A whip against violent dissidence

INTERNATIONAL CRIMINAL COURT' STORY

CENTRE FOR INTERNATIONAL RELATIONS

Analysis

08/2019 www.csm.org.pl

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During the almost 30 years of his existence, the International Criminal Court (ICC) has tried a bit more than a dozen defendants, out of which the ICC chambers have found eight guilty. In no single case did ICC chambers sentence a defendant against the will of a government, on whose territory he had committed the crimes he was judged for. This paper argues, the ICC has become a prosthesis for governments in fragile states, which lost their grip on parts of their territory or whose judiciary is too much in shambles to punish perpetrators of mass violence. This, rather than recurring claims about the ICC becoming an instrument of neo-colonialism, imperialism, the West and of being biased against Africa, is the problem, the ICC now faces. But it is also a chance. By embarking on a mission to reinforce the judicial capacities of fragile states the ICC has more chances to garner legitimacy than by launching investigations and issuing arrest warrants against key actors from the world's most powerful nations, which are unlikely to be ever served upon.

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During the most recent years, whenever the ICC issued an arrest against a sitting head of state, the spokespersons of the respective government, but also of other, mostly African governments, accused the ICC of "anti-African bias", of having become an "neo-colonial" or "neo-imperialist" instrument of the West (or the global North) to subdue Africa and weaken its internationally recognized governments. This happened, when the ICC indicted Sudanese president Omar Al Bashir and several high-ranking members of his government and the Sudanese military, acting on a UNSC referral, but it also happened, when the ICC indicted members of the Kenyan political establishment for the Post-Election Violence in 2007-2008.

Opposite to Kenya and Libya, where the ICC investigated international crimes according to a UNSC referral, Kenya had ratified the Rome Statute beforehand and could not argue the UNSC had imposed ICC jurisdiction upon the country against the latter's will. It is true – all arrest warrants the ICC has issued so far, concern Africans and all arrest warrants against sitting heads of state bear the names of African politicians. In recent years, the ICC prosecution has launched examinations and investigations concerning many countries outside Africa, from Palestine, Afghanistan, the United Kingdom, Ukraine and Georgia, but its investigations have concentrated on Africa, its arrest warrants have targeted African governments, its trials concerned cases in Africa and all defendants found guilty came from the African continent. It is this last number, which is most revealing. Out of these eight defendants, the ICC convicted four of minor vices – for witness tempering in the Bemba case, which ended with

an acquittal on appeal.[1] The remaining four defendants were sentenced for ICC core crimes.[2]

Table 1: Defendants convicted by the ICC for international crimes

Defendant found guilty by the ICC	Underlying conflict	Conflict side, with which the defendant was affiliated
Al Fahdi al Mahdi	Mali	Opposition to the Mali government (member of Al Kaida in Magreb)
Germain Katanga	Democratic Republic of Congo (Ituri)	Opposition to the Democratic Republic of Congo (DRC) government in Kinshasa
Thomas Lubanga Dyilo	Democratic Republic of Congo (Ituri)	Opposition to the DRC government in Kinshasa
Bosco Ntaganda	Democratic Republic of Congo (Ituri)	Opposition to the DRC government in Kinshasa

This does not mean the ICC did not attempt to try defendants associated with governments and from other parts than Mali or the Eastern part of

[1] These are the cases of Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu, Narcisse Arido. Jean-Pierre Bemba was also convicted of witness tampering.

[2] These core crimes are genocide, crimes against humanity and war crimes, and, with various limitations, the crime of aggression. They will further be called "international crimes", no matter, whether they were actually of an "international" (that is transnational) character.

the DRC. After the Post-Election Violence in Kenya, the ICC tried leading members of both main factions involved in the violence, including sitting Kenyan head of state Uhuru Kenyatta. After years of investigation, the trial began and then collapsed, because the prosecution lost key witnesses, while others retracted their statements. Finally, the prosecution withdrew one cases, while the trial chamber ended the other ones and all that is left now are several arrest warrants (not served upon so far) against Kenyans, who are suspected of obstructing the course of justice in the Kenya I and Kenya II cases.

The ICC issued arrest warrants against the Sudanese leadership under Al-Bashir, but proved unable to get hold of suspects. The Sudanese government openly defied the ICC arrest warrants, Al-Bashir travelled to other African countries freely and was never arrested, not even by governments, who had ratified the Rome Statute. They usually argue their obligation to arrest and transfer suspects sought by the ICC to be in contravention of their bilateral obligations to respect the immunity of sitting heads of states. In the meantime, members of Al-Bashir's own military junta toppled him after massive anti-government protests in Khartoum, but the interim rulers still refuse to surrender him to the ICC.

The ICC's judicial intervention in Libya ended in a yet bigger quagmire, although the Libyan anti-Gaddafi opposition and the ICC had, to some extent, been allies during the civil war, which led to an armed foreign intervention and to Muhammar Al Gadaffi's overthrow (and violent death). After Gadaffi's death, the interim government intended to try leading members of his junta on its own and claimed their cases to be inadmissible at the ICC. The ICC agreed in one case and disagreed in the oth-

er, but never saw his arrest warrant served. In the case of Abdullah Senussi, Gadaffi's former chief of intelligence and brother-in-law, Libya paid a large amount to incline Mauretania to extradite Senussi to Libya rather than to the ICC and it succeeded. Just like Gadaffi's son, Saif Al-Gadaffi, Senussi was tried in Libya, sentenced to death and then released during the civil war, which has tormented the country since 2014. The ICC never got hold of them. ICC investigations and trials have always collapsed, when they concerned high ranking, prominent suspects affiliated with a sitting government.

Trials were more often, though not always, successful, when they targeted leaders of opposition movements. This was the case with the sole, successfully completed trial concerning Mali, during which the defendant, a member of Al Kaida in the Maghreb, admitted guilt and was relatively leniently sentenced for the wanton destruction of parts of Mali's cultural heritage.[3] But indicting opponents of governments, which ratified the Rome Statute, is no blueprint for success, either. Jean-Pierre Bemba, powerful contender to DRC's president Joseph Kabila, was arrested, tried and sentenced for crimes against humanity and war crimes, but then the appeals chamber quashed the verdict, exonerated Kabila and released him. The ICC now faces its highest compensation claim ever for Bemba's time spent in prison and the assets, he lost while he was in the bench in The Hague.[4]

[3] The prosecutor v. Al Faqui al Mahdi.
[4] Wairagala Wakabi, Defense Lawyers make the case for Bemba's compensation by the ICC. International Justice Monitor 10.5.2019, https://www.ijmonitor.org/2019/05/defense-lawyers-make-the-case-for-bembas-compensation-by-the-icc/

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When in 2010/11 sitting head of state of Ivory Coast, Laurent Gbagbo, refused to acknowledge his defeat in the election, a civil war broke out, which his challenger, Alassane Quattaro, finally won with military assistance from France. Gbagbo and Charles Blé Goudé, a close associate, sports minister and leader of armed youth gangs, who fought for Gbagbo during the crisis, were both arrested and tried at the ICC. But the trial ended with an acquittal. So far Ivory Coast, which had accepted ICC jurisdiction based on a self-referral, failed to serve another arrest warrant, issued against Gbagbos wife, Simone.

A prosthesis for frail governance

When the ICC goes after high ranking members of sitting governments and their military, it fails and trials either never start, end with acquittals (mostly due to witness tempering and disappearing evidence) or break down. When the ICC tries to hold members of an armed opposition accountable for international crimes, it is more successful, although the outcome can hardly be taken for granted. Powerful opposition figures with international connections and access to funding are likely to be acquitted. Investigations against conflict parties associated with permanent UNSC members either never begin, or even trigger l sanctions against the ICC. When the ICC prosecution started to examine the violence in Eastern Ukraine and a pre-trial judge approved investigations into Georgia, the Russian government withdrew its signature from the Rome Statute (which it had never ratified anyway).

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When the ICC announced investigations into Afghanistan (potentially involving British and US troops' misconduct), the US government imposed a visa ban on ICC staff dealing with Afghanistan. The ICC joined the world-wide campaign against impunity for international crimes, which had been launched and driven by non-governmental human rights organisations. What is left from the ICC's mission is a fight against impunity for armed opposition groups, of which the respective government cannot get hold, because it either has no leverage over the territory on which these groups are operating, or because its judiciary is in shambles and unable to hold them accountable. Nowhere is this more visible – and nowhere are the ambiguous moral repercussions more obvious – than in the Eastern part of the DRC. There, the ICC has issued arrest warrants against members of two antagonistic groups. Thomas Lubango Dyilo and Jean-Bosco Ntaganda both belonged to groups, which were supported by and loyal to the Rwandan government and fought against militias, supported by the DRC government in Kinshasa. There are several reasons, why Rwanda supported Lubanga and Ntaganda and not all of them are honourable, but one of them was the Forces *Démocratiques de Libération du Rwanda* (FDLR)'s presence in the area west of Rwanda. The FDLR is the successor of the forces, which in 1994 carried out the genocide in Rwanda. In 1994, their leadership and their members escaped to Zaire (which is now the DRC), re-armed, re-grouped, intermingled with Hutu communities and other culturally close ethnic groups on the Western shore of Lake Kivu and helped the Kabila government to get rid of Rwandans, who had taken power in Kinshasa after Rwanda's invasion of Zaire in 1998. One of their first victims were Banyamulenge, Tutsi in Eastern DRC, who had survived the Rwandan genocide in 1994. To keep the FLDR down, prevent attacks against Banyarmulenge and pre-empt FDLR incursions into

Rwanda (and terrorist attacks inside the country), Rwanda first had its own boots on the Western Kivu ground, and then, when donors, the UN and pressure from other African countries forced Kigali to withdraw its army, supported local militias loyal to Kigali. Lubanga and Ntaganda commanded such militias. They bought arms with diamonds from Kivu and Ituri mines, they recruited youngsters, the killed, tortured and raped. Lubanga was arrested in 2006, Ntaganda six years later, when the ever first UN-mission with a strong mandate to fight, rather than only monitor and negotiate, drove the Rwandan-backed forces into the mountains. One day, Ntaganda crossed the border to Rwanda, rang the bell at the US embassy and asked to be transferred to the ICC. Both, Lubangada and Ntaganda, got severe prison sentences Their enemies, the ICC-indicted FLDR commanders, did not. Sylvestre Mudacumura, FLDR commander from Ituri, is still at large, despite an arrest warrant issued by the ICC, while Callixte Mbarushimana, another FDLR commander, was released, after an ICC pre-trial chamber refused to confirm the charges against him.[5]

This is the dark side of the ICC's institutional bias. More telling than whom the ICC indicts, tries and sentences is it to observe, whom it does not indict, try and sentence: Allasane Quattaro, the victor of Ivory Coast's civil war, no member of Mali's military or political establishment, no member of any Sudanese rebel group. In Uganda, the ICC issued arrest warrants against several commanders of the Lord's Resistance Army (LRA) and is currently trying one of them (Dominic Ongwen), but no-

[5] Callixte Mbarushimana is also sought by the Rwandan judiciary for genocide charges connected to his role at the UN Development Program in Kigali in 1994. However, the ICC allowed his return to France after the ICC charges were rejected by the pre-trial chamber. Edwin Musoni: "Rwanda to pursue Mbarushimana", The New Times, 31.5.2012, available at: https://www.newtimes.co.rw/section/read/53430

body is prosecuted for international crimes committed by the Ugandan Army in the course of the fight against the LRA.

The ICC is no instrument of "the West" to keep down Africa, it is rather an instrument of some African governments to weaken and hold down their domestic opposition. Therefore, it actually strengthens fragile African states and raises the cost of opposing those governments for rebel groups.

From a human rights perspective, this is no compliment, because these governments' human rights record is hardly ever better than their opponents' record. It should well be seen as a compliment from the realist, sovereignty-oriented perspective of many ICC-critics, who often accuse the ICC, other international tribunals and the increasing globalization of criminal law of imposing a new world order.[6] In all the cases, where the ICC ultimately was able to punish perpetrators of international crimes, in Ituri, Kivu and Mali, it did so on behalf of the respective government, whose judiciary was unable to go after the perpetrators. In the DRC, the ICC had jurisdiction, because the DRC and Mali had ratified the Rome Statute and later referred the cases to the ICC. In no single case, where the UNSC imposed the ICC's jurisdiction the ICC intervention ended with a trial completed. In other words: The ICC can examine and investigate crimes against the will of sovereign states, but it cannot conduct trials

[6] Nagy, R., 'Transitional justice as global project: critical reflections.' Third World Quarterly 29 (2008, 2), 275–289; Schwöbel, C. (Ed.): *Critical Approaches to International Criminal Law: an Introduction.* Routledge, London, New York. Laughland, John, and Ramsey Clark. *Travesty: the trial of Slobodan Milosevic and the corruption of international justice*. London: Pluto Press, 2007.

against their will. It is indeed able to assist sovereign (though often very fragile) states in the fight against armed rebel groups on their own territory. This is something already, although it is far from the ambitions, in which the ICC's creation once was rooted.

Once upon a time in The Hague

International Criminal Tribunals were created, first and foremost, to prosecute perpetrators of the most heinous crimes. In the tradition of the Nuremberg and Tokyo tribunals, International Criminal Tribunals usually punished criminals who had lost a war and they did not punish criminals, whose countries had won. It was victor's justice, although it hardly ever hit innocent people. International Criminal Tribunals do not judge everyone who deserves it, they only judge those, whom they can judge. As time went by, they were charged with additional tasks: to stabilize fragile post-conflict areas (the International Criminal Tribunal for the former Yugoslavia) or even to contribute to reconciliation (the International Criminal Tribunal for Rwanda) and often, their staff saw themselves as protagonists of an international fight against denial, intended "to give victims a voice" (chief prosecutor Carla Del Ponte) and tell authoritative stories about the underlying conflict.[7]

[7] Bachmann, K. and Fatić, A.: *The UN International Criminal Tribunals. Transition without Justice?* London, New York: Routledge 2015, 232-263; Wilson, R.: *Writing History in International Criminal Tribunals*, Cambridge, New York, Cambridge University Press 2011, 170-191.

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The ICC was created with less ambition, mainly because its jurisdiction was limited by the complementarity principle: the court could only take over an investigation from a country, if the prosecution could prove the country's inability or unwillingness to go after the perpetrators. It often meant, the ICC's intervention could only start long after the crime, and sometimes even after the death of the most important suspects. It was late justice and incomplete justice and it was exposed to political interference by the respective country, its external enemies, powerful neighbours and regional hegemonic powers and the permanent UNSC members (who, under the Rome Statute, can lobby the UNSC into deferring an ICC investigation).

International Criminal Tribunals' interventions tend to have side-effects, not all of which are only negative. Often, these tribunals do not achieve their founders' objectives but instead reach goals, they were never expected to reach. The ICTY managed to eliminate potential spoilers of the Yugoslav successor states' transitions and its arrest warrants forced extremist leaders to keep a low profile in domestic politics. The ICTR did the same to leading members and militaries of the genocidal junta, who had escaped abroad and it did so at a time, when Rwanda was not able to because its judiciary and law enforcement were still in shambles and its new government lacked the leverage and legitimacy needed to issue successful extradition requests. This way, the ICTR became a whip against violent dissidence when the latter was beyond the reach of the government, which wanted to take a swing.

The ICC's inception created similar hopes. Its mere existence could have been a constraint on extremist politics and a human rights safeguard

against violent transitions. Whoever intended to escalate a negotiated transition, would have the ICC prosecutor like the sword of Damokles hanging over his head. There also was the opposite contention: that the ICC's focus on retributive justice would eliminate non-retributive solutions in peaceful political transitions, render transitional amnesties impossible and thus increase the risk of violent transitions. In the meantime, most of these fears and hopes have proved unfounded. Neither did ICC intervention prevent Libya from plunging into civil war, nor did the ICC prevent Columbia's way of dealing with its violent legacy.

What then is left as the ICC's possible contribution to making the world a better place? In the NGO-driven fight against impunity, the ICC is an uncertain ally. Too often its interventions failed, too often did judges dismiss charges, reject arrest warrants and terminate trials against people, whom the international community regarded as political instigators of criminal violence.

Despite the Rome Statute, Al-Bashir, the Kenyan and Ivory Coast's instigators of Post-Election Violence still enjoy impunity, while the ICC has erected a huge bureaucracy, with expenses exceeding the budget of the ad hoc tribunals and numbers of completed cases remaining much below the ad hoc tribunals' records.[8] While the ICC never became the sword of Damokles, its supporters may have hoped for, it has, unadmitted, become

[8] With smaller budgets, the ICTY conducted finished trials (with either acquittals or guilty verdicts) against 108 defendants in 24 years, while the ICTR finished trials against 76 defendants during the same time. So far, in 27 years, the ICC conducted 11 trials (out of which 3 were terminated before a verdict). Only half of these four completed ICC-trials had to do with the ICC's core crimes, the remaining four dealing with contempt and witness tampering charges.

something else, which is more complex and difficult to grasp. Former ICC chief prosecutor Moreno Luis Moreno Ocampo once described it as an instrument of "positive complementarity".

Giving "positive complementarity" a chance?

Whenever the ICC prosecutor Fatou Besouda wants to investigate a case, she must prove before a pre-trial judge, that the ICC has jurisdiction and that the respective country is either unable or unwilling to prosecute the cases on its own.

The respective country's government can oppose her request and induce evidence about its willingness and ability to prosecute. It can even do so after a self-referral or after a UNSC referral. Whenever the judges conclude a country to be able and willing, they have to declare the case inadmissible. But what happens, when the picture that emerges in the courtroom shows the respective country's eagerness to prosecute the underlying crimes, but leaves no doubt about its inability to do so? In such cases, the ICC can take over the investigation and prosecution, but then the perpetrators will be judged in The Hague and according to the ICC's rules and with no regard to local customs and norms. When Ocampo invented the notion of "positive complementarity", he wanted to emphasize the ICC's possible deterring influence, arguing, that the success of the court should not be measured by the number of cases finished in The Hague, but rather by the number of crimes either not committed on the ground or the number of defendants put on trial by governments that would other-

wise be reluctant to do so if the ICC had not been created.[9] The ICC should, as Ocampo argued, incline states to ratify the Rome Statute and then enact it once crimes are committed. If it did so successfully, it would never have to judge a crime on its own. The sword of Damokles' shadow would be enough to convince governments that impunity for perpetrators was no option. The Rome Statute does not confine the ICC to such a passive role – it empowers the prosecutor to launch investigations *proprio motu* – like he did in Kenya. Despite Ocampo's label, this kind of complementarity would rather be negative, or, in other words, his sword would hang over the unwilling, but without empowering those willing, but unable. And governments would comply under the threat of the ICC taking over, not necessarily because they share the values behind the ICC's mission.

Yet there is a positive concept behind Ocampo's label, one, which also provides a carrot for the unable instead of sticks for unwilling governments. The current state of affairs forces willing but unable governments to either defy the ICC (and leave the perpetrators scot-free) or to hand over the entire process to the ICC and risk domestic protests and accusations of yielding to international pressure.

[9] Moreno-Ocampo, L. A., A positive approach to complementarity: The impacts of the Office of the Prosecutor. In C. Stahn & M. El Zeidy (eds): *The International Criminal Court and Complementarity: From Theory to Practice, Cambridge: Cambridge University Press, 21-32.*

See also: William Burke-White: Implementing a Policy of Positive Complementarity in the Rome System of Justice. Criminal Law Forum, March 2008, vol. 19, pp. 55-85, available at: https://link.springer.com/article/10.1007/s10609-007-9050-9

An intermediate solution would be a ICC-sponsored or ICC assisted trial in the respective country, involving local lawyers and laws and even mixed chambers. It would make the ICC a flying hybrid court[10], with more capacity and legitimacy than the domestic courts, but the ICC's almost global reach and its transnational competence. It would leave domestic judiciaries more agency and would be closer to the crime scene and the victims. The Rome Statute does not allow it yet. But as the statistics show, the ICC already has become a "court of last resort" for governments, which are willing but unable to prosecute the Rome Statute's crimes. Regarding those unable and unwilling, the ICC's trial record is far from impressive.

Research for this articles was conducted in the framework of the NCN-sponsored project "A History of Rwanda" (Narodowy Centrum Nauki, nr 2015/19/B/HS3/02497).

[10] Hybrid courts (also called internationalized criminal tribunals) are usually created in cooperation between the UN and the respective country and then involve local judges and UN judges. Such courts (or special chambers) have been used among others in Sierra Leone, Kosovo and Cambodia.

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