crimes is an act of defiance against some of the world's most powerful capitals, including Washington, Moscow, and Beijing, as indicated by their efforts to constrain and politicize the court's work.

The court was derided as racist and neocolonial.

When the sixtieth country ratified the Rome Statute in 2002, the ICC became a functioning entity, just four years after its treaty had been negotiated—much faster than many had anticipated. The court was initially headquartered in a vacant telecommunications office tower on the outskirts of The Hague—the so-called city of peace and justice, thanks to the longtime presence of international organizations and courts there.

That the ICC had even come into existence was a remarkable achievement. But what would it do? The liberal heyday of the 1990s was already a thing of the past. How would the court navigate a post-9/11 world marked by the US-led global war on terror and a growing number of mass atrocity events, some of which implicated Western powers?

Curiously, judges were elected by ICC member states to sit at the court before the first prosecutor was chosen. What do judges do if there are no cases? The court's first prosecutor, Luis Moreno Ocampo, an Argentine who cut his teeth during the famous 1985 trials of his country's former junta and later hosted a reality television show, was under pressure to produce indictments. Judges told Moreno Ocampo to get them a "Tadić," a reference to the first, low-level defendant prosecuted at the International Criminal Tribunal for the former Yugoslavia.

For the ICC and its early staff, the obvious place to look was a handful of wars in Central and East Africa, where atrocities had been well documented and governments were open to engaging with the court. The African continent became an experimental ground for the ICC's first investigatory forays. But the first actions of the prosecutor came at the direct request of African states. Negotiations between the ICC staff and autocratic Ugandan President Yoweri Museveni led to the opening of an investigation into the brutal war between his government and the Lord's Resistance Army (LRA).

For the early investigators and prosecutors of the court, it made sense to go after the LRA and its notorious and universally loathed leader, Joseph Kony. He was widely described as "evil." Few states, if any, could oppose the ICC's efforts to bring accountability to a rebel group that abducted children and forced them to commit mass atrocities.

For Museveni, pitting the ICC against his adversaries was likewise useful in his ongoing quest to bring northern Uganda under his control. It would also serve as a diversion from the numerous atrocities committed by his own military forces against Ugandan civilians. So transparent were his goals that Museveni referred the LRA itself, not the territory of northern Uganda, to the ICC in 2005. Under ICC rules, only situations of atrocities can be referred to the court of investigation, rather than individual suspects. Uganda's request was therefore later amended by the court's judges to mean the situation in northern Uganda.

Similar dynamics were in place in the Democratic Republic of Congo (DRC), where the interests of the ICC and President Joseph Kabila converged. In 2004, Kabila referred the situation in the DRC, involving allegations of war crimes and crimes against humanity, to the ICC. He, too, was successful in inducing the courts' investigators and

prosecutors to target his adversaries while avoiding any scrutiny of his own forces' atrocities.

In the coming years, the ICC would open investigations into other African contexts. Joining northern Uganda and the DRC were the Central African Republic, the Darfur region of Sudan, Kenya, Libya, Ivory Coast, Burundi, and Mali. Allegations of ICC bias against Africa built to a fever pitch. The court was derided as racist and neocolonial. The African Union passed resolutions denouncing the ICC and suggesting that African states withdraw from the court. Even those who had directly requested and benefited politically from the ICC's investigations decried the court. In 2016, Museveni declared that the ICC was just a "bunch of useless people."

The court's staff and supporters tried to counter this narrative, insisting that most investigations had resulted from African states requesting them; or, in the cases of Darfur and Libya, from UN Security Council referrals in 2005 and 2011, respectively. But the numbers spoke more loudly than words. By the mid-2010s, despite atrocities happening in many parts of the world, including alleged war crimes by Western forces in Iraq and Afghanistan, the ICC's only investigations were in Africa.

Even so, the debate over the ICC's African emphasis was conducted in overly simplistic terms. To be sure, the court is not immune to structural racism; no international body is. Yet a focus on the bias apparent in the ICC's selection of situations to investigate and individuals to prosecute obscured a different, endemic problem: the court's dependence on cooperation.

In both Uganda and the DRC, although the ICC had (mostly) firm legal grounds to prosecute those it targeted, it also did the bidding of officials who themselves should have been investigated, such as Kabila and Museveni. But they held the keys to what ICC investigators and prosecutors so desperately needed: access to crime scenes and evidence to build cases. To varying degrees, both states appeared to keep the ICC on something of a drip feed to guarantee their own impunity. The Office of the Prosecutor did not avert its gaze from Museveni's or Kabila's opponents to scrutinize the presidents and those who executed their orders.

After the court's first decade and a half of operations, the statistics were striking and undeniable. The ICC had issued warrants of arrest only for Africans. The appearance of bias was simply too obvious. And in the world of international criminal law and justice, appearance matters, sometimes as much as substance. A common refrain in this field is that justice not only must be done, but must be *seen* to be done. The ICC had to be unbiased in the investigations it opened and the figures it targeted, but it also needed to be seen as unbiased.

The allegations of picking on African states and ignoring atrocities committed by Western states and their allies had serious consequences for the court. Powerful, self-interested actors eagerly tapped into the narrative of bias. When the ICC sought to prosecute Uhuru Kenyatta and William Ruto on charges of crimes against humanity related to their involvement in deadly 2007–8 post-election violence in Kenya, the two erstwhile political opponents joined forces, forming an alliance to counter the cases against them and run on a joint ticket in the next election. Their union ushered them into power, with Kenyatta taking office as president and Ruto as deputy president after their victory in 2013. They quickly deployed their considerable power and influence against the ICC.

As a veteran of the ICC's yearly Assembly of States Parties conference, I was present in 2015 when dozens of Kenyan politicians traveled to The Hague at their taxpayers' expense. For many attendees, the full-court press to intimidate the ICC into withdrawing its cases against Kenyan leaders was offensive and embarrassing. But whether it was this show of diplomatic force, poor case construction, interference with witnesses that left some dead under suspicious circumstances, or all of the above, the Kenyan campaign worked. By 2016, the cases against Kenyatta and Ruto had collapsed. In a peculiar example of how international criminal lawyers often move between institutions and roles, Ruto's counsel at the ICC, Karim Khan, became the court's chief prosecutor in 2021.

With time, the allegations of African bias subsided, largely due to the Office of the Prosecutor opening investigations in other regions: Georgia in 2016, Bangladesh and Myanmar in 2019, Afghanistan in 2020, the Philippines and Palestine in 2021, and Ukraine in 2022. The focus of the ICC today, and that of observers who follow the court, is largely on situations outside of Africa. In 2022, when the attention of the Assembly of States Parties session had turned toward Russian aggression and atrocities in Ukraine, a Kenyan diplomat told me—with some regret but no apparent sense of irony—that Kenya had once drawn all the attention in ICC circles, but now received none.

FRAUGHT RELATIONS WITH WASHINGTON

What had not changed was the curious and often strained relationship between the United States and the ICC. The court's history has long been shaped by mixed messages from Washington. Hundreds of articles have delved into how the relationship has changed over time, what can be done to affect it (either negatively or positively), and what international criminal law looks like with or without Washington as an active participant. Yet the United States is not a member state of the ICC.

The United States participated in the 1998 negotiations on the Rome Statute, but then joined a handful of autocracies and states with reputations for poor adherence to international law and human rights standards—China, Libya, Iraq, Israel, Qatar, and Yemen—in voting against it. The primary reason for this position was US opposition to the independence of the ICC and the prosecutor. Washington insisted that the court should conduct investigations and prosecutions only in contexts where relevant states, and especially the UN Security Council, approved of its doing so.

Although President Bill Clinton signed the Rome Statute on his last day in office, he did not recommend that the incoming administration of George W. Bush ratify it. In one of his first moves in office, Bush decided to "unsign" the Rome Statute—a symbolic measure, but one that nevertheless signaled an intent to undermine and isolate an institution that was barely even staffed. Once the ICC became a functioning reality in 2002, its relations with the United States became even more strained. Before the ICC prosecutor made any decision to investigate or prosecute a case, the Bush administration launched an outright, comprehensive attack on the court.

Over the next few years, a barrage of coercive measures was directed by US lawmakers against the ICC. The American Servicemembers Protection Act (ASPA) of 2002 ensured that the United States would not support the court—and that if any US citizens were to find themselves in The Hague, the president could resort to "all necessary measures" to repatriate them. The nod to the use of force inspired ASPA's nickname, "The Hague Invasion Act." The United States also pressed other countries not to join the ICC, or, if they did, to sign bilateral agreements guaranteeing that they would never surrender a US citizen to the court. The potential cost of refusal was an end to US military aid and other assistance.

One might imagine that the ICC posed a significant threat to the United States. Why would Washington go to such lengths to bury an institution before it even got off the ground, unless it undermined key US interests? But in its first decade of existence, the ICC posed no such threat. On the contrary, all of its operations appeared to be in line with US interests.

The prosecutor's first arrest warrants were issued against five leaders in the LRA, including Kony himself. The LRA was reviled in the United States and the West more generally. Targeting these rebels was helpful to Museveni's Ugandan government, a key ally in America's global war on terror and recipient of substantial US military aid. The ICC's other investigations and efforts at accountability—in the DRC and the Central African Republic—either dovetailed with US interests or, at the very least, did not clash with them. Then came Darfur.

Whether states like it or not, the ICC matters.

The atrocities in Darfur, regularly characterized as genocidal, erupted around the same time that the ICC became a functioning court. But unlike other situations investigated by the ICC, the violence in western Sudan captured the imagination of many Americans, particularly evangelical Christian communities who saw it as a battle of good versus evil, with marauding Arab militias hell-bent on wiping out Black Darfuri Christians. Those evangelicals were also a key part of Bush's voter base.

As the atrocities in Darfur drew attention across the US media and penetrated the public's conscience via movements like the Save Darfur campaign, the Bush administration needed to come up with some kind of response. It favored an ad hoc tribunal, set up from scratch, but Washington's partners would have none of it. The ICC already existed. Could the United States finally accept that the court should investigate precisely the types of crimes that it had been created by states to address?

The international community needed the United States on board because Sudan had not joined the ICC. Under the Rome Statute, the ICC prosecutor can open an investigation into a state that is not a member of the court only if that state

willingly delegates its jurisdiction to the ICC (as Ukraine later would), or if the UN Security Council refers the relevant situation to the ICC. The former was not an option for Darfur: President Omar al-Bashir and his regime were themselves allegedly behind the atrocities. If the court was going to play any role, Washington had to allow a the UN Security Council to make a referral.

On the last day of March 2005, it did so. Along with Algeria, Brazil, and China, the United States abstained from voting on Resolution 1593, which referred the situation in Darfur to the ICC. The other 11 members of the Security Council unanimously approved the measure, resulting in its first-ever referral of a situation to the ICC.

In the wake of the vote, the acting US ambassador to the UN, Anne Woods Patterson, insisted that Washington still opposed the ICC. Calling the Rome Statute "flawed," she said that the United States had allowed the resolution to pass because it expressly prevented the court from investigating citizens of states that had not joined the ICC. Patterson also said she was "pleased" that the ICC would not be provided with additional resources to undertake an investigation at the request of the Security Council.

Yet relations between the court and Washington began to warm. The State Department's Rewards for Justice program, established to benefit those who provided information leading to the arrest of international criminals, was expanded to include informants on suspects in Darfur and Uganda wanted by the ICC. Elements of ASPA were repealed. As the Arab Spring erupted in February 2011, the United States voted in favor of UN Security Council Resolution 1970, which referred the situation in Libya to the ICC.

Within a few years, those warming relations gave way to the sheer scorn for the ICC expressed by the Trump administration. This was prompted by the ICC's stated interest in investigating alleged US war crimes in Afghanistan and Israeli atrocities in Palestine. Trump's national security adviser, John Bolton, who had called Bush's unsigning of the Rome Statute the happiest day of his professional life, declared the ICC "dead to us" in 2018. The Trump administration went so far as to issue sanctions in 2020 against then–ICC Chief Prosecutor Fatou Bensouda and some of her staff.

During that time, a US State Department employee told me that if the ICC prosecutor called, American diplomats might not pick up the phone. It was a grim period for the court, which nevertheless continued its work and did not kowtow to pressure from Washington. The Trump administration's hysterics also coincided with improvement in the ICC's global standing.

One of the ironies of coercive US diplomacy toward the ICC is the impact it has on other parts of the international community. When US hostility was at its most intense under the Bush and Trump administrations, the ICC's standing in the rest of the world appeared strongest. There were few criticisms of the court for alleged bias during these periods.

In contrast, when the US relationship with the court has been closest, especially during the Obama administration, allegations of bias and concerns over the proximity of the ICC to major Western powers increased. Much of the world fears that the ICC will target weaker states while ignoring the alleged atrocities for which powerful Western nations—and their allies—are responsible. Such arguments may be more difficult to sustain when the leading Western power lashes out at the ICC.

CROSSROADS OF JUSTICE

There is no doubt that the ICC is at a crossroads. The Biden administration has been supportive of the court's work in Ukraine but fervently opposed to its operations in Palestine, especially the warrants issued for Netanyahu and Gallant. The ICC has more investigations ongoing than ever, but it also has more enemies than ever. The United States, Russia, and Israel have all sought to interfere in the court's work, sometimes in a manner more appropriate for mafias than sovereign states. Meanwhile, atrocities are hardly abating, and geopolitical divisions are as severe as they have been since the end of the Cold War.

But crossroads are nothing new for the court or for the field of international criminal law. And the ICC is by no means the only player in that field. Never has there been more activity aimed at holding perpetrators to account for international crimes than there is today.

In West Africa, Liberia is finally moving toward the creation of a War Crimes and Economic Crimes Court to address atrocities committed during its civil wars, and Gambia is negotiating with the Economic Community of West African States to create a tribunal that would investigate and prosecute crimes against humanity committed during the 22-year dictatorship of Yahya Jammeh. Across Europe, dozens of cases have been brought

in national courts against alleged Syrian war criminals under the principle of universal jurisdiction, which allows states to investigate and prosecute certain international crimes committed abroad, irrespective of the nationality of the perpetrator or victims. Communities around the world are agitating for accountability. More and more people seem to expect that perpetrators will be held to account rather than escape justice.

Many of the challenges that the ICC confronts are the same ones it has always faced. Powerful states oppose the court when it interferes with their geopolitical interests. The number of perpetrators is not diminishing; on the contrary, the violence seen today is so blatant that those perpetrating it prefer to rely on misinformation and character assassination rather than careful legal arguments to refute the allegations against them.

Cooperation ebbs and flows in a way that confirms what many suspect: even where the ICC has jurisdiction, it will only offer justice for some people in some cases some of the time. Double standards persist. The ICC's warrant for Putin in connection with war crimes in Ukraine stands in stark contrast to Khan's decision to "deprioritize" his investigation into the CIA's alleged war crimes in Afghanistan.

At the same time, for those who thought the ICC would never confront the alleged atrocities of a Putin or a Netanyahu, the court is perhaps more legitimate than ever. Indeed, perceptions of whether the court is doing well or not largely depend on what one expects of the ICC. For anyone who assumed that the ICC would lack the gall to confront the United States or Russia, or their allies, the institution is surely exceeding expectations. Although the ICC in 2021 declined to investigate atrocities allegedly committed against the Uyghur population in China's western region of Xinjiang, the court is investigating Myanmar—a close ally of China—over the forced deportation and possible genocide committed against the Rohingya minority. No one today claims that the ICC is only interested in going after weak states.

For many, what makes the ICC worth supporting is not any promise of perfect justice, but the fact that it often remains the best, and sometimes only, viable avenue for accountability. It is not the possibility of applying law outside of politics that the ICC offers, but politics as law: a juridical answer to atrocities, delivered by a court that exists within a sharply political world, and is itself a political animal. Whether states like it or not, the ICC matters. If nothing else, the warrants issued by the ICC for Putin and Netanyahu have announced to victims in Ukraine and Palestine that the world's only permanent international court capable of prosecuting the crimes they have experienced actually believes them.

Some things are evolving at the ICC as it tries to keep up with an ever-changing world and a burgeoning industry of atrocity crimes. Perhaps no move is more significant than the turn toward the use of open-source digital evidence. Eliot Higgins, the founder of Bellingcat, an NGO focused on open-source investigations, has observed that there has never been more information, misinformation, and disinformation in circulation, nor has there ever been more truth accessible to those who can parse the differences among them.

Courts across Europe have prosecuted cases using open-source evidence, such as videos and photographs of atrocities posted to social media, often by the perpetrators themselves. When the ICC issued warrants for Libyan warlord Mahmoud al-Werfalli in 2017 and 2018, it did so largely based on videos of extrajudicial executions that he and his own fighters recorded and published. Tomorrow's key international crime fighters might not be lawyers in robes or the investigators who diligently collect evidence of war crimes in places like Ukraine. Increasingly, they are cyber sleuths and data specialists able to verify open-source evidence of mass atrocity events.

The ICC has always been in crisis; that is just the kind of institution it is. But however angry and belligerent they get, the United States, Russia, and Israel cannot destroy the court. The institution will persist. As developments in Ukraine and Palestine draw headlines, the ICC will also continue its work in Myanmar and the Philippines, in the Central African Republic and Venezuela.

Does this mean that the ICC is always the only or the best answer to mass atrocity events? No. The court has not stopped wars or the perpetration of international crimes. It is a profoundly imperfect institution. But its story to date, after almost a quarter-century of existence, also suggests that it has managed to deliver a modicum of accountability and a degree of recognition for victims in contexts where they would otherwise be out of reach. Given the state of the world today, that is a remarkable story indeed. ■