

Challenges Facing the International Criminal Court: Recommendations to the Assembly of States Parties

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The International Criminal Court is facing a time of transition. The ICC's leadership that charted the course of the court's first decade is in a state of flux. In 2012, a new prosecutor, six judges and an incoming president of the Assembly of States Parties (ASP) will have assumed their posts, fundamentally changing the face of the ICC. Meanwhile the court faces major challenges. A global economic crisis dominates discussions of the court's budget and future. Attacks on the court's legitimacy and manipulation of the ICC as a political tool continue to affect the court's credibility. There have been significant achievements both inside the courtroom and out – including investigations in seven countries and preliminary examinations in eight more. Moreover, 120 States are now Parties to the court, including 33 from Africa alone. Frustration exists at the pace of justice, since almost ten years after the ICC's founding document, the Rome Statute, entered into force, the world still awaits a judgment from the ICC's first trial of Congolese businessman, Thomas Lubanga. However, just last month, the ICC's first former head of state was transferred to the court, a monumental occasion for justice advocates worldwide.

At a time when tribunal fatigue and tightening purse strings dominate discussions around the ICC's future, visionary leadership and practical, effective support for the Court are more necessary than ever. Choices made now by the ASP – about the ICC's efficiency, its core functions, its size, and political backing – will affect not only the Court's operations, visibility and long-term impact, but also the viability of the international justice enterprise. Three key areas crucial for the ICC's success stand out for ASP attention:

- **The ASP has a unique role to play in identifying, coordinating and promoting complementarity efforts to bolster national justice systems in prosecuting international crimes.**
- **The ASP should sustain civil society support for and engagement with the ICC through:**
 - **Cementing and supporting a more formalized relationship between the ICC and “intermediaries” who help to do its work on the ground;**
 - **Ensuring outreach continues to be funded as part of the Court's core budget; and**
 - **Creating opportunities for more regular consultations between civil society and the ASP.**

- **The ASP should provide the political backing the ICC needs to fend off unwarranted attacks on its legitimacy, and its manipulation by some states as a political tool.**

(1) The ICC as a Court of Last Resort: Complementarity and Promoting National Accountability

The Rome Statute’s drafters clearly envisioned that the International Criminal Court should be “complementary to national criminal jurisdictions.”¹ References to the need to take “measures at the national level” to ensure the “effective prosecution” of the “most serious crimes” are woven throughout the treaty, as is the “duty” of each State to “exercise its criminal jurisdiction over those responsible for international crimes.”² Indeed, these references form the basis of a broader international system of justice that the Rome Statute envisions.

Yet States cannot always conduct domestic prosecutions on their own. Sometimes they need support from others to develop their national justice systems, particularly in the wake of conflict and mass atrocity. Since the Kampala Review Conference in June 2010, increasing rhetorical attention has been paid to the notion of integrating complementarity into rule of law programs of bilateral and multilateral donors.³ For their part, those donors have increasingly recognized the profound threat posed by violence and conflict to the symbiosis between the rule of law and development. Rebuilding legal institutions after conflict is crucial to restarting development, while the failure of justice systems is one of the factors that feeds violence.⁴ Much less effort, however, has been devoted to actually harmonizing technical and financial assistance, and marshaling political will, for complementarity.

The ASP is well placed to play such a role. The ASP is the prime guardian of the ICC and the Rome Statute system. In addition, many major rule of law donors are also State Parties to the Rome Statute. The Review Conference recognized the potential role the ASP could play in promoting complementarity by tasking the Secretariat of the ASP (SASP), “within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.”⁵

¹ Preamble, *Rome Statute of the International Criminal Court* (‘Rome Statute’), U.N. Doc A/CONF.183/9, adopted July 17, 1998, available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

² See Preamble and Article 17, *Rome Statute*, *ibid*.

³ The Justice Initiative has produced two major reports, for example, analyzing the role that rule of law donors already play in promoting complementarity (see *Putting Complementarity Into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda and Kenya*, available at http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119) as well as a guide to the role interested donors could play to support complementarity through their rule of law programs (see *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers*, available at http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-witte-20111129).

⁴ For example, see *World Development Report 2011: Conflict Security and Development* (World Bank, 2011) at chapter one, “Repeated Violence Threatens Development” available at <http://wdr2011.worldbank.org/fulltext>

⁵ Kampala Review Conference, Resolution RC/1, confirmed by ASP resolution ICC-ASP/9/Res.3.

As the Court's workload increases and the risk of overload is real, the ASP has a genuine interest in further supporting and strengthening efforts to promote complementarity. Investing political energy into enhancing national justice systems should assist in the long-term to ease the burden on the ICC and contribute to the fight against impunity for Rome Statute crimes.

Recommendations:

The ASP and its Secretariat can perform three central functions to catalyze greater and more coordinated international support for complementarity. Each requires little or no cost in the short term:

- (1) **Education and awareness raising:** ASP members are uniquely placed to spearhead efforts to encourage other actors to support complementarity efforts, including development agencies, multilateral development banks, embassies on the ground, national governments, and civil society. The new ASP President is particularly well positioned to engage the leadership of various institutions to impress upon them the importance of complementarity in general, and to enlist their support in finding solutions for complementarity needs in specific states.
- (2) **Convening Key Stakeholders:** The ASP can use its convening power to foster regular discussions among the actors needed to address complementarity effectively: states, civil society and the global legal community. In particular, it can help bridge the gap in communication between the international justice and international development communities. For example, development agencies could be invited to participate in ASP sessions and side events.
- (3) **Information Sharing about Complementarity Needs:** The ASP is also well poised to improve the sharing of information among different actors engaged in complementarity on an ongoing basis. The creation of an ASP extranet on complementarity by the body's Secretariat is a welcome development. If followed by active promotion, it could potentially be a powerful tool. The SASP could, for example, engage with governments and in-country donor coordination mechanisms in all ICC situation countries, and countries under preliminary analysis, to ensure that they are aware of the extranet as a forum to post their needs. Similarly, the SASP can ensure that States Parties and relevant civil society organizations have identified focal points for posting information on activities and resources. The Bureau's Working Groups can and should convene meetings to discuss specific needs identified by States Parties. These might range from calls for assistance on domesticating Rome Statute crimes, to trainings on international criminal law for prosecutors or defense counsel, to prison management needs critical to shore up the back end of the judicial chain. ASP delegates should be encouraged to discuss these needs and take them back to their governments to identify possible roles for their countries in finding a solution. They can also use their awareness of these needs to inform their governments' participation in other relevant forums: whether at the General Assembly, in rule of law donor forums, or relevant regional meetings.

(2) Increasing Civil Society Support for and Engagement with the Court:

a. Standardizing Relationships with Intermediaries

As a global court, the ICC is required to investigate around the world in countries with very different cultures, histories, languages and conflicts – and it must do so with limited resources. As a result, the court depends on partners to assist its work – with advice, convening power, and background information about the context in which it is operating. Sometimes the Court needs local partners to help conduct outreach in local languages in the field, liaise with victims and witnesses, or facilitate victims’ participation in legal proceedings. To undertake these tasks, the ICC relies heavily on a group of people commonly referred to as “intermediaries” – that is, people who work “between one person and another; who facilitate contact or provide a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations or affected communities more broadly on the other.”⁶ Without the work of intermediaries, the Court would simply be unable to function as well as it does now.

Yet some use of intermediaries by the ICC has been controversial. In the ICC’s first trial of Congolese businessman, Thomas Lubanga, questions over the role and proper use of intermediaries by the prosecutor’s office nearly derailed the trial twice. The trial’s judgment, expected at the start of 2012, will likely zero in on the role of intermediaries in investigations.

The increasing spotlight on the court’s deployment of intermediaries throughout the Lubanga trial highlighted the need for more formal regulation of the relationships between the ICC and intermediaries. To its credit, the ICC took a positive step to respond to this issue by developing the *Draft Guidelines Governing the Relationship between the Court and Intermediaries*. The *Draft Guidelines* address the existing legal and policy framework governing the use of intermediaries; the definition, functions and selection of intermediaries; and the relationship between the Court and intermediaries, including with respect to security and protection, as well as payment of expenses and provision of support to build capacity or address psycho-social care. The *Draft Guidelines* also anticipate a monitoring process which assesses the implementation of its provisions. The *Draft Guidelines* were finalized by the Court this year, but failed to be tabled at this ASP. They must be considered and formally adopted by the ASP as soon as possible.

The complex nature of the Court’s relationship with intermediaries requires that States remain engaged with this issue. The Assembly’s President should appoint a dedicated intermediaries facilitator through The Hague Working Group specifically to interact with the Court on intermediaries and to take forward review and discussion of the *Draft Guidelines* as they are implemented through the Court’s activities.

Recommendations:

- **Appoint a facilitator on intermediaries;**

⁶ See International Criminal Court, *Draft Guidelines Governing the relations Between the Court and Intermediaries*, August 2011, copy on file with the Open Society Justice Initiative, p 5.

- **Adopt the *Draft Guidelines Governing the Relations Between the Court and Intermediaries* as soon as possible.**
- **In the absence of formal adoption by the ASP at its 2011 session, the ICC should still i) utilize the *Draft Guidelines* to inform its interactions with intermediaries pending their adoption; and (ii) ensure the *Draft Guidelines* are subject to an on-going monitoring process, involving the Court, intermediaries and external experts to ensure the *Draft Guidelines* achieve their aims in managing the partnership with intermediaries.**

b. Maintaining Outreach Within the ICC's Core Budget

The current economic climate has created understandable pressure on States Parties to identify scope for greater efficiencies in the Court's operations and to take a fresh look at the composition of the budget. Such scrutiny of financial contributions to the Court can be a positive process if approached with a view to preserving the ICC's fundamental underlying principles and ensuring that cuts will not impact rights and obligations contained within the Rome Statute.

One item that some have suggested for possible removal from the ICC's core budget is outreach. Yet outreach is not a discreet activity that can be excised without significant cost to the court's essential operations. Outreach helps to realize victims' Rome Statute rights to participate in ICC proceedings. It raises the visibility of ICC trials conducted far from those most affected by the crimes being prosecuted. It also helps address misconceptions and concerns about the Court that often arise for reasons as diverse as deliberate misinformation campaigns, erroneous media reporting, or confusion among those who may have had little exposure to formal justice processes, let alone international ones. Two-way engagement between Court staff and affected communities can also help inform Court policies in the countries in which it works, as well as foster trust and facilitate participation among victimized communities.

Some efforts to cut outreach from the core budget are premised on the idea that outreach can be outsourced to others, specifically states and civil society. This is misguided. In countries where political elites are hostile to the ICC's work, leaving outreach in the hands of the State threatens the accuracy of information and the security of all perceived to cooperate with the Court. Similar security concerns exist for civil society groups taking on outreach in hostile situation countries. In Sudan, for example, civil society groups suspected of helping the Court were expelled from the country after the announcement of the arrest warrant for Sudanese President Omar Al Bashir in March 2009. Moreover, funding for civil society is notoriously unreliable. And outsourcing outreach deprives the Court of the opportunity – and responsibility – to engage directly with victim communities about its work.

For these reasons, exclusive reliance on NGOs or States to do outreach over the long-term is untenable. The ICC must maintain its own securely funded outreach role.

Recommendation:

- **Retain funding for outreach within the core ICC budget**

c. Enhancing Opportunities for Civil Society Consultations with the ASP

Civil society is of great benefit to the functioning of the ICC. Many NGOs closely follow the operations of the Court and have valuable contributions to offer the ASP.

The ASP already provides significant opportunities for interactions with NGOs – through its informal Friends of the ICC meetings, working group meetings in The Hague and New York to which civil society representatives are sometimes invited, and at the annual ASP sessions themselves. Yet more extensive and regular consultation is needed. The ASP can benefit, at no cost to States, from civil society expertise in specific areas of law and practice, or country-specific knowledge. Civil society groups are often the most avid and vocal supporters of the ICC’s work. Shoring up that support by welcoming civil society engagement in key policy or decision-making discussions would undoubtedly facilitate a greater sense of ownership and commitment to the ICC and the achievement of its goals.

Civil society would welcome other avenues for interaction – including through greater access to thematic facilitators; more formalized opportunities to engage with the budget and finance discussions in advance of ASP meetings; and more regular consultations as the agenda for ASP sessions is being developed.

***Recommendation:* Identify and offer more opportunities for regular consultations between the ASP and civil society.**

(3) Coordinated Political Support to Combat Hostile Attacks on the ICC and Halt its Use as a Political Tool

Increasingly in recent years, the ICC has come under concerted attack by political elites hostile to its mission and work, often by governments whose top leaders themselves are under scrutiny of the Court. These challenges have taken a range of forms, including, for example, the repeated travel of President Bashir to countries mandated either by the ICC or the Security Council to arrest him. Other governments have at times sought to use the ICC as a political tool against political opponents, or to enhance leverage over recalcitrant states – a tool which can then be revoked when political interests require. For instance, although the Security Council initially referred the situation of Libya to the ICC, a number of state representatives unhelpfully suggested after Colonel Gaddafi's arrest warrant was issued that, in the interest of securing a political end to the conflict, he might remain in Libya and not be handed over to the Court.

Left unchecked, manipulation of the ICC -- through challenges to its legitimacy or its use as a political tool – is dangerous for the Court’s long-term survival and effectiveness. States parties have at times been effective in defending the work of the Court. But on the whole, the lack of an effective political strategy that States Parties can consistently deploy to pro-actively assert the Court’s legitimacy and utility is a distinct challenge that leaves the ICC politically vulnerable.

In this moment of ICC and ASP leadership change, states should develop a concerted strategy to maximize the ASP's considerable political power on the Court's behalf. This can be done both by the ASP as a united body, and through bilateral representations in other fora where support for the ICC is important but at times challenged -- such as the United Nations Security Council, and in regional bodies such as the African Union and the European Union. Collaboration among states to offer more consistent support for the ICC in political fora will help bolster ICC's credibility, legitimacy and respect.

Recommendation:

- **Renew the cooperation facilitator mandate;**
- **Identify the development and implementation of a robust and coordinated political support strategy as one of the pressing needs to be addressed by the ASP.**

Conclusion

Taken together, these recommendations will strengthen not only the ICC itself, but the system of global support that underpins the Court. Most changes can be implemented with little or no cost to the Court or States Parties in the short-term, but they will require increased and more consistent political commitment. As a new era is ushered in for the ICC at this ASP session, States Parties should prioritize the above issues for consideration.