



Editorial

International Criminal Justice, Peace and Reconciliation in Africa: The ICC and Beyond

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The articles in this volume are revised versions of papers presented at a conference in July 2014 on the theme 'International Criminal Justice, Reconciliation and Peace in Africa: The ICC and Beyond' in Dakar, Senegal. The conference was organized by the Council for the Development of Social Science Research in Africa (CODESRIA), the Social Science Research Council's (SSRC), and African Peacebuilding Network (APN) with support from CDD-West Africa and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The conference was part of a broader programme that also eventually included smaller meetings in Kinshasa and Nairobi. It was instigated by the increasingly prominent role that the International Criminal Court (ICC) had come to occupy in discussions concerning politics and human rights at various levels of governance in Africa. While some have portrayed the court as the epitome of many of the things that are wrong with the international justice system others see it as a key instrument in the punishment and prevention of gross human rights violations in Africa and the insurance of justice for its victims.

The July 2014 conference was a hugely engaging affair, which was characterized by heated debate between about 100 scholars and practitioners gathered. These included representatives of some of the leading institutions working on the issue of international criminal justice. Present were a representative of the Office of the Prosecutor of the ICC, a judge representing the President of the African Court on Human and Peoples Rights, the Prosecutor of the International Criminal Tribunal for Rwanda, the President of the East African Court of Justice, the Deputy Prosecutor of the African Extraordinary Chambers for the trial of Hissène Habré and a representative of the special court trying alleged perpetrators of abuses in Cambodia. The conference was opened by the Senegalese Minister of

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Justice, who has since been elected President of the Assembly of State Parties of the Rome Statute. Voices ranged from acerbic criticisms of the ICC and its robust defence to suggestions for an improved international criminal justice regime and calls for the exploration of non-retributive systems of transitional justice. The conference was followed by smaller meetings in Kinshasa and Nairobi as well as a mission to Addis Ababa to engage with leading officials at the African Union Commission on some of the key issues raised during these meetings.

The papers in this collection vigorously debate many of the key issues that featured in discussions at the July 2014 Dakar meeting and in broader conversations concerning gross human rights abuses, international criminal justice and peace and reconciliation in Africa. One of these concerns which comes out in the contributions of Mensa-Bonsu, Murithi and others centers on perceptions of the ICC in Africa. How is the ICC perceived by African states that are signatories to the Rome Statute as opposed to the African Union, which represents all states on the continent? What is the extent of the homogeneity or heterogeneity of such perceptions, and how can we explain such perceptions and their changing dynamics over time? How can the challenge of coherence between the ICC and African justice, human rights and reconciliation institutions be best addressed in the interest of the African people?

The relationship between justice, peace and reconciliation is also one that occupies various contributions to this volume including the pieces by Murithi and Odinkalu. Does the ICC's insistence on indicting leaders in conflict-affected or post-conflict African countries privilege justice and the subversion of impunity over the pursuit of peace or is it in fact integral to long-term peacebuilding? Are there ways of sequencing prosecutions and other peace-making efforts that ensure long-term peace and guarantee justice without encouraging abusive leaders to continue to hold on to power?

Grovogui, Fofe, Mangu, Okafor and Mensa-Bonsu all reflect on the much debated issue of the selectivity that is perceived to characterize the decisions of the Office of the Prosecutor in investigating and trying cases. Does the ICC's exclusive indictment of Africans and seemingly partisan indictments in situation countries demonstrate the Court's non-adherence to the basic principle of equality before the law in judicial processes and jeopardize long-term peacebuilding and reconciliation? Is the court's exclusive indictment of Africans another demonstration of the West's historical paternalism towards Africa that was once widely referred to as the 'White man's burden'?

This question of selectivity is linked to that of the perceived partisanship that characterizes patterns of indictment in the situations in which the Court

intervenes, and is addressed by Grovogui, Mangu and Fofe. Has the ICC become an instrument used by winners in conflict situations to impose versions of justice and peace that fit their interests and ideas? Will such use of the ICC still be consistent with a view of the Court as making valuable contributions towards ending impunity and bringing justice to victims of war crimes, crimes against humanity and genocide?

Related to the issues of selectivity and partisanship raised above, Grovogui and others broach the question of the extent to which the perceived problems of partisanship and selectivity of the ICC simply represent new incarnations of the pathology of global inequality. To what extent are the actions of the ICC in Africa the result of its manipulation by powerful countries, and a reflection of global inequalities, which have historically resulted in the instrumentalization of many other international institutions like the WTO, World Bank and IMF by powerful actors?

The significance of the politics and of history is invoked by Odinkalu who broaches the question of history and memory in questions of gross human rights abuses and how they are tackled. These questions are related to the extent to which international criminal justice systems, as incarnated in the form of the ICC, de-politicize and de-historicize the complex situations in which they intervene. Does the ICC in its approach to justice deliberately de-historicize and de-politicize conflicts and abuses in Africa and is this detrimental to the achievement of long-term peace and reconciliation in troubled countries in Africa? What is the ICC's perception of Africa? Can this be changed and under what conditions?

Given all of these concerns over the ICC, it is unsurprising that alternative conceptions of international criminal justice occupy some of the articles including those by Okafor, Jallow and Jalloh. What does a reflection on alternatives, including ad hoc tribunals tell us about the possibilities and pitfalls of the ICC? Has the focus on, and investment in, the ICC starved alternative justice institutions and paradigms of much needed support and attention? What other alternative justice mechanisms and political institutions exist? In what ways, and at what levels, can such institutions represent viable alternatives to the ICC as a modality for ending impunity and ensuring justice for victims of gross human rights violations?

Discussions about alternatives to the ICC at the 2014 conference came just a month after the African Union decided to give institutional form to its concerns over the conduct and form of the ICC by creating a criminal chamber in the African Court of Justice and Human Rights. The chamber is empowered to deal with the three crimes that currently pre-occupy the ICC – genocide, war crimes and crimes against humanity – as well as a

few others including trafficking in persons and money laundering. As Jalloh (2015) points out, innovations in the form of the types of crimes over which the African Court would be competent and its ability to try corporate entities have been overshadowed by concerns over what many see as an impunity provision (Jalloh 2015:5-6). The court is not allowed to try 'sitting AU heads of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials during their tenure of office'. Suggestions that leaders can always be tried once they leave office tend to overlook the potential for this possibility to dissuade leaders from leaving power at the end of their constitutional mandates. This is already a problem that is threatening the stability of countries including Burundi and the Democratic Republic of Congo.

One thing that is clear from these contributions, and that is evident from wider conversations about the ICC and international criminal justice, is that discussions about international criminal justice almost always end up becoming conversations about power and its deployment at international, regional, national and local levels. The idea of a court that will banish political and 'partisan' considerations from the act of holding those responsible for gross human rights abuses that was advocated by many a legal internationalist going back decades (Parker 1952:642; Pella 1950: 44-5) has not been realized and may well be unrealizable.

Maybe, this should lead us to go beyond decrying the 'politicized' nature of the ICC and international criminal justice to pose a more fundamental question that requires further work in this literature. What is the real nature of the difference that Mamdani (2013) and Mbeki and Mamdani (2014) try to identify when they distinguish between judicial schemes versus political processes for dealing with gross human rights abuses? We can point out that the dichotomy is false in that justice, regardless of its particular hue (retributive, reparative, redistributive), is inherently political in being part of the processes of sharing the burdens and benefits that human co-existence continually requires us to undertake. But this reaction, while being a good one may also be a lazy one. Work needs to go beyond this to investigate what seems to be a rather perceptive and useful but not clearly specified distinction between what these authors call retributive justice systems and 'political processes'.

In a sense the process of clarifying this difference between international criminal justice, and its current incarnation in the form of the ICC, and 'political processes' is part of the much needed task of properly locating international criminal justice and the ICC in a broader social scientific discourse that goes beyond the severely restricted legalistic garb in which they

are too often robbed. Properly understood as an institution, interdisciplinary work aimed at inserting the study of the ICC into the very broad literature on institutions, including

its historical, sociological and rational choice variants (Thelen 1999), will be useful. In this respect scholars working on the political economy of Africa have a lot to offer. The continent is the site of various efforts at 'institutional reform' that have ranged from structural adjustment programmes and the construction of 'market-enhancing institutions' to democratization processes and security sector reforms. What lessons can we draw from these efforts at institution making and reform in an effort to make sense of what a permanent international criminal tribunal for trying perpetrators of gross abuses is, what it can be, what it can do and what we can reasonably expect from it.

Such an examination of the ICC, far from being a backward looking exercise in an age when some on the continent are already beginning to look beyond the Hague Court, is in fact a vital step towards the future and towards making sense of alternatives. We have to understand the ICC well enough to be able to fashion alternatives that help us overcome many of the problems for which it is usually critiqued. Without this there is a great chance that new institutions like the African Court may end up displaying the same problems that the ICC is accused of. In this stead I end this brief introduction with a question: to what extent does the African Court as conceived represent an alternative that can avoid many of the critiques posed against the ICC?

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