

Africa and the International Criminal Court

Closing the impunity gap

Africa can use the International Criminal Court to help break the cycle of impunity that plagues several of its states. But to function effectively, the Court needs support from the international community to resolve the challenges it faces in Africa.

The Rome Statute of the International Criminal Court (ICC), the law establishing the first permanent tribunal to combat war crimes, crimes against humanity, genocide and crimes of aggression, was adopted in 1998. The ICC, which is located in The Hague, the Netherlands, was inaugurated in 2003 after the Rome Statute came into force the previous year. Today, the Rome Statute has been ratified by 113 states drawn from all the regions of the world. But the work of the ICC is limited by several challenges: charges of selectivity, a painfully slow work process, politicization and failing support from intergovernmental organizations (IGOs). These challenges risk its legitimacy as a court, and may keep it from succeeding in its mission.

The role of the ICC is to assist states in closing the 'impunity gap' by fostering a culture for the respect of the rule of law. The hope is that the national executive and judicial arms of states that are party to the Rome Statute will obey and apply the law equally, especially against powerful figures. The ICC should act as a 'gentle civilizer' of state power in weak states that are unable, or unwilling, to bring powerful perpetrators of egregious offenses to account.

But the ICC cannot – nor is it intended to – end impunity by itself. It is meant to complement municipal legal systems and help them incubate accountability. However, as Olympia Bekou and Sangeeta Shah of the University of Nottingham have argued, many African states – where the ICC is most active – have yet to domesticate the Rome Statute. This limits the influence of the ICC on domestic legal systems.

A challenged experiment

The ICC has not concluded a single case since it was established. It is currently hearing its first four cases, all from African states – Uganda, the Central African Republic (CAR), the Democratic Republic of the Congo (DRC) and

summary

- The International Criminal Court assists states in closing the 'impunity gap' by fostering a culture for the respect of the rule of law.
- But the Court does not yet have sufficient legitimacy in Africa with the core domestic protagonists to accomplish its goals.
- This has put the Court's success at risk, as have charges that it selectively targets poor African states.
- The Court must secure the political, moral, diplomatic, material and logistical support of the United Nations, the European Union and the African Union if it is to succeed in its work.

Sudan. And the ICC has authorized its prosecutor, Luis Moreno-Ocampo, to open an investigation on Kenya, which will focus on post-election violence in 2008. This is arguably a modest beginning for a tribunal on which a large number of victims have staked their hopes. But it is a historic achievement too as the first global attempt to tackle the phenomenon of impunity on a permanent basis. The court faces challenges, however.

First, the ICC's work is infuriatingly slow and painstaking. Second, it is clear that the Court does not have today the legitimacy it needs in Africa with the core domestic protagonists – senior officials, suspects, police and security organs, victims and civil society – to accomplish its goals. It has in fact faced obstruction and subterfuge in a number of target states.

In Sudan, the ICC has faced outright hostility, particularly after it issued arrest warrants for the country's president, Omar al-Bashir, for war crimes, crimes against humanity and genocide. In Kenya, the ICC enjoys wide public support, but some senior officials view it with trepidation and have sent mixed signals about their willingness to cooperate. This became blatantly clear when, in August 2010, President al-Bashir was invited to Kenya for the promulgation of its new constitution – and not arrested.

Charges that the ICC has politically lost its moral standing because it selectively targets poor African states, has further

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Kenya turned a blind eye to its duty to arrest Omar al-Bashir (second from the right), president of Sudan, who faces charges of genocide, when he attended the festivities for the promulgation of Kenya's new constitution, August 2010. Mwai Kibaki, president of Kenya, is pictured second from the left.

eroded its legitimacy. Why, some might ask, has the ICC not gone after Iraq, Afghanistan, Israel-Palestine, Mexico, Colombia and other troubled states outside Africa? Are some Africans correct to read a racist slant in the ICC's work?

Charles Villa-Vicencio, the former executive director of the Institute for Justice and Reconciliation in South Africa, has accused the ICC of using Africa as a 'proving ground' and guinea pig. Vincent Nmehielle, head of the Programme in Law, Justice and Development in Africa at the University of Witwatersrand in Johannesburg, South Africa, also accused the ICC of selectively targeting African tyrants.

It is, however, no mystery why the ICC is involved in four African countries, and is targeting a fifth. Uganda, CAR, DRC and Sudan have long and troubled histories marked by civil conflicts and the most egregious atrocities. They have weak states with little or no civil society. But it is similarly important to note that, with the exception of Sudan, the ICC has not imposed itself on African states. The Court has acted at the invitation of the states in question.

Nevertheless, the fact that no state outside Africa is subject to an ICC investigation is a blow to the credibility of the Court, which opens it to charges of applying an uneven and skewed mandate. However, Stephanie Hanson of the Council on Foreign Relations, a think tank with offices in New York City and Washington DC, downplays charges of selectivity and indicates that, except for Sudan,

the African countries under ICC scrutiny have self-referred themselves.

Trading peace for impunity

The ICC is caught in a paradox in its work on Africa. The fight to close the impunity gap is easier said than done. States that are party to the Rome Statute are obliged by law to fully cooperate with the ICC's investigators and prosecutors. These parties must arrest the individuals wanted by the Court, locate and provide evidence needed for use by the Court, relocate and protect witnesses, and enforce the Court's decisions, including sentences.

These obligations are binding, even if the target is a sitting head of state, such as al-Bashir. But they pose a conundrum. Pressing fully for justice, some argue, may well hinder the ends of peace and reconciliation. Sudan presents a stark dilemma. The African Union (AU) thinks that going after al-Bashir will complicate peace efforts in Darfur and disrupt the January 2011 referendum on South Sudan. As a result, the AU has asked the United Nations (UN) to suspend arrest warrants against al-Bashir.

In Kenya, there is concern that indictments of senior officials implicated in post-election violence could exacerbate ethnic tensions. Demagogic ethnic barons will seize on the opportunity to further polarize the country. In Uganda, where the ICC has been involved with the prosecution of the

leaders of the Lord's Resistance Army, the question whether 'peace' can be traded for impunity was heavily debated. Human rights groups believe that justice is necessary for peace. Many of the people who were victims of the decade-long violence in Northern Uganda, however, preferred the establishment of peace before justice.

At the same time, President Yoweri Museveni of Uganda is thought to be using the ICC prosecutions to endear himself to the West and justify his stranglehold on power. In power since 1986, Museveni has changed the constitution to remove presidential term limits and is expected to seek another term. The concern that elites could politicize the ICC prosecutions to settle scores with opponents and curry favour with diverse groups and stakeholders is widespread. In Kenya, for example, there is a perception that some candidates may want to use the ICC to get their challengers out of the way ahead of the 2012 presidential elections. If so, the ICC would become an unwitting accomplice in partisan domestic politics.

Both CAR and DRC have collaborated with the ICC to remove Jean-Pierre Bemba, a Congolese warlord, from the political scene. The ICC has put Bemba on trial in The Hague for war crimes and crimes against humanity in CAR. He is also an opponent of President Joseph Kabila of DRC. The ICC's legitimacy is at risk of being soiled by these murky political entanglements.

The role of intergovernmental bodies

For the ICC to be successful, and to meet its objectives, it must of necessity receive the support of a wide array of actors and key stakeholders. The ICC can only succeed in its work in Africa if it receives the political, moral, diplomatic, material and logistical support from the leading IGOs – the UN, the European Union (EU) and the AU.

The UN has enormous significance in Africa, which can be used as a hook to support the ICC. In 2004, the UN signed a cooperation agreement with the ICC. But neither Ban Ki-moon, the Secretary-General of the UN, nor individual UN bodies, have used their considerable influence to support the ICC in Africa. The UN Security Council assumed a passive role once it authorized investigations on Sudan. In 2010, the UN failed to sanction Kenya for inviting, and failing to arrest, al-Bashir. The UN Security Council should have taken a strong position against Kenya for the blatant violation of the Rome Statute.

The EU has taken the most encouraging position among IGOs on the ICC's work. However, the EU has done little to actually support the ICC on the ground. It is true that the EU and the ICC signed a cooperation-assistance agreement in 2006, but the letter of that agreement has not been backed by concrete action. The EU has significant economic, diplomatic, political, security and other interests in Africa. The EU's 'partnerships' with African countries are deep and abiding. Yet they have not been exploited for the ICC's benefit.

Moreover, the EU could do more to support civil society organizations that are working with the ICC. Significantly,

the EU could use other levers against African states to induce compliance with the Rome Statute. These could include visa bans to Europe for African officials who obstruct the ICC or seizing their funds and other assets located in Europe.

There is no doubt that some of the EU member states have taken a more active role than others in assisting the ICC in Africa. In Kenya, for example, the EU has supported the location and transfer of witnesses. Much of this has happened out of the public view because of the sensitivity of the investigations and the safety of the witnesses. The ICC has worked with human rights groups, the government, and foreign missions to do its work in Kenya.

The same is true in Sudan where less-open contact between NGOs and EU missions in the country have been useful for collecting evidence and information on atrocities in Darfur. The EU has put pressure on African states to arrest al-Bashir should he set foot in their countries. This was true for Chad when the indicted Sudanese president was about to visit the country for a regional summit. Al-Bashir has been shunned by the EU which, along with President Barack Obama, heavily criticized Kenya for not arresting him when he visited the country in August 2010.

Diplomatic niceties have certainly been a stumbling block to a more public role by the EU and other Western countries in openly supporting the ICC. The US, for example, is constrained from being too vocal about the ICC because it is not party to the Rome Statute. But European states, which are parties to the Rome Statute, should do more, especially behind the scenes.

There are more opportunities for confronting Sudan because of the egregious nature of its regime's conduct. Visa bans and freezing the assets of senior officials could ratchet up the pressure, as would moves on trade restrictions. In both Uganda and Kenya, the EU should offer more carrots, and fewer sticks, because the two states have shown an inclination to work with the ICC. Incentives could include targeted support for the judiciary and police reforms.

The AU is the most baffling of all the IGOs. The successor to the Organization of African Unity, which Africans regarded as a 'club of dictators', the AU vowed to turn a new chapter on the continent. It has committed itself – on paper – to a democratic, rule-of-law culture based on peer review and pressure. This is both noble and laudable. But the AU's work has not matched its lofty rhetoric. The AU has been an unabashed apologist for al-Bashir. In July 2010, at the AU summit in Kampala, Uganda, the organization attacked Moreno-Ocampo for securing an arrest warrant against al-Bashir for genocide. The AU then made its request to the UN to suspend the arrest warrants against al-Bashir.

The ostensible reason for the request was that the arrest warrants would interfere with peace efforts in Sudan. In reality, the AU, which is steeped in a culture of impunity, was simply protecting one of its own. To their credit, South Africa, Uganda and Botswana opposed the AU's position. But a larger cabal, led by Libya and supported by Nigeria, won out.



A supporter of Sudan's President Omar al-Bashir holds up a crossed-out poster of ICC prosecutor Luis Moreno-Ocampo during the inauguration of the Merowe Dam in northern Sudan, March 2009

The role of the United States

The United States is not party to the Rome Statute, but it was deeply involved in the treaty's negotiations. Many concessions were made to accommodate American objections. The United States even signed the treaty before 'unsigning' it under former President George W. Bush. President Obama has shown tentative support for the ICC, although he has not pushed for its ratification. After the ICC issued its second arrest warrant for al-Bashir in July 2010, Obama said that he was 'fully supportive' of the Court.

But a few months later, Scott Gration, Obama's special envoy to Sudan, said that the Court's decision 'will make my mission more difficult and challenging, especially if we realize that resolving the crisis in Darfur and [the] south, issues of oil, and combating terrorism 100%, we need al-Bashir'. Gration gave the wrong message to Sudan and the world by, in effect, declaring that the United States needs al-Bashir, a fugitive from justice, to pursue objectives such as the 'war on terror'. Obama did not repudiate his special envoy's statement, and some may question whether the president should not have replaced his envoy with someone who is less willing to sanction a political figure accused of genocide for geopolitical interests.

The United States' huge international leverage enables it to put pressure on Sudan by freezing the assets of senior leaders, including al-Bashir, and imposing sanctions on the state. Furthermore, the United States and European countries

should work together to put pressure on China, the most powerful apologist and supporter of the al-Bashir regime.

Obama, unlike his predecessor, George W. Bush, has sent more encouraging signals to the ICC. Harold Koh, Legal Advisor of the US Department of State, has explicitly stated that the United States is working 'extremely hard to resume engagement with the court, the state parties,' and other stakeholders. This spirit, if followed by practical steps, could make the ICC a critical forum for delivering international justice.

Root causes

Africa can use the ICC to help break the cycle of impunity that plagues several of its states. Wangari Maathi, the 2004 Nobel peace laureate, has emphatically argued that the ICC is Africa's 'only shield from crimes against humanity'. The international community should therefore support the ICC and help resolve the challenges it faces in Africa.

This support requires a holistic understanding of the root causes of the culture of impunity and the seemingly intractable ethnic, social and political problems. This would put stakeholders in a better position to decide the most effective and practical areas of 'intervention' and partnership with local actors. After all, the ICC's role is not to end impunity, but to support local actors and create an environment in which the ICC's work can help reduce impunity and foster a culture of accountability and the rule of law. ■