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International criminal court comes of age

BY NANCY L. COMBS, OPINION CONTRIBUTOR — 01/30/19 01:00 PM EST

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The international criminal court is in crisis. That certainly will be a common assessment of the court after the Jan. 15 [acquittal of Laurent Gbagbo](#), former Ivory Coast president, who has been in custody in The Hague court since 2011. Gbagbo was accused of unleashing violence that killed more than 3,000 people in 2010, when he refused to step down after a disputed presidential election in which his opponent [Alassane Ouattara](#) was deemed the victor.

International criminal court (ICC) judges delivered a stinging blow to the prosecution by acquitting Gbagbo and his co-defendant, Charles Ble Goude, without requiring the defense to present any evidence. Judges determined that the evidence prosecutors presented was not sufficient to satisfy the burden of proof necessary to link the defendants to post-election violence, so the defense did not need to make a case.

Gbagbo's acquittal will produce catastrophizing commentary not only because prosecutors have spent more than seven years, and many millions of dollars, to have their case thrown out without the defendants even saying a word, but primarily because this acquittal follows a series of high-profile prosecutorial failures.

In June, the ICC appeals chamber overturned the conviction of Jean-Pierre Bemba Gombo, former vice president of the Democratic Republic of the Congo, who had been convicted of failing to appropriately supervise troops committing mass rapes and killing in the Central African republic. There too, the appeals chamber determined the prosecution failed to support its allegations with sufficient evidence.

And these prosecutorial defeats follow even more high-profile losses in Kenya cases, in which prosecutors sought to convict Kenyan President Uhuru Kenyatta and Vice President William Ruto for their alleged roles in 2008 post-election violence. In those cases, ICC prosecutors maintained the moral high ground because their inability to present sufficient evidence was widely seen to be a result of a coordinated plan by Kenyan officials to intimidate witnesses — but the disappointing end result is the same.

In a series of cases over a series of years, prosecutors have spent millions of dollars to launch prosecutions against some of the most powerful political leaders in Africa only to come up short — in some cases, very short. How long will the international community be willing to tolerate, much less fund, such disappointing results?

This doomsday narrative certainly has a factual basis. The ICC, once considered humankind's greatest hope for ending mass atrocities, for more than a decade has successfully convicted only a few individuals, all relatively low-level and one by means of a guilty plea — while atrocities rage in Syria, Yemen and Myanmar, outside the scope of ICC jurisdiction.

At the same time, a different, far more positive assessment of these events should be considered. Specifically, one can view the ICC's recent acquittals as an indication that international criminal justice finally has come of age. The Nuremberg and Tokyo tribunals, though successful in terms of convictions, were sharply criticized for imposing victors' justice and convicting defendants on the basis of ex post facto lawmaking. More recent international criminal tribunals have shed some of those pejorative labels, but they have struggled mightily to obtain credible evidence supporting their convictions.

In particular, many of the ICC's predecessors, such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Panels

for East Timor, boast impressive conviction rates, but a close examination of the evidence supporting those convictions suggests that, in many cases, tribunal judges failed to carefully scrutinize weaknesses in prosecutorial evidence. ICC trial chambers have carefully assessed the evidence in ways that some previous tribunals failed to do, and although doing so has unquestionably brought the ICC to a crisis point, it has established the ICC as an international criminal justice system that takes due-process rights seriously.

Seventy-three years ago, in his opening statement before the Nuremberg Tribunal, chief prosecutor and U.S. Supreme Court Justice Robert Jackson told the court: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. ... We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”

Those exhortations remain equally true today. The mark of a mature, fair criminal justice system is its willingness to acquit defendants when the evidence for conviction is insufficient and even when an acquittal will provoke widespread condemnation. Although the Gbagbo acquittal is a keen disappointment in the short term, if it motivates prosecutors to construct evidentiarily sound cases that can withstand careful judicial scrutiny, it will be a disappointment well worth experiencing.

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