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Q: What was the impact of the Court's involvement on the peace process in Northern Uganda? Were there tradeoffs between “peace and justice” in this instance? How significant was it that President Yoweri Museveni invited the Court to investigate these cases? What lessons can be extrapolated from this case?

A: It was significant that Museveni invited the ICC into Uganda in the first place. For some this undermined the perceived impartiality of the prosecutor, Luis Moreno Ocampo, when made he the announcement of indictments in Museveni’s company. It gave the appearance from the start that the investigation would focus primarily on the crimes of the LRA, and not other actors in the conflict as well. Given the history of the conflict in Uganda, one has to understand that there is widespread resentment against the government in the North, with many believing that has deliberately disempowered Northerners for political and historical reasons.

Recently though the Court has worked diligently to address the issue how it is perceived in Uganda. The Court has certainly improved its outreach programs in Northern Uganda, but still has a long way to go. The Court’s role in Uganda also did change the dynamic of the peace process and has helped to make it a more sustained and deeper effort than almost any other peace process in the past 20 years, even if it hasn’t ultimately been successful. So in that sense the Court has also played a positive role in Uganda.

I think the Court has to realize that there will always be a risk it will be perceived as partial to particular sides when it investigates ongoing conflict. I think the Court learned from Uganda that it has to be very aware of the political dynamics of a conflict before it gets involved so it can take the necessary steps to ensure it is, as far as possible, perceived as impartial. Continued improvement to outreach efforts in Uganda is a good step in the right direction.

Q: How has the request for an indictment of President Omar al-Bashir for genocide impacted perceptions of and expectations for the Court? Do you think a genocide charge can be successfully prosecuted? What do you expect to be the impact of the indictment on prospects for peace in Sudan and the region?
A: First let me say that dealing with genocide is always a difficult issue. There is a view that genocide, while already in a category of the worst crimes, is the most serious of these. Not everyone agrees with this view. Some regard other large scale crimes against humanity are being just as serious. Whatever view one subscribes to, there is, however, a public perception that genocide is at the top of the list and this has important implications.

This is also the first genocide charge the ICC is looking into and also its first charge against a sitting head of state. From a political perspective there is a risk that if the judges say no to the genocide charge then this will be used to criticize the prosecutor. Sudan will presumably claim that he has overreached. But of course proving genocide requires evidence of special intent, and such intent is particularly difficult to establish. If the Court does not find the genocide charge established, it will simply mean that on the evidence before it in this case, there was not sufficient proof to meet the threshold – nothing more. It certainly does not mean that there has not been genocide in Sudan, and that there cannot be future charges of genocide.

There are also political and legal complications that arise when prosecuting non-signatory countries to the Rome Statute on a UN Security Council referral. Some critics also claim that Bashir is being treated differently than others because in the case of Ahmed Harun and Ali Kusheb the prosecutor didn’t allege genocide, but has done so in his application against Bashir. Sudan might perceive that Bashir is being singled out, which isn’t necessarily the case, but one should be aware of the implications of the prosecutor’s actions. It would be helpful if Ocampo could do more to explain his strategy of moving directly from Harun to Bashir. One should also understand that the prosecutor faces serious constraints in not having direct access to Sudan in order to get evidence and source materials as he has in other cases.

There are also some issues to consider with regard to the peace process. Sudan has alleged that there will be serious consequences if Bashir is indicted, but we need to take a serious and objective look at what they actually could do. First, Khartoum could certainly make it more difficult for NGOs operating in Sudan. It could also target the IDP camps. And there is some risk of fracturing the country, considering the interests of different parties in economic development and the already tenuous North-South peace agreement.

I think though that we often lose sight of the potential benefits of indictment in this case. This may be one of the only opportunities to actually have those responsible for the violence held accountable. Also the move to indictment might create more political space within Sudan for reform and changes in leadership. It might also go a long way towards convincing Sudan that opposition to the international community is not ultimately a viable strategy. As a result it may drive change in Sudan’s confrontational policies, and encourage it to move toward peace.

Q: What would represent "success" for the Court overall? What are the standards by which we can consider a prosecution successful?
A: For the prosecutor I think success is really measured in the courtroom: having the accused before the court, following clear procedures of due process, producing robust evidence, and resulting in a judgment that is accepted and respected would all be important for success. The prosecutor says that according to the doctrine of complementarity, in an ideal world, he’d have no job since national courts would handle all the cases. In the real world, however, countries in conflict are often unlikely to have the resources and institutions to mount serious investigations and prosecutions and oftentimes in conflict situations societal coherence does not exist strongly enough to mount fair and impartial trials. So the ICC or other institutions like it will be necessary for the foreseeable future.

If people respect the court and its work then this will of course give them an incentive to send cases forward. Kenya is an interesting example here with the Waki Report. If Kenya doesn’t deal with these prosecutions domestically the ICC will most likely get involved. Either way though, in this case the very presence of the Court on the international scene helps to drive the norm of accountability and this can be seen as a success in many respects.

The Court needs to remain aware though that it will continue to have to do work in highly political areas. The prosecutor has to be scrupulous and be conscious about the importance of the perception of fairness.

Q: How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court in Africa and in the international community more broadly?

A: I think it is significant, but not to the extent that some people think. The reality is that the Court has constraints on where it can act. African countries are one of the largest regional groups to sign the Rome Statute and the Court’s mandate only allows it to prosecute crimes that occurred after July 2002. Since that time, most serious violent conflicts have occurred in Africa. These factors combine to make Africa a natural focus for the Court. The Court also has four active investigations at this point, and it is important to remember that in three of those instances the Court was invited in and in the other instance it received a Security Council referral.

That being said, however, if in five years time we are still only seeing indictments in African cases that will be a more serious problem for the Court. At that time people will start to ask more serious questions about the Court’s focus. There could be future investigations in Kenya and Cote d’Ivoire, but also in Colombia, Georgia and Afghanistan, even though none of these countries have had atrocities on the scale of Sudan or Uganda, with the possible exception of Afghanistan.

Moreover, I think the Court is aware of this issue, and that while it will continue to insist that cases meet an appropriate threshold, it will pay serious attention conflicts outside of Africa.
Q: Does Article 16 of the Rome Statute effectively give the Security Council authority over the prosecutor’s office? On what grounds and in what types of situations should the Council invoke Article 16?

A: It doesn’t give the Security Council authority over the prosecutor, but it does ensure that they have an awareness of each other’s role. The prosecutor will be conscious that the Security Council can put prosecutions on hold. Ocampo probably suspects that some members of the Security Council would not have wanted him to go after Bashir, and in full-awareness of the possible use of Article 16, proceeded with the indictment. So I think it is going too far to say that the Security Council has authority over the prosecutor.

All of this also plays out in the public arena. The Security Council also has to think about interests other than those national interests of its members. In this case, the question really will be whether the US would support an Article 16 deferral. Considering Bush’s statements about genocide in Darfur, and the new Administration’s foreign policy team, - Susan Rice in particular has been a strong Darfur advocate - it will be an interesting and important debate. In the present circumstances it would and should be very difficult for the US to even contemplate a deferral, given the lack of effort by the Sudanese government to move towards peace.

There are always going to be political factors at play; consider that there is a movement for a deferral in the Sudan case, but not in Uganda. One way to get around this dilemma is to say that it is the job of the prosecutor to prosecute, and that of the Security Council to consider the more political requirements of peace and security.

I will say also that Article 16 should be used vary rarely and as a last resort, otherwise it will undermine the Court. There is currently, in a sense, a presumption against its use and that is a good thing. If and when that presumption is broken it will undoubtedly change the dynamics. It really needs to only be used on a very limited basis concerning issues of peace and security on the ground.

Q: What do you think will be the outcome of the Court’s first set of prosecutions? How influential will these prosecutions be for the Court’s future activities?

A: I can say generally that the Court needs to get credible convictions to strengthen its profile and impact. Five years from now if we are still waiting for our first credible conviction this will be a serious problem. The Court needs to demonstrate its effectiveness. It should have ample evidence in the Lubanga case; Sudan will be the most difficult in terms of evidence. Also the concern that even if Bashir is indicted that in five years time he could still be running Sudan is a bit troubling, especially if no other Sudanese officials have been prosecuted.

The ICTY had strong NATO support for it, but the ICC doesn’t necessarily have the same degree of international support in terms of getting criminals handed over to it. The Court could still be a weak institution in the future if it can’t get the people it is indicting. The Court also needs to get serious convictions beyond just rebel leaders and also show
that it can successfully prosecute those people in positions of power like political leaders. I note that some Western backers have not yet given the Court the necessary support to further these goals.

Ultimately, though, it depends on how you look at things. Sure one can be pessimistic looking at individual cases, but if you look at the bigger context of the development of international criminal justice then there have been major success. The ICTR, ICTY and ICC are all up and running with investigations in nine or ten countries. This is a huge advance from even two decades ago, when people said that the establishment of institutions on this scale was unfeasible. Of course there will be bumps along the way, there are bound to be in establishing such important institutions, but in terms of the bigger picture genuine norms of accountability and respect for international justice are emerging. Countries have to create domestic legislation to be in compliance with the Court now, amnesties are being increasingly questioned, and head of state immunity is being eroded. These are advancements in the cause of international justice that are harder to quantify and track, but that are critically important.

The Court has its work cut out for it, but if it achieves core successes to build upon, it can become the powerful institution that its founders hoped it would be. The development of norms of universal jurisdiction, and the promotion of the Responsibility to Protect doctrine will also help to strengthen the Court’s acceptance over time.