STATES PARTIES, NON-STATES PARTIES, AND THE IDEA OF INTERNATIONAL COMMUNITY

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The title of this conference, *The International Criminal Court and the Community of Nations*, invokes the notion of an international community, while the organization of sessions structures our discussions today in part around the categories of states parties to the Rome Statute, on the one hand, and non-party states, on the other. Accordingly, I have chosen to draw attention in my remarks to these groupings—international community, states parties, and non-states parties. Specifically, I will focus on how the institutionalization of international criminal law through the establishment of the International Criminal Court (ICC), and the consequent division of the world into states parties and non-states parties to the Rome Statute, may undermine the notion that the international community as a whole condemns mass atrocity crimes.

I will begin with the idea of international community, and its connection to the field of international criminal law, and then I will turn to the division of the field into parties and non-parties, or supporters and opponents, of the ICC.

Lawyers and scholars of international law and international relations have struggled to construct a uniform understanding of the concept of an "international community." The concept is heavily used in cases, in treaties, and in scholarly writing, often without much explanation, as if its meaning is self-evident.

By international community, I mean a conception of international community distinct from a mere collection of states, or even a collection of states bound together by shared rules established in pursuit of some common interest. Rather, international community can be understood as a collection of states and other actors that constitutes a community because of a set of shared values.

The history of the international community and the history of international criminal law are closely intertwined, as Nuremberg is often identified as a moment when international community was born. As Christian Tomuschat writes, with the Nuremberg trial, as well as the creation of the United Nations, "[a]ll of a sudden . . . it appeared that there was a common moral ground acknowledged by all states that demanded respect and could eventually be

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enforced through common institutions."[1] It is that sense of international community—a community built around shared values, a common ground of morality—that underlies the notion that an international community was born with the Nuremberg tribunal. Moreover, it was that sense of international community that allowed for the Nuremberg tribunal to exist.

What were those shared values at the heart of the project of international criminal law? Rule of law; a conviction that no one, no matter how powerful, is above the law; a shared intolerance for the crimes of the cruelty and magnitude of those that had taken place during the Second World War; and a conviction that the lives of victims are more important than the power of any person or government. Consistent with theories of international cooperation that conceptualize institutionalization as arising out of "common identities,"[2] this idea of a set of shared values has continued to drive the field of international criminal law. Antonio Cassese notes that an essential feature of the substantive prohibitions of international criminal law themselves is their "inten[tion] to protect *values* considered important by the whole international community."[3] And along with the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, the Rome Statute itself draws on this notion of common interest or identity. The preamble begins with a reference to the drafters' consciousness "that all peoples are united by common bonds, their cultures pieced together in a shared heritage."[4] It acknowledges the roots of the Court, of the movement for international justice, in the unimaginable atrocities of the twentieth century against millions of children, women, and men that shocked the "conscience of humanity."[5]

The "international" in international criminal law thus represents far more than a mere demarcation of jurisdiction in international courts, rather than domestic ones; and it has significance beyond identifying that the sources of law for these courts are treaties or customary international law, rather than domestic statutes. Instead, international criminal law is international because it is a body of law and a set of institutions that are understood to represent shared global values.

But in the years since the creation of the ICC, the common value of intolerance for mass atrocity crimes has had to exist alongside a new purported common value: the value of support for the prosecution by the ICC of those who commit those crimes. The tension for the international community, then, is that the field has become institutionalized—but not universally. The

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[1] Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. Int'l Crim. Just. 830, 830 (2006).

[2] *See* SALLA HUIKURI, THE INSTITUTIONALIZATION OF THE INTERNATIONAL CRIMINAL COURT 31-56 (2019).

[3] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 11 (2d ed. 2008) (emphasis in original).

[4] Rome Statute of the International Criminal Court pmbl ¶ 1, July 17, 1998, 2187 U.N.T.S. 90.

[5] *Id.* pmbl. ¶ 2.

creation of the Rome Statute means not only that there are parties, but also non-parties.

And these are not supportive non-parties, nor are they uninterested non-parties, content to sit on the sidelines. The early years of the ICC of course featured some opposition from prominent non-parties, but those early years also saw toleration from non-parties for the activities of the Court, such as the decisions by China and the United States to abstain in the Security Council's decision to refer the situation in Darfur to the Court.[6] But over time, some non-parties have shifted away from positions of support or indifference. We are now living in the world of angry, defiant non-parties—of the John Boltons who say the Court is dead to them[7] and the Burundis who "rejoice" in this display of American fury toward the ICC.[8]

If we compare the world of international criminal law today to what existed in the 1990s, as David Tolbert discusses in his contribution to this symposium,[9] there appears to have been broader global support for the values of intolerance for mass atrocity crimes then versus now. Even if we compare the world of international criminal law today to what existed in the late 2000s, a time when I was in the U.S. government advising on the ICC's new case against Omar al Bashir, opposition to the Court is more extreme.

So, what are we to make of this apparent decline in support, and the attacks on the Court? If opposition to the Court could be understood as mere opposition to one particular institution, to one particular treaty, perhaps it would not be so alarming to those who count themselves as advocates of greater intolerance for mass atrocity crimes. But opposition to the Court is not merely opposition to one institution. And that is because the prevailing understanding is that the ICC is not just one institution; it is not just one treaty regime.

Instead, the ICC is viewed often as the culmination of the development of the field of international criminal law—it is the ultimate goal, the crowning achievement. In scholarly, practice, and public circles, the ICC has become synonymous with the entire field of international criminal law—and for some, the entire project of accountability for mass atrocity crimes.

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[6] *See* U.N. SCOR, 60th Sess., 5158th mtg. at 2, U.N. Doc. S/PV.5158 (Mar. 31, 2005) (recording vote on Security Council Resolution 1593, referring situation in Darfur to the ICC Prosecutor).

[7] *See National Security Adviser John Bolton on Global Threats and National Security*, C-SPAN (Sept. 10, 2018), https://www.c-span.org/video/?451213-1/national-security-adviser-john-bolton-addresses-federalist-society ("For all intents and purposes, the ICC is dead to us.").

[8] *See* Matt Apuzzo & Marlise Simmons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. TIMES (Sept. 13, 2018), https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html.

[9] David Tolbert, *Looking Forward and Looking Back: How Can the International Criminal Court (ICC) Navigate in a Complicated and Largely Hostile World*, 47 GA. J. INT'L & COMP. L. 659 (2019).

The creation of the ICC is, of course, a massive achievement in the field of international criminal justice. But it has also been viewed as the highest achievement of the field. And along with that, prosecution in the ICC has become a primary lens for examining and understanding justice in the context of mass atrocity, and for understanding success in the fight against mass atrocity crimes. We come together today, for example, not to discuss how to prevent mass atrocity crimes, and not even to address the broader array of efforts at accountability such as the rise of universal jurisdiction prosecutions in recent days. Instead, we come together today to focus our attention on the ICC.

And in part as a result of this association of the Court with the broader field, the division of the international community around the issue of the Court has come to represent a larger division around the very ideas behind the Court—that intolerance for mass atrocity crimes, and the refusal to let the systematic infliction of suffering go unnoticed. This conflation of the ICC and international criminal law means that the common values that once were the province of the entire field have become the territory of the Court. And with the division of the world into parties and non-parties, the values associated with the field, that are now increasingly tied to the Court, become the property of a subset of states rather than the whole. They become representations of the values of some, but not all.

Perhaps this is just a necessary reckoning with the fact that there is not a unified international community behind this intolerance for mass crime. But to the extent we find there is still broad intolerance for these acts that constitute the crimes under the jurisdiction of the ICC, we should remember that the ICC is just a court, and the Rome Statute just a treaty.

We might do well to separate the substantive norms from the procedural institution set up to protect them in a particular way. That is, the recognition of this fracturing can be taken as a call, once again, to remember that the ICC is just one institution; and it is one institution that dispenses one form of justice. The seeming disintegration of the international community around the work of the ICC might indeed be a fracturing of a community that once existed around shared intolerance for mass victimization; or it might be a fracturing of the community (or a recognition that there was no such community) that favored *this particular method of enforcement.*

I propose, then, that the division of the world into states parties and non-states parties, for those of us who support the larger project of international reckoning for mass atrocity crimes, should serve as another call for pluralization of these efforts to protect the substantive norms, and for greater attention to the political and cultural work that needs to be done alongside the legal work.