OP-ED / GLOBAL 24 FEBRUARY 2009

The Politics of Ending Impunity

Originally published in Aegis Trust

This article appears in the Aegis Trust's 2009 publication "The Enforcement of International Criminal Law".

Introduction

The pursuit of international justice for perpetrators of atrocity crimes necessarily has political implications – from shifting the balance of power within a country, to requiring other states to cooperate when doing so may adversely affect their own interests, to confronting both international and domestic actors with the undesirable task of weighing the benefits of peace against the costs of impunity. Not all of these issues are present in every case, but few, if any, international prosecutions escape controversy. And the more closely international investigations and indictments follow on the heels of atrocities, the more likely they are to generate political challenges.

Yet this more swift international justice is also what we are starting to see more often, particularly with the work of the International Criminal Court (ICC). Instead of delaying justice for years after the end of deadly conflict, or allowing impunity to prevail permanently, the ICC can inject criminal accountability into the equation immediately. This is true both for the situations into which the Court has already opened formal investigations and for those that could end up in that category. But prioritising justice in this way still leaves a lot to be done to actually achieve it. The political dilemmas it can raise, as we have seen most starkly in Sudan and Uganda, are substantial.

Thus, it is important to understand how the pursuit of international justice can affect situations of ongoing (or recent) conflict and to have a framework for addressing the difficult issue of determining when, in the case of a true clash between peace and justice, the latter should give way. This paper aims to outline these issues, looking in particular at certain situations in which the ICC has been active. [1]

Pursuing justice and advancing peace

When mass atrocities have been committed, or are underway, one of the most important tools the international community has to try to stop or contain them is the threat that the individuals responsible will be prosecuted and spend the rest of their lives in prison. The effectiveness of this tool depends primarily on its credibility, and then on a host of other, often context-specific considerations that influence the calculations of the actors involved.

Effectiveness also depends in part on what you are hoping to achieve. Beyond the ultimate prize of bringing a sustainable end to deadly conflict – a complex and resource-intensive task, which requires much more than justice alone – international prosecution can have a range of shorter-term impacts. Any attempt to draw up a comprehensive list of these will, of course, fall short, as the situations are too diverse and the number of international prosecutions to date too limited. Yet there are a few notable examples of how the ICC's unwavering pursuit of those most responsible for atrocities can advance peace.

Getting perpetrators to the table and justice on the agenda

The ICC's prosecution of the leadership of the Lord's Resistance Army (LRA) has played a positive role in helping to transform the conflict in northern Uganda. [2] While the impact should not be overstated, the four-year-old investigations appear to have encouraged and reinforced a series of regional developments that by early 2008 had produced a significantly improved security situation and a robust peace process. While those security gains are not guaranteed – as demonstrated by a wave of attacks in late 2008 in north-eastern Congo and elsewhere in the region by reported LRA rebels – and the possibility of a final peace deal has been fading since the LRA's elusive and paranoid leader Joseph Kony repeatedly failed to sign the final agreement, the changes on the ground in northern Uganda are remarkable.

For the previous 20 years, the people of northern Uganda suffered tremendously because of the vicious actions of the LRA rebels and brutal response of the Ugandan Government. [3] Yet in the last two years, a sustained peace process between the LRA and Ugandan Government, mediated by the Government of Southern Sudan, took hold and the humanitarian situation has improved considerably. A landmark cessation of hostilities agreement in August 2006 removed most LRA combatants from Uganda, allowing hundreds of thousands of war-weary civilians to begin the process of resettlement and redevelopment. By June 2008, around 900,000 of the total estimated population of 1.8 million displaced had returned to their original villages, while another 460,000 had left the camps for transit sites. [4] The LRA has largely abandoned northern Uganda as a field of

operation, though it was reported to be engaged in a frightening escalation of atrocities in neighbouring countries in late 2008, and the armies of Uganda, DRC and South Sudan launched a joint offensive against the rebels in December. [5]

The progress from 2006 to 2008 followed the announcement in January 2004 that the Ugandan Government had made the first state party referral to the ICC, and the unsealing in October 2005 of the Court's first arrest warrants – for five leaders of the LRA, including Kony. [6] The ICC's intervention in northern Uganda has been the subject of intense and sustained criticism. Academics, international NGOs, mediators and some northern Ugandans argued that the prosecutions would obliterate the LRA's incentive to negotiate, undermine local peace initiatives and traditional reconciliation efforts, and ultimately prolong the conflict. [7]

But that analysis largely proved to be incorrect and it overlooked ways in which the ICC prosecutions might interact with other factors to advance peace. As it turned out, various political and military developments in the region – most notably the signing of Sudan's Comprehensive Peace Agreement in 2005 and improved performance by the Ugandan army – increased the costs of continued conflict in northern Uganda for the LRA. These shifts reduced the rebels' room for tactical and strategic manoeuvre and compelled the LRA leadership to explore a negotiated settlement more vigorously than in the past. Even though the LRA has continued to insist that the ICC warrants are the ultimate barrier to a final deal (an assertion that must be viewed in the context of the serious safety and security concerns that the leadership would confront in northern Uganda if they came out of the bush under any circumstances), they clearly were not a barrier to crucial intermediate steps.

In fact, the threat of prosecution helped make those steps possible. This is largely because the ICC efforts seriously rattled and isolated the LRA military leadership, pushing them to the negotiating table and giving them an incentive to reach a deal. They may ultimately have given them an excuse to walk away as well, but they did not do so until the process had developed a momentum of its own and the LRA had effectively withdrawn from Uganda. The prosecutions also helped create that momentum by raising awareness and focusing the attention of the international community, which in turn provided a crucial broad base of regional and international support for the fledgling peace process.

Finally, the ICC's efforts to hold the LRA leadership criminally responsible for its atrocities in northern Uganda embedded accountability and victims' interests in the structure and vocabulary of

the peace process. As a result, Uganda now has a war crimes chamber in the High Court and traditional justice mechanisms to address accountability. While the modalities of these structures are still unclear, and important issues such as investigation and prosecution of atrocities committed by the Ugandan army need to be resolved, their existence severely limits (if not completely eliminates) the LRA's ability to negotiate its way out of accountability. This is the case in part because of the continued pressure from the ICC.

The final stages in the long war in northern Uganda are still in progress. Many of the benefits of the peace process have already taken hold and every day become harder to reverse. Others will have to wait to see whether the LRA can be convinced to commit to a final deal. If they cannot, and instead choose to remain a threat to Sudan, Congo and Central African Republic – possibly provoking a military response, as occurred in December 2008 – things may again get worse in northern Uganda before they get better. If they can, a very strict set of conditions will have to be imposed on them (and some limited safety and security guarantees given) to ensure demobilisation and an end to their crimes. Only then might a deferral of the ICC prosecutions by the UN Security Council under Article 16 of the Rome Statute, discussed further below, be warranted – and only under the condition that Kony and his fellow ICC indictees would have to comply with the new domestic accountability processes.

Creating pressure for political reform

The complex conflicts throughout Sudan and the ICC's work in Darfur are vastly different than Uganda, but there is similarly a possibility that international efforts to prosecute those most responsible for atrocity crimes in Darfur may positively influence the overall situation. The ICC Prosecutor's application in July for a warrant for President Bashir, in addition to warrants already outstanding against a Janjaweed commander and a government minister, [8] certainly created some risk that the regime in Khartoum would only harden its stance and step up its campaign of violence and intimidation to maintain its hold on power.

This is, of course, the same regime that has conducted a systematic campaign of destruction in Darfur over the past five years, resulting in the deaths of hundreds of thousands and displacement of millions. [9] It has also repeatedly flouted UN Security Council's resolutions on Darfur for everything from deployment of the hybrid AU/UN peacekeeping mission to cooperation with the ICC, and delayed implementation of key provisions of the 2005 Comprehensive Peace Agreement (CPA) that ended the country's separate twenty-year war

between its North and South. The international community's utter failure to devise a comprehensive, coordinated strategy toward Sudan – instead pursuing multiple agendas (oil for some, purported cooperation on counterterrorism for others) that have allowed Khartoum to play actors against each other – has only emboldened the regime.

Yet, despite this impressive record of defiance, the ICC prosecutions may be one of the most effective points of leverage available in Sudan. Since the Prosecutor's July application, which is still under consideration by the ICC judges with a decision now expected early in 2009, we have already seen movement. There have been a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration by Bashir. While significant and certainly headline-grabbing, they fall far short of an overall shift in the conflict dynamic – the security and humanitarian situation in Darfur is worse than it has been in years. But they also represent trends that should be encouraged with maximum pressure behind the ICC. If Khartoum in fact makes substantial progress on a range of issues, which include improved security, genuine peace talks and full implementation of the CPA, the UN Security Council should consider a twelve-month deferral of the ICC prosecutions under Article 16 of the Rome Statute. Yet all parties must recognise that meaningful progress on the necessary benchmarks will take considerable time, and require undivided support from the international community, including Sudan's neighbours. And, given Khartoum's past unwillingness to make any genuine concessions to peace, even in the face of the ICC threat, it appears very unlikely that there will be a credible case for a deferral any time soon.

Another potential effect of the ICC prosecutions in Sudan, and particularly the prosecution of Bashir, is the possibility that it may lend support to existing domestic currents of reform in Khartoum. The observable evidence of this at present is limited, and the internal dynamics of the ruling party (NCP) are under any circumstances extremely difficult to judge. However, the singling out of Bashir by the Court does appear to have given other Sudanese players a glimpse of the possibility of opening political space in Sudan. Some senior members of the NCP are seriously questioning the wisdom of the regime's unrelenting and aggressively confrontational approach to the international community. This development holds out the potential for fundamental change across Sudan's many conflict cycles, but only if pressure in support of the prosecutions is high and sustained, and the independence and credibility of the Court itself are beyond reproach.

Setting the terms for conflict resolution

The ICC also took action twice in 2008 in response to new outbreaks of hostilities. Kenya experienced its worst political crisis since independence in the aftermath of the contested presidential election at the end of December 2007. Following the announcement of results giving a second term to Mwai Kibaki, over 1,000 were killed and 300,000 were displaced in violence with inflammatory ethnic undertones. Then, in August, war broke out between Georgia and Russia over Georgia's breakaway regions: with a Georgian assault on South Ossetia's capital Tskhinvali and a massive Russian counter-offensive spreading also to Abkhazia and Georgia's heartland. Hundreds were killed and thousands displaced – though the numbers are still unconfirmed and disputed – and war crimes were allegedly committed by Georgians, Russians and South Ossetian militias.

In both of these instances, the ICC Prosecutor made public statements advising that the Court's jurisdiction extends to both Kenya and Georgia, as signatories of the Rome Statute, and warning that alleged atrocity crimes were being analysed. While any deterrent impact of these statements is difficult to evaluate – substantial international efforts were mobilised (and needed) to end and contain the violence in both of these crises – they are notable also for helping to inform the conflict resolution efforts that have followed, highlighting the importance of having an accurate record of what occurred and devising appropriate accountability and reconciliation mechanisms.

The need for credible threats of ICC prosecution and international support

For ICC prosecutions to continue to have any of these or other positive impacts in situations of ongoing or recent conflict, it is absolutely essential that the threat of prosecution is of sufficient credibility to influence the calculations of the warring parties. This is exceptionally challenging when the subject of prosecution is an individual still in office, as in the case of President Bashir. Prosecution increases the incentive to cling to power at all costs. But, as discussed above, it may also give some parties an incentive to negotiate and others a reason to resist further consolidation of power. The challenge is different for other subjects, such as certain rebel groups, where incentives appear to be much more about short-term security and well-being than long-term power dynamics. What is critical to remember in all of these instances is, first, that each is different and needs to be analysed separately, and, secondly, that despite these differences credibility of the threat of ICC prosecution is critical.

To ensure that credibility, the ICC Prosecutor needs to continue to pursue the most serious crimes within the ICC's jurisdiction, and secure

convictions. With multiple defendants now in custody in its DRC investigation, along with former Congolese Vice President Jean-Pierre Bemba in the CAR investigation, trials and convictions are finally in sight. But concerted effort is needed to avoid difficulties such as those already encountered in the prosecution of DRC rebel leader Thomas Lubanga. [10] It will also be much more challenging to secure arrests in the Darfur and Uganda cases, with absolutely no cooperation in the former and twenty years of eluding the Ugandan army in the latter.

The other essential component to ensure the ICC's credibility is strong and unwavering support from the international community. This means insisting that all states comply with their obligations under the Rome Statute and UN Security Council resolutions to cooperate with the ICC. It also means applying pressure to make sure that happens. In Sudan in particular, much greater political will than the international community has been able to muster over the last five years, is needed. This must be applied equally to support all of the ICC prosecutions in Darfur (including the recent announcement of a pending application for warrants against certain rebels) and a comprehensive strategy to promote a sustainable resolution to Sudan's multiple conflicts.

The fact that both Sudan and Uganda are cases in which the suspects have requested deferral of the prosecutions by the UN Security Council under Article 16 of the Rome Statute, which permits deferrals for twelve-months renewable indefinitely, [11] only increases this need for international support for the ICC. The Court's mandate is to promote justice in all cases – not to decide whether the prospects of an uncertain peace should trump justice. That is a fundamentally political decision and one appropriately allocated to the Security Council. Thus, to maintain this critical balance of political and judicial responsibilities under the Statute, the entire international community – including those who believe a deferral may be appropriate in the future – must support prosecutions that are under way, unless and until the Security Council decides that the politics of peace require a limitation on justice.

Where the price of peace is a limitation on justice

When and how the Security Council should take any decision under Article 16 is a more difficult question. But some basic principles provide guidance.

Only as a last resort

Perhaps the most critical decision point in weighing peace and justice is determining whether the two are truly irreconcilable, such that one must give way to the other. As we have seen in Uganda and now in Sudan, prosecutions can often proceed in parallel to peace efforts and even bolster them. The immediate reaction of any warring party confronted with an indictment will be to claim that it removes all incentives to negotiate and leaves no choice but to continue fighting. This is rarely true at the outset of a prosecution, as there are plenty of other factors in play – the whole range of financial, political and personal costs and benefits of continued conflict. And it may not hold even at the end of a peace process if the means and incentives for violence can be neutralised through negotiations and transitional processes.

But there will be situations where that is not possible, and prosecutions will stand as a barrier to realising crucial gains in peace. Before the Security Council even considers an Article 16 deferral, it is incumbent on it to ensure that all alternatives have been exhausted and a limitation on justice is truly a last option.

The potential costs of indiscriminate exercise of this power are high. If granted to suspects who have not made substantial advances toward peace, it risks undermining the ICC itself, as well as broader efforts to institutionalise international human rights norms. Halting an ICC prosecution when not necessary to achieve peace and when the costs of doing so are so high could not only hamper the Court's ability to conduct ongoing investigations and prosecutions, but also seriously limit the deterrent impact it may have on future perpetrators.

Moreover, if and when the Security Council does grant an Article 16 deferral, it will set a significant precedent and create a risk that deferral will become the default option for ICC prosecutions. Thus, it is crucial that the Security Council intervene only in exceptional cases, after determining, first, that deferral is a last resort and, secondly, that the benefits of peace outweigh the costs of allowing a measure of impunity.

Only when the benefits of peace clearly outweigh the harms of limiting justice

Weighing these benefits and costs is difficult and will always be situation-specific. If deferral is truly a last resort (e.g., without it, the warring parties have incentive and capacity to continue fighting; and with it, substantial improvements in peace and security that have already been made can be further guaranteed), the value of peace is straightforward. For the society subject to the conflict, it means an end

to killing and suffering and the removal of an overwhelming obstacle to development. For those not yet victim to the conflict, it eliminates the risk of becoming so. These benefits are immediate, and to the extent peace is sustained, they are long-term. For the international community, and particularly neighbouring regions, peace brings an end to actual or threatened destabilisation and decreases the likelihood of state failure and related dangers. These benefits too are short- and long-term.

The value of justice is also substantial, though it can serve a greater range of goals. Broad assertions that justice is a moral imperative or a prerequisite for sustainable peace do not outright trump the immediate alleviation of human suffering, or necessarily hold up against the historical record. But justice does serve important public policy goals, which can be weighed against the value of an end to a particular conflict. While this will always require Solomon-like judgement, a better understanding of the range of competing goals should lead to better decision-making when an Article 16 deferral is being considered, once a suspect has made significant efforts to achieve peace.

The goals of justice include the impact on perpetrators – specifically, their incapacitation and delegitimisation – as well as retribution for victims, truth-telling for the affected population as a whole, institutionalisation of human rights norms more broadly and deterrence. [12] While the impact on all of these should be considered carefully when the possibility of deferring an ICC prosecution is on the table, deterrence, delegitimisation and institutionalisation of human rights norms deserve special attention. They, more than the others, concern not only the situation at hand, but also the overall international legal and political architecture that may help prevent atrocity crimes in the future.

There is no clear-cut answer when considering the effect of a potential deferral on these factors. Deterrence itself is difficult to prove – as with all efforts to prevent something from occurring, it is hard to demonstrate when they work because nothing happens. But we know that prosecutions weigh on the minds of warring parties and authoritarian leaders, who often take the time to denounce them publicly, and we have better evidence to see how delegitimisation positively impacts conflict dynamics. Because these are such crucial and potentially powerful tools, the Security Council needs to consider them carefully. It should refrain from putting a prosecution on hold, even at the price of continued conflict, where doing so is likely to significantly undercut the impact of the Court in terms of delegitimising perpetrators, deterring future atrocity crimes and reinforcing norms designed to prevent them.

Finally, in those cases in which the Security Council determines that the benefits of peace clearly outweigh the damage that may be done in terms of deterrence and other policy goals of justice, it must set out clearly the conditions that justify the deferral for the initial twelve-month period, and those that will be required for any extension. Each review must be detailed and made with sufficient information to evaluate whether the suspect has acted in a way that is consistent with a continued limitation on international justice.

The benchmarks the Security Council sets, for the first deferral and any thereafter, must be high enough and monitored closely enough to drive sustainable change in the conflict dynamics. When a suspect fails to meet them, the deferral of prosecution should not be renewed and the individual should have to face the ICC Prosecutor's charges. This rigorous approach to Article 16 is warranted by the clear division of responsibilities under the Rome Statute and the UN Charter. It is also the best way to minimise the negative impact a deferral of ICC prosecution may have on efforts to bring an end, once and for all, to atrocity crimes.

Contributors