CREATED AND LIMITED BY POLITICS

A view of the ICC from Africa

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The adoption of the Rome Statute of the International Criminal Court (ICC) in 1998 marked an historic achievement for humanity. The entry into force of the Statute in 2002 and the election of the judges and appointment of the Prosecutor and the Registrar in 2003 were quick by comparison to previous behaviour of states in such serious matters. For the first time in history a truly international criminal judicial institution has been established. The gap created by the fact that the International Court of Justice (ICJ) was given a limited mandate to interpret the UN Charter and to adjudicate on disputes between states, meant that responsibility and accountability for serious international crimes was left at the mercy of national jurisdictions, or ad-hoc regional and international measures.

National jurisdictions are often weak in responding to serious international crimes, especially where crimes are committed by nationals abroad, or where the crimes' impact at the domestic or national level is limited or complicated. This helps explain why those who repeatedly violate international treaties—especially that give authority to universal jurisdiction—are seldom prosecuted by national courts for serious international crimes. Good examples of these international treaties are the Genocide Convention (1948), the four Geneva Conventions of 1949 and the two common Protocols of 1977, the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Suppression and Punishment of the Crime of Apartheid (1973) and the Convention against Torture (1984).

Reliance on the establishment of regional or international tribunals is perilous at best. Unlike the atrocities they are meant to address, these tribunals are rare. And, more often than not, they depend on the politics of the moment. The Nuremberg and Tokyo military tribunals were for the victorious Allies in the Second World War. These were not truly international tribunals although they set some useful precedents. The Hague and Arusha international tribunals for the former Yugoslavia and Rwanda respectively, and the special international court for Sierra Leone had to be negotiated through the pressure-cooker politics of the UN Security Council.

What the Rome Statute introduces is the principle of 'complementarity'. This means that the ICC is an international court with powers to indict, prosecute and punish offenders in cases where national systems are either unable or unwilling to do so. Complementarity also means that the ICC can assume jurisdiction, without having to wait for the national systems' failure to prosecute.

Despite the historic advances made in the field of individual responsibility under international criminal law, it is important to note the weaknesses and gaps that remain.

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First, the ICC is a creature of a treaty, voluntarily entered into by states. This explains why the United States of America has found it convenient to shield its present and future criminals by coercing weak or amiable states to enter into bilateral agreements that will compel states parties not to extradite or surrender US citizens to the ICC or to other national jurisdiction. The US has also effectively forced countries like Belgium to repudiate indictments against US and Israeli criminal suspects. Belgium has had to concede the relativity of the principle of sovereign equality of states by promising the US that it will enact amendments to its laws to give effect to the US demands (and veiled threats). The behaviour of the US in this regard puts into sharp focus the perennial struggle between 'universalism' and 'relativism' that scholars in North America often invoke in their discourse about the Third World. This time, it is the Big Brother that is the champion of relativism.

Second, it is useful to remember that the ICC is still very much a work-in-progress. Once again, this is because of the more powerful states parties. The crime of aggression—recognised as a UN Charter (Chapter VII) issue requiring enforcement action—is identified by the ICC as a serious international crime but put in abeyance for the next seven years while states reach agreement on a more exact definition of this crime . Aggression, which is a form of international state terrorism, is carried out by people who ought to be brought to book just like those who commit genocide, war crimes and crimes against humanity.

A third potential weakness concerns reparations. The Rome Statute anticipates reparations to victims of serious international crimes under its jurisdiction (Article 75). The resources for such reparations are to be exacted from the perpetrators and, where appropriate, from the Trust Fund envisaged in Article 79. In theory, these are very positive undertakings as they will ensure that the justice regime provides substantive redress to the victims and survivors and is not only preoccupied with punishment of the offender. The challenge for the Court in this regard is to guard against falling into the trap of established international bad practice where injuries to those in the North are valued more than injuries to those in the South. Unequal justice is injustice.

The ICC is a judicial body. The doctrine of separation of powers and the principle of independence of the judiciary, as used in contemporary times, dictate that the ICC not meddle with politics and that it discharge its obligations without interference from the political principals—especially those with executive powers. How it asserts its independence and separateness shall be measured by its practice. Will it acquit itself with honour or will it disgrace itself? Many Africans will be watching with keen interest.