

Analysis No. 247, May 2014

THE INTERNATIONAL CRIMINAL COURT AND AFRICAN LEADERS: *DETERRENCE AND GENERATIONAL SHIFT OF ATTITUDE*

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With thirty-four of its member states being state parties to the ICC, the AU's main disagreement is not with the ICC, as a court, but rather with the prosecutorial policy, the powers of the UNSC and more fundamentally with some of the provisions of the Rome Statute of the ICC. For many African scholars, as well as ordinary people, there is a serious concern that the dominant powers are using the UNSC as a back door to impose their will on weaker countries. In addition to that, the ICC's inability to bring any case against the powerful non-African countries raises serious doubts about its independence and capacity to address human rights violations. The solution to the current challenges affecting relations between ICC and AU may require a generational shift of attitude: African states must first totally reject impunity and establish national and regional mechanisms that will ensure accountability even at the highest levels of office, while the ICC must guarantee more understanding, credibility and scrupulousness within its procedures.

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On 15 November 2013,¹ immediately after the United Nations Security Council (UNSC) voted against the African Union's (AU) request for deferral of the trials of Kenya's President Uhuru Kenyatta and Vice President William Ruto by the ICC for a year, the United Kingdom (UK) Permanent Representative to the UN, announced that "there is a right place and wrong place" to present the AU's requests for deferral of cases.² He was referring to the Assembly of States Parties (ASP) of ICC. Indeed, the Ambassador appeared to understand this only in a very narrow way. The demand by the AU was motivated by the question of whether the UNSC had exercised its power in manner that enhanced its legitimacy or not. Indeed for this reason, the Permanent Representatives of various African countries expressed their total disappointment on the double standard of UNSC and its failure to discharge its responsibility.³ It is somewhat contradictory that while the UK and US as a permanent member of the UNSC are willing to refer cases on Darfur or Libya to the ICC, the UK and US Representatives argues as if the UNSC has no power to defer ICC cases for a year.

Similarly, both the President of the ICC and the Chair of the ASP have been active in arguing that African countries had referred five cases to the ICC, and that the ICC had not specifically targeted African countries.⁴ These are evasive arguments at best; arguments that are not only simplistic, but also symptomatic of the challenges the ICC is facing in solving its contentious relations with Africa.

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¹ UN News Centre, "Security Council: bid to defer International Criminal Court cases of Kenyan leaders fails", available from <http://www.un.org/apps/news/story.asp?NewsID=46499&Cr=criminal+court&Cr1=#.UouewBYwaL8> (accessed 19 February 2014).

² Foreign and Commonwealth Office, *UK abstains on UN Security Council resolution on ICC*, available from <https://www.gov.uk/government/speeches/uk-abstains-on-un-security-council-resolution-on-icc> (accessed 14 February 2014).

³ M. NICHOLAS, 'Africa fails to get Kenya ICC trial deferred at United Nations', Reuters available from <http://www.reuters.com/article/2013/11/15/us-kenya-icc-un-idUSBRE9AE0S420131115> (accessed 14 February 2014).

⁴ AFP, *ICC has never targeted any African country*, 17 October 2013, available from http://www.google.com/hostednews/afp/article/ALeqM5jnVrXxA0swyH2IV_mbvB1sYSMklw?docId=1a52c90e-371d-4342-9e69-29ffff63e18 (accessed 12 February 2014).

The AU's dispute with regard to the ICC is not whether African countries have referred five cases to the ICC,⁵ but rather why the ICC is only prosecuting Africans. Are Africans the only ones committing crimes proscribed by the Rome Statute? Did the UNSC referral and deferral powers politicize the ICC's judicial role and led to the application of a double standard? Does the unrepresentative nature of the UNSC and longstanding demands for its reform affect the stand of the ICC in the eyes of the weakest countries? Did the activist prosecutorial policy and selective prosecution policy pursued by the former Chief Prosecutor, Mr Luise Ocampo, place the ICC in a position conducive to political wrangling and selective justice? Is the UNSC's failure to formally respond to AU requests to defer trials for a year appropriate? Did the ICC fail to dispel the widespread misunderstanding about the work of the ICC and the political misuse of the referral of cases by African states? Are there some discrepancies in the interpretation of the Rome Statute that cause legitimate legal concerns and debate, particularly in regard to the rejection of impunity and applications of immunity with regard to officials of non-states parties? Should the UNSC enjoy the referral and deferral powers it has now?⁶

The Unholy Alliance between the ICC and UNSC: *What does the UNSC have to do with justice?*

As per articles 12-15 of the Rome Statute, the ICC may initiate an investigation, either by the referral of a state party, wilful acceptance of the ICC jurisdiction by a non-state party, the prosecutor's own initiative, or referral from the UN Security Council. The UN Security Council referral power enables the ICC to exercise jurisdiction when a state is not party to the Rome Statute. The same Council can also defer cases for subsequent years. While the majority of the Permanent UNSC members (USA, China, and Russia) are not states parties to the ICC, Articles 13 and 16 of the Rome Statute confer powers for referral and deferral of cases to the UNSC. Barely an imposition on the rest of the world, the few

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⁵ M.T. MARU, The Future of the ICC and Africa: the good, the bad, and the ugly, Al Jazeera Net, 11 October 2013, 15:03; available from <http://www.aljazeera.com/indepth/opinion/2013/10/future-icc-africa-good-bad-ugly-20131011143130881924.html> (accessed 19 November 2013).

⁶ See M.T. MARU, "ICC and African Union, Bones of Contention and Way forward", *The Horn of Africa Bulletin*, Vol 25, No 6., November –December 2013; and see also Articles 27, 97, and 98 of the Rome Statute, available from http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 19 November 2013).

powerful members of the UNSC often apply rules that do not apply to themselves. Fairness demands that they apply the same rules to themselves or should not exercise powers that would be broadly considered as illegitimate, even if legal. Many Africans and non-African alike argue that the referral and deferral powers of the UNSC undermine the credibility and independence of the ICC. Underlining the undemocratic nature of the veto powers of the UNSC permanent members, such powers of referral and deferral place the ICC under the influence of the dominant global powers. These powers of the UNSC bring the quintessential problem of international politics to the ICC; that power politics determines the fate of those being indicted. This referral and deferral power reduces international justice to the selective justice of the powerful over the powerless. Many fear that the undemocratic nature of veto power dictates justice at the ICC by selecting who and when investigation and prosecution may take place. It politicizes the ICC.

Double Standard: Swift against the weak, sluggish against the strong

Public perceptions have been high that the ICC is a tool of powerful countries such as America and Europe. Of the seven African cases before the ICC, only three were referred by African state parties to the Rome Statute, while two were initiated by the Prosecutor. The remaining two, Sudan and Libya, were referred by the UNSC. The leaders of both Sudan and Libya were known for their political rows with dominant Western powers with veto powers in the UNSC. Officials of some countries in the Americas, Europe and the Middle East have been exempted from investigation either due to the undemocratic nature of the UNSC or the failure of Mr Ocampo. Indeed, one cannot foresee veto powers allowing the referral of cases against their own officials. Russia, China, and the Western permanent members of the UNSC are yet to face any investigation against their citizens or officials. USA refers cases to the ICC through the UNSC, even though bilateral agreements and the American Service-Members' Protection Act shield American citizens from prosecution by the ICC. This constitutes the most problematic aspect of the referral and deferral arrangement. For many scholars and ordinary people, there is a serious concern that the dominant powers are using the UNSC as a back door to impose their will on weaker countries. This situation will lead to the weakest being prosecuted while the strongest remain exempt from prosecution.

Referrals of cases from African states should not be considered as the best and the only way to establish a successful Court. On the contrary, the independence of the Court could be called into question for the fact that it is closely cooperating with states that are implicated in violations of

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human rights. More gravely, the ICC's inability to bring any case against the powerful non-African countries raises serious doubts about its independence and capacity to address human rights violations.

In other words, to paraphrase George Orwell, under the current ICC Statute 'all are equal before the ICC, but some are more equal than others' because they have UNSC veto powers. This puts the ICC in a situation of grave crisis in two ways. The first has to do with the diminished credibility and public reputation of the ICC. With such an arrangement for the UNSC, the ICC could be easily accused of employing double standards and discriminatory selective justice. The second concern relates to the actual long-term negative effect of such practices on the legitimacy of the ICC and the UNSC. This has to be seen in the context of the long-standing debate about the reform of the UN, more specifically the UNSC.

The Dangers of an activist Prosecutor: ICC in Political Wrangling

Mr Ocampo's activist approach to his prosecutorial functions has seriously damaged the ICC. His activist approach has been without limitations. Mr Ocampo was determined to make use of any means to achieve his objectives, including through controversial alliances and sources of information and the use of media smearing campaigns in futile attempts to change national politics.⁷ A senior US official reported: "Ocampo suggested if Bashir's stash of money were disclosed (he put the figure \$9bn), it would change Sudanese public opinion (of him) from being a 'crusader' to that of a thief." As the first Chief Prosecutor of the fledgling global court in its earliest formative years, wisdom and patience should have been the mantra of his approach to his work. His approach ran counter to traditional national self-restrained prosecutorial roles.

In its first Strategic plan, the AU called on its member states to ratify the Rome Statute. As the largest bloc to ratify the ICC Rome Statute, Africa showed its staunch support for the ICC. Indeed many of the African states parties genuinely believed that they wanted an end to genocide, war crimes and crimes against humanity. Furthermore, the AU did not totally reject the ICC's work in Africa. The AU non-cooperation decision on the ICC remains only in a few cases, particularly in the case of the president of Sudan, Mr Al Bashir, and that of the Kenyan President, Mr Kenyatta. In the case of the Sudanese president, the AU would like to first exhaust the peace mediation efforts by its High Level Panel led by former South African president Thabo Mbeki. In the case of Kenya, in line with the

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⁷ WikiLeaks cables: Sudanese president 'stashed \$9bn in UK banks', The Guardian, Friday 17 December 2010 21.30 GMT, available from <http://www.theguardian.com/world/2010/dec/17/wikileaks-sudanese-president-cash-london> (accessed 19 November 2013).

principle of complementarity, the AU would like to exhaust the local judicial process given the new constitutional and judicial dispensation prevailing in Kenya. What is more, the requests and pleas from the AU to the UNSC were only deferral for a year or two, not for the entire withdrawal of the cases from ICC. The AU is not requesting an exemption of individuals from the Court's jurisdiction, or exemptions about any of the indictments and accountability of the officials.

With the principle of complementarity, governing national and ICC exercise of jurisdiction, the ICC serves as a backup judicial system that kicks in when national systems are unwilling or unable to act. Thus, the ICC works as a standby generator that operates when the national juridical systems for some reason fail to work. Nevertheless, on the African continent most judicial organs face serious political and financial constraints in adjudicating international crimes stipulated in the Rome Statute, particularly against heads of state. While in principle, the ICC's jurisdiction should have been exercised as an exception, it has become ubiquitously the norm. Article 53 grants such discretionary powers to the Prosecutor. Nevertheless, the current prosecutorial policy did not give sufficient consideration to this article.

Unlike most national legal systems, where the prosecutor is part of the executive branch of the state, the ICC Prosecutor is part of the ICC, but different from the judicial body. This creates confusion for many people. Public perception of the Prosecutor affects the public image of the Court. In addition, even if relatively speaking they could be insulated from overtly unwarranted political and public opinions, like any institution, courts operate within a political and public space. There is no special vacuum created for them. This begins with the underlying factor that the job of the Prosecutor entails political consideration in decision making. Mr Ocampo has exercised his prosecutorial powers without professional restraints or any understanding of local peculiarities that need some form of public outreach or consultations.

Through his activist approach, the Prosecutor exacerbated on-going conflicts and the accused used anti-ICC rhetoric to avoid arrest and win elections. This is what we have seen in Sudan, Uganda and Kenya. Consequently, Mr Al Bashir, Mr Kenyatta, and Mr Ruto all fought back more aggressively. Indeed in the case of Al Bashir, many Sudanese citizens argued that the ICC arrest warrant increased his popularity at least in the short-term. An additional arrest warrant against the Defence Minister has only consolidated the 'anti-ICC' group in Sudan, ready to fight tooth and nail, and die together.

Regardless of the legal merits of the cases, the ICC is highly controversial now as a result of Mr Ocampo's activist tendencies. Consequently, the

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negative impact of this tension between the ICC and the African States Parties to the ICC (ASP) is evidenced by Kenya's decision to withdraw from the ICC. The idea of inserting a provision for the withdrawal from the ICC was discussed in 2010 at the behest of ASP after the AU's repeated decisions on non-cooperation with the ICC and proposals for amendments to the Rome Statute.⁸ The other far-reaching negative implication of the Summit was the continued politicization of the ICC's judicial role due to the former Prosecutor's activist prosecutorial policy. That is the reason why the election victory of Mr Kenyatta and Mr Ruto was construed as the people's indictment of the ICC and its activists prosecutor, Ocampo. Last year's Kenyan presidential election was effectively a choice between Mr Kenyatta and Mr Ocampo. The jurors were the Kenyans, not the ICC judges.

The far reaching consequential impact for the ICC's future in Africa will be that countries like Algeria, Angola, Cameroon, Egypt, Eritrea, Guinea-Bissau, Mozambique, Sao Tome and Principe, the Republic of Sudan, and Zimbabwe, that have signed, but not ratified, the Rome Statute may also decide to not ratify the Statute or even to "un-sign" the Rome Statute as in the case of the USA and some other states. Moreover, countries like Equatorial Guinea, Ethiopia, Libya, Mauritania, Rwanda, Somalia South Sudan and Togo will consolidate their determination not to sign the ICC statute altogether. While only Kenya has decided to withdraw from the ICC, Uganda and Djibouti have verbally threatened taking a similar decision. Nigeria, Algeria, South Africa, and Egypt will probably fully support the AU's stand on particular cases, while they remain committed to the middle ground. Paradoxically Kenya and Uganda were the most aggressive proponents of the ICC during the negotiation for the Rome Statutes and they were the first to ratify. Actually, Kenyan and Ugandan diplomats were very vocal in supporting the ICC before the indictment. Kenya was active in using the support of IGAD members.

Interpretation Discrepancies: *Immunities of officials of non-states parties*

While Article 27 removes the immunities of officials of states parties, Article 98 allows states parties to respect the laws governing immunities. Thus they are not obliged to arrest or surrender an official of a non-state party who enjoys immunity from prosecution. Article 98 applies only to non-states parties. Under Article 98, deals with immunity of officials of

⁸ Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC).

non-states parties to ICC. Nevertheless, under Article 27 of the same Statute, immunity suspended when it comes to the court's exercise of its jurisdiction on officials of States Parties, and even on non-states parties as per Article 25 of the UN Charter where decisions by the UNSC are binding on all states. However, when the UNSC refers the case of a non-state party, the non-state party legally expected to discharge all responsibilities as a state party for the specific case. Whatever the judicial interpretation, the ICC Trial Chamber failed to consider the relationship between Article 27 and Article 98 of the Rome Statute.

The ICC-Effect: *the fears of African leaders*

The ICC had an effect of instilling fear on incumbent officials and political leaders and those indicted. However, eight years after the issue of arrest warrants against the President of Sudan and his cohorts, they remain firmly entrenched in power, and the new indictees, the President and Vice President of Kenya, are fighting back against the ICC Prosecutor, threatening the very foundations of the ICC. The indictments also raised patriotic sentiments that were misused in election campaigns in Kenya and Sudan. However, one cannot say with full confidence that the indictments by the ICC have been effective in deterrence, serving justice, bringing peace and addressing or reducing victimization. Rather the deterrent effect of the ICC and its indictments in Africa could be effective, not against those already indicted but against those who might have the power to commit crimes as newly elected or appointed leaders. Where, with the ICC in mind, they would otherwise be careful about the consequences of their actions.

Conclusion: *the future of ICC in Africa*

Despite the current widely held public misgivings of Africans about the role of the ICC, I believe future generations of Africans and their leaders will increasingly support the ICC as a complementary institution of global justice rather than as the indicter of African leaders with different views from western powers.

There is no legal solution to conflicts in Africa, but certainly there can be no solution without justice. At the heart of this debate is the nature of African states, African political forces and interventions by the international community. With states that are strong in terms of the wrong functions such as repression, intimidation, and deception, and at the same time weak in regard to the right functions, mainly in ensuring human security of their population, the contention between ICC and Africa will remain until such time as responsive governance systems are established in Africa. Similarly, the mobilization of political parties and

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rebel groups on undemocratic and sectarian platforms, such as ethnicity and religion, will lead to violence and brutal political changes in Africa. Similarly, due to the undemocratic nature of the UNSC, the double standards practiced in international relations as well as national and corporate interests, international interventions will continue to misuse and abuse the UN and other regional systems for their own advantage. To keep the ICC at bay and address the fear of misuse of the ICC by dominant powers, African states must first totally reject impunity and establish national and regional mechanisms that will ensure accountability even at the highest levels of office.

Thus, the solution to the current challenges affecting relations between ICC and AU may require a generational shift of attitude on the part of African leaders and more understanding, credibility and scrupulousness on the part of the ICC. Such a change of attitude will not come unless the ICC and its Statute are amended to address some fundamental questions including the referral and deferral powers of the UNSC; the issue of double standards in the application of justice with a focus only on Africans; the peace-justice dilemma during ongoing conflicts and the place of transitional justice mechanisms; and the application of the principle of complementarity when a country or a regional mechanism attempts to address impunity. With 34 of its member states being state parties to the ICC, the AU's main disagreement is not with the ICC, as a court, but rather with the prosecutorial policy, the powers of the UNSC and more fundamentally with some of the provisions of the Rome Statute of the ICC. As with any agreement, the States Parties could amend the Rome Statute or have the right to withdraw from it if they wish to do so. The ASPs have accordingly all the right to collectively deliberate, consider and act upon issues that would be in the interest of Africa. The fact that the AU, as the premier Pan-African organization to which all ASPs are member states, have a solid single voice on these issues indicates a continental achievement rather than fragmentation within the AU.

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