Justice for export: Africa and the International Criminal Court

By Shingirai Maparura (1)

The International Criminal Court (ICC) was founded on 1 July 2002, as a result of its founding treaty, the Rome Statute of the International Criminal Court.(2) The need for an independent legal body to try leaders for war crimes was first voiced at the Paris Peace Conference of 1919.(3) It was not until the human devastation of the Rwandan genocide and ethnic cleansing in the former Yugoslavia, that the system of states was forced to make the international tribunal a reality. The ICC has its head quarters at The Hague, Netherlands and has a global mandate to prosecute those responsible for war crimes, crimes against humanity and genocide.(4) To date, 111 states are members of the court and 37 are yet to ratify the Rome Statute.(5)

The aim of the court is to end impunity and its challenge is to build a system so strong, universal and effective that it will deter even the most determined of despots.(6) The legitimacy of the court has not come under scrutiny, although its efficacy has been questioned. Seven years after its establishment, it has received at least 139 complaints, but all five of its investigations have been in Africa, all without any concrete outcome. This paper will assess the efficacy of the ICC in delivering justice in Africa. By exploring the mandate of the ICC and its progress in the Democratic Republic of Congo (DRC), the Central African Republic (CAR), northern Uganda, Darfur and Kenya, it will become apparent that though the ideals of the ICC are noble, the pragmatic demands of running a court with an international reach is challenging. Hindered by political, logistic and financial hurdles, the ICC may become a toothless bulldog, like many of the world's international organisations.

The structure and mandate of the ICC

The Court is composed of four organs, which are the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry. The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court. It is also accountable for examining these referrals and conducting investigations and prosecutions before the Court. The Office is headed by the Prosecutor, currently Luis Moreno-Ocampo, who serves a nine-year term.(7)

As stated above, the court is mandated to prosecute war crimes, crimes against humanity and genocide. However, the prosecution of individuals responsible for such crimes is contingent on a number of factors. Firstly, the individual must come from a member state and have been referred to the court by that member state. The only exception to this rule is if the individual is referred to the court by the United Nations (UN) Security Council, as seen with the case of Darfur.

Secondly, the court only has jurisdiction over member states - if a state is not party to the Rome Statute, it is not subject to the authority of the ICC. To date, key nations like China, Russia, the United States and India are not members.(8) The court can also only prosecute against crimes committed after the Rome Statute came into effect; thus any perpetrators of war crimes before 2002 are effectively immune.(9)

The efficacy of the court is fully reliant on the cooperation it receives from it members. The court relies on its members to refer cases, arrest and surrender individuals at the ICC's request. States also supply documentation, evidence and witnesses where necessary. In addition, the state may be asked to serve warrants, execute searches and seizures, and comply with the final ruling of the court.(10) In essence, without the full cooperation of the states, the ICC is powerless to operate as it has no police force of its own.

Financially, the ICC is reliant on the contributions of the member states. In 2008 the European Union contributed € 51.5 million (approximately US$ 63 million), while Africa only contributed € 0.6 million (approximately US$ 730,000).(11) Considering the ICC's focus on Africa, critics begin to question the credibility of a court funded by former colonisers to investigate former colonies. These criticisms may be unsubstantiated, but they affect the accountability of the court.

Progress in Africa

The first investigation and subsequent trial held by the ICC was of Thomas Lubanga, a former Congolese warlord. Lubanga is accused of conscripting child soldiers, and using them in the 2002 & 2003 ethnic conflicts in Ituri province.(12) The investigation was first opened in June of 2004, and Lubanga was transferred to the court in March 2006, where his charges were confirmed in January 2007. His trial, where he pleaded not guilty, began in January 2009. It took the ICC two years to open its first investigation after its inception, an additional three years to charge Lubanga and a further two years to start court proceedings.

Considering the magnitude of administration and investigation that goes into a trial at the international level, it is expected that the proceeding would take time. However, a total of five years between apprehension and trial is too long-winded. If this is the trend the ICC is to follow, then the five cases already underway should only expect to be concluded in the next decade. In addition to Lubanga, the court has also charged Germain Katanga and Matheieu Ngudjolo Chui, also from the DRC. Bosco Ntaganda has been indicted, but remains at large.(13)

The Ugandan Lord's Resistance Army (LRA) has killed and abducted people on a regular basis for the last 23 years, from Uganda, Sudan, Central African Republic and Democratic Republic of Congo.(14) Their crimes range from conscription of child soldiers, to rape, to murder. The ICC opened its second investigation in June 2004 and subsequently charged Joseph Kony, the LRA leader, Vincent Otti and Raska Lukwiya, who are now believed to be dead, and Okot Odhiambo and Dominic Ongwen.(15) None of the indicted criminals have yet been apprehended. However, their killings still persist, with 100 people reported dead in Kpanga at the border of DRC and CAR in January 2010.(16) Thus, their apprehension is imperative for the peace and security of the central African region.

The third investigation focussed on Jean-Pierre Bemba, former Vice-President of the DRC, who was charged with war crimes and crimes against humanity when he interfered in intense conflict within the CAR in 2002 and 2003. He was apprehended in Brussels in July 2008 and charged in June 2009 and his trial is expected to start on 14 July 2010.(17)

The situation in Darfur has dominated the agendas of many international organisations, humanitarian agencies and media. The complex nature of the conflict has led to the proposal of numerous multi-faceted initiatives aimed at securing the lives of the people of Darfur. Most notably, the African Union (AU) together with the UN has intervened in Darfur to establish peace. The ICC, at the request of the UN, began its fourth investigation of the situation in Darfur, which resulted in the indictment of Ahmed Haran, Ali Kushayb and the Sudanese President Omar al-Bashir. The president of Sudan is the first sitting head of state to be charged with a crime. He is charged with five counts of crimes against humanity - murder, extermination, forcible transfer, torture and rape; and two counts of war crimes - intentionally directing attacks against a civilian population and pillaging.(18)

A further charge was laid against a rebel leader Bahr Garda, who surrendered to the court in 2009. The charges against him were dropped in February 2010 after the prosecution failed to obtain substantial evidence to try him.(19) Two rebel leaders accused of being involved in an attack that

killed peace keepers have also been charged, with Abdullah Nouran and Saleh Jamus appearing voluntarily before the court this month.(20)

The final ICC investigation is of the 2008 election violence in Kenya that killed an estimated 1,300 people.(21) The investigation is still in its initial stages.

Factors affecting the efficacy of the ICC

As already mentioned above, the amount of time consumed between investigation and the subsequent trial is too long. If the court is to be effective in its deliberation and delivery of justice, it must streamline its activities to make them more timely. The reliance of the court on the cooperation of its members also undermines its effectiveness. Of the 13 individuals eligible for trial, 7 are fugitives, as their countries are unable or unwilling to apprehend them.

The ICC's focus on Africa has come under great scrutiny. Since its inception, all of its investigations have been with regards to Africa, suggesting a skewed emphasis on African conflicts. The reason for this is unclear. Pessimists argue that the focus on Africa is a continuation of paternalistic neo-colonial relations between Africa and the International community. President Kagame of Rwanda questioned if the ICC was put in place only for African countries or poor countries, with imperialistic intent.(22) This is a mentality shared by many Africans as colonialism and its legacy is still a reality to them and their offspring.

This is not to say the investigations into Africa are unfounded. Aptly stated by Martin Ngogo, prosecutor-general of Rwanda, "There is not a single case at the ICC that does not deserve to be there. But there are many cases that belong there, that aren't there."(23) It is baffling that there are no investigations on Gaza, Columbia, Iraq, Afghanistan or Caucasus, though it has been suggested that perhaps the ICC is experimenting in Africa, honing and perfecting their skills so as to be more effective when more 'important' cases arise.

Less emotive analyses attribute the ICC's focus on Africa to Africa's weak judicial systems and their inability to prosecute the powerful. Solomon Dersso, a senior researcher with the South African-based Institute of Security Studies (ISS), argues that while donors have invested millions of dollars supporting international tribunals, they have not given much support to Africa's domestic judicial systems. This has prevented Africa's courts from developing the ability to try such crimes, in turn making it harder for a culture of human rights and respect for the rule of law to take root.(24)

This is not to negate the obvious regional skew. Kofi Annan is of the opinion that this emphasis on Africa is to be heralded, "The African opponents of the international court argue that it is fixated on Africa because its four cases so far all concern alleged crimes against African victims. One must begin by asking why African leaders shouldn't celebrate this focus on African victims....Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?"(25)

The chief criticism of ICC's focus on Africa is the impediment of peace. Contrary to popular opinion, the reluctance of the AU to turn over al-Bashir was not due to in-house bullying, but to concerns of peace. The AU has been involved in peace processes in Darfur since 2005 and the fear was that indicting al-Bashir would intensify tension in an already volatile environment. The simultaneous pursuit of peace and justice has proven to be difficult. While the two are not mutually exclusive, the attainment of one is usually at the expense of the other. The AU advised that the indictment rather be held off till they were able to broker a ceasefire or establish sustainable peace in the area.

The involvement of the ICC in Sudan highlights another potential predicament for the ICC in Africa. The ICC is a legal organ operating in a political realm and must adapt to live in the world it inhabits.(26) While it aims to remain independent, global politics will undoubtedly affect it. For instance, the surrender of Garda in 2009 was seen as political ploy on his part to use the ICC to boost his domestic credibility against that of the Sudanese government officials who remain at large.(27) It is inevitable that the decisions that the ICC makes will take political turns. In an arena where a court is being scrutinised by political opponents, the court must show itself to be viable, effective, efficient, independent, accountable and transparent. Thus, the choice of which case to select considers justice, as well as politics.

Conclusion

In consideration of all this, the efficacy of the ICC is unsatisfactory. To date, the ICC has 0% delivery on their pledges of justice. No charged individual has been convicted, 7 culprits remain at large and no reparations have been paid. However, it is indeed noteworthy that the community of states have joined together in this initiative to hold perpetrators of war crimes accountable, and that the precedent has been set that no criminal, no matter how powerful, will escape scrutiny.

The regional bias and delay in procedures are all pragmatic problems that can be resolved. In the opening address to the Rome Conference Mr Annan said that, "the eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us."(28) Indeed, the efficacy and success of the ICC has more significance to the victims than anyone else.

NOTES:

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