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Remarks by Diane Orentilcher

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of that state (apology). If you get a Security Council referral, you are obviously a tool of the P-5 (apology). If you seek to avoid those criticisms through a *proprio motu* activation, then you are foolishly intervening without support (utopia).

Those are just a few basic examples. As you think about these dyads, you can see how these catch-22s permeate even small and technical policy decisions about gravity and case selection. For example, do you think "feasibility of arrest" should be a factor in case selection? If you say "yes," then you are giving immunity to the powerful (apology). If you say "no," then you are endorsing putting resources into ineffective investigations (utopia). Whichever choice you make, one of these perfectly salient and powerful critiques is available.

If one peruses the commentary in articles, books, and blogs, one can read numerous variations on these themes, all arguing that the ICC keeps making "wrong" decisions which are "political" and tragically short-sighted (either because the decisions appease power but lose sight of legitimacy, or because they are too rigid and lose sight of effectiveness). My aim today is simply to draw your attention to these dyads. The ICC works across intractable fault lines, so that any decision can always be plausibly criticized as flawed from one direction or the other, and the claim of politicization can always plausibly be laid.

What should one do with these observations? What conclusions should one draw? You could be attracted to the view that the ICC should "balance" these considerations. But again, I should emphasize that there is no magic in-between spot where one is free from criticism. Or you could conclude that the ICC should position itself at a point where the criticisms are equally loud on each side. But I have doubts about that prescription as well. It is not necessarily the purpose of the ICC to equalize criticisms. The ICC's task is something broader and more enduring.[3] I am not making a prescription but simply noting that we should be aware of these patterns.

Moreover, I am not saying that the existence of such tensions and patterns means that the criticisms are meaningless or invalid. Critical evaluation is essential; arguments must be made. My aim is simply to encourage an awareness of these dyads as we wade into the debate. Any given policy or decision can always be criticized plausibly from one side of the dyad or the other when taken in isolation. When you read or hear an argument, consider how it fits in with these dyads. Importantly, is it a one-dimensional critique of multi-dimensional problem? Or does it acknowledge the full complexity of the problem and the fundamental underlying tension, and give a reason to agree that a shift in policy is needed?

Remarks of Diane Orentlicher*

Twenty years into the contemporary era of international criminal tribunals, a large measure of consensus has developed (at least among states that fund tribunals) has developed around the notion that these courts should dispense justice only in respect of the most serious international crimes. This view is reflected in the Rome Statute of the International Criminal Court (ICC), whose preamble affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished" and whose admissibility

[3] Fulfilling that task might involve taking into account the cooperation environment and the concerns and criticisms of different stakeholders. My point is simply that that adapting to the latest round of criticisms is not the *raison d'être* of the ICC. The reactions and inputs are useful in making calibrations in how best to build legitimacy and effectiveness, and even in helping to inform and refine the institution's mandate, but pleasing the crowds is not the mandate per se.

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provisions direct the Court to dismiss a case on the ground that it "is not of sufficient gravity to justify further action by the Court."[1] As developed in practice, the notion of gravity serves several important functions but cannot by itself effectively guide the selection of cases to be prosecuted by the ICC.

The Functions of "Gravity" in ICC Practice

To begin, the concept of gravity communicates in shorthand one of the core justifications for exercising international criminal jurisdiction, first enunciated during the postwar period: some crimes are so surpassingly evil that they threaten humanity itself. This conception of gravity is both a rationale and legitimating principle for the extraordinary displacement of national jurisdiction effected by international prosecutions.

In addition, the notion of gravity can be harnessed to advance the normative goals of international criminal jurisdiction by promoting a deeper global entrenchment of core human values. For example, the prosecution of crimes of sexual violence by the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone and other international and hybrid courts has helped brand these depredations as intolerable affronts to our common humanity, not as inevitable byproducts of conflict.[2] In this sense, the notion of gravity serves an expressive function for a global audience. Victims, moreover, can derive some measure of satisfaction when an international court brands the atrocities they endured as among the most serious offenses in the lexicon of inhumanity.

Functionally, gravity provides a sorting mechanism for the ICC—a criterion for allocating judicial resources that are extremely limited when considered in light of the myriad situations in which international crimes are committed with impunity. If this criterion for selection is applied consistently[3] and explained persuasively, the concept of gravity can help counter the inevitable charges of geopolitical influence that the ICC faces and thereby help legitimate the selection of situations deemed to warrant the Court's attention. Of course, invoking the notion of relative gravity will not by itself dispel suspicions that the Court's docket reflects a global power imbalance. But if its officials cannot credibly defend the Court's case load in terms of consistent baseline criteria, the ICC will be even more vulnerable to such charges.

Gravity Plus

None of this is to say, however, that gravity is or should be the sole criterion for determining the ICC's docket. Beyond the jurisdictional and admissibility requirements in the Rome Statute, the Court's work must be guided by sound priorities. A key element of this is ensuring not only that every case taken up by the Court meets a common gravity threshold, but that there is, in addition, a compelling and plausible theory of the case for the ICC's engagement in each case it accepts.

In a domestic setting, it would be absurd to suppose that bringing charges against, say, three suspects in a vast criminal organization would have a transformative impact on crime levels (or, if prosecutions are justified in other terms such as providing a measure of satisfaction to the criminal syndicates' victims or fostering a normative shift, that prosecuting a

[1] Rome Statute of the International Criminal Court art. 17(1)(d), U.N. Doc. A/CONF. 183/9, as corrected by the procés-verbaux of 10 November 1998 and 12 July 1999, 37 ILM 1002 (1998), 2187 U.N.T.S. 90.

[2] ICC Prosecutor Fatou Bensouda may have had this kind of consideration in mind when she indicated soon after taking office that she would emphasize crimes of sexual violence and violence against children.

[3] Here, it is more precise to say "applied as consistently as possible," as every situation potentially warranting ICC engagement is uniquely horrible.

handful of perpetrators could by itself significantly advance those goals). Yet the ICC Prosecutor typically seeks charges against only a handful of suspects in each situation country—where, almost by definition, massive atrocities have occurred. In light of this, we ought to be able to explain persuasively what impact we expect the ICC to have—and *how*—when there is a choice to be made about taking on or referring to the Court a new situation. Equally important, we should be as rigorous as possible in identifying the circumstances in which the Court is most likely to make an effective contribution. What else, beyond the ICC's finite prosecutions, must happen to maximize its efforts in each country that is the focus of its investigations and prosecutions? What should the Court and its supporters do to ensure that those conditions exist?

Although, as noted, I believe it is important that the ICC maintain a consistent and relatively high gravity threshold for all of its cases, I would expect the answer to this second level of questions to vary from one situation country to the next. To illustrate, the theory of the case for the ICC's engagement in one country might be that it has just begun the tenuous and fraught process of post-conflict recovery and cannot easily withstand an effort to prosecute the masterminds of recent atrocities itself. In this situation the ICC might be able to ensure that a destabilizing group of spoilers is removed from a fragile country.

Yet we know that successfully combating impunity requires a multifaceted, holistic approach; neutralizing and prosecuting those most responsible may be a vital but insufficient part of this process. In the case of Côte d'Ivoire, for example, I would have greater confidence in the contributions of the ICC's prosecution of former leader Laurent Gbagbo if the current government were undertaking even-handed prosecutions domestically. Instead, its prosecutions have focused on supporters of former President Gbagbo, despite the fact that supporters of President Alassane Ouattara also committed grave human rights violations in the period following contested presidential elections in November 2010. It may make sense for the ICC Prosecutor to resist a country's self-referral or declaration accepting jurisdiction unless it undertakes a commitment to institute a credible program of prosecutions domestically and develops a plan for meeting this commitment. To make the point in a more affirmative way, does it not make sense for the ICC and the states that support it to leverage the potential influence of the Court's work by embedding its prosecutions in a more comprehensive program of domestic reform and repair?

A different situation in which ICC prosecutions may be warranted is where there are sound reasons to believe the Court's timely engagement could help prevent a perilous situation from spiraling out of control. Although it may be hazardous to cite this as an example, the ICC's investigation of violence following the December 2007 presidential elections in Kenya illustrates this point. While a perilous example for several reasons, the most obvious relates to the recent election to the presidency and deputy presidency, respectively, of two men who face charges before the Court for their alleged roles in the 2007–2008 post-election violence; the two reportedly ran on the same ticket in the belief they could thwart the ICC's case against them. But if the Court's Kenya cases are fraught with peril, many Kenyans and Kenya experts are convinced that the ICC's engagement played a vital role in preventing a recurrence of election-related violence during recent presidential elections.

To be sure, there may be situations in which atrocities are so surpassingly savage in nature and scope that it is sufficient to justify ICC engagement on the ground that failure to punish those crimes would profoundly weaken the moral fabric of our common humanity and embolden others to believe they can commit atrocities with wholesale impunity. But in a world where atrocities occur far too frequently, the limited resources of the ICC are best