

PARLIAMENTARIANS FOR GLOBAL ACTION (PGA)

A Deterrent International Criminal Court – The Ultimate Objective

"By putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes"

Judge Philippe Kirsch, President of the International Criminal Court

"The gravity of the crimes is central to the process of case selection. My office looks at factors such as the scale and nature of crimes as well as the impact of ICC investigations and prosecutions in the prevention of further crimes.....Our justice efforts should contribute to the protection of the displaced population in Darfur and to the prevention of further crimes"

Luis Moreno Ocampo, Chief Prosecutor of the International Criminal Court

"If perpetrators know that they're going to be prosecuted and punished they will hopefully be deterred. Now this may not deter the type of tyrants that we have seen throughout history. But it may deter a number of senior or even junior officers who will be able to say "well, I'm not going to obey this order and I'm not going to commit this act because I'm liable to be prosecuted." And so we do hope that it will have a deterrent action and therefore that it will prevent some harm. Obviously, it is not going to prevent all harm, but it will prevent some, and if we can create an institution that can minimize the amount of human harm that occurs, then I think it will be a very useful step to take"

Prof. Cherif Bassiouni, President, International Human Rights Law Institute, DePaul University

"If, for example, we had such a permanent court, they would not have had to establish a tribunal in Bosnia Herzegovina, in Rwanda, and so on and maybe those crimes would not have been committed because the persons who are now before those tribunals would have known that they could be brought to account for the commission of those crimes and the people around them would have known that those persons could be brought to account. So this could be a tremendous deterrent - if one is to have a permanent court, rather than have to resort to tribunals - to doing something after the act has been done rather than having provision so that action could be taken. Everyone should know that action could be taken. This would be a tremendous deterrent influence"

H.E. Arthur N. Robinson – Former President of Trinidad and Tobago; former Convenor of the PGA International Law & Human Rights programme

Two weeks ago, US Deputy Secretary of State Robert Zoellick told reporters that the ICC proceedings (in Sudan) are "a useful deterrence against others" and allow the US to emphasize the need to stop the violence."

Mr. Robert Zoellick, US Deputy Secretary of State

The ICC is not a hurdle to the talks, instead it is the reason why we have peace talks today," US ambassador to Uganda Steven Browning told reporters. "All earlier efforts failed," he said. "What is new that this current process is somehow succeeding? The ICC is the new thing in the process."

Mr. Steven Browning, US Ambassador to Uganda

"At the conceptual level, OHCHR recognizes that a proactive field presence increase the protection space and opens up points of contact for a comprehensive protection strategy.....active presences on the ground deter violations of human rights by influencing political calculations of perpetrators, who are often more sensitive to these elements than assumed."

Ms. Louise Arbour, UN High Commissioner for Human Rights (in Observations made to a Pre-Trial Chamber of the ICC)

"It is our belief that the Court's establishment will also be a powerful deterrent against future authors of such atrocities. It is therefore a critical instrument for strengthening the rule of law and promoting a stable peace"

Ambassador Juan Gabriel Valdes, Permanent Representative of Chile to the United Nations, on behalf of the member states of the Rio Group

"The ICC will serve notice on leaders like Milosevic and Saddam Hussein that they will be held responsible for their actions, thereby creating a meaningful deterrent"

Professor Ann-Marie Slaughter, Council of Foreign Relations, New York

"The Court is strong enough to bring war criminals to justice and provide a deterrent against future atrocities"

US Senator Patrick Leahy

"Let us together establish a credible, fair and effective International Criminal Court which will serve as a deterrent - as a signal that impunity will no longer be tolerated"

Ambassador Ellen Løj (Denmark) – Presidency of the EU (2002)

In a world where a premium is justifiably placed on hard facts or evidence/indicators of hard facts, measuring the deterrent effect of an institution such as the International Criminal Court (ICC) will always present something of a challenge. There is no readily available mechanism pursuant to which we can accurately assess the Court's 'long arm' or 'long term' preventative effect. Instead, we could be faced with a more vague 'no news is good news/silence is golden' scenario. Because of the many variables often present, deterrence, as a general proposition, is inherently difficult to gauge. Nevertheless, it has been proven that well-educated would-be criminals are often deterred by the certainty or high probability of punishment, which makes their criminal plan too risky and not "cost-effective" enough: this is particularly true for would-be perpetrators of "white-collar crimes" and corruption. The area of international crimes still needs to be tested by statistical analysis, but the fact that the ICC Prosecutor's strategy is focusing on the "persons bearing the greatest responsibility for the most serious atrocities" (e.g., political and military leaders) may lead to an assessment of the ICC impact on the future commission of these crimes in a similar vein in which effective national jurisdictions help deter white-collar crimes.

A number of unique factors arise for consideration insofar as the potential preventive effect of the ICC may be concerned:

- 1 The ICC is still at an embryonic stage in its existence. It is yet to complete its first case. It must be afforded an opportunity to establish its credentials. This, by its very nature, is not an overnight process, but may take a number of years.
- 2 Does the establishment alone of the ICC have a deterrent effect? Its permanent status, in contrast to the *ad hoc* nature of the tribunals for the former Yugoslavia, Rwanda and Sierra Leone, undoubtedly sends a strong signal *per se*. It is here to stay. At the same time, however, the real strength of its deterrent force, at least to some extent, may have to be 'earned' through the effective and impartial conduct of cases during the course of the coming years. Even a relatively small number of well managed cases should serve to consolidate the reputation of the Court and, consequently, instill more hesitancy in the minds of potential future perpetrators of the crimes set out in the Rome Statute. By its deeds, the ICC has an opportunity to emit an unambiguous message that it is an institution which 'means business', that it will act decisively, where there is an unwillingness or inability to do so on the part of national authorities. Action will undoubtedly speak louder than words to those who in the future may contemplate commission of any of the heinous crimes set out in the Rome Statute.
- 3 Even if not completely conclusive, an increase in the number of national prosecutions in the next 5-10 years of individuals charged with genocide, crimes against humanity or war crimes, could also be reasonably credited to a beneficial, knock-on 'contagion' effect of the ICC's presence in The Hague. As a corollary, although perhaps more optimistically, were there to be an appreciable decline in the commission of the crimes set out in the Rome Statute in the coming years, it would not be unreasonable to attribute this to the 'long shadow' of the ICC. After all, this would be the ultimate and ideal indicator of success in the fight against impunity. The initial practise of the ICC can be analysed in this perspective, especially with respect to the developing situation of Northern Uganda, as outlined below.

- 4 It ought to be emphasized that *whether or not the ICC will in time wield a significant deterrent effect will not, and cannot, depend exclusively on its conduct alone*. States must actively discharge their responsibilities under national law and prosecute individuals charged with the crimes in question, emboldened in this task by the very existence of the ICC. Parliamentarians, as legislators, have a key role to play to equip their national systems with the effective laws and remedies to fight impunity and complement the action of the ICC. The ICC must be directly engaged by external actors where circumstances so warrant it. Constructive UN Security Council engagement with the Court can only enhance and consolidate its reputation and, in turn, its deterrent effect. And constant, swift and firm reminders by both governmental and non-governmental sources to ‘vulnerable constituencies’ of the serious *personal* legal implications and ramifications of any actions they may be contemplating or have just embarked upon, remain an essential component in this mix. In practical terms, this could take the form of rapid deployment missions by prominent politicians to affected countries/regions. And, in parallel, ICC outreach and technical assistance programmes must continue undiminished. Information is power.

CONSIDERATIONS BASED ON THE INITIAL PRACTISE OF THE ICC, STATES AND NON-STATE ACTORS

While it is premature to make any definitive assessment regarding the ICC’s deterrent effect in respect of the future commission or restraint from commission of genocide, crimes against humanity or war crimes, early indications are promising:

- 1 At a public hearing with the ICC Prosecutor in June 2003, Antoine Bernard, President of the International Federation of Human Rights (FIDH) observed that swift action by FIDH and media broadcasts in the Central African Republic (CAR) following a coup attempt in October 2002 reportedly led to a reduction in tension of the situation (according to FIDH and other local NGO sources on the ground). In particular, a communiqué calling for ICC intervention that was widely broadcasted on national and international radios became a key factor in the decision of the main belligerent to move out from the country with his armed followers. In this respect, it must be noted that the alleged crimes in question fall under the jurisdiction of the ICC, as the Rome Statute entered into force on July 1, 2002, and the crimes were allegedly committed in October 2002. This action undertaken by civil society was reinforced by the decision of the Government of the CAR to refer their country-situation to the ICC on December 21, 2004 – in fact, the referral requests the ICC Prosecutor to investigate any crime committed after July 1, 2002. The Prosecutor is currently analysing and closely monitoring the situation.
- 2 The UN News Service reported on November 17, 2004 on comments made by the UN Operation in Côte d’Ivoire (UNOCI) that, a day after the UN Special Advisor on Genocide Juan Mendez remarked that the situation in Côte d’Ivoire was falling under the jurisdiction of the ICC “*National radio and Television have been airing peace messages significantly different in tone and content to the ones we have been hearing of late*”. On November 16, Mr. Juan Mendez had said: “*The Special Adviser recalls that the Ivoirian authorities have an obligation to end impunity and to curb public expressions of racial or religious hatred especially those aimed at inciting violence. It should be recalled that, in the absence of effective action by courts of national jurisdiction, incitement to violence directed against civilians or ethnic,*

religious or racial communities can be subject to international action, including under the Rome Statute of the International Criminal Court. For instance, the Security Council could refer the situation in Cote d'Ivoire to the International Criminal Court. It bears noting that Cote d'Ivoire lodged a declaration with the Registrar accepting the exercise of jurisdiction by the International Criminal Court with respect to "acts committed on Ivoirian territory following the events of 19 September 2002." It would be very important for PGA and its membership to take stock of the effectiveness of Mr. Mendez's message and similarly utilize the *threat* of ICC intervention to curb the violence and break the cycle of impunity in other future situations, when and if the circumstances would appear to justify such an intervention.

- 3 The most remarkable achievement of the initial practise of the ICC has been, so far, its fundamental contribution to the suspension of hostilities in Northern Uganda. As noted by the Representative of the High Commissioner for Human Rights In Kampala at a Panel Discussion in Kampala in September 2006, and as recently confirmed by statements of the US Ambassador to Uganda reproduced in the media, "peace-talks" between the Lord's Resistance Army (LRA) and the Ugandan Government would have not resumed with serious prospects of success without the arrest warrants issued by the ICC in July 2005 against Joseph Kony and other 4 leaders of the LRA. In June 2006, a top official of the UN Department of Peacekeeping Operations (DPKO) and a senior South African diplomat to the PGA's Director of Programmes at the UN that "Kony is terrorised by the prospect of being arrested and surrendered to the ICC!" An agreement between the ICC Prosecutor and the Government of Sudan to enforce the arrest warrants further weakened the position of the LRA leadership, who found refuge across the border of the Democratic Republic of the Congo (in the Garanga National Park). **"As a consequence, crimes allegedly committed by the LRA in Northern Uganda have dramatically decreased"**, Prosecutor Luis Moreno Ocampo stated in his address to the V Assembly of States Parties to the ICC in The Hague on November 23, 2006. He added: **"People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousand of children are in the process of closing. The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006."**

As of today, these events attest the deterrent impact of the ICC intervention, as no LRA attack against civilians has been reported over the past months after almost 20 years of armed conflict in Northern Uganda.

In all current or future crisis situations, Parliamentarians - as political leaders - may make their best efforts to disseminate knowledge of the Rome Statute and the implications for would-be perpetrators of ICC jurisdiction in connection with their present and future criminal plans and actions. Additionally, Parliamentarians could urge all relevant national, regional and international actors, such as the United Nations, the European Union and the African Union, to alert political and military leaders regarding the implications of ICC potential jurisdiction over their actions. In so doing, Parliamentarians will be able to contribute to this pivotal preventative function of the ICC.

Coordinated and concerted actions by all relevant actors in the next few years, as outlined above, should lay the groundwork for the ICC to assume it's indisputably most important role - that as a force of deterrence.