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The International Criminal Court: Is it a Panacea?

By Joel Ng

Synopsis

ASEAN countries considering ratification of the Rome Statute of the International Criminal Court must press for commitments from the ICC that it will complement, and not supplant, local initiatives attempting to address complex issues relating to conflicts and war crimes.

Commentary

THE PRESIDENT of the International Criminal Court (ICC), Judge Song Sang-Hyun, is visiting Southeast Asia this week, holding consultations in the Philippines, Malaysia and Brunei on ratification of the Rome Statute of the ICC. To date, only Cambodia has ratified the Rome Statute which established the ICC in 1998. None of the other ASEAN states have acceded to the ICC, although the three countries in the ICC President's tour are considering it.

The push to acquire more signatories to the Rome Statute, supporters argue, is intended to build a global mechanism of accountability and combat impunity for crimes committed by belligerent rulers. The establishment of the ICC was itself the result of a long hard-fought battle by international groups to create a permanent institution to deal with problems such as the genocides in Rwanda and the former Yugoslavia.

ICC's Difficulties

Although the principles of fighting impunity are laudable, implementation by the ICC has been wrought with difficulties. To date, the ICC has only investigated cases in Africa, declining requests in Venezuela and Iraq. Nonetheless these cases are instructive. While working on the northern Uganda conflict from 2005 to 2007, I witnessed first-hand the results of the ICC investigations of the infamously brutal insurgency, the Lord's Resistance Army (LRA).

Despite serious concerns raised by civil society organisations before, during and after the investigation of leaders of the LRA, the ICC continued to push its position with scant regard for conditions on the ground. Because it did not also investigate the Ugandan government (of which there were numerous allegations of abuses by the military), the LRA considered these investigations to be an escalation of the conflict itself.

When the warrants were unsealed in 2005 – they were kept sealed earlier due to concerns for the safety of the victims -- the reaction was fatal: The LRA launched reprisals against humanitarian workers and foreigners, killing several in Sudan and Uganda, with clear messages that such actions would lead to escalations of

violence. Peace negotiations in 2007 collapsed with the first hurdle -- prosecution by the ICC -- unable to be resolved. Today, three of the original five indicted leaders are reportedly dead, but the LRA continues its 25-year insurgency in the Democratic Republic of Congo, Central African Republic and Sudan. The warrants have not diminished the scale of atrocities in these countries.

ICC's Problematic Strategy

The ICC's strategy has been problematic because it has neglected local initiatives and mechanisms for peace and justice, particularly when they are still emerging from conflicts. Under Article 17 of the Rome Statute, the ICC only conducts investigations where a state is "unwilling or unable" to carry out investigations or prosecutions. Even in Uganda, where the case was initially referred to the ICC by the Ugandan government, later attempts by the government to revoke its referral to facilitate peace negotiations failed. ICC Prosecutor Luis Moreno-Ocampo decided that this constituted unwillingness by the government to prosecute those indicted. In many local people's eyes, the ICC became yet another political actor of the conflict -- albeit a remote and insulated one -- greatly complicating attempts to resolve it.

While nothing in the Rome Statute bars the ICC from supporting local institutions, in practice once a case has been referred to them, they have hindered local mechanisms in their hurry to strengthen their own nascent powers by refusing to relinquish authority. In this manner, only one form of "justice" is permissible -- the ICC way. Yet in our work with transitional justice issues, we have seen that an adversarial brand of justice may be fraught with problems when applied across distinct cultural contexts in the midst of complex emergencies.

Creating a court room for a conflict zone is not always the appropriate action when local institutional structures have been decimated by civil strife. Indeed, innovative local initiatives that are vital for the long-term stability of these troubled areas must be given the chance to develop, for they will be the structures that remain after the ICC has departed. It is a valid concern that local mechanisms might not be able to dispense the "hard" accountability preferred by Western states, but the solution is not to bypass or dispense with them altogether. Every international tribunal has had to grapple with its legacy, and it is often too late when they realise that local institutions are barely better off than when the tribunals arrived.

ASEAN's Case

ASEAN states take very seriously their sovereignty and rights to settle disputes internally. In considering whether to accept ratification of the Rome Statute, they should press the ICC for commitments to allow local initiatives to take root and be supported by the ICC that will create long-term, sustainable and locally-appropriate systems of justice. They should avoid recourse to expensive courts packed with foreign lawyers that may create as much trouble as their supposed added-value and are likely to leave large vacuums when they wind up, as Sierra Leone and other tribunals witnessed.

ASEAN institutions are relatively young, yet they have come a long way in tackling issues relating to past dictatorships and even genocides. Cambodia has established the Extraordinary Chambers of the Courts of Cambodia. Indonesia and Timor-Leste have jointly set up the Commission on Truth and Friendship. Both provided varied models of transitional justice mechanisms in Southeast Asia with mixed results. They have shown the complexities of international courts. There is much that may be learned from these experiences, without the prospects of an ICC structure looming over their shoulders.

Other conflict resolution mechanisms may be needed to handle longstanding grievances in Myanmar, the Philippines and Thailand. It is, however, not clear how the international body would promote local ownership of institutions supporting justice and accountability. The ICC must demonstrate to ASEAN that it seeks to complement, and not supplant, future developments in the region that address conflicts and crimes against humanity.

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