

INTERNATIONAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND AFRICA

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The Priority

On July 17, 1998, 120 countries adopted the Rome Statute which established the International Criminal Court (ICC). The ICC, which came into being in July 2002, is “a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern,” which include “genocide; crimes against humanity; war crimes; and the crime of aggression.” These countries believed that global justice would benefit from and be greatly enhanced by the creation of an “international criminal justice regime empowered to prosecute individuals guilty of gross atrocities and human rights violations, including war crimes, crimes against humanity and genocide,” (Boell 2012).

Two realities gave impetus to Africa’s strong support for the establishment of the ICC: the carnage that gripped Rwanda in 1994 and the need to find ways to prevent powerful countries from preying on weaker ones. There was urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones.

In terms of the latter, the inclusion of “crimes of aggression”—“the planning, preparation, initiation or execution of an act of using armed force by a state against the sovereignty, territorial integrity or political independence of another state,”—was especially attractive to African countries (ICC 2012). Today, 43 African countries are signatories to the Rome State and, of these, 31 are states parties.

Increasingly, however, African countries have come to be critical of the ICC and relations between Africa and the court are currently severely strained. In fact, the African Union has asked its members to implement a policy of non-compliance and non-cooperation with the ICC. For the court to remain a credible institution for the execution of international justice, it is important that there be reforms on how the ICC operates. However, there is also a need to strengthen African judicial systems.

Why Is It Important?

While a careful examination of each African case before the ICC may “yield a rational explanation for its remittance to the ICC, it would seem that there is a combina-

tion of domestic and international factors that lie behind the court's current exclusive focus on African cases. The same appears to apply to the U.N. Security Council referrals to the ICC, which are similarly biased," (Boell 2012). One may wonder if crimes that fall within the ICC's jurisdiction have only been committed in Africa. Certainly not. Throughout the world, "serious crimes of concern to the international community as a whole" are being committed, yet the ICC has devoted its resources to prosecuting mostly African cases. African governments argue that the ICC is practicing a form of "selective justice" and that it is avoiding diplomatically, economically, financially and politically strong countries, such as the United States, the United Kingdom, Russia and China, because these countries can threaten the ICC's existence. Today, opposition against the ICC is growing. For the ICC to function effectively, especially within an increasingly politicized global environment, it must secure the cooperation and compliance of national governments, including those in Africa.

Many Africans are now joining their leaders to challenge the moral integrity of the ICC, with some arguing that the court is opting for political expediency instead of the universal justice spelled out in the Rome Statute. Unfortunately, the ICC is yet to adequately and effectively allay the fears of Africans and convince them that the court's work is based exclusively on the belief that "the most serious crimes of concern to the international community as a whole must not go unpunished" and not on political and other unrelated considerations.

At a recent summit in Addis Ababa, the AU resolved that no sitting African head of state should be required to appear before an international tribunal and demanded that the ICC not proceed with the trial of President Uhuru Kenyatta of Kenya. The AU, however, has not been successful in passing a motion to withdraw African countries from the ICC (BBC 2013).

On the other hand, some African countries like Botswana have disagreed publicly with the AU's decision against cooperation and compliance with the ICC and have argued that African countries ought to keep their obligations under the Rome Statute (VOA 2013). In addition, former U.N. Secretary-General Kofi Annan and Nobel Peace Laureate

Archbishop Desmond Tutu have urged African countries to remain with the ICC (BBC 2013).

While both the AU and the ICC share a common interest in dealing with crimes of impunity, the AU argues that it does not agree with externally imposed strategies to fight these crimes on the continent. Perhaps more important is the fact that while the ICC is simply an international judicial instrument and hence can be apolitical in its decisions, the AU as a political body will address impunity by opting for a political approach, which necessarily calls for "peacemaking and political reconciliation," (Boell 2012).

What Should Be Done in 2014

Restoring trust in the ICC among Africans is a monumental task that will require the type of robust dialogue, which is currently not taking place between the ICC and African countries. Supporters of the ICC believe that the appointment of former Gambian justice minister, Fatou Bensouda, as chief prosecutor of the ICC should provide an opportunity for the latter to amend its relationship with Africa.

Regardless of how the conflict between African countries and the ICC is eventually resolved, each country must develop the capacity to effectively investigate and prosecute international crimes committed within its borders. Where necessary, the AU can help such prosecutions, especially in the case where accused individuals have left the country where the crime was committed to avoid prosecution. It is important for the administration of justice that accused persons be prosecuted in the communities where the crimes were committed. Allowing each African country to retain a significant level of sovereignty on criminal jurisdiction, instead of ceding it to the ICC, would ensure that "justice would be administered and delivered at the national level" and that "victims would be closer to the legal proceedings," (ICC 2011). For example, while the successful prosecution of Charles Taylor by the Sierra Leone Special Court in The Hague for aiding and abetting war crimes augurs well for justice in Africa, it is important to note that it also reveals the fact that even after so many years of independence, African countries have still not developed domestic legal and ju-

dicial systems capable of effectively administering justice and safeguarding the fundamental rights of their citizens.

The Taylor affair as well as the situations in Sudan and Kenya reveal serious deficiencies with the administration of justice in Africa. The fact that the ICC has to be called upon to deal with legal issues that ought to be handled effectively by African governments is a sign of African states' collective failure to properly govern themselves and administer justice fairly and timely. Thus, the AU should help its members undertake necessary institutional reforms to create locally focused and culturally relevant legal and judicial systems that can effectively prosecute those accused of impunity and hence minimize the need to call upon the ICC to intervene. Of course, domestic legal systems are better able to deal with critical issues, such as peace and reconciliation; safeguarding the rights and meeting the needs of victims of crime; and making adequate and effective use of traditional mechanisms for conflict resolution. Unfortunately, the AU has had very limited success imposing its will on its members.

Kenya exploded in ethnic-induced violence following the presidential election of 2007. The carnage, which was "perpetrated by actors on both sides of the political and ethnic divide, and included arson, rape, torture and murder," left more than 1000 people dead and over 600,000 homeless (Boell 2012). The Waki Commission, which was established following the AU intervention and was charged with investigating the violence, made several recommendations, including asking the government of Kenya to establish a special tribunal to fully and fairly dispense justice with respect to the post-election violence. The commission further recommended that the Kenyan government consider referring the matter to the ICC in case it failed to render justice through its domestic institutions. However, the government neither established the tribunal nor referred the matter to the ICC. Luis Moreno Ocampo, the ICC prosecutor at the time, subsequently intervened under powers granted to his office by Article 15 of the Rome Statute and effectively initiated an investigation into the Kenyan situation without referral either

from the Kenyan government or the U.N. Security Council. Why did the Kenyan legal system fail to dispense the necessary justice associated with the post-election violence? George Kegoro, executive director of the Kenyan Section of the International Commission of Jurists, has suggested that it was the "lack of political will and weakness on the part of those public institutions responsible for law enforcement" that contributed to the failure by the government to dispense justice in relation to the post-election violence (Ibid.).

Making arguments similar to those advanced by the AU, the government of Kenya recently asked the U.N. Security Council to defer the cases against President Kenyatta and Deputy President Ruto so that the two could devote their efforts to dealing with security issues facing the country and the greater East Africa region. Meanwhile, former chief prosecutor of the Special Court for Sierra Leone and the person who built the case against Charles Taylor, American lawyer David Crane, has argued that in pursuing indictments against Kenyatta and Ruto, the ICC ignored political realities both at the domestic and international level. Mr. Crane suggested that the ICC should have used the "threat of its intervention to nudge for reform rather than launching prosecutions that the Kenyan elite would never support," (Howden 2013).

The people of Kenya elected Uhuru Kenyatta as their president, and it is to them that he should be accountable. The three-judge panel at the ICC, an unelected body, appears to be determining when and the extent to which Kenya's legitimate leaders can govern the country. No matter how the conflict between African countries and the ICC is eventually resolved, all these countries must improve their domestic legal and judicial systems so that they can deliver justice fully, fairly, effectively and timely. Such institutional reconstruction should not only be undertaken because of the need to prevent ICC intervention in domestic affairs but also because it is the duty of each country's government to protect the person and property of its citizens. Hence, state reconstruction should be the preoccupation of African countries instead of the ICC.

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