

## **The Limits of Prosecutions**

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There exists in Africa a general agreement about the need for accountability, but a divergence exists as to how this could be pursued. Some countries use criminal prosecutions to address the aftermath of mass violence. Others prefer non-punitive mechanisms, like truth commissions and amnesty, as alternatives to criminal prosecutions. Some countries use truth commissions in combination with criminal trials to address the aftermath of human rights violations. Most recently, traditional methods of conflict resolution feature prominently in the anti-impunity arsenal of some African countries. It appears, however, that the preferred mechanism adopted by the international community to address impunity is criminal prosecution. Currently, investigations and prosecutions of serious crimes are taking place in post-conflict African societies before the ad hoc international tribunals in Rwanda, the Special Court for Sierra Leone and the International Criminal Court at The Hague.

I concede that prosecuting perpetrators of human rights violations is definitively a viable mechanism for combating impunity. In appropriate cases, the criminal process can be deployed to engineer compliance with the law and to deter would-be perpetrators of human rights violations. In this essay, however, I argue that the objectives of using criminal prosecution to reestablish social equilibrium and promote reconciliation, though laudable and rhetorically inspiring, are simply unattainable. The hope that international criminal prosecutions will reconcile mutually distrustful ethnic groups with a long history of reciprocal antagonism is quaint, perhaps even naive. International criminal prosecutions launched in Africa amid much publicity and high expectations are on the verge of irrelevance. After more than ten years of international criminal prosecutions in Africa, it is becoming increasingly obvious that criminal prosecution is a weak reed on which to hoist the strategy of reestablishing social equilibrium and reconciling intergroup hostilities in post-conflict African societies. A confluence of systemic and environmental factors has whittled down the influence of international criminal prosecutions in Africa.

First, efforts to use criminal prosecution to modify behavior and contribute to social equilibrium rest on a failure to appreciate that causes of conflict in Africa cannot be resolved through the criminal process. The overarching goal of criminal prosecution is to apportion blame and punish the guilty. Criminal prosecutions are not designed to address or alleviate the underlying social problems that lead to and perpetuate violence. Violence may be more pronounced in some parts of Africa, but its causes remain mostly the same in virtually every African country: ethnic distrust, corruption, marginalization of ethnic groups and inequitable allocation of a nation's resources. The frequency, resilience and indeed the incentive to resort to violence will shrink by addressing the underlying causes of violence. These problems cannot be addressed comprehensively through the prosecution of selected perpetrators of human rights violations. The underlying culture that sustains social disequilibrium must be counteracted if accountability is to take roots in Africa.

Second, criminal prosecution is a poor vehicle for restoring social equilibrium in increasingly fragmented societies where violence is viewed as a legitimate means to attain desired objectives. In a fledgling democracy fractured along ethnic lines with a history of mutual ethnic hostilities, international criminal prosecutions may end up becoming an impetus for, not a deterrent to, extra legal violent conduct. Some warlords have apocalyptic goals and readily resort to violence to mould the society according to their image. Faced with the threat of prosecution, and sensing their inability to negotiate with a determined world community, warlords with everything to lose may decide that it is in their best interest to fight till the end. Also, criminal trials can have adverse impacts on relationships. They can often involve accusations and counter accusations, rehashing of facts that rekindle old hostilities and reigniting passions that ultimately make reconciliation difficult.

Third, the causes of violence in Africa are considerably different from what leads to deviant behavior elsewhere, and are therefore more difficult to address via criminal trials. The dynamics of violence in Africa challenge the expectations of a Western-type criminal justice system and raise serious questions about the assumptions that undergird criminal prosecution. Violence in Africa is the product of a different phenomenon; Rwanda, Sudan and Sierra Leone result not from deviant behavior of citizens but from tensions at the armature of the society: ethnic distrust. Its dynamism is sustained by the belief that violence in defense of ethnic interests is a moral imperative, even a legal obligation. Decades of ethnic distrust and rivalries coupled with the central government's inability to deal fairly with the ethnic groups provide further impetus for the apocalyptic dynamism of violence. The traditional criminal process fails to address the broad range of ways in which situational cultural pressures exacerbate violence. Violence created by underlying social problems and perpetrated by several citizens with varying degrees of culpability cannot be addressed by criminal prosecution designed to address individual misconduct, especially in cases where the causes of deviant conduct reside not at the individual level but at the communal level. Moreover, whether international criminal prosecution actually serves as deterrence is unclear because its effect cannot be empirically verified.

Fourth, the effectiveness of international criminal prosecutions depends on support both from the public and state governments. In Africa, public support has been low because of negative attitudes of African leaders towards the West shaped by historical circumstances, especially the adverse effects of colonialism. Public support continues to dwindle because of prevailing attitudes which view international criminal tribunals as agents and symptoms of imperialism, and as attempts by the West to reestablish influence over Africa. The effectiveness of international criminal prosecutions also depends on support from African governments which has been less than enthusiastic. African leaders are reluctant to support the prosecution of their benefactors, tribesmen or warlords who have the capacity to cause troubles for the fledgling government. Whether ad hoc or permanent, international criminal tribunals based on Western notions of justice, can do very little to reestablish social equilibrium and arrest the advancing decrepitude threatening to engulf Africa.

I acknowledge that international criminal prosecution can play significant roles in promoting accountability in Africa, so long as it is properly structured and undertaken with some sensitivity to the sentiments and feelings of Africans who live with the painful realities of violence. But, for all the above reasons, international criminal prosecutions have neither delivered on the promise

of social equilibrium nor served as a chastening influence on impunity in Africa. Wholesale adoption of Western models of justice may not work in Africa given the prevailing social, political and cultural realities. Concerns for accountability offer no license for the international community to arrogate to itself the right to determine what is best for Africa. Imposing the preferences of the international community without due consultations with affected African nations will revive poignant painful memories of colonialism and reignite negative sentiments that will ultimately undermine efforts to promote accountability.

I urge all those involved in the fight against impunity in Africa to rethink the deeply flawed assumptions about the capacity of international law to bring about transformative changes in the conduct of citizen and group relations in Africa. Violence is so interwoven with the maladies in the continent - corruption, poverty, ethnic tensions - that it is doubtful that criminal prosecutions alone can serve as a chastening influence on the behavior of the leaders or the citizens trapped within the society. Building an effective strategy to reestablish social order in post-conflict African societies requires an understanding of the idiosyncratic environmental factors that animate violence, as well as recognition that criminal prosecutions cannot address the social pathologies that have disfigured Africa. It is these pathologies that will define and shape Africa's future, not the legacy of criminal prosecutions.

It is my submission that a single-minded pursuit of criminal prosecutions as the panacea to impunity in Africa, regardless of the anguishing realities, carries the dangerous and unacceptably high risk of further deterioration, anarchy and bloodshed in Africa. It is important, therefore, to confect a strategy that can simultaneously promote accountability and address the social pathologies that undermine efforts to reestablish social equilibrium and reconciliation.

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