



International
Criminal
Court

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Why international
justice must go local:
the ICC in Africa

Africa Research Institute
COUNTERPOINTS



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Criticism of the International Criminal Court (ICC) on the grounds of anti-African bias or neo-colonialism is simplistic. It overstates the power of the ICC and underestimates the ability of African states to manipulate the Court for their own ends. There are other, more compelling reasons to question the Court's record in Africa.

The ICC aspires to complement domestic judiciaries and other local institutions. Instead, in its early years it actively chased cases in the Democratic Republic of Congo and Uganda. By intervening in situations where domestic courts were already investigating and prosecuting cases, the ICC has actively and fundamentally undermined its guiding principle of complementarity.

After 17 years in operation, the ICC has also proven structurally incapable of prosecuting heads of state or sitting government officials, encouraging malefactors to cling to power. While maintaining relations with national governments that have too often been cosy, and thereby confounding the claim to be apolitical, the Court has been unresponsive to local people who attribute great importance to prosecuting state crimes.

The ICC has sought to enact a highly particular – rather than universal – brand of legalist, procedural justice. This approach is intolerant of alternative legal or non-legal responses to addressing mass crimes. Adherence to a model of 'distant' justice, ostensibly to maintain impartiality, has been counter-productive. Reliance on Western investigators with little or no experience in the areas where they operate, and investigations of very limited duration, are major shortcomings in the ICC's *modus operandi*. Most trials have either collapsed or been abandoned due to poor-quality evidence.

In African societies affected by mass atrocity, ICC involvement has made justice and lasting peace less, rather than more, likely. This Counterpoint argues that major reform of the Court is urgently required if it is to serve the needs of African communities, including victims of mass crimes.

By Phil Clark

On 28 January 2009, before a packed courtroom in The Hague, the Prosecution of the International Criminal Court (ICC) called its first ever witness, a young man from Ituri district in north-eastern Democratic Republic of Congo (DRC). For the ICC and its supporters this represented the moment the seven-year-old Court truly arrived – when the dream of building a permanent global institution to prosecute genocide, war crimes and crimes against humanity became a reality.

The young man, testifying under the pseudonym ‘Mr Witness’, stated that he had been recruited as a child soldier when the forces of rebel leader Thomas Lubanga abducted him on his way home from school. Shortly afterwards he attended a military training camp run by Lubanga, who now sat in a crisp three-piece suit, listening intently on the other side of the courtroom.

Leading up to the trial, critics questioned why the Prosecution had only charged Lubanga with the crimes of enlisting and conscripting child soldiers, and using them to participate actively in hostilities, when communities in Ituri accused him of orchestrating much graver atrocities, including mass murder and rape. The Prosecution responded that the charges reflected the strongest evidence it had gathered against Lubanga and a vital opportunity to spotlight the global scourge of using child soldiers.

When Mr Witness returned after the lunch break, he stunned the courtroom by announcing that he wished to retract his entire testimony. A Congolese non-governmental organisation the Prosecution had tasked with finding witnesses for the Lubanga case had, he stated, told him what to say on the stand. Everything he had claimed in the morning was false.

Outraged, Lubanga’s defence team asked the judges for a permanent stay of proceedings – in effect, a collapse of the trial – on the grounds that if the Prosecution’s star witness had been coached, all of its evidence was likely to be tainted. Perhaps realising the institutional perils of ending the ICC’s first ever trial when it had barely begun, and mindful it had already been stayed the previous year, the judges ordered the case should continue, but not before issuing a stark warning to the Prosecution about the quality of its investigations.

A poor record

Ten years later and with ICC cases currently open in eight African states, most of the problems apparent in the Lubanga case – including the Prosecution’s outsourcing of investigations to local intermediaries and the weakness of much of its evidence – continue to bedevil the Court. Only five of the ICC’s 28 cases have been completed; five have collapsed either before or during trial for lack of evidence. The remaining 18 cases have not progressed because of insufficient evidence, the failure of states and international peacekeeping missions to capture and transfer suspects to The Hague, or the death of suspects on the battlefield.

No serving head of state or government official has ever been prosecuted by the ICC. By 2016, the Prosecution had dropped charges against all suspects in cases relating to the 2007-8 post-election violence in Kenya, including those against President Uhuru Kenyatta and Deputy President William Ruto; and all cases concerning Sudan, including that of President Omar al-Bashir, have been ‘hibernated’. After 17 years of the ICC’s work, one of the most telling realisations is that – without a police or military force of its own and reliant on states for the security of its personnel and enforcement of arrest warrants – the Court is structurally incapable of prosecuting sitting members of government. It is, in effect, only able to tackle crimes by non-state actors such as rebel leaders or recently deposed government elites.

Even strong supporters of the ICC such as the United Kingdom have started to question whether the US\$1.7 billion the Court has received from member states since its inauguration has been money well spent.¹ Its track record and the causes of its failure call into question whether the ICC, headquartered in The Netherlands, is fit for purpose in investigating and prosecuting complex atrocity cases in far-flung parts of the world.

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Distant justice

In my book *Distant Justice: The Impact of the International Criminal Court on African Politics*,² I argue that the principal reason the ICC has struggled to conduct effective investigations is that its *modus operandi* – attempting to dispense justice from The Hague, with mainly non-African staff who have limited experience in Africa and spend minimal time on the ground – is consistently found wanting when applied to African conflict zones. The ICC pursues distant justice because it believes this maintains the security and neutrality of its personnel, allowing the Court to hover above the political fray, investigating and prosecuting individuals regardless of the domestic consequences or local context. This smacks of political naiveté or hubris or both.

To date, neither the ICC Prosecution – nor the Defence – have hired a single investigator from any of the eight African states where investigations have taken place. Foreign nationals are perceived as more impartial. This practice has denied the ICC the domestic expertise essential to investigating atrocities in difficult environments where conflict is often ongoing. Without deep knowledge of local causes and agents of violence, political networks, languages and cultures, ICC investigators have struggled to gather evidence that can withstand scrutiny in the courtroom.

Compounding the lack of contextual familiarity at the ICC, the Prosecution has typically limited its investigators to only ten days in the field at a time and often divided their time between multiple cases across a number of states. Several investigators – seasoned professionals in their native Western countries – have complained that these conditions made the systematic conduct of their work almost impossible. ‘We probably didn’t know enough about these countries when we went in – how politics worked, how to get governments to work with us, what their concerns were, what they were trying to achieve,’ recalled one. ‘How many of us had ever been to Ituri or northern Uganda before our investigations started?...There’s no question it would have helped to know more before we went in.’³

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Gbagbo’s acquittal is the biggest blow to the Court since its inauguration

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These shortcomings in the ICC's approach contributed directly to the acquittal of the ICC's two highest-profile suspects to reach the dock, former Congolese rebel leader and vice-president Jean-Pierre Bemba and former president of Côte d'Ivoire Laurent Gbagbo. The judges who in June 2018 acquitted Bemba on appeal ruled that the Prosecution had provided only abstract evidence – much of it gathered from secondary sources rather than first-hand investigations on the ground – to show that Bemba, according to the theory of command responsibility, had failed to prevent his troops from carrying out rape, murder and pillage in the Central African Republic (CAR).

In January 2019, seven years after issuing a warrant for Gbagbo's arrest for crimes against humanity during the 2010-11 post-election violence in Côte d'Ivoire, which claimed 3,000 lives,⁴ the ICC judges ruled that he and his youth minister Charles Blé Goudé had no case to answer. As the only former head of state to have been prosecuted by the ICC, Gbagbo's acquittal is the biggest blow to the Court since its inauguration.

The damage to the ICC's standing isn't in the acquittal of Gbagbo *per se*: the role of a court is to convict or acquit based on the evidence presented. What condemns the Prosecution and the ICC as a whole are the flawed investigative practices and poor-quality evidence that led to the decision there was no case to answer. As the judges highlighted,⁵ the Prosecution failed to prove several key allegations against Gbagbo, including that he had an explicit policy of targeting civilians and that his public speeches contained direct orders to carry out atrocities. This failure conformed to a long-standing tendency of the Prosecution – dropping investigators into conflict environments for short periods – to present broad-brush evidence about atrocities, without the meticulous proof necessary to link those crimes incontrovertibly to the accused.

Damaging relations

The impact of the ICC's distant approach goes far beyond its difficulty in building sound criminal cases. Altogether more concerning are the negative consequences of its methods for the African societies in which the Court carries out investigations. The ICC has unwittingly established relations with African governments,

local populations and national judiciaries that are damaging. It has also undermined domestic responses to mass atrocity that include amnesties for high-level perpetrators. Collectively, these relations highlight that distant justice makes the ICC unaccountable to conflict-affected communities and blind to the consequences on the ground.

First, lacking the necessary expertise in domestic political dynamics, the ICC has left itself open to interference and manipulation by African governments whose motivations and tactics the Court often doesn't fully grasp. Seeking to distance itself from the political arena and thus remain impartial, the ICC has instead become more politicised. Relations with some African states have been antagonistic. The Sudanese and Kenyan governments, for example, systematically blocked the ICC's investigations by denying ICC investigators access to crime sites, allegedly killing and threatening witnesses and refusing to hand over evidence. All

“The ICC's failure to address state criminality is a key reason the Court has scant legitimacy among conflict-affected communities across Africa”

the while, they rallied domestic and continental support by defeating what President Bashir – after the ICC called a halt to investigations into crimes in Darfur – branded the ICC's 'colonial' justice designed to 'humiliate' African leaders.⁶

More often, the ICC has naively cultivated overly cosy working relations, especially with states that have referred situations to the Court; for example, Uganda, the DRC, CAR and Mali. Heavily dependent on state cooperation, the ICC has conducted investigations in lock-step

with domestic governments, including travelling to crime scenes with members of the national army and police.

In Uganda and the DRC, close relations stemmed from the fact that the ICC chased cases in those countries, approaching the respective presidents to encourage them to refer their situations to the Court. During pre-referral negotiations, the ICC Prosecution assured the Ugandan and Congolese governments that it would focus only on rebel leaders and not state actors. This not only ensured impunity for widespread government atrocities during the same period, but emboldened these states. During all national elections in Uganda and the DRC since the launch of ICC investigations in central Africa in 2004, both states have brazenly and routinely committed crimes against civilians.

The ICC's failure to address state criminality is a key reason the Court has scant legitimacy among conflict-affected communities across Africa. During more than a decade of field research I have conducted in northern Uganda and eastern DRC,⁷ interviewees emphasised the gravity of atrocities committed by their governments and their anger at the ICC's neglect of these crimes. In northern Uganda, state violations have included forced displacement, murder, rape, torture and failure to protect the population from attacks by Lord's Resistance Army (LRA) rebels. Many respondents argued that such actions violate the social contract between the state and its citizens. 'We expect the government to protect us,' said Michael, a 42-year-old man in the Pabbo camp for internally displaced persons in Acholiland, northern Uganda, who had lost his wife and two children to LRA violence.

*Not only have they failed to protect us, they have murdered us... People start screaming when they know the LRA is coming but the UPDF [Ugandan People's Defence Force, the Ugandan army] does nothing. It does nothing to stop the rebels and it violates us. Soldiers always come into the camp at night. They rape our women and girls and abduct the men they say collaborate with the rebels.*⁸

When courts collide

Local respondents criticised the ICC's model of delivering justice from afar, lacking local presence and accountability to affected communities. The intimacy of conflict – in which many victims know their assailants personally and are likely to live side by side with them once violence subsides and they return to their communities – underscores a widespread need for victims and perpetrators to confront one another directly. This would enable them to deliver and receive apologies, and to engage in a dialogue about the crimes committed. 'We need to bring the fighters together with the victims,' said Patience, a 48-year-old victim of LRA attacks in the northern Ugandan district of Amuru. 'They should apologise to the victims and ask their forgiveness. Only when that happens will we know that they won't go back to the bush and continue the killing.'

In many interviews, the desire for direct engagement between victims and perpetrators – as opposed to their separation when the ICC holds trials in The Hague – extends equally to senior government

and rebel leaders. '[Joseph] Kony and [Ugandan president Yoweri] Museveni should come here to Gulu,' said Henry, an Acholi shop owner. 'They should stand in front of all of us, apologise and ask for forgiveness.'

Meanwhile, the ICC has undermined national judiciaries in Africa by claiming jurisdiction over cases that could have been – and sometimes were already being – investigated by domestic courts. This conduct undermines the ICC's own principle of complementarity enshrined in the Rome Statute, which stresses the primary responsibility of states to prosecute crimes committed by their nationals or on their territory. Instead, the Court has often intervened even when local courts have displayed a genuine willingness and ability to handle atrocity cases on the basis that its distance confers impartiality likely to be lacking in domestic institutions.

Judicial personnel in Ituri, in north-eastern DRC, were furious that rebel leaders Lubanga, Germain Katanga and Mathieu Ngudjolo, were whisked off to the ICC between 2006 and 2008 when their cases were still being investigated domestically. Under a US\$40 million European Commission-funded judicial reform process begun in 2003, national military courts in Ituri successfully prosecuted a string of high-ranking members of the Congolese army and several rebel groups. Discussing the near-collapse of the Lubanga trial mentioned at the start of this *Counterpoint*, one Congolese investigator in Ituri said, 'The ICC stole these cases from us and has done a worse job. What was the point of sending these suspects to The Hague, to face a lower standard of justice?'⁹ The ICC's intervention in the DRC demoralised a domestic judiciary that has benefited from substantial internationally backed reform and will continue prosecuting atrocity cases long after the ICC has departed.

More broadly, the ICC's distant justice has diminished the capacity of African policymakers and local communities to determine, on their own terms, how best to address mass conflict. Options available include domestic prosecutions, local reconciliation rituals or amnesty-based approaches such as peace negotiations, truth commissions, security sector reform or disarmament, demobilisation and reintegration of combatants. During the 2006-8 peace talks between the Ugandan government and the LRA in Juba, in southern Sudan, the ICC's issuance of arrest warrants for the top five LRA commanders was the principal stumbling block to reaching a resolution. The

Juba process was consumed by debates over how to drop the warrants or pause the ICC investigations for one year renewable – permissible under the ICC’s Statute – and thereby enable the peace talks to proceed. The ICC and its international backers rejected these options, insisting that the pursuit of justice was essential to achieving sustainable peace.

One of the consequences of the ICC’s intransigence was that none of the LRA commanders would come to the negotiating table in Juba, fearing arrest and transfer to The Hague. The ICC also inhibited the substantive flexibility that is vital to any successful peace process, by thwarting the possible offer of an amnesty for the LRA leadership, to which they were entitled at the time under Ugandan law. This denied the negotiators one of the major incentives for the LRA to lay down its arms.

As one senior negotiator in Juba observed, ‘Imagine if South Africa wanted to use the Truth and Reconciliation Commission today and offered an amnesty [for high-ranking suspects from the apartheid era] the way it did after 1994. The ICC wouldn’t allow it. And without amnesty, the transition would’ve collapsed and then where would we be?’¹⁰ Various issues contributed to the ultimate collapse of the Juba talks in 2008 before a comprehensive peace agreement between the Ugandan government and the LRA could be signed, but the shadow of the ICC was a telling factor.

“ the Court has often intervened even when local courts have displayed a genuine willingness and ability to handle atrocity cases ”

Towards reform

Major reform of the ICC is urgently needed if it is to become fit for purpose. A vital first move is to transform the profile of the Court’s personnel. The intricacies of the settings where the ICC intervenes require deep contextual expertise. Ivorian investigators should be hired to investigate crimes in Côte d’Ivoire, and Ivorian country experts – rather than legal generalists – to advise on how to navigate difficult political and social terrain. This approach would improve the quality of investigations, while assisting the ICC to develop more even-handed and productive state co-operation than the overly cosy relations developed with the governments of Uganda and the DRC.

The ICC must also increase its presence in the communities where it operates. This requires allowing investigators to spend more time on the ground and holding trials closer to atrocity sites, rather than in The Hague. This would make the Court’s work more visible and approachable for local communities, help build trust and encourage more local witnesses to assist the Court’s investigations – issues that have hamstrung the ICC since its inception.

More fundamentally, though, **the ICC and international policymakers must afford domestic actors more latitude to address atrocities by whichever means they deem appropriate.** International prosecutions of a small number of elite suspects constitute only one response to mass violence – and, as highlighted in this *Counterpoint*, an often flawed and damaging one at that. There should therefore be no inherent impediment to Uganda, for example, deciding to use a conditional amnesty or community-based rituals to address the crimes of Kony and other LRA commanders – as some northern Ugandan civil society groups advocated during the Juba peace talks – if affected communities deem these the most appropriate way of ensuring accountability and pursuing reconciliation. As I argued in a 2012 *Counterpoint*,¹¹ while Rwanda’s decision to use the community-based *gacaca* system to prosecute 400,000 genocide suspects was roundly criticised by international legal and human rights commentators, the system delivered widespread and durable benefits for Rwandan society.

The ICC and its backers have paid insufficient attention to the diverse ways that mass crimes are being addressed across Africa.

In various African states, a brighter future for justice is emerging at community, national and regional levels. Depending on the context, these practices need either international support or freedom from external intrusion to maximise their potential. A key reason the ICC was established was the expectation that domestic institutions would often be unwilling or unable to prosecute serious crimes, especially those involving their own state officials. African courts, however, are increasingly tackling atrocity cases – including against government suspects – and have much to teach the ICC about how to investigate atrocities on the continent.

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The example of the Ituri courts shows that **strategic investment in domestic judicial reform can enable national courts to prosecute complex cases in courtrooms accessible to victims and other groups directly affected by violence**. Elsewhere in the DRC, in South Kivu and Maniema provinces, a system of mobile gender units between 2009 and 2012 prosecuted 382 cases of sexual violence, many involving high-ranking suspects in the Congolese army. These units were a creative collaboration between international specialists from the American Bar Association and US-based Open Society Justice Initiative, and Congolese judges, lawyers and investigators. Like *gacaca*, they held open-air trials in full view of local communities. The process involved ‘light touch’ international assistance that bolstered the independence of domestic actors.

Similar reforms have enabled the Rwandan national courts to handle numerous cases since 2008 concerning high-profile genocide suspects extradited from abroad. In 2014, the Constitutional Court in South Africa ruled that the South African police force was legally obliged to investigate Zimbabwean officials accused of torturing opponents of Robert Mugabe’s regime. The Southern African Litigation Centre and the Zimbabwean Exiles Forum successfully argued that South Africa has an obligation to prosecute these international crimes, having implemented the ICC Statute within domestic law.

Meanwhile, in 2016 the Extraordinary African Chambers in Senegal convicted former Chadian dictator Hissène Habré of crimes committed in Chad between 1982 and 1990.¹² All four investigating judges in the Chambers were African: the president of the court was from Burkina Faso and the three remaining judges were Senegalese. Chad and the African Union provided more than half of the tribunal’s budget, with the balance provided by international donors. The South Africa and Senegal cases highlight that, if some African states are unwilling to address serious crimes committed on their soil, other African states may intervene to do so. Under the principle of universal jurisdiction, the Habré trial was the first in the world in which one country prosecuted the former head of state of another. After the collapse of the Gbagbo case, the ICC was undoubtedly envious of the Chambers’ success.

The DRC, Rwanda, South Africa and Senegal examples **show that external support for African courts can yield a more robust and**

accessible form of accountability than the distant justice delivered by the ICC. None of these legal processes – local or international – is perfect. However, domestic institutions have inherent advantages over international approaches, such as that taken by the distant ICC – namely, their visibility among affected communities and their longevity. The Court therefore needs to rethink its own practices, while ensuring it does no harm to competent domestic institutions. Equally, international donors and policymakers must recognise that more lasting and cost-effective results can be achieved by backing African remedies to violent conflict. While international justice has dominated external debates about addressing mass crimes in Africa over the past 20 years, **the future is local.**

Notes

¹ See UK statement to ICC Assembly of States Parties 17th session, published 5 December 2018

² Clark, Phil, *Distant Justice: The Impact of the International Criminal Court on African Politics*, Cambridge University Press, 2018

³ Author's interview, ICC, Office of the Prosecutor official, The Hague, 7 May 2011

⁴ "They killed them like it was nothing": The need for justice for Côte d'Ivoire's post-election crimes', Human Rights Watch, 5 October 2011

⁵ 'Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity', The New York Times, 15 Jan 2019

⁶ 'Sudan President Bashir hails 'victory' over ICC charges', BBC News, 13 December 2014

⁷ Between 2006 and 2016, the author conducted 426 community-level interviews in Uganda and the DRC (229 in the Acholi, Lango and Teso sub-regions of northern Uganda and in Kampala, and 197 in Ituri, North and South Kivu and Equateur provinces of the DRC and in Kinshasa); and 97 interviews with customary and civil society leaders (53 in Uganda and 44 in the DRC)

⁸ Author's interview, Pabbo, 11 March 2006

⁹ Author's interview, Congolese investigator, Bunia, 15 April 2013

¹⁰ Author's interview, member of mediation team to Ugandan peace talks, Juba, 16 February 2007

¹¹ Clark, Phil, 'How Rwanda judged its genocide', Africa Research Institute, May 2012

¹² See Hicks, Celeste, *The Trial of Hissène Habré*, Zed Books, 2018

TIMELINE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

17 July 1998	Rome Statute of the ICC created and signed
11 April 2002	Deposit of 60th ratification of the Rome Statute necessary for the ICC to be established
1 July 2002	Rome Statute comes into force
11 March 2003	First ICC judges sworn in
16 June 2003	Luis Moreno Ocampo sworn in as inaugural Chief Prosecutor of the ICC
29 January 2004	ICC receives first referral of a situation from the Republic of Uganda
23 June 2004	Opening of first ever ICC investigations in Uganda
29 June 2004	Opening of ICC investigations in the Democratic Republic of Congo (DRC)
December 2004	Government of Central African Republic (CAR) refers situation to the ICC
17 March 2006	Congolese rebel leader Thomas Lubanga becomes first suspect arrested and transferred to the ICC
May 2007	Investigations commence in CAR situation
3 July 2008	Transfer of Jean-Pierre Bemba, former Vice-President of the DRC, to the ICC
14 July 2008	ICC prosecutor issues arrest warrant for Omar al-Bashir, President of Sudan
26 January 2009	Opening of first trial in the case of Thomas Lubanga
8 March 2011	ICC issues summonses for Kenya's President Uhuru Kenyatta and Deputy President William Ruto
14 March 2012	Thomas Lubanga becomes first individual convicted by the ICC
15 June 2012	Fatou Bensouda sworn in as the second Chief Prosecutor of the ICC
27 January 2016	ICC opens first non-African situation in the conflict between Georgia and Russia
8 June 2018	ICC appeals chamber acquits Jean-Pierre Bemba on all charges
15 January 2019	ICC trial chamber acquits former Ivorian President Laurent Gbagbo

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