The ICC Under a New Threat

Why the West Must not Throw the ICC under the Bus of Short-sighted Politics

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In a recent essay, I discussed the nugatory argument engaged in a later statement of the French government communicating an apparent *volte-face* about their obligation to enforce ICC arrest warrants against Benjamin Netanyahu and Yoav Gallant. As I demonstrated in that essay (a fuller, more technical version of which is pending publication), the French government's attitude is unsustainable as a matter of customary international law because of the mistaken suggestion that senior officials of a state are immune from the jurisdiction of an international criminal court if their state has not ratified the treaty establishing that court.

In this related essay, I engage certain extra-jural considerations that must be kept in mind at all times, in light of the foreseeable implications of the naked political hedging involved in that kind of attitude. Those implications are troubling because France is not —as this mapping exercise reveals—the only ICC state party now signalling equivocal support for the ICC since the announcement of arrest warrants against the Israeli nationals. It is also to be expected that the incoming administration in Washington will bring intense pressure upon European and Western States, in hopes of bullying them out of enforcing those arrest warrants.

These political countercurrents should not be underestimated in their potential to undermine the continued existence of the ICC.

A short history of unflinching support for the ICC

Prior to the imperatives of accountability that the Israeli military operations in Gaza have galvanised, Europe and the Western world—minus the US—always comprised the strongest bastion of support for the ICC. For the European Union and its member states in particular, unflinching support for the ICC was an article of faith, a critical component of the EU's core value of support for the rule of international law. EU support for the ICC was especially fervent in their insistence that all ICC states parties must execute all ICC arrest warrants without exception, given the EU's valid view of the court "as the cornerstone in the fight against impunity and to help victims of atrocities to achieve justice."

I recall a meeting at the African Union headquarters in Addis Ababa in June 2019, during which the EU Ambassador delivered a moving speech to African ambassadors whose states had generally grown sceptical of the ICC and its processes. That scepticism resulted from the fact that all the ICC arrest warrants at that time were only against Africans. Understandably, some African leaders felt fooled and began questioning their nations' continued participation in the ICC project. "We had enthusiastically rushed in to embrace a system of justice that was promised the whole world," they repeatedly complained in effect. "But we see now that this is a system that seems to work robustly only when Africans are the suspects of wrongdoing." The result was a rising stirring for mass withdrawal of African states parties to the Rome Statute—an impetus turbo-charged by the selfish designs of African leaders then under investigation, under arrest warrants or under prosecution at the ICC. It was in that context that the EU ambassador made his heartfelt speech about the policy of unflinching EU support for the ICC. He explained—as did many European statesmen and women who also spoke to that policy—that it was a policy with no hidden agenda to target African leaders (as many were beginning to allege); but had everything to do with Europe's own experience and history with international criminality chronicled in two world wars. That argument was

compelling in my view; it was all the more so when in 2014 Russia annexed Crimea and then launched a full-scale invasion of Ukraine in 2022. Still, Africans remained sceptical.

Staving off an African mass withdrawal

As the African mass withdrawal agitation gathered steam between about 2015 and 2018, I felt called upon to intervene personally as a senior ICC functionary of African origins. The aim was to persuade African leaders to reverse course and to start supporting the Court again. The effort, which began before my ascension to the Court's Presidency and continued into it, required leaning into my own native nationality and enlisting Nigeria's leaders not only to oppose firmly the adoption of a mass withdrawal resolution at the African Union, but also to declare support for the Court in multiple public pronouncements that should encourage other African states to follow that lead. Eventually, they did. Our shared African affinity allowed them to trust me as I told them then the story I have now memorialised in greater detail in my new book (*End of Immunity*). It is the story of the provenance of the norm against immunity for heads of state; a norm that originated in 1919 when all the nations on the continent of Africa (except Ethiopia and Liberia) were under colonial rule, and Israel, I should add for purposes of this essay, had not yet been created.

Since the ICC announced arrest warrants against Netanyahu and Gallant, the world has started to observe open equivocation from France and other European states about executing those arrest warrants. This inevitably raises the question whether it had been too easy in the past for nations of the West to profess "unflinching support" for the ICC when all the accused persons were Africans; even though the conducts of some of them (consider, for instance, the defendants from Kenya and Côte d'Ivoire) came nowhere close to the extravagant cruelty on full display in Gaza, despite rulings of the International Court of Justice and the relentless appeals of the UN Secretary General.

The states now signalling a change of tune do not argue that what they see in Gaza raises no probable cause for criminal accountability in international law. They nevertheless appear prepared to use carefully contrived weasel words and phrases to undermine the Court's confidence—and confidence in its processes—regarding the arrest warrants issued against just two human beings whose leadership roles have directly resulted in the deaths of scores of thousands of their fellow human beings and deliberate catastrophic circumstances for the survivors. The obvious message—and a very confounding one—seems to be that there will always be accommodation for the political aptitude of whoever ascends to political power in Israel, however extremist the conduct and however injurious to the international order or even ultimately to Israel itself.

One such injury to the international order lies in this obvious risk: African States *will* re-engage their earlier efforts to withdraw from the Rome Statute should nations of the West manage to renege on their obligation to execute ICC arrest warrants while the Court continues to prosecute African defendants now or in future. Given that African states make up 33 of the 124 states parties to the Rome Statute, their mass withdrawal will mark the beginning of the end for the ICC. That outcome would, of course, be the preference of those who object to the execution of these arrest warrants. But, it is for European and other Western nations to resolve themselves to their own role in such an eventuality: if, as it seems, preserving impunity for two individuals is more important than preserving a global institution that was specifically created to serve, in the apt words of the EU, "as the cornerstone in the fight against impunity and to help victims of atrocities to achieve justice."

The question of genocide

It is more than surprising that this prospect of wrecking the ICC because it issued arrest warrants against two individuals is occurring amidst the crescendo of ardent opinions alleging that the military operations that these individuals have directed in Gaza have since taken a genocidal turn or plausibly so or are at least in serious danger of doing so. These opinions come from stalwart sources, including independent courts of law, human rights organisations and experts in genocide

studies. Amongst them are the International Court of Justice, the US Federal Court for the Northern District of California, a UN Special Committee, a group of over 20 UN human rights mandate holders, the UN Special Rapporteur on the situation of human rights in the Palestinian territories, Amnesty International, Human Rights Watch, the University Network for Human Rights, groups of academics (see here and here), and individual experts in the field of genocide research (see here, here and here). Many of those sounding these alarm bells are Israeli nationals and or Jewish persons.

Against these mounting allegations that are based on expert, careful analysis of the evidence, the most resonant response from Israeli leaders has been what one commentator put thus: "How can you call it genocide if it's waged by us?" The response is quite simply inadequate.

These allegations are serious. The world cannot realistically afford to ignore them, especially given that those making the allegations are not frivolous provocateurs. Their united opinions on the matter will, at the barest minimum, comprise a permanent scaffolding of an open query, unless there is a definitive judgment of a court of law that holds otherwise. Considering that the charges currently indicated by the ICC arrest warrants do not include the charge of genocide, the time has now come to formulate that charge so that ICC judges can subject it to close judicial scrutiny. Let the judges decide the question whether genocide has been committed in Gaza and Israel in the events that unfolded from 7 October: and if so, who bears individual criminal responsibility for the crime. If there is no genocide, the judges should tell the world that after a fair trial on the question. That will be the best argument against that allegation.

But will sacrificing the ICC be really all in vain?

"Don't it always seem to go," sang Joni Mitchell, famously capturing the psychology of the aft side of the hedonistic treadmill, "That you don't know what you got 'till it's gone." It is possible that the current generation of statesmen and -women, for whom the presence of the ICC has become as commonplace and occasionally irritating as the presence of a long-established romantic partner, could not relate to the dream of a permanent international criminal court at the time when it did not exist. So, they may play short-sighted politics that may thoughtlessly endanger the court's existence.

As a practical matter, though, one profound question that arises is whether sacrificing the ICC on the altar of raw politics is ultimately worth the anticipated gain. In that regard, consider the following factors. In recent rulings, the ICJ has repeatedly signalled the international illegality of Israeli governments' policies and operations in Gaza. Several organs and mandate holders of the UN have conveyed the same message. So have eminent international human rights organisations like Human Rights Watch and Amnesty International; as well as renowned genocide scholars (some of them Israelis and Jews). How truly realistic is it for states to hope permanently to suppress these existing and growing concerns, such that it is worth destroying the ICC in the attempt to do so?

It is all well and good for Western and European politicians to try and give political comfort to friends who consciously brought unto themselves the legal jeopardy now confronting them—pretending to deny the reality of a permanently altered life for those friends regardless of the role of the ICC. In other words, does that political stroking ignore the robust culture of judicial independence in many European countries, where it is prosecutors and judges—not politicians—that determine who is investigated, prosecuted and convicted of crimes? Does the political stroking ignore the fact that the doctrine of universal jurisdiction for international crimes is alive and well in France and other European states? It was always legally hazardous to have done things in Gaza, apparently inspired by mindsets that guided warfare in the era between the Bible's Old Testament (recall the Amalek reminder) and World War II (recall the invocation of carpet-bombing of Germany and the dropping of atom bombs in which a lot of civilians died). It is hazardous to misapprehend that the principle of universal jurisdiction was amongst the salutary elements of the international law reforms that were

adopted after World War II, notably spelt out in the second paragraph of article 49 of the first Geneva Convention of 1949 and equivalent provisions in the other three. The European embrace of universal jurisdiction makes life truly difficult for people suspected of international crimes should they brave travel to Europe. French prosecutors have prosecuted Rwandan nationals in France for their roles in the Rwandan genocide. French prosecutors sought to prosecute Syria's President Bashar Al-Assad in France for war crimes before his recent expulsion from power in Syria. France's first instance and appellate criminal courts held that President Assad (as he then was) could be prosecuted in France without immunity; the ruling is now pending on appeal before France's Cour de cassation. Swedish courts have also convicted an Iranian for war crimes committed in Iran years ago. So, too, have German courts for international crimes committed in Syria. Whether German prosecutors will retain their fervour in prosecuting Israeli officials and soldiers implicated in the Gaza war remains an open question; still it bears recalling that it was Spanish prosecutors who famously hounded Augusto Pinochet when he visited England. Who is to say that prosecutors of Spain or of another European nation will not do the same if an Israeli official or solider suspected of war crimes braves a visit to Germany?

The practical question thus arises: What is the enduring advantage if the political preferences of European states lead them to destroy the ICC in a world and in an era in which European prosecutors may still pursue the same individuals for prosecution for international crimes in national courts of Europe?

The question of "legitimacy"

All this raises the problem of "legitimacy" in relation to the work of the ICC. At a recent public lecture at the University of Toronto, a member of the audience asked me a question to the following effect: Is the ICC's legitimacy not undermined when states parties to the Rome Statute refuse to execute its arrest warrants? At the time, it was only Viktor Orbán that had indicated an inclination to ignore the ICC arrest warrants issued against Mr Netanyahu and Mr Gallant. But Mongolia had failed to arrest Putin during his visit to Ulaanbaatar, as had some African states parties to the Rome Statute received Omar Al-Bashir when (as Sudan's President) he visited them without being arrested though he was under an ICC arrest warrant.

My response to that question was this: (1) How is it correct to raise questions about "ICC's legitimacy" when states fail in their own international obligations? (2) It is generally known and accepted that the efficacy of the Rome Statute system—as well as the system of international law in general—rests on two limbs of complementary action. One limb entails the obligations of the international institution (in this case the ICC) and the second limb entails the obligations of the member states that are part of the system. (3) In that arrangement, the ICC has completely discharged its obligation by issuing the arrest warrants that only it could issue. There was nothing more for it to do. After that, the ball of action falls to states, for them to play their own part. Given that the states failed in their part, how then could it be right to question the "legitimacy" of the ICC? Why is it that the uniform condemnation for illegitimate conduct does not rest exclusively on the states who failed to play their own part?

A choice of two outlooks

At the end of World War II, the legendary American jurist Robert H Jackson delivered what remains a classic commentary on international law, titled "Rule of Law Among Nations." In it, he repudiated the mindset he identified as guiding the attitude and actions of "extreme nationalists." A Western political leader recently reprised that mindset to Karim Khan KC, the Chief Prosecutor of the ICC, in the following crude terms: "This court is built for Africa and for thugs like Putin." That is to say, the ICC was not established to question the conduct of nationals of Western nations and their cherished allies. Jackson duly contrasted that mindset with his more sensible doctrine: "It is futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooper-

ate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage." Jackson later emphasised that doctrine in his opening statement at the Nuremberg trial, when he insisted that the "common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."

In the end, the dialectical choice presented to nations required to execute ICC arrest warrants is starkly between the mindset of extreme nationalists and the philosophy of common sense represented by Robert Jackson's Doctrine, as described above.

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