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The international criminal court as an actor of the multilevel protection

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Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

Magdalena Correa Henao
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The international criminal court as an actor of the multilevel protection**

In the context of recent mutations experienced by international law, multilevel protection appears as the most viable option to achieve effective protection of individuals. According to this model, the safeguarding of common interests, including the protection of human dignity, can only be achieved through the articulation of the various levels of functional and territorial protection offered throughout the global legal area.

One of the most important aspects of this proposal is the reformulation of the relationship between national and international mechanisms of protection. Indeed, much of the multilevel model is based, among others, on the idea that the interaction between these two systems is essential nowadays and, therefore, in the recognition of national actors as fundamental agents to achieve the effectiveness of international law, while international actors are effective allies in promoting national objectives.

Thus, in the multilevel context, the link between the national and international mechanisms of protection is strengthened and this is true not just because the activation of the later depends on the ineffectiveness of the former but because the success of international protection depends, to a large extent, on the cooperation of national authorities.

Indeed, as noted by Helfer & Slaughter, the effectiveness of an international tribunal is measured "in terms of its Ability to compel compliance with its Judgments by convincing domestic Government Institutions, directly and through pressure from private litigants, to use their power on its behalf "[1]. Now, from our point of view, the effectiveness of the work of an international tribunal is not only measured in terms of compliance with its judgments (effectiveness in the thin sense), but also in its ability to achieve the necessary changes to get the protection pursued even without activating its functions

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1. Helfer, L; Slaughter, A.M. Towards theory of effective supranational adjudication. In *The Yale law Journal*, No. 107, 1997.

(this is what we call thick effectiveness). It is perhaps in this scenario that we better appreciate the idea of interaction and multilevel protection[2].

This context of interdependence of the various scenarios of protection is not unknown to the International Criminal Court (ICC). On the contrary, in the current days, the ICC appears as one of the actors whose success depends, largely, on its articulation, among others, with national actors. This is the subject that will be discussed in the following lines.

THE ICC AND ITS INTERACTION WITH NATIONAL AUTHORITIES

The reality we just described is of fundamental importance for the International Criminal Court. On the one hand, we cannot forget that this international judicial body has been created under the idea of complementarity which is as an alternative to the inefficiency or inability of national protection mechanisms and means that before opening its doors the ICC should take into account the work of its national counterparts[3].

In this case, we can see the role of the ICC as an actor of multilevel protection in two different senses. First, this international court stands as one of the options on a scale of resources that are articulated to protect individuals. Second, even if the ICC's jurisdiction would not have been activated, the pressure involving the eventual opening of a case would drive the improvement of the mechanisms of national protection in light of the standards outlined by the Rome Statute and international criminal case law. In this sense, the protection sought by the international tribunal is achieved even without its activation and through national authorities.

In the other hand, given the absence of an own suitable system of compliance, the effectiveness of the decisions of the ICC depends entirely on the cooperation of national actors. It is probably in this scenario that is seen more clearly the need for interaction and coordination between the two levels of protection. What happened in the case of the warrant order against Omar AlBashir, for example, well illustrates this argument[4].

2. This is true in so far as the protection parameters outlined in the international arena but their implementation depends on national authorities.

3. The recent "Interim Report" on the "Situation in Colombia" of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) is a fundamental test of how the ICC has a conversation with national authorities before considering opening a case.

4. As is well known, the Pre-Trial Chamber I issued arrest warrant against Sudanese President Omar Al Bashir for his alleged responsibility in the commission of war crimes and crimes against humanity (March 2009) and genocide (July 2010), however, both the African Union and many African states have refused to cooperate to enforce the warrant of arrest. Among other documents see the decisions of the Pre-Trial Chamber I on the refusal of Malawi and Chad. ICC Pre-Trial Chamber I, December 12 of 2011, ICC-02/05-01/09, ICC Pre-Trial Chamber I, December 13 of 2011, ICC-02/05-01/09. Another situation that illustrates this point is the so-called Kenyan

So, as we can see, although the ICC is often viewed as the last stay of protection, in practice it turns out that it is only one link in a series of mechanisms available to achieve the purpose of protection.

These ideas allow us to emphasize two important premises: a) the ICC is part of a network of protection at various levels so that its effectiveness is measured not only in connection with the compliance of its sentences but also in terms of its influence on the improvement of other protection's mechanisms and b) its effectiveness, in the thin sense, depends largely on its coordination with national authorities.

This is the context in which it is clear that one of the great challenges that the ICC faces is its articulation with national authorities. This interaction can be achieved through various formal and informal ways, some of which fall directly in the ICC's authority others are beyond its reach[5]. Taking into account the purpose of this discussion, we will focus on presenting some of the factors that are held by the ICC which facilitate its articulation.

OPENING WAY TO THE INTERACTION

According to Helfer & Slaughter[6], the international judge must ensure that six different criteria are met to facilitate the implementation of its decisions by national authorities. Although their proposal was designed for a different context, we will adapt those parameters to the ICC's scenario.

The first criterion is 'the awareness of the audience'. According to this criterion, the ICC should be aware of: to who it is addressing its work, how necessary is the cooperation of the national authorities and the potential of its own ideas. In addition, the international judge must convince national actors that collaboration between the two levels is also beneficial for them. Second, the ICC must ensure its neutrality and independence from political interests as its bias would undermine its credibility and can affect the effectiveness of its decisions. Third, Helfer & Slaughter allude to 'incrementalism' which means that the international judge must prefer small steps but accurate, appropriate to the context, rather than the ambitious feats. In this context it may be more useful for the purposes of protecting, the decision to refrain from intervening, respecting the discretion of the States, before the decision of taking any measure. Fourth, the ICC should strive to ensure the quality of its legal reasoning. The international judge should strive to maintain the

cases. About this issue see http://www.ejiltalk.org/kenyan-case-a-good-test-of-an-icc-founding-principle/#more-3027

5. It is true that the more or less collaboration of national authorities depends, among others, on the national regulatory framework and political context and that these issues cannot be fully controlled, although influenced, by the ICC.

6. Op.. Cit. Helfer, L; Slaughter, A.M. Towards theory of effective supranational adjudication.

internal logic and systemic consistency of its decisions. Fifth, as a result of awareness of the importance of the work of the national actors, ICC should allow cross-fertilization and dialogue. Such a conversation with national players will help ICC to endorse and promote compliance, while also serve to promote a common goal despite local differences. Furthermore, this dialogue must also include international colleagues. Finally, Helfer & Slaughter draw attention to the usefulness of the dissenting votes in convincing national authorities. To these criteria we would add the importance of ensuring due process, because domestic players will only be willing to fulfil international orders respectful of all legal guarantees.

The aforementioned case of the arrest warrant against Omar Al Bashir proves how useful could be the compliance with these criteria. From our point of view, when the Pre-Trial Chamber for the first time ruled on this issue in 2009 completely ignored how important it is to "address" to the national authorities and to convince them that the execution of that order was not going against its international obligations but, on the contrary, was one of its obligations in the light of the Rome Statute. As a result, the ICC failed in its burden of justifying the decision -and the request coming with it- in an appropriate way, did not offer sufficient reasons to justify the need for the execution of the order by the national authorities even though it was clear that there was a strong argument against it, sufficient to prevent the execution. The Court also omitted the advantages that could mean taking into consideration the views of other national and international courts on the issue of immunity of jurisdiction to justify its decision and to convince national authorities.

It was only on its pronouncements in December 2011 –related to the refusal to execute the arrest warrant by Malawi and Chad[7]– that the Pre-Trial Chamber decided to address the topic of jurisdictional immunities. Thus, using its own and others international judge's arguments the ICC answered to national authorities. It is true that this decision came pretty late and it is also true that maybe the arguments used are not enough, perhaps not entirely correct, but in light of the issue that concerns us, we can say that the ICC has taken a significant step recognizing national authorities as a necessary interlocutor who should be convinced. In any case, there is still a very long way to go in this direction.

The criteria mentioned so far not only serve to ensure effectiveness in the thin sense, the work of the ICC is also useful to promote the effectiveness of the protection in a thick sense. As mentioned above, the work done by the ICC may extend its effects to the point to get effective protection even without

7. ICC, Pre-Trial Chamber I, December 12 of 2011, ICC-02/05-01/09; ICC, Pre-Trial Chamber I, December 13 of 2011, ICC-02/05-01/09

the need to activate its powers. This can be achieved if the international judge can convince national authorities, especially judges, to use the Rome Statute and international criminal case law as a decision-making parameter.

This possibility that national actors become agents of international criminal law depends on many factors-normative and contextual[8] –out of reach of the ICC; however, the same factors that facilitate compliance with international orders by domestic authorities can help them to choose to use the internatio-nal law and standards as a benchmark. In this sense, if national players find that the work of the ICC is independent and impartial, properly justified, respectful of due process and related to their needs and expectations, they will have no objection to use it to promote the improvement of their own protection's mechanisms.

The advantages of interaction generated by the respect of those criteria are manifold. For now it suffices to mention two of them. From the national perspective, the improvement of national mechanisms in the light of interna-tional standards facilitates expeditious protection of individuals and reaffirm the complementary nature of the ICC; from the international perspective, creating communication channels between the two jurisdictions prevents situations, such as the Al Bashir Case, which deteriorate the image of the ICC and undermine its possibility of effectiveness.

CONCLUSIONS

As noted, the ICC is one of the actors of a network of multilevel protection offered by the current global legal scene. In that multilevel scenario, the interaction between national courts and the international criminal court is essential to ensure the effectiveness of the protection offered by the Rome Statute.

In this context, one of the current challenges of the ICC is to find the ideal way to achieve the best possible articulation with national counter-parts. Achieving such articulation brings benefits to both levels (national and international) but, above all, results in better protection of individuals.

It is also important to say that this multilevel scenario is not only concerned by this vertical articulation between national and international levels. Also the horizontal interaction between the ICC and other regional or universal mechanisms' protection of human rights, for example, or between ICC and the International Court of Justice, is fundamental to improve the effectiveness of the protection offered by the Rome Statue however that is a challenge that we will address on another occasion.

8. Among them, for example, the way it is incorporated the international criminal law to the domestic legal systems and the status it acquires or the conditions of independence and the capacity of national judicial system.

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