International Justice for Atrocity in Africa? The International Criminal Court, African Governments and Sustainable Peace

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Recent research findings in Eastern Africa

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Volume IX n° 1; 2011

The action of the International Criminal Court (ICC) in Africa is often criticized for its partiality and as being a tool in the hands of a hegemonic neocolonialism. Despite those critics, which are sometimes caricatural, the analysis of the intervention of the first permanent institution for international criminal justice is crucial to understand the dilemma and contradictions arising between the theory and the practice of transitional justice. This paper will discuss the role of the International Criminal Court (ICC) in Africa, with particular reference to the process of Transitional Justice (TJ) in Burundi. The main topics of this paper consider the relationship between the ICC and the peace-justice dilemma, as well as critical analysis of this peace-justice dichotomy in light of TJ processes more broadly.

1. The ICC in Africa, the confrontation between theory and practice

1.1 The ICC and the Peace-Justice Dilemma

The ICC is the symbol of a new era of moral and judicial diplomacy. The impunity of mass violence and international crimes has become unacceptable. A determined fight against impunity has become the priority of peace-building and peace-making programs. Truth-telling and punishment of the perpetrators of past mass violence now takes precedence over the old rule of forgetting and offering amnesty.

In theory the advocates of the ICC support Kant's theory[1], the philosophy of "peace by justice", (or Gandhi who said "no peace possible without justice"). But the idea of justice as a vehicle of peace is often contradicted in practice, revealing the restrictive nature of the debate surrounding the peace-justice dilemma.

In practice the ICC is seen as a tool of retributive justice in opposition to peace. After a crisis, there are certain points in a transition process during which the ICC may be used. If peace agreements are associated with the idea or the concept of "justice", they would refer to the idea or the concept of "peace" in its negative meaning: that is to say, to "stop the fighting" in opposition to its positive meaning, "to reconcile".

The Ugandan example shows that the use of the ICC outside of a peace agreement may produce perverse effects, contrary to the aim of establishing sustainable peace. The ICC was used as a political tool by the government and by the rebels as a threat against the opposite party. Some commentators have said that the ICC action in Uganda led to faster negotiations to end the conflict and to sign the peace agreement. However, no peace agreement has been signed yet. Government and rebels have both used the ICC as an instrument of political pressure. In this case, peace seems to be necessary before aiming for justice. The ICC as a representation of "justice" seems to fail to stop violence.

1 J. SAADA, La justice pénale internationale, entre idéaux et justification, In Revue Tiers Monde, N°205, Janvier-mars 2011, pp. 47-64.

The Rwandan example is an illustration of the weakness and ambiguity of peace and reconstruction objectives after mass violence and, in particular, genocide. Even if retributive justice is used as the means to reach reconciliation it seems an ambitious agenda. In this context, International Criminal Justice (ICJ) and national criminal justice were used by 'winners' against 'losers' and not in a transitional way. Current circumstances make it reasonable to think that there has not been a true political transition in Rwanda. In a transition both parties of a conflict, 'winners' and 'losers', negotiate to find a solution.

Only one side of the history of mass violence has been broadcast and acknowledged. Claims for justice by Hutu are increasingly audible, raising doubts about the reality of Rwanda's 'national' reconciliation. On the other hand, in such a tragic context, and after such serious mass violations of human rights, we might wonder what the other options were.

The process offers some political stability to the country, but the price of this stability seems to be high. There is decreed peace in Rwanda and a sacrificed generation. Indeed, recent internal divisions among the main political party have showed the weakness of authoritarian power.

The Ugandan and Rwandan contexts are very different, although they highlight the fact that the ICC or ICJ more broadly is often manipulated to serve political interests, inside or outside of the country. Furthermore the practical experiences demonstrate the restrictive notion of the "justice" which is ordinarily used and referred to[2]. In Uganda the ICC represented only retributive justice and in Rwanda justice was only granted to one part of the population.

1.2 ICC and the dogma of universal justice

In theory the ICC represents an old dream of justice from which nobody should escape especially political leaders. It is the dream of universal justice.

The supporters of the ICC argue for its potential through highlighting the international judicial investigations opened against the "big fishes" involved in mass violence, genocide, crimes against humanity or war crimes in Africa. In practice, beyond the classical critiques raised against ICC, such as the slowness of procedures, one may legitimately doubt its equity by considering the selectivity of its cases. There are different possibilities of opening an investigation: a situation can be referred to the Prosecutor by a state party, by the United Nation Security Council (UNSC) (acting to address a threat to international peace and security), or, the Pre-Trial Chamber can authorize the Prosecutor to open an investigation on the basis of information received from other sources, such as individuals or non-governmental organizations (NGO). We can therefore conclude that the UNSC has a dominant role in the ICC procedures of investigation.

More than the geographic asymmetry (the majority of cases come from sub-Saharan Africa), the structural inequalities are stark. The UNSC can ask the court to suspend its inquiries for a renewable duration of one year. It is the only authority allowed to expand the mandate of the court to persons who belong to non-state parties. Among the five permanent members of the UNSC, three are non-state parties (United States, Russia and China). The ICC faces a strange situation in which non-state parties can prosecute other non-state parties via the UNSC, but with a significant difference: the non-state parties sit as permanent members to the UNSC and cannot, in practice, be prosecuted because of their right of veto.

1.3 ICC and the priority of victims

The ICC offers a considerable service to the victims of mass violations of human rights. For example, its decision of 17 January 2006 regarding a Democratic Republic of Congo (DRC) case allowed the participation of victims from the early stage of the investigation. The court offers the victims a double end: restorative justice for the undergone damages and punitive for the committed crimes. The double face of the civil action is recognized by international jurisdiction. As far as victimology is concerned, this evolution underlines the restorative potential of the participation in the judicial process, which will result in symbolic reparation.

However, the overall reparation of victims is undermined by the lack of efficiency of ICC witness protection. The ICC has not set up an overall support process for victims with legal and judicial dimensions, nor psychological or social. One wonders if the ICC may have the ambition to translate the jurisdictional protection of the rights of victims in actions with a permanent department for overall support. On the other hand, is this really the ICC's mandate or should the court even have this ambition?

Concerning victims' perceptions of ICC, an April 2010 report titled "The impact of the ICC on victims and affected communities", produced by a victims' rights working group[3],

2 Ch. SRIRAM et S. PILLAY, Peace versus Justice? The dilemma of transitional justice in Africa, University of Kwazulu-Natal Press, 2010, 373 p.

3 "The impact of ICC on victims and affected communities", report of the victims' rights working group, April 2010,

underlined the lack of outreach in countries where the ICC has worked, as well as in those where there have been no procedures. It highlighted how victims are unprepared for the slowness of the ICC procedures and how small the number of cases dealt with is. However it also underlined the positive influence of the ICC interventions to increase knowledge of victims' rights. Despite this, in-situ trials are highly recommended; victims are often disappointed with the ICC's lengthy procedures. Among victims directly involved in ICC proceedings a general feeling of "lassitude" was found.

Expectations regarding the potential peacemaking role of the ICC are huge. Victims are easily disappointed with the practical limitations of the court, as well as the crippling diplomatic issues. The recent UN report about crimes committed in DRC between 1993 and 2003 also admits the ineptitude of the ICC for some cases and calls for other complementary solutions[4].

This paper has so far emphasized the negative outcomes of ICC intervention in Africa. Those comments however should not elude the role of the court in influencing (transitional?) processes initiated after mass violence. Stephen Brown shows that in Kenya the ICC intervention allowed the continuing operation of the national commission on the violence perpetrated during the 2007 elections. Even if the work of the commission stagnates, it is important to recognize its existence[5]. If only one of the six leaders charged by ICC is sentenced to jail it will be the first symbolic positive effect of International Criminal Law regarding structural impunity in Kenya. It would represent significant progress for the fight against impunity. However, huge expectations in terms of justice, prevention of future crimes or improvement of judicial reforms will undoubtedly lead to disappointment among people.

2. Transitional justice without justice in Burundi

2.1 Characteristics of the TJ process in Burundi

Burundi, with an estimated population of eight million inhabitants composed of 85% Hutu, 14 % Tutsi, 1% Twa and some Ganwa, has undergone various cycles of violence during its history. Among these have been mass violations of human rights; the events of 1972 and 1993 in particular have been labeled by some as genocide or acts of genocide. The polemical aspect of labeling crimes is observable through the use of this generic term. In 1994 a civil war broke out; officially it lasted until 2006, but in reality the noise of weapons only silenced in 2008.

A peace agreement, the Arusha Peace and Reconciliation Agreement for Burundi, was signed in August 2000. It specifies that the Burundian conflict is a fundamentally political conflict with extremely important ethnic dimensions, and that it arose from a struggle of the political class to access power and/or to maintain their power.

In the Burundian case, negotiations and mediation occurred during the war. There were no winners and no losers at this stage but just armed men who had decided to enter discussions, in order to conquer power or to keep it. This situation may explain why negotiations were so long and staggered. The Burundian case is therefore very different to the Rwandan one because of the intensity of the crimes in Rwanda and because there was no "winner" in Burundi.

A sort of consociationalist[6] system was set up in Burundi as the model organization for power-sharing[7]. Inside the political game of power-sharing the peace-justice dilemma appeared through the instrumentalization of retributive justice assimilated to justice and the truth and forgiveness claimed in the name of peace. In an historical perspective justice has always been used as a mean of disqualification or physical elimination of political opponents.

In the Arusha Agreement two TJ tools were set up: a special chamber for crimes committed in Burundi and a Truth Reconciliation Commission (TRC). However the TJ process has not yet begun. Only National Consultations (NC) were organized in July to December 2009. These consultations were also not immune to criticism. Although the country is still in the process of transition, another characteristic of the Burundian case is found in the ongoing judicial and legal reforms related to children's

40 p, http://www.redress.org/downloads/publications/Stocktakingreport2010.pdf

4 ONU, Rapport publié le vendredi 1er octobre 2010 par le Haut commissariat des Nations Unies aux droits de l'homme (HCDH) et relatif aux violations graves des droits de l'homme et du droit humanitaire commises sur le sol congolais entre 1993 et 2003.

5 S. BROWN, Justice pénale internationale et violences électorales, In Revue Tiers Monde, N°205, Janvier-mars 2011, pp. 85-102.

6 Consociationalism is a form of government involving guaranteed group representation, and is often suggested for managing conflict in deeply divided societies. It is often viewed as synonymous with power-sharing, although it is technically only one form of power-sharing. (Wikipedia definition)

7 S. VANDEGINSTE, Théorie consociative et partage du pouvoir au Burundi, In F. REYNTJENS et S. MARYSSE (eds.), L'Afrique des Grands Lacs. Annuaire 2005-2006. Dix ans de transitions conflictuelles, Paris, L'Harmattan, 2006 et S. VANDEGINSTE, Burundi: entre le modèle consociatif et sa mise en œuvre, In S. Marysse et al. (eds.), L'Afrique des Grands Lacs. Annuaire 2007-2008, Paris, L'Harmattan, 2008, pp. 55-76.

rights, land conflict, electoral law and the Criminal Code. This is important as the dependence of justice and magistrates to the political elite remains a critical problem to resolve.

2.2-The peace-justice dilemma in Burundi: the choice of peace or oblivion?

The National Consultations aimed to gather Burundians' views about the TJ process. While more than 4000 persons were consulted, the wording of questions cast doubt on the relevance of the consultations. In fact, people were not invited to choose what TJ tools they wanted but to confirm the UN and Government decision. This approach was clearly not inspired by the objective of finding a balance between population's needs and the imperatives of international standards. What really mattered was the chance for different political parties to use the results in their favour.

For example the first question asked people whether they would prefer international judges sitting at the special court and the second question asked whether they would prefer national judges. The percentage results of each question were very close and consequently the results might be used in one direction or the other: peace or justice? Through these different critics, the Burundian habit to look for the hidden agenda behind the official discourses appears. Such suspicions are strengthened by the reluctance expressed by the Burundian Government for a double transitional mechanism and particularly about the establishment of a Special Court.

Some observers have asserted that the choice of peace has been made in Burundi. The 2010 elections demonstrated that neither sustainable peace nor negative peace had been established because of the boycott of opposition political parties after the declaration of the large victory of CNDD-FDD. According to an ICG report it was a political suicide[8].

2.3 The challenges of an overall Transitional Justice process

The blocking of institutional TJ process is not the only manifestation of the TJ process in Burundi. Over 10 years several activities were implemented by civil society. Among these was a theatrical performance which conveyed a representation about the conflicts and victimizations among Hutu, Tutsi and even the Twa population. After the performance the public was invited to participate in group talks facilitated by psychologists and express their feelings about the drama. This experience used a restorative approach outside of the institutional TJ process[9].

One should nevertheless note that civil society in Burundi is essentially urban, small in scale and anti-establishment. The scattered activities of the TJ civil society demonstrate the difficulties for institutional bodies to delegate their functions in the field of justice.

In the particular circumstances of the Burundian case, and maybe in all transitional cases, one can point out the importance of non-official actors in the TJ process. The role of civil society, historians, media, religious actors and the general populace, is to increase understanding of the outline of the TJ system or to reveal the reconciliation potential within it.

The main challenge of TJ is to find the balance between external and internal needs, an expression often used in Burundi. Adequate time and multiplicity of actors and TJ tools might be strengths and not weaknesses. The possibility of referring a matter to the ICC is in the hands of civil society but it is a dangerous decision. It requires a lot of courage and isn't necessarily the only solution and tool in a process such as Transitional Justice.

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8 International Crisis Group (ICG), Burundi : du boycott électoral à l'impasse politique, Rapport Afrique N°169, 7 février 2011, 33 p.

9 RCN Justice & Démocratie, Paroles de Burundais sur la justice d'après-guerre, Expérience de consultations réalisées auprès de la population sur la justice et le conflit au Burundi, Rapports 2006-2007, 239 p.