DAVID BOSCO

ROUGH JUSTICE

THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS

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Rough Justice

For Shana

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D.B.

Rough Justice

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Introduction

IN MAY 2011, an Argentine lawyer stood at a podium in a quiet Dutch suburb and accused Libya's dictator of committing serious crimes. Luis Moreno-Ocampo, the chief prosecutor of the International Criminal Court (ICC), described how Muammar Gaddafi had ordered his forces to assault unarmed protesters and wage a brutal military campaign against regime opponents. "The evidence shows that Muammar Gaddafi, personally, ordered attacks on unarmed Libyan civilians," the prosecutor charged.[1] Just a few months after violence began in Libya, and as fighting raged between government forces and rebels, the machinery of international justice was turning. And it was targeting not low-level perpetrators, but individuals at the very top of the Libyan regime.

It was the kind of moment that advocates of international justice had long sought. Instead of being deemed a regrettable but inevitable feature of conflict, abuses by Gaddafi's forces were being treated as crimes. The story of the International Criminal Court is in many ways the story of this simple aspiration: that those guilty of serious crimes, even those individuals who command armies or occupy high office, should be held accountable. The letter and spirit of the court's governing statute reject the idea that power or political influence should influence the course of justice.

But the new court operates in a turbulent world where power matters. Even as the prosecutor leveled legal charges at Gaddafi, NATO warplanes had the dictator's armed forces in their sights. With Britain, France, and the United States in the lead, the Western alliance was in the midst of a complex military and political operation. That intervention had its own political logic and imperatives that did not necessarily correspond to the demands of international justice. In the abstract, the powerful states leading the intervention had all endorsed international justice. In practice, as the prosecutor discovered, there were distinct limits to their support.

This book examines how the world's most serious attempt at achieving international justice meshes with the realities of power politics. It focuses in particular on the relationship between the ICC and states with global interests and influence. In many contexts, these states will have reason to support the

court's work. But because of its formal independence, the ICC is also a potential challenge to their prerogatives and interests. In certain circumstances, the court claims the right to investigate their activities and those of close allies. It can judge whether their domestic justice systems have adequately investigated possible crimes. Ultimately, it could indict their top political and military leaders. Recognizing the institution's risks, several powerful states at first resisted the court. The United States even launched a worldwide diplomatic campaign to limit its reach. That tension has abated in the decade since the court opened its doors. It has rapidly become part of the international architecture and has grown from a hollow shell to a bustling institution with an annual budget of more than $100 million. The United States has turned from the court's principal adversary to an ally. Other skeptical powers have grudgingly acknowledged that the court has an important role to play.

This book tells the story of how powerful states and a potentially revolutionary court learned to get along. It argues that both key states and the court have given ground to avoid a direct clash between power and international justice.

Independence and Dependence

The International Criminal Court represents a remarkable transfer of authority from sovereign states to an international institution. The investigation and prosecution of individuals, particularly senior military, political, and security officials, is a sensitive function even for countries with strong and stable domestic institutions. In the context of internal or external conflict, that sensitivity increases markedly. Yet more than a hundred states have given an international body the ultimate say over whether these individuals should be prosecuted. "The development of the ICC represents a stunning change of course," conclude scholars Beth Simmons and Alison Danner. "Not only does the ICC promise more stringent enforcement of international crimes, it also takes away from sovereign states the discretion to decide when to initiate prosecutions—a right they have heretofore jealously guarded."[2]

For decades, the radical nature of that idea confined discussion of an international criminal court to a handful of devoted lawyers and activists. Those advocating a court were inspired, in particular, by the Nuremberg trials after the Second World War.[3] If international justice should apply to senior German officials, they insisted, why not perpetrators of similar crimes around the world? In the wake of Nuremberg, states signed a treaty outlawing genocide, and international lawyers set to work drafting a charter for a permanent

court that might prosecute future perpetrators. But by the early 1950s, the Nuremberg moment had passed and the momentum dissipated. National sovereignty reasserted itself, and the Cold War precluded the construction of such an ambitious new international structure. For decades, the project lay dormant.

The idea's rapid reemergence after the Cold War's end reflected new political flexibility and a renewed determination to address conflict and bloodshed with the tools of international law. In the early 1990s, the UN Security Council created special tribunals to prosecute atrocities committed in the former Yugoslavia and Rwanda. Their launch set in motion a broad diplomatic and activist campaign for a permanent court. In 1998, a mere five years after those tribunals began operating, more than one hundred states signed the Rome Statute of an International Criminal Court.

Many advocates saw the court as more than just a mechanism for punishing excesses during conflict; it was designed to help prevent conflict and replace the rule of force with the rule of law. William Pace, the leader of an influential coalition of nongovernmental organizations, declared: "[T]he ICC will deter; the ICC will prevent.... The ICC will save millions of humans from suffering unspeakably horrible and inhumane death in the coming decades."[4] Then UN Secretary-General Kofi Annan echoed the theme. "The establishment of the Court is a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[5]

That march toward the rule of law was conceived of as a march away from something else: politics and expediency. During the negotiations that produced the court's founding document, diplomats and advocates repeatedly insisted that the new court must be independent, impartial, and fundamentally apolitical. "The Court should be a strictly independent and impartial judicial organ of the international community, independent of any political influence, and its judgments should be given exclusively on the basis of law," said a Japanese delegate.[6] The court "must not become a tool for the political convenience of states," insisted an African negotiator.[7] Another diplomat asked the conference to "overcome selfish national interests" and create an "effective, permanent court, independent of any political structures."[8]

Many of these diplomats were drawing on a strain of thought that has been described by the scholar Judith Shklar as "legalism." As described by Shklar, "[p]olitics is regarded not only as something apart from law, but as inferior to law," for "[l]aw aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies."[9] That legalist sensibility suffused the

debate about the new court, but it long predated the ICC. The desire to channel messy and sometimes violent international relations into a system of binding law extends back centuries and has spawned other institutions, including the UN's International Court of Justice (ICJ), a collection of regional courts, and, even more recently, a dispute settlement mechanism at the World Trade Organization (WTO).

On paper at least, the International Criminal Court is a striking advance for the legalist worldview against the traditional concept of sovereignty. Indeed, the court was created in the face of significant opposition from several powerful states. Some of these states questioned the value of international judicial intervention, while others argued for greater political control of the judicial process. Their efforts mostly failed. The ICC is designed to be largely free from political control. The court's prosecutor and its judges are asked to work on the basis of the court's governing statute, a set of carefully defined crimes, and the court's rules of evidence and procedure. Their work does not require formal political input or the approval of states. By design, states have few levers to influence the prosecutor or judges.

Yet the Rome Statute also made clear that the court would be entirely dependent on state resources to succeed. Negotiators gave the court no enforcement tools of its own. Investigations on national soil require official permission and access. To apprehend suspects, the court leans on state police and military forces. Financially, the court relies on annual dues from members. As the court's prosecutor said shortly after taking office, "the ICC is independent and interdependent at the same time."[10] In this sense at least, the ICC is very much like other international organizations. States in the past century have consented to create dozens of these institutions, but they rarely endow them with permanent resources or enforcement power. They are quite intentionally left dependent on state resources.[11]

If the court needs the support of states in general, those major powers that enjoy global reach and influence are particularly important. These states have the economic, diplomatic, intelligence, and military resources needed to help turn the court's writ into reality either directly or via pressure on those whose cooperation is essential in particular cases.[12]

The End of Great-Power Privilege?

As a result of design choices, the International Criminal Court was born with a weak connection to major powers whose support it needs. Those major powers who are court members—the United Kingdom, France, Germany,

Japan, and Brazil—are accorded no special powers or privileged place in the institution. In large part because of this lack of deference and protection, other major powers have chosen not to join the court at all. Those states outside the court include the world's uncontested superpower, the United States, and its most rapidly growing power, China. Nuclear-armed giants Russia and India have not joined the court. (Regional powers including Turkey, Egypt, Israel, Saudi Arabia, Pakistan, and Indonesia have also kept their distance.) Together, nonmembers account for two-thirds of the world's population and almost three-quarters of its armed forces (see figures I.1-I.3).

This dynamic is in tension with traditional accounts of how international organizations are shaped. Scholars have generally assumed that international organizations are, at their core, the product of major-power interests. As Kenneth Abbott and Duncan Snidal have written, "powerful states structure [international] organizations to further their own interests but must do so in a way that induces weaker states to participate."[13] In making concessions to less powerful states, however, major powers generally award themselves enough formal influence to safeguard their interests.

When the principal allied nations drafted the United Nations Charter in the wake of the Second World War, they secured the right to veto decisions in the UN's powerful Security Council. At the World Bank and the International Monetary Fund, major powers have their status recognized

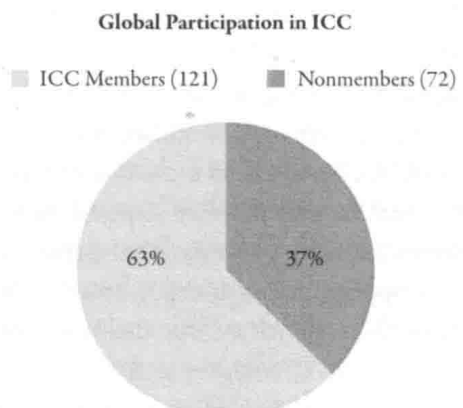

FIGURE I.1 ICC member states and nonmember states

Source: The list of 193 UN member states is available at http://www.un.org/en/members/. The list of 122 ICC states parties is listed at http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. Please note that the Cook Islands is not included in this dataset. The Cook Islands became a party to the ICC on July 18, 2008, but is not a United Nations member state.

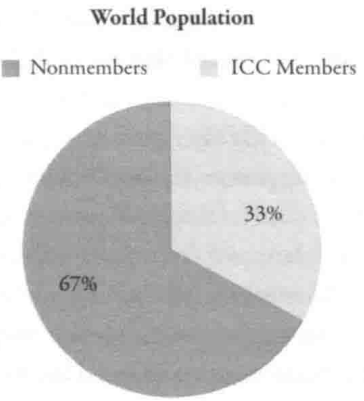

FIGURE I.2 Percentage of world population in ICC member states

Source: Population data for this analysis drawn from World Bank World Development Indicators for 2012, last updated July 2, 2013. Total population was 7,023,106,813. The populations of ICC member states and of semi-autonomous territories to which Britain, the Netherlands, and Denmark have extended Rome Statute ratification totaled 2,330,948,656. Combined population of nonmember states was 4,692,158,157. Between December 31, 2011, and June 1, 2013, Guatemala and Côte d'Ivoire joined the ICC, and the populations of these two states are included in the "ICC Members" category. ICC membership data is drawn from the list of ICC states parties, last updated March 15, 2013, by the ICC Assembly of States Parties, at http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx. Membership information is cross-checked and adjusted to include semi-autonomous regions using the United Nations Treaty Series Online Collection at http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=1&mtdsg_no=XVIII-10&chapter=18&lang=en#Participants. The interactive World Bank World Development Indicators database is available at http://databank.worldbank.org/data/home.aspx.

through large voting shares that give them effective control of institutional decision-making. Other major organizations, including the World Trade Organization and NATO, operate on a consensus basis, meaning that no major decisions can be taken without state acquiescence.

Courts are a distinct kind of international organization, and independence (or at least the appearance of independence) from state influence is much more central to their identity.[14] But the ICC is unique even in this smaller universe. Its ability to investigate and issue arrest warrants for even senior government officials is unprecedented. At the same time, states have fewer means to control its activities than in other international courts. The ICJ, for example, can only hear cases against states when they have in some form consented to have them heard.[15] ICJ processes are also state-driven, and court officials cannot initiate cases. By custom, moreover, the permanent Security Council members always hold one judgeship each on that court.[16]

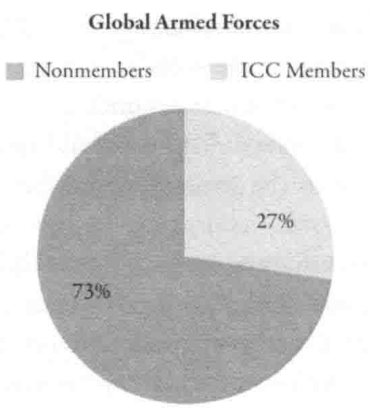

FIGURE 1.3 Percentage of global armed forces in ICC member states

Source: Data for total armed forces personnel drawn from the World Bank World Development Indicators for 2011 (more recent data was not available at the time this book went to press). Available data for armed forces personnel in all countries and territories surveyed by the World Bank totaled 27,713,079. Armed forces in ICC member states totaled 7,600,975. Armed forces in nonmember states totaled 20,112,104.

The WTO's adjudication process is also state-driven, and there is no WTO official capable of initiating investigations without state action. The WTO's processes incorporate required "waiting periods" during which diplomatic processes may work. Its system of remedies also effectively privileges powerful states.[17] The UN's Law of the Sea Tribunal is highly constrained in its ability to hear cases. In all these institutions, major states have mechanisms to exert their influence or, at the very least, protect their vital interests.

In key respects, the International Criminal Court rejects this model. Its uniqueness derives in large part from the negotiating process that produced it. The Rome conference marked an important departure from the traditional process of building international institutions. A group of smaller and mid-size states—the "like-minded group"—was the dominant presence in the lead-up to the conference. Before and during the conference, civil society groups both helped shape and amplify the message of these smaller states. By contrast, no group of major powers emerged as an effective or coherent negotiating bloc.

In this context, attempts to include in the evolving document privileges for powerful states met strong resistance. This occurred most notably on the question of what role the UN Security Council—a body dominated by its powerful five permanent members—should play. During the negotiations, state after state inveighed against according the Council members special power, and the final statute gave the body only a limited role. The like-minded

group and civil-society activists also fiercely defended the ability of the court's prosecutor to launch investigations without a request from states. The court's supporters saw judicial independence as critical to keeping power politics at bay, and scholars have concurred. "The more independent a court is, the less likely its decisions cater to the wishes of powerful states," Erik Voeten has noted.[18]

For those major states that choose to join the ICC, formal influence in the body is limited. The court's judges and prosecutor are elected by a majority vote, on a one-state, one-vote process numerically dominated by small and mid-size states. No two judges may be from the same state, so major powers can only have one national on a bench that includes eighteen judges. Because judges and the prosecutor cannot be reappointed, states cannot implicitly threaten them with a withdrawal of support. The only way in which the status of major powers is recognized is through higher budget assessments, but the budget is also approved by a simple majority vote. Once elected, and assuming the court has jurisdiction, the prosecutor and the judges have almost complete discretion as to which situations to investigate and which individuals to prosecute. Even when the UN Security Council refers a situation to the court, the prosecutor and judges may choose not to investigate or bring any charges.

Those major powers that have chosen not to join the court lack even the limited formal influence member states enjoy, while still facing the possibility—reduced but still real—that the court could investigate and prosecute their citizens and even their leaders. Nonmembers cannot nominate or vote upon candidates for court prosecutor and judgeships. They have no direct influence over its budget process. More than any other major international organization, the ICC keeps its distance from state power.

Approach of the Book

This book constructs an analytical account of the ICC's first decade that seeks to illuminate the relations between the court and major states. Its theoretical ambition is modest. It does not seek to test a general theory but instead deploys existing theory to help understand and analyze the court's first decade. Its approach is narrative and historical.[19] A chronological approach here has several advantages over a thematic or case-study based treatment. While the court's major investigations (in places including Sudan, the Democratic Republic of Congo, and Kenya) would appear to be natural case studies, they do not capture effectively the trajectory of the institution or its relations with major states, which weave between cases and often involve matters not