

Commentary, March 28, 2017

KENYA AND SUDAN: THE TWO CASES THAT SHAPED AFRICA'S CRITICISM TOWARDS THE ICC

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In September, 2013 the Parliament voted to withdraw Kenya out of the ICC, being the second time it made this move. There is currently a bill pending in parliament seeking to repeal the ICC/Rome Statute's implementation statute, the International Crimes Act.

Kenya's hostility towards the Court has perhaps had the greatest contribution towards the strained relationship between the African Union (AU) and the ICC. Its aggression towards the ICC heightened with the election of President Uhuru Kenyatta and his deputy William Ruto who were already indicted before the ICC for their suspected role in the post-election violence in Kenya in 2007/2008. Their winning the elections galvanised their position of influence. Kenya has persistently mobilized the AU to attack the ICC, and even inciting the call by the AU for en masse withdrawal from the ICC. It is however yet to file an official notice of withdrawal, keeping many guessing as to its true intention. Some suggest that the issue of withdrawing from the ICC is a foregone conclusion, the question is when it shall be implemented. Others consider that the threat to withdraw is being used by Kenya as a negotiating tool to push for its reform agenda within the ICC. In fact, it might not be in Kenya's interest to withdraw immediately with some outstanding issues

in relation to the Court, in particular, the referral by the ICC of Kenya to the Assembly of States Parties (ASP) for failure to cooperate.

During the recently held 28th AU Summit in Addis Ababa from 30-31st January 2017, African leaders adopted a Strategy calling for a collective withdrawal from the ICC. This non-binding decision follows the AU's previous decision in January 2016 which gave mandate to its Open-Ended Committee on the ICC to develop "a comprehensive strategy that includes withdrawal from the ICC". The Committee identified three conditions that needed to be met to avoid the threatened mass withdrawal from membership of the ICC by African states. First, Heads of State and Government and senior state officials should be granted immunity. Second, in cases involving African states, the ICC should only intervene after such cases have been submitted to the AU or AU judicial institutions. And, finally, the ICC prosecutor's powers should be reduced and amendments to the Rome Statute expedited.

The fall out

The 34 African state parties to the ICC form the largest block of regional membership, a reflection of Africa's

ardent support for the creation of the ICC. This relationship however, seems to be at its lowest moment looking at the current state of affairs. Two situation countries seem to have particularly escalated the crisis, Sudan and Kenya. The situation relating to Libya also elicited negative reactions from the AU with the arrest warrant issued against the late Muammar Gaddafi, but the unfolding events which eventually led to the demise of the late Libyan leader silenced the debate on the issue.

The genesis of this seemingly acrimonious relationship can be traced to the issuance of arrest warrants against the President of Sudan Omar al-Bashir, the first being on 4th March 2009. The reaction of the AU was to issue a declaration denouncing the arrest warrant against al-Bashir, stating that the indictment derailed the Darfur peace process, asserting that the AU would not cooperate with the ICC arguing that the right to immunity could not even be ousted by the Rome Statute.

The Sudanese President is still at large and has since visited several African countries including ICC state parties. Among these are Malawi, Djibouti and Uganda who have been referred by the ICC to the United Nations Security Council (UNSC) and ASP for failing to arrest al-Bashir. South Africa is the latest country that has been under immense pressure both domestically and internationally for failing to arrest al-Bashir. Its decision to host al-Bashir during the AU summit held in June 2015 has led to its domestic courts calling the executive to account for failing to arrest the Sudanese President and pending proceedings before the ICC on whether South Africa is responsible for failure to observe its cooperation obligations under the ICC Statute. This state of affairs eventually led to the filing of the now derailed notice of withdrawal.

The contention by the African states is that the ICC has disproportionately targeted Africa. Since its inception in 2002 all cases before the Court involve Africans (although an investigation is ongoing in Georgia, no case has been opened in that contest). It is argued that the Court has evolved into a neo-colonial instrument push-

ing for a Western agenda with some critiques nicknaming it "the International Caucasian Court". A cursory look at the manner in which the specific cases have found themselves before the ICC creates doubt to this contention. The current investigations by the ICC in Central African Republic, Uganda, Mali and the Democratic Republic of Congo were referred to the ICC by the governments of those countries. In respect to Kenya and Cote d'Ivoire, the ICC's intervention was as a result of an indirect and direct invitation by both States. The contentious referrals perhaps would be those by the UNSC on Sudan and Libya.

The other contention and perhaps the main Achilles' heel in the relationship between the AU and the ICC is the prosecution of Heads of State who the AU asserts are entitled to immunity. The prosecution of African Heads of State is considered an affront to the sovereignty of the various countries involved. Article 27 of the Rome Statute excludes immunity as a bar to the exercise of the ICC's jurisdiction over Heads of State, Heads of Government and other senior government officials. While the article may be binding to state parties, the challenge in its application arises in situations involving Heads of State whose countries are not party to the ICC. The dilemma raised by observation of Article 98 of the Rome Statute has brought about opposing interpretations with no possibility of agreement even between scholars. Art 98 (1) provides "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to State or diplomatic immunity of a person or property of a third state...". This Article has often been cited by States that have failed to arrest President Omar al Bashir, an argument also used by state parties who otherwise have an obligation to cooperate with the Court under article 86 of the Rome Statute.

The intervention of the ICC is also considered to interfere with peace initiatives, thwarting Africa's efforts to deal with atrocities in the continent.

Way Forward

The collective narrative on Africa's reason to withdraw is often a camouflage for the actual reasons that contribute to particular states' hostility towards the ICC. The actual drive behind the push to withdraw from the ICC has mainly been to protect certain leaders from accountability thus supporting impunity. This push to withdraw from the ICC by some African states is an unfortunate situation. Withdrawing from the Court will make it difficult for African countries to cooperate with Court. It will also make it difficult for the Court to exercise its jurisdiction in cases where there is genuine need for intervention, as has been the case of Syria. In such instances, the possibility of an ICC intervention depends on the political considerations of the UNSC where victims' needs only play second fiddle to ultimate political interests. Withdrawal also discourages potential would-be state parties to the ICC from joining its membership.

Article 127 of the Rome Statute allows for the withdrawal of a state party from the Statute through a notification addressed to the Secretary-General of the United Nations. Such a withdrawal takes effect at least one year after the date of its receipt and the state is not discharged from obligations arising while it was a party to the Statute. The implication of this article is that states trying to avoid responsibilities already arising from its membership of the ICC cannot avoid them by simply withdrawing from the Statute.

It is also foolhardy to dismiss Africa's concerns as mere rhetoric. The recent withdrawal attempts confirm that the threat to withdraw could be real and actually has the potential for a ripple effect. Instead of a complete withdrawal, it would be better for Africa to push for a reform agenda within the Court, ensuring that the Court's exercise of its jurisdictions applies only to those situations that genuinely need the Court's intervention. The implication of this would also require that African states continue to push for the strengthening of their own judicial systems as urged in the recent 2017 AU summit. Such a bid would ensure that the ICC has no opportunity

to intervene in cases where local institutions adequately and efficiently address issues of justice enhancing the fight against impunity. Efforts to amend the ICC Statute should be aimed at facilitating the Court's pursuit of those who commit crimes that shock the conscience of mankind as opposed to fundamentally inhibiting it.

The adoption of the Malabo Protocol – which seeks to extend the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include criminal prosecutions – may be another solution to the problem. Nevertheless, the inclusion of an immunity clause that bars the prosecution of Heads of State and Government and other senior officials waters down its impact¹. Immunity has never been recognised in any of the international tribunals set up to hold perpetrators of international crimes accountable. The persons who hold high positions in government are more often than not the most culpable for the grave crimes: allowing immunity for such personalities is an endorsement of impunity.

Despite the narrative that Africa is collectively against the ICC, several countries have opposed or expressed their reservations to the call for withdrawal from the ICC. In July 2016 in Kigali during the AU summit Botswana, Cote d'Ivoire, Nigeria, Senegal and Tunisia held off a potential call by AU for mass exit from the ICC. Burkina Faso, Cape Verde, the Democratic Republic of Congo, Nigeria and Senegal also entered reservations to the AU decision to withdraw from the ICC. The number of countries coming in support of the ICC shows that African nations at an individual level could be supporting a different position from the withdrawal of the court.

¹ Gerhard Werle, Moritz Vormbaum *The Search for Alternatives: The "African Criminal"*, ISPI Dossier, Africa vs the ICC Searching for an exit strategy, 28 March 2017, Court", <http://www.ispionline.it/en/publicazione/search-alternatives-african-criminal-court-16511>