

PROSECUTING PRESIDENTS

The Challenges of International Indictments of African Leaders

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CONFERENCE REPORT

Summary

The RUSI and CFPA conference on the international indictments of heads of government drew on political and legal theory, as well as detailed case studies, to address the many questions posed by the issuing of an arrest warrant of Sudanese President Omar Al-Bashir by the International Criminal Court on 4 March 2009. A wealth of study and experience on the issue of international justice was applied to the Court itself and its recent decision. Many questions were raised in a day of passionate exchange of evidence and argument, but two key themes in particular stood out.

Central to the debate is the familiar ‘justice vs. peace conundrum’. On the one hand, the needs of victims are clear – justice and some form of reparation are, if not sufficient for peace, necessary in a moral sense. There is also a more practical consideration – a failure to provide justice, while being a short-term expedient, can perpetuate a culture of political violence or leave simmering grievances unresolved. And it is difficult to accept that those who commit the most universally reviled crimes should enjoy effective impunity.

Yet there are also compelling and powerful arguments for pragmatism. What use is justice if its blind pursuit scuppers peace overtures? One panellist posed the difficult question of whether the absence of war was valued more than retribution. The question of context surfaced repeatedly.

Priorities in conflicts or fragile peace processes may vary markedly from case to case. For many of the presenters, the Court was a broad-brush solution to such delicate situations. Finally, as an institution, some argued that the Court itself sat uneasily with international law and the current system of world order.

Following this dichotomy came the question of indigenous and international processes. How are they to be reconciled, if this is at all possible? The charge of being an imperial endeavour is common, and regardless of its truth it provides a powerful rhetorical device for indicted politicians.

The principle of complementarity – the concept by which international courts are used only when domestic capability is lacking – was raised. But as the case studies showed, in practice this was not always easy to implement. In this, something of a dilemma is faced. The process and outcome of both domestic and international justice in these situations is often problematic. If deficiencies exist at both levels, then what is the least-worst solution?

There are no easy answers in the quest for security and justice. As highlighted in this conference report, analysts and practitioners must always be alert to contextual nuance. Ultimately, it seems, the solution is always political – but the key role justice plays cannot be discounted.

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Keynote Speech

Jonathan Steele (Senior Foreign Correspondent, the *Guardian*) in his keynote address prophetically sketched out many of the issues and questions that would be wrestled over in the conference. He began by linking two seemingly separate indictments: that of Sudanese president, Omar Al-Bashir, and the former president of the Republic of Serbia, Milan Milutinovic. On 4 March 2009, the pre-trial chamber of the International Criminal Court (ICC) accepted the decision of the prosecutor to issue an arrest warrant for the former – the first time this has been done for a sitting head of state. But the case of Milutinovic was equally unprecedented: but a week earlier, he had been acquitted of all charges of genocide in Kosovo after a two-year trial.

For Mr Steele, this acquittal is an important reminder of the presumption of innocence; in this case, the Court could not prove direct responsibility of the former president for crimes in Kosovo.

The ICC is not universally viewed as politically independent, and China, Russia and the African Union (AU) would prefer to see Al-Bashir's arrest warrant rescinded. Mr Steele also highlighted US political imperatives, namely the 'Save Darfur' lobby. Both Hillary Clinton and Barack Obama made open claims of genocide in Darfur during the presidential primaries.

The notion of universal jurisdiction also raises controversy. Henry Kissinger argued, in the aftermath of the Pinochet affair, that the fabric of international law could not become subject to 'the tyranny of judges'. But in response, Kenneth Roth of Human Rights Watch argued that universal jurisdiction is not a new concept: it is, after all, what permitted the trial of Adolf Eichmann in Israel for crimes committed in the Third Reich. Indeed, the Geneva Conventions demand that states 'search for' suspected violators of human rights. What Roth argued was new, in fact, was the political will to chase such cases.

So what is outwardly a legal issue raises a new set of political questions. Al-Bashir was always subject to these laws – the only change has been the willingness of other governments to enforce them. A second set of questions are thus raised:

- Is it wise to indict sitting leaders?
- Will the behaviour of leaders change because of this indictment?
- Will the indictment improve conditions on the ground?

In answer, Mr Steele suggested that the ICC had been reckless in its rush to set a precedent. Leaders who are likely to be indicted will not change their behaviour – they conduct 'tough politics'. And on the question of whether indictments will improve conditions on the ground, that too is doubtful. The Milutinovic indictment, for example, came two months into the NATO bombing of Yugoslavia in 1999 – if the goal was to foster a negotiated settlement, the logic of the decision to prosecute was curious. Indeed, the AU's objection to the Al-Bashir warrant is not purely cynical – there is a very real risk to peace that ultimately could also punish Sudan's neighbours.

South Africa offers a good example of an alternative policy. Nelson Mandela agreed to swap immunity for white leaders for detailed testimony. Punishment is not the only model of justice. Outsiders should keep out if domestic constituencies are not demanding prosecution.

Discussion

In the questions and answers session, Mr Steele emphasised that the Court should not be seen as a magic solution to conflict. Dynamics of resolution will always be internal: to pretend otherwise is folly. Furthermore, autocrats must be given incentives to abandon power – punitive indictments do not assist a voluntary abandonment of power. In this light, the opposition MDC party in Zimbabwe may have acted shrewdly by avoiding the question of prosecuting ZANU-PF leaders.

On the question of the Court's future, the inherent inertia of international institutions was highlighted: once created, they rarely die. The question yet to be answered is whether it can become effective – its record so far is poor.

So what has gone wrong? The ICC is clearly well-intentioned, but it is impossible to pretend that

international legal mechanisms can operate independently of power and politics. Blame was placed at the feet of the UN Security Council, whom, it was felt, should not have referred Al-Bashir's case to the Court. Now, they should suspend it. Politics is primary: the absence of peace affects many more people, and more directly, than the absence of an indictment.

Session 2: Indicting Leaders: Theory and Practice

Sir Geoffrey Nice QC (Temple Gardens) led the session from the perspective of a distinguished practitioner. In his view, the ICC and special tribunals such as those for the former-Yugoslavia embodied a rejection of the realist view that world order is impossible without a world army and police. It is possible that this well-meaning thinking has had unfortunate results. Nevertheless, there are some lessons to be drawn from experience.

The seeds of the International Criminal Tribunal for the former-Yugoslavia's (ICTY) declining reputation were structural. Unlike the highly regulated domestic systems of the West, this independent court was free of natural checks and balances. Internal and external pressures subverted the process of justice. These pressures were not easily resisted by staff, judges and lawyers – many have limited personal means and are not able to defy organisational culture.

From this experience, Sir Geoffrey outlined the main lessons that should be adopted.

- The US, China and Russia must sign up to the ICC to ensure its relevance
- The cadre of people to be prosecuted should be narrowed
- The legal and political aspects of the ICC should be separated. The accountability for success or failure should be left with a political body
- ICC trials are limited, and should be part of an integrated process of reconciliation

- The limitations of staffing need to be recognised
- Awareness of local culture and nuance is essential to avoid the appearance of an imperial enterprise.

Dr John Laughland (Director of Studies, Institute of Democracy and Co-operation) provided a historical view of trials of heads of state – the first being Charles I. There has never been a single acquittal (with some very partial exceptions) – indeed the very fact of trial is an expression of a new political order. Hence in these situations, law cannot be disassociated from politics. As a result, all trials of heads of state have involved gross violations of legality. This is not to say the outcomes were unjust – but as acts of law, they are flawed. History therefore provides us with some instructive lessons following from this analysis.

One of the key violations is that of retroactive jurisdiction, which belongs to the very nature of such prosecutions. For Dr Laughland, the indictment of Al-Bashir is an example of this and is plainly a violation of international law.

The Hague and Nuremburg tribunals are often painted as 'international' and as applying universal principles. But in the case of Nuremburg, which is often cited as the key precedent, this is patently not the case. It was only international in the sense that the four major victorious Allied powers exercised full political authority in Germany in the aftermath of total surrender. Further, the law adjudicated

applied only to the Axis powers. In the subsequent Nuremberg trials, the judges themselves ruled against applying universal jurisdiction. Finally, the primary charges against the Nazi regime related to crimes against the international system – aggressive war – rather than those against humanity.

What can we take from this history? Firstly, the immutable nexus of law and politics means criminal law breaks down when applied to political events. Secondly, the laws of war themselves are based on a tradition of *decriminalising* war, and non-interference has been reimposed upon the system after the Napoleonic and World Wars. In sum: ‘political trials are nothing but the continuation of war by other means’.

Dr Milyus Pilayiwa (Registrar, Oxford University) gave a critical African view of the Court and the idea of international justice. He began by stressing the importance of context: who is being indicted, at whose behest; which laws are being used; who is doing the judging? From this analysis, we see that national/political interests always come into play.

An immediate question is why the ICC’s only indicted suspects are African. The continent does not have a monopoly on atrocities or human rights abuses. By October 2007, the prosecutor had received many allegations of abuse: but only four cases were examined, all of which were African. Thirteen public warrants of arrest have been issued – all for Africans. And examining the jurisdiction of the Court – genocide, crimes against humanity, war crimes and crimes of aggression – one sees that issues such as terrorism and the use of weapons of mass destruction are absent. But these issues are covered by the interest of great powers – is there a double standard here?

Some of the more practical failings of international justice were referred to in Mr Pilayiwa’s examination of the Sierra Leonean experience. The broad-brush application of ‘justice’ brought charges against the civil self-defence militias (the *kamajors* or Civil Defence Units). Yet these formations were fighting to restore democracy to the country during its state collapse.

Badly implemented trials have humiliated locals in Sierra Leone despite the international legal regime’s ostensible duty to protect their dignity. Given this risk, national reconciliation, not retribution, must be the priority. For Pilayiwa, conflict prevention and capacity-building are more important than ‘prosecuting presidents’.

Brigadier General Frank Rusagara (Rwanda Defence Forces and Visiting Fellow, RUSI) spoke of the Rwandan experience of post-conflict justice, analysing both international and indigenous processes. In its parallel systems of justice, Rwanda provides an interesting case study of their relative effectiveness.

The International Criminal Tribunal for Rwanda (ICTR) did have some achievements:

- Accumulation of historical record (testimony, documents and so on)
- Contribution to international jurisprudence (rape, for example, is now an act of genocide)
- Erosion of immunity for crime because of official position
- Incitement to commit genocide is now criminalised.

Nevertheless, the brigadier general highlighted some key shortcomings:

- The court was very remote to Rwandans, who may not have *seen* justice being done
- Its expense - \$100 million a year – was prohibitive
- Uncertainty over where the trial archives will be located conflicts with the right of Rwanda to host its own historical materials
- Its continuing existence (unfairly) implies insufficient domestic capacity.

On the other hand, the indigenous process has given Rwandans the opportunity to mediate their own conflicts. In fact, given the vast number of suspects, such processes were logistically necessary. This, however, did not sit well with the international community, which did not necessarily believe in Rwandan capacity.

The indigenous process of *gachacha* has served six aspects of nation-building:

- Fostered truth and reconciliation to generate a 'Rwanda of Rwandans'
- Delivery of justice to victims
- Breaking a culture of impunity
- Generating collective ownership of the Rwandan tragedy
- Rejecting divisive colonial ethnic distinctions.

Session 3: Sudan

Dr Abdullahi Osman El-Tom (Justice and Equality Movement) argued that the warrant issued for Al-Bashir's arrest in fact addressed some valid concerns of the Sudanese peace process – and was not necessarily detrimental.

He clarified that the issue is not about heads of state per se, but rather about those that are responsible for heinous crimes. And in Sudan, there are wider issues of an imperfect peace process that has perhaps strayed too far away from the justice side of the equation. Sudanese society remains marginalised and Darfuris and southerners continue to be underrepresented, he argued. As a result, the roots causes of secessionism remain; in other words, compromise has not in effect guaranteed 'peace'.

Additionally, far from being an 'imperial' enterprise, holding leaders to account for genocide without selectivity or variation would advance the cause of all Africans. Africans, he said, must be accountable. So while it is true that all indicted by the ICC have been African, it reflects an underlying reality: 'it is not hard to find war criminals' on the continent. The argument that pursuing justice would worsen the situation, Dr El-Tom stated, is undermined when one considers the violations of the peace process that Al-Bashir has himself perpetrated.

The point was also made that it is extremely unfair to expect the Sudanese to live under the rule of a

This process has been integral to the wider effort to remould Rwandan society in an image that eschews colonial and post-colonial artefacts of ethnic identity. As such, it is a wholly indigenous process, removing constraints which have been imposed by foreign powers throughout Rwanda's history.

war criminal who has presided over a systematic campaign of ethnic cleansing.

Marc Glendening (Director, ICC Watch) placed the ICC's actions in Sudan as part of a wider shift in the nature of the international system. The Court was, he said, part of a transition to transnational governance that undermines the key principle of equal sovereignty of states. We now are creeping towards a system which proscribes sovereign equality under an international regime that defines the limits of domestic behaviour.

This transitional system is at its most advanced stage in the EU, which claims legal supremacy over its member states. Outside of the EU, however, the world is being subjected to the interventionism of great powers. This essentially amounts to a 'counter-enlightenment' that is inserting post-modernism into the international system. Some key differences between each were juxtaposed.

In a modern system, rulers are accountable to their own people. But in the post-modern system, law-making and enforcement are increasingly disconnected from the people. Power is sacrificed to elites by fragmentation: 'politics is becoming mysterious again'.

Democracy, in the modern system, was the guiding principle for legitimacy. International law was to be composed of voluntarily entered-into agreements,

as enshrined in the Vienna Convention. But where does the ICC derive its universal legal and moral mandate?

Further, rule of law in a modern state is the non-discretionary application of law and safeguarding of procedural rights for the accused. Yet this is not ensured by the elastic provisions of the ICC. And the charge of selectivity is particularly damaging here. The Justice and Equality Movement, for example, has not been held to account for their use of child soldiers. Also, in terms of procedure, defendants are disadvantaged as the prosecution can withhold documents until trial.

In essence, the principal threat to modernist democratic values is the transnational movement. Mr Glendening hoped there would be a reawakening of these conventional values emphasising the nation state and embodying a drive against imperial values.

Dr Lam Akol Ajawin (Former minister of foreign affairs in the National Unity Government of Sudan, SPLM) provocatively defined the purpose of ICC involvement in Sudan as regime change. He charged the Court with appreciating this itself, yet pressing on with the arrest warrant regardless. Most importantly, the Court's actions threaten the fragile peace process. This 'hidden agenda' of regime change, in Dr Ajawin's view, can neither be justified pragmatically nor sit easily with the Court's universal moral principles.

The original indictment for Al-Bashir was submitted in March 2005, two months after the signing of the Comprehensive Peace Agreement (CPA) between the north and south. Because the ICC seeks to undo the agreement itself, Dr Ajawin believes the Court should rethink its stance. This agreement was only reached after a terribly costly civil war – millions died and were displaced. The ICC's interpretation of justice should not be put before the peace agreement; it does not improve the prospects for security in Sudan. The crux of his objection related to the *de facto* demand for regime change. The West, in essence, has demanded an undoing of an indigenous peace process, and failed to understand

the discontinuity in the regime from the CPA onwards.

The speaker accepted the point, made earlier in the conference, that it is immoral to expect Sudanese victims to live under a war criminal. But he stressed that change had to be *domestically* generated, not externally imposed. The risks of the unintended consequences of international meddling were too great: war in Darfur will be prolonged, and peace in the south may unravel.

Professor Tim Allen (Development Studies Institute, LSE) assessed the Court's record in Uganda in order to derive conclusions about its potential for justice in Sudan. Northern Uganda was the first big case for the ICC. Here, it was reasonably successful. The Lord's Resistance Army (LRA) left the area quickly; Ugandan government forces have begun to act in a more accountable manner; and foreign aid agencies have absorbed criticisms from the process of examination.

The situation in northern Uganda was more complicated than that initial examination may suggest. For example, the emotive issue of child soldiery was not simply exploitation. As is common in such cases, for some children it was in fact a way of life where a gun provided power, respect and economic reward. And Professor Allen also cautioned on the limits of NGO-managed 'local rituals' as an alternative to formal justice; many of these rituals were in fact codified by old imperial overlords as part of indirect rule. Reliance on such mechanisms also creates a two-tier system of justice, since residents outside of the north would enjoy access to a formal system of justice.

Finally, Professor Allen weighed in on one question in particular: is prosecution of Africans persecution of Africa? He argued that, if all humans are equal, then the worst crimes have taken place in Africa. Therefore, it is appropriate that Africa is emphasised in the Court's work. Furthermore, several key positions in the Court are held by Africans. In fact, most criticisms against the ICC are really assertions that it should be able to do more.

Discussion

Because of time constraints, discussion for this session was brief. Nevertheless, one important question was raised: how could the indictment be reconciled with equal sovereignty of states? In reply, it was said that the rights of sovereignty cannot apply to states engaged in genocide. This reply raised a further issue, regarding the definition of genocide and the context in which the term can be used. Both of these issues directly bear upon the operation of the Court in the future.

Session 4: Zimbabwe

Wilf Mbanga (Editor, the *Zimbabwean*) opened the session on Zimbabwe with the obvious question: should Robert Mugabe be brought before the ICC? He identified two competing strands of thought on the so-called 'peace vs justice' conundrum. One feeling is that the past must be left behind, otherwise the current regime will not relinquish their grip on power. Yet this is also problematic in that it continues a culture of impunity.

Morally, Mr Mbanga argued, this minimalist path is wrong; it also sits uneasily with the victims. Further, there is also a critical lack of *information* about the crimes – so at the very least there must be a truth commission for full disclosure.

There is also a practical dimension to this supposed dichotomy. A criminal process is necessary, he said, to prevent a recurrence of these crimes and scrub Zimbabwean politics of this culture of political violence. 'Moving on' means little if the problem is not eradicated.

The culture of impunity must be broken. Violations of the rule of law must be exposed and full accounts given to victims. Reparations and guarantees of non-repetition must be given. Indeed, Mr Mbanga suggested that in fact a failure to provide justice would only lead to underlying tensions as grievances are unresolved, which itself could spark new violence. Therefore, any process of justice

A more case-specific question asked about the effects of the indictment on the operation of relief agencies in Darfur. A number had been expelled by the Sudanese government in the wake of the indictment. However, not all had been expelled; the real issue is whether the government will step in to fill the operations of those which had been told to leave.

requires: truth-telling; confessions; forgiveness; justice; and then will come reconciliation.

Derek Matyszak (Research and Advocacy Unit, Zimbabwe) continued with a detailed examination of the role the Zimbabwean judiciary could play in any transitional justice programme. His conclusion was pessimistic: the judiciary in Zimbabwe is 'hopelessly compromised'.

The mechanism of appointment is partisan, undemocratic and opaque. It works through the Judicial Services Commission, the members of which are either appointed directly by Mr Mugabe or *ex-officio*. And the process by which names are put forward for the commission is opaque. Senior ZANU-PF officials make recommendations, based on closed meetings, to the commission, who then rubber-stamp this nomination.

This direct interference gravely undermines judicial independence. The judges that have been forced off the bench since 2000 have been replaced with candidates loyal to ZANU-PF. Yet this interference is not just restricted to appointment. During the land redistribution process, the spoils given to loyal judges consisted of land – but not title to the land. Therefore judges remain continually dependent on the patronage of the regime. Hyperinflation also makes government largesse more important for sitting judges as the system for preventing

tampering with salaries is undermined. Judges are now paid in foreign currency directly from the president's office.

Can this situation be reformed? There are two potential solutions. Security of land tenure and salary (through a control of hyperinflation) would erode this system of patronage. But the rot has set in, and this systemic abuse hangs over the head of sitting judges. In this regard, Dr Matyszak holds the ICC as providing a useful system of complementarity, allowing perpetrators of crime to be held to account when they cannot be tried at the domestic level.

Carla Ferstman (Director, Redress Trust) offered a wider perspective, describing the problem of justice as not simply one for Zimbabwe, but for the international community as a whole. In particular, the leadership of the AU will be vital.

The choice between justice and order, in her argument, was often manipulated. Governments stressed 'reconciliation' in order to create a balance of peace and justice that favoured them; victims, she argued, less often pushed for reconciliation on its own. Is a process that does not satisfy the victims truly reconciliation?

Referring to Zimbabwe, she reiterated the point that domestic prosecutions are unlikely. Could there be a process similar to Cambodia's, where perpetrators were held to account decades after their crimes? This is not ideal, however, for Zimbabwe, so impetus for a solution may have to come from above.

Regional leadership will be essential in resolving Zimbabwe's problem of justice. Indeed, AU criticism of the ICC is not as straightforward as may first be thought. Many signatories to the Rome Treaty are also members of the AU. The Union has also made statements in favour of universal jurisdiction for human rights abuses. These competing national and regional positions seem paradoxical. So the question is therefore how to encourage the AU to play a more useful role in pushing accountability for the very worst criminals, such as the Rwandan *genocidaires*.

Dr Blessing Miles-Tendi (Zimbabwean Writer and researcher) provided the historical context to peace and reconciliation in Zimbabwe. The periodic outbursts of political violence are not new: they are part of a 'century-long' process dating to the pioneer columns of the 1890s.

Violence was an integral part of the colonial experience, with its attendant human rights violations. Nationalist movements embraced the same modes of operation, which both suffered and committed similar abuses. This culture of violence and abuse continues through the independence period.

For Dr Miles-Tendi, there can be no permanent political solution in Zimbabwe until this long history of violence is addressed. It will be an 'endless cycle' unless there can be a comprehensive rupture with the past. Indeed, history itself is used as a tool in Zimbabwean politics and as a justification for violence; old grievances become a tool of mobilisation.

Discussion

Lively discussion focused on two main themes: the peace vs. justice conundrum and the nature of the ICC itself.

On the conundrum, the first point was raised that certain crimes should never receive amnesty. Given this, could peace and justice be reconciled by setting up special courts on a specific basis for Zimbabwe that can ignore amnesties – as was done in Sierra Leone? Others agreed that there was not a real dichotomy – it was really about long- and short-term solutions. Because there existed a legacy of impunity at each electoral node in Zimbabwe's history, human rights abuses because a systemic process. Short-term expedients have only crystallised this culture of political violence.

Naturally, the ICC itself came under inquisition. Rather than being a 'group of philanthropists and neutral observers', was it more a political tool? Panellists rejected this argument. Though the politics of the international community are undeniable, the ICC nevertheless holds that certain

crimes are *above* politics. We should hope that states recognise this.

Echoing Dr Ajawin's comments in the Sudan session, it was asked whether the panel would admit that the ICC was, in effect, advocating regime change. One panellist rejected the assumption, asking what could be the alternative in a country that has not effected change through the ballot box: armed

struggle? Another panellist outlined the paths of Europe and Africa since the Second World War with regards to human rights and sovereignty. Whereas Europe elevated the rights of the individual over sovereignty, African states guarded sovereignty as a defence against foreign intervention. This divergent experience may explain some of the contradictions of the system.

Session 5: Universal Human Rights

Alex Yearsley (Head of special projects, Global Witness) examined the trial of Charles Taylor and the Special Court for Sierra Leone. He highlighted a number of problems that the Special Court faced. Institutional deficiencies were a key problem. At the start of the trial in particular, the knowledge of the Sierra Leonean conflict held by the court was very poor. Compounding this was the high turnover of staff, which presented a barrier to institutional learning; knowledge and best practice were lost.

The nature of such cases also complicates international involvement. International politics can have a bearing upon the trial that may undermine the pursuit of impartial justice. In particular, embarrassing 'hidden histories' can be thrown up by such investigations. For example, it is likely that Charles Taylor had some involvement with US intelligence services. While in the context of the Cold War this makes sense, this link does create a potential problem when he takes the stand, particularly with access to documents and testimony.

Resources were also lacking, as international partners did not provide sufficient backing. Witness protection in particular was poor, with the result that prosecution witnesses have been threatened and other people assisting with the trial. Finally, there has also been a lack of ability or an unwillingness to prosecute economic actors from the civil war.

Dr Phil Clark (Centre for Socio-Legal Studies, Oxford University), wading into a key theme of some of the most contentious discussion in the conference, addressed the political dimensions of the ICC and the prosecution of presidents. Two main claims had to be addressed: that the 'ICC is a tool of Western power' and that 'African states and populations are powerless victims in the face of international justice – the ICC consistently violates national sovereignty'.

It was pointed out that the Court is a more limited organisation than has been supposed. Indeed, the Al-Bashir indictment highlights a number of weaknesses relating to its power, liberty to operate and procedures, particularly of the office of the prosecutor.

The indictment is a symbolic gesture. There is great scepticism that he will ever be seen in the dock – so why is he being pursued? Dr Clark suggested that the prosecutor was gambling to try and regain a sense of legitimacy for the Court that has been lost in the last few years. Its previous targets have been low-level leaders charged with low-level offences. This perhaps reflected a necessary pragmatism, but it has nevertheless brought about criticism from large donor states who have ploughed vast resources into it. The Darfur case, therefore, is a response to these criticisms.

But the Court is limited in terms of its ability to arrest. It appears to be a paper tiger, able only to issue high-profile arrest warrants but not to go in

for the kill. Yet paradoxically the Court is reliant on co-operation from actors on the ground. The prosecutor is also weak within the Court: it has a limited internal function. This is illustrated by the relationship with the judges – they have criticised prosecutions and the ways of seeking indictments. Judges are also setting up a legal basis for how the Court will operate.

Finally, discussions often overlook the agency African governments have had in dealing with the ICC. They have demonstrated a keen understanding of international law in getting what they want from the Court. Ugandan president Museveni managed to strike a deal with the ICC gaining effective immunity, for example. The principle of complementarity gives states a huge degree of manoeuvre in shaping how the court operates.

Silas Chekera (Counsellor, Special Court for Sierra Leone) gave the last presentation of the day, making an argument for African exceptionalism. African states choose politically expedient measures reflecting the local context. They have developed context-specific ways of responding to the legacies of human rights violations.

Systems of international justice should be an instrument of choice. Referrals do not necessarily take consideration of the facts on the ground – what do Security Council members know of unique political contexts or the best solutions? Chekera gave several specific objections to the ICC that favour exceptionalism.

First, the notion of justice is not necessarily universally definable. How can we impose a system of justice on different local contexts and unshared assumptions?

Second, we must reject the notion that prosecution equals justice. This is not always the case – truth and reconciliation commissions can often be better measures. Other times, more complicated policies that address underlying social grievances are required, such as land redistribution. And the resources spent on the Court often do not sit well with victims who live in poverty.

Discussion

The relative effectiveness of different measures of justice was the dominant concern in this last discussion session. One objection raised to some of the less-stringent processes of justice is that they leave problems unresolved. The legacy of the Angolan civil war, for example, has left tensions that remain. Will these boil over once Dos Santos is no longer in power?

Further, did the process of Charles Taylor's arrest set a worrying precedent? He sacrificed some measure of personal gain for peace, but this has been turned around and he now faces trial. Perhaps not – Taylor, it was argued, flouted specific conditions and he remained a security risk to the region.

Finally, the issue of European support for the ICC was raised. How is the Court perceived in Africa as a tool for dispensing justice given this European involvement? As seen with the Sudanese case, this backing provides the opportunity for government propaganda. It has been a 'shot in the arm' for Al-Bashir and has strengthened him politically, at least for now. The Court has made a mistake in going only for African leaders so early on in its existence. Further, by picking cases in overlapping conflicts, the prosecutor's case is only made harder.

But the ICC may not have been able to avoid such claims; its first task is to construct its own relevance, and in this regard African targets are the weakest in standing up to such institutions.

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