The Limits and Pitfalls of the International Criminal Court in Africa

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A popular criticism of the International Criminal Court (ICC) is that, by focusing solely to date on African conflicts, it represents a neo-colonialist intervention in the affairs of African states. While there are justified concerns over the impact of the global Court in Africa, arguments about neo-colonialism exaggerate the strength of the ICC. They also underestimate the ability of African governments to manipulate international justice to their own ends. The lesson from the ICC's operations in Africa so far is that we must be sober about what the ICC can achieve and awake to the politicisation of its work. In recognising the ICC's limitations, we must also recognise the vital role that national and community-level institutions can play in addressing African conflicts.

The ICC operates on a minimal budget with a small staff who are usually involved in multiple conflict countries simultaneously. With limited resources to cover a global jurisdiction, the ICC relies on domestic states to investigate and prosecute their own cases. The ICC also has no police force of its own. Consequently, when the ICC does open investigations in a country, it depends on domestic governments to arrest suspects and protect the Court's investigators. This poses significant challenges because the ICC must often cooperate with state officials who themselves are suspected of committing atrocities.

The ICC's Africa cases to date highlight that immense problems emerge both when domestic governments refuse or agree to cooperate with the Court. In either scenario, domestic politics tend to hamper the ICC's work, as well as the broader cause of local democracy and justice. This is a structural limitation of the Court that will persist in the future, whether in Africa or elsewhere.

In the Darfur situation, the Sudanese government has refused to allow ICC investigators on the ground. This has forced the Court to gather evidence from distant sources, particularly among Sudanese exiles and refugees. It remains to be seen whether this sort of evidence withstands scrutiny in the courtroom.

At the same time, Sudanese president Omar al Bashir has regularly accused the ICC of neo-colonialist meddling to bolster his domestic political support. After the ICC indicted Bashir in 2008, the embattled president – who faces stiff opposition from within his own party and across the Sudanese political spectrum – successfully argued that the ICC's actions contravened the principles of national sovereignty and sovereign immunity. In the lead-up to the 2010 Sudanese presidential elections, the ICC was just the political fillip Bashir needed.

Major problems also arise when states agree to cooperate with the ICC. Some African governments have been all too willing to assist the ICC in exchange for insulating their officials from prosecution. Ocampo's stock response to criticisms about neo-colonialism is to highlight that, countries like Uganda, the Democratic Republic of Congo (DRC) and Central African Republic voluntarily referred their conflict situations to the ICC. How can the Court be seen as interfering unjustifiably in Africa, Ocampo asks, when these African governments have requested the ICC's assistance?

The reality, however, is considerably more complex. My research in Uganda and Congo over the last six years shows that the ICC actively chased the referrals by these two states, which were initially reluctant to engage with the Court.

In each situation, at least a year's negotiations ensued between Ocampo's office and local officials before these states agreed to the referrals. Only when the Ugandan and Congolese governments were certain that an ICC intervention would serve their interests did they request the Court's involvement. The suspicion among many Ugandan and Congolese actors is that deals were struck and promises made to convince their governments to cooperate with international justice.

Fuelling these suspicions is the fact that the ICC has so far avoided pursuing criminal cases involving Ugandan and Congolese state officials. This is despite the grave and widespread abuses committed by these governments against their own people. The Uganda and Congo situations raise questions about how closely the ICC should engage with national governments before, during and after conflict situations are referred. The danger is that African leaders may use the ICC to target their political opponents while protecting themselves from prosecution. Certainly the ICC's pursuit of the Lord's Resistance Army (LRA) in northern Uganda has greatly benefited President Yoweri Museveni, who has been locked in a 25-year civil war with the rebel force. Likewise, President Joseph Kabila has gained from the ICC's prosecution of Jean-Pierre Bemba, his main opponent at the last Congolese presidential elections. The ICC's reliance on state cooperation leaves it open to these sorts of domestic political machinations.

The ICC's inherent limitations should make us wary about expecting too much from international justice. With its finite resources, the ICC will only be able to focus on a small number of elite suspects in a few conflict countries at any one time. Domestic institutions therefore will bear the greatest load in responding to gross human rights violations. This realisation shifts our focus to the role of national and community-level processes in Africa which are designed to address mass atrocity. With so much attention on the ICC and questions of international justice generally, significant reforms and innovation at these two levels have often been overlooked. Champions of the ICC and international policymakers should broaden their vision to recognise the virtues of these other means of delivering justice.

One positive outcome of the failed Juba peace talks between the Ugandan government and the LRA in 2006-2008 was the creation of a special war crimes division within the Ugandan High Court. This division – although it is yet to become fully operational – will allow the prosecution of serious perpetrators in full view of the Ugandan population.

Similar judicial reforms are currently underway in Congo. Since July 2003, the European Commission has financed the overhaul of the domestic judiciary in Ituri province. As a result, the Ituri courts have prosecuted numerous atrocity cases, including war crimes and crimes against humanity committed both by rebel and government forces. This has led senior judicial officials in Ituri to question why the ICC is needed to prosecute the Ituri rebel leaders currently in its custody, Thomas Lubanga, Mathieu Ngudjolo and Germain Katanga, when they could be handled in local courtrooms, and domestic proceedings were already underway against these suspects when the ICC intervened in Congo.

Officials in Ituri believe they are receiving mixed messages from the international community. On the one hand, they are forced to reform domestic practices in line with (usually ill-defined) international legal standards. Once these reforms are enacted, however, they are then told that local judicial practices are inadequate and serious criminal cases must be sent to The Hague. The result is a confused and frustrated domestic judiciary that nonetheless continues to handle complex atrocity cases.

Also critical in terms of domestic judicial developments is the creation of mobile gender units in the Congolese province of South Kivu, which are designed to handle cases of rape and other sexual violence. These courts represent an innovative collaboration between international actors including the Open Society Justice Initiative and the American Bar Association, and local Congolese judges, lawyers and investigators. To date, the courts have produced remarkable (and rapid) results, with several convictions this year of Congolese army officials for sexual violence against civilians. The early success of these courts stems from their focus on a discrete range of crimes in a limited territory, their mobility and therefore proximity to affected populations, as well as the combination of international training and finance and local expertise and ownership.

This more focused approach to justice for mass atrocity may represent a new international trend. Foreign donors and domestic governments are seeking new methods of accountability, given their unease with the enormous expense

and political detachment of international institutions such as the ICC and the UN-backed tribunals for the former Yugoslavia and Rwanda.

Finally, the experience of Rwanda's gacaca community courts highlights the importance of delivering justice at the local level. Since their creation in 2001, the gacaca jurisdictions – despite sustained criticism by international human rights groups – have prosecuted 400,000 suspected perpetrators of the 1994 genocide and contributed substantially to community truth-telling and social cohesion. Nearly every Rwandan adult has been involved in the trials, including providing eyewitness accounts of genocide crimes. Village-level processes like gacaca attempt what the ICC and national courts can never do, namely delivering accountability for everyday citizens who participate in violence. For many Rwandan genocide survivors, the most important perpetrators are not the government officials who planned and incited mass murder, but rather the neighbour or family member who wielded the machete in 1994. Violence committed by community-level actors – which is increasingly common in diffuse forms of modern conflict – requires these new forms of community-level accountability.

While we should scrutinise the ICC's work in Africa, it is important to recognise that international justice is not the only possible response to atrocity. National and local processes are proving to be vital tools of justice, truth and reconciliation across Africa – and these are likely to have even more profound and lasting effects than the prosecution of a handful of suspects in The Hague.

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