

EGMONT

THE PITFALLS OF AN OVERRELIANCE ON THE INTERNATIONAL CRIMINAL COURT



By Valérie Arnould (<http://www.egmontinstitute.be/expert-author/valerie-arnould/>) (21 August 2018)
In Commentaries (http://www.egmontinstitute.be/publication_parent/commentaries/)

Central Africa (<http://www.egmontinstitute.be/core/central-africa/>)

This blog post (<http://blog.associatie.kuleuven.be/ltjb/the-pitfalls-of-an-overreliance-on-the-international-criminal-court/>) reflects on the recent acquittal of former Congolese rebel leader Jean-Pierre Bemba by the ICC Appeals Chamber. It argues that our overreliance on the ICC as a

We use cookies to ensure that we give you the best experience on our website. If you continue to use this site we will assume that you are happy with it.

provider of justice has contributed to the absence of justice for victims in the Central African Republic. This piece by Valerie Arnould, Research Associate at the KU Leuven, was originally published in Dutch in Knack (<http://www.knack.be/nieuws/wereld/blind-vertrouwen-op-het-internationaal-strafhof-helpt-niet-in-de-strijd-tegen-straffeloosheid/article-opinion-1170039.html>) on 5 July 2018.

(Photo credit: Wikimedia)

THE PITFALLS OF AN OVERRELIANCE ON THE INTERNATIONAL CRIMINAL COURT

The ICC's acquittal (https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF) on 11 June 2018 of Jean-Pierre Bemba, former DR Congo Vice-President and leader of Congolese rebel group turned political party, the *Mouvement pour la Libération du Congo* (MLC), kicked up a veritable storm. The ICC Appeals Chamber overturned the 21 March 2016 conviction of Bemba by the ICC Trial Chamber for crimes against humanity and war crimes, for acts of murder, rape and pillaging committed by MLC troops in the Central African Republic (CAR) between October 2002 and March 2003. By a 3-2 majority ruling, it found that Bemba had been convicted for specific criminal acts for which he had not been formally charged and that trial judges erred in their assessment of Bemba's adoption of necessary and reasonable measures to prevent or punish the commission of crimes committed by MLC troops. Bemba was provisionally released on 13 June 2018, pending his revised sentencing in a separate case on witness tampering.

The acquittal of war crimes suspects by an international criminal tribunal is not a novelty. The International Criminal Tribunal for the former Yugoslavia acquitted 19 accused, while the International Criminal Tribunal for Rwanda acquitted 14 individuals (representing about 19% of all individuals tried by these courts). Even for the ICC, Bemba's acquittal is not a first: on 18 December 2012, another Congolese rebel leader, Mathieu Ngudjolo Chui, was acquitted of charges of war crimes and crimes against humanity. Such acquittals are generally motivated by a lack of evidence or failure of the prosecutor's office to establish the accused's guilt beyond reasonable doubt. Consequently, they can be taken as an indicator of fairness of the judicial proceedings before international criminal tribunals and as demonstrating these courts' scrupulous respect for due process standards and the rights of the accused.

Notwithstanding, Bemba's acquittal has been met with widespread disappointment (<http://www.dw.com/en/congo-jean-pierre-bembas-icc-acquittal-may-bode-ill-for-courts-future/a-44141323>), even outrage. Commentators lament that the appeals ruling erases important legal precedents set by the initial ruling regarding the prosecution of sexual violence and the determination of command responsibility as a mode of liability. Undoubtedly, the Bemba case will trigger many debates (<https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>) about the scope and boundaries of command responsibility.

We use cookies to ensure that we give you the best experience on our website. If you continue to use this site we will assume that you are happy with it.

The ruling has also revived criticisms of perceived failings (<https://www.justiceinfo.net/fr/justice-reconciliation/37679-cpi.html>) by the Office of the Prosecutor (OTP) in the conduct of its investigations, especially under former Prosecutor Louis Moreno Ocampo (<https://www.justicetribune.com/blog/ocampos-shadow-still-hangs-over-icc>), while others are critical of what they perceive as the Appeal Chamber's overreach (<https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/>). The decision to overturn Bemba's conviction has also been denounced for inflicting a serious blow to victims' aspirations to justice and their access to reparations.

It is, however, overly easy to solely center the debates on the alleged failings of the ICC and to blame the absence of justice for victims in the CAR on the ICC alone. Instead, Bemba's acquittal should lead us to reflect on the tendency, including amongst those currently lambasting the ICC for acquitting Bemba, to pin all justice expectations on the ICC. What has gotten lost in many analyses, is that the ICC is not, and never was, the only available venue for pursuing justice for victims. This is not merely a question of managing victims' expectations (<https://www.justsecurity.org/58386/belief-shattered-international-criminal-courts-bemba-acquittal/>) regarding unpredictable court proceedings or about downscaling unrealistic expectations about the ICC's ability to produce broader societal transformation in the societies where it intervenes. At a much more fundamental level, this is about being realistic, and fair towards the ICC, about the role it can play as a justice mechanism. The ICC was never intended to function as the *primus inter pares* among justice institutions. Yet, what has increasingly emerged, as I have argued elsewhere (<http://www.egmontinstitute.be/a-court-in-crisis-the-icc-in-africa-and-beyond/>), is a powerful discourse portraying the ICC as sitting at the top of a 'justice pyramid' and therefore as the most appropriate response to mass atrocities, especially in conflict and post-conflict contexts in sub-Saharan Africa (<https://academic.oup.com/ijtj/article-abstract/9/1/90/678037>).

The ICC will never be able to live up to such expectations though. Because of the principle of complementarity on which it is founded, its mandated focus on those most serious crimes, and the sheer vastness of grave crimes that are being committed in the world, the ICC cannot go it alone. Moreover, if the past 15 years has taught us anything it is that the ICC, like domestic justice efforts, faces significant political hurdles and legal challenges in bringing war criminals to justice, especially high-level political and military officials. The tendency of the ICC to only open investigations into a very small number of suspects in any given situation – of which the CAR I situation is the most striking instance – further underscores the limitations inherent to the institution as a provider of justice.

This is not to suggest that the ICC is irrelevant – it remains an important mechanism within the justice toolbox and one which will hopefully be improved and strengthened over time. But our overreliance on the ICC has contributed to creating a justice gap in the CAR. If there is one key

We use cookies to ensure that we give you the best experience on our website. If you continue to use this site we will assume that you are happy with it.

lesson to draw from Bemba's acquittal it is that we would do well to not put all our eggs in one basket and instead invest significant effort, from the outset, in advocating for and supporting supplementary mechanisms that can deliver justice and redress for victims.

While being sympathetic to disappointments that Bemba's acquittal deprives victims of reparations (though the Trust Fund for Victims (<https://www.trustfundforvictims.org/en/news/press-release-following-mr-bemba%E2%80%99s-acquittal-trust-fund-victims-icc-decides-accelerate-launch>) did announce on 13 June 2018 that it would allocate €1 million for an assistance programme for the victims and their families in the present case), there should also be a humbling recognition that over the course of the near decade-long ICC proceedings little significant efforts were made to push for non-judicial reparations measures or complementary efforts to offer victims and communities in the CAR justice and redress. The 2015 Bangui peace agreement put forward a comprehensive justice response to past atrocities, but so far, only the Special Criminal Court in the Central African Republic (<https://www.cps-rca.cf/>) (SCC-CAR) has been set up (it was set to start its first investigations in July 2018). While this constitutes an important achievement, we should avoid repeating the mistake of placing excessive justice expectations on a single judicial institution which faces inherent limitations in terms of mandate and resources to address the widespread impunity problem in the CAR. It is key to pursue a comprehensive justice approach in the CAR from the outset, involving non-judicial reparation programmes, community reconciliation efforts, local justice approaches, and truth-telling.

Yet where organisations already attempt to engage in such activities, they often face less political will or difficulty in garnering donor support and reaching the top of international human rights NGOs advocacy agendas, which remain resolutely focused on judicial responses to violence and atrocities. Pursuing a broader justice agenda would not only contribute to avoiding impunity gaps resulting from ICC or SCC-CAR acquittals, but also enable the development of justice policies that are responsive to the multilayered conceptions of justice (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531638) that tend to exist on the ground, and which are not reducible to criminal prosecutions. It is time that we move away from the naïve fiction that the ICC alone provides a sufficient and superior justice response to atrocities. For sure, implementing multiple justice mechanisms comes with challenges (<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2486.2011.01014.x>) and political or resource constraints may sometimes make sequencing of justice policies a necessity. But there is at present no empirical evidence (<https://link.springer.com/article/10.1007/s12142-015-0374-2>) that sequencing *in se* or prioritizing trials over other justice instruments is more effective. Thus, while Bemba's acquittal does not signal the end of the ICC, it will hopefully encourage us to move away from an ICC-dominated conception of justice.

Valerie Arnould is Senior Research Fellow with the Africa Programme at the Egmont – Royal Institute for International Relations and a Research Associate at the Leuven Institute of Criminology, KU Leuven. She holds a PhD in War Studies from King's College London. Her

research interests are transitional justice, the politics of international justice, and political and security dynamics in Central Africa.


EGMONT


Royal Institute for International Relations
Rue des Petits Carmes 24A
1000 Brussels - BELGIUM

POSTAL ADDRESS

Rue des Petits Carmes 15
1000 Brussels - BELGIUM

CONTACT

 +32 (0) 2 223 41 14

 info@egmontinstitute.be (mailto:info@egmontinstitute.be)

