The ICC Would Increase Its Prevention Ability If the Prosecutor’s Discretion were More Visibly Limited

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Summary

The prosecutorial discretion granted institutionally to the ICC has the upside of allowing a resource-constrained Prosecutor’s Office to maximize its effect by being able to pick and choose where to act or threaten to act. The downside of this discretion, in what is otherwise a strongly rule-governed legal system established by treaty, is that, if overplayed, it can undermine the legitimacy of the Court and the norms that it attempts to uphold. The suggestion made here is that the long-term legitimacy of the Court would be enhanced if prosecutorial discretion were cabined within greater rule-governed and accountable constraints. That legitimacy is crucial to deterrence over the long term, because the ability of the institution to prevent criminality must eventually, as with criminal law systems generally, rest upon a generally internalized set of norms, rather than the naked threat of possible enforcement.

Argument

A Politics, Not a Society

My own general views of the International Criminal Court are skeptical, principally on grounds that its mandate and aspirations do not correspond to an international body, because the legitimacy of a court of this kind requires, as Max Weber noted, that it be embedded in a genuinely social structure, and not merely in the institutions of international politics. The legitimacy of courts in enforcing the law in domestic societies depends fundamentally not upon naked deterrent calculations by would-be lawbreakers, but upon the general casting of norms within a structure in which they are generally accepted and internalized. The internalization takes two directions, according to classic social theory, acceptance and adherence by nearly all and, if not obedience, then at least acceptance and internalization sufficient to regard violation as deviance from a legitimate social order. In order for there to be either of those forms of internalization leading to legitimacy, there must be a social order.
Since I do not regard what passes for the international community as constituting a social order—a society, in Weber’s sense—it seems to me mere metaphor and analogy to consider that the ICC can play a role globally that criminal courts play domestically.

This is of course a distinctly minority view within international law as a field, and it is not my intention to pursue this level of argument here. Nonetheless, deep skeptics can sometimes play a salutary role in forcing enthusiasts to at least pause in the march forward to ask if it goes quite where they think it goes. In this case, the highest level question is, does the mission, goals, reach, ambitions, and—notably—ability to deter of the ICC depend ultimately upon the embedded community being a society and not merely a politics? And, if so, in what sense is the ICC embedded in a society?

The problem in raising this kind of question is that the ICC always has an answer to this kind of skepticism, even if it is granted as a category even in principle: give us time. We need more time to solidify and consolidate our institution, and the institutions among which it nestles; as international society, as you say, consolidates, it will too. If it becomes obvious that the ICC is achieving prevention of international crimes, then the question goes away. If there are questions about that, then at some point someone has to say, well, how much time before we are permitted to judge whether the institution is a success or failure or something in between.

*The Metrics of Prevention, or, the Dangers of Datasets*

In practical terms, what are the metrics on which to ask whether the actions of the Court or the Prosecutor are having a preventative impact on international crimes? As I scan the scholarly literature, particularly that coming from political science, I am impressed with the efforts being made to establish measurable and quantifiable methods of establishing to the satisfaction of social science that an action, or threatened action, by the Prosecutor or by the Court had a deterrent effect, either in that direct case or indirectly elsewhere. And that the accumulation of such actions was having, or not having, such effects on a more global basis.

Methods such as examining statements by the subjects of such actions, whether reported in the press or once in custody, can help give some sense of possible impacts. More indirect measures, looking to such things as child soldier recruiting practices or rates of attacks in violation of the laws of armed conflict that were expressly raised by the Prosecutor, can also help to establish whether the institution has a preventive impact. I hope that scholars who deal in empirical methods elaborate more and better methods of evaluation. It is an improvement on the traditional methods of international law, which are not well informed by social science.