

Should African States pull out of the ICC?

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ABSTRACT: Since its establishment by the Rome statute in 2002, the International Criminal Court (ICC) has been variously criticized for being bluntly biased against African states. This criticism is rooted in the fact that all the 39 leaders who have been indicted by the court for trial and those subsequently punished have all, without an exception, been African leaders. Currently, the African Union (AU) is divided in their opinion about the court with about 36 states threatening to pull out of the ICC. The irony of the situation is that Africans continue to hold important positions within the ICC. The current chief prosecutor and first vice president of the ICC are Africans. This study considers the normative question of whether or not African states should withdraw from the ICC and projects the possible ramifications that could mean for the Continent.

This qualitative study draws data mainly from secondary sources from journal articles on the work of the ICC, the Rome Statute, official documents from the ICC, AU, and governments across Africa.

The final part of the paper concludes with recommendations for reforms for the ICC regarding how it can reverse the current pervasive but porous perceptions of credibility and impartiality deficits as far as states in Africa are concerned.

Keywords: ICC, African States, Criticism, pull out, important position etc.

INTRODUCTION

The 21st century started with a renewed effort by the international community to find lasting solutions to worse forms of human atrocities such as genocides, crimes against humanity, war crimes and other gross acts of inhumanity that characterized the 20th century. The coming into force of the International Criminal Court (ICC) in July 2002 and the unanimous adoption of the Responsibility to Protect (R2P) doctrine in 2005 by the UN General Assembly are two key steps demonstrating this renewed resolve by the international community in dealing with these human atrocities. Since its establishment as the first permanent international court, the ICC has become the most controversial international tribunal especially among African states. Many governments across the continent have spoken vehemently against the operational inadequacies of the Court with some even calling for African states to entirely pull out from the Court.

In 2009 and 2011 respectively, the United Nations Security Council (UNSC) referred Sudanese president, Umar Al Bashir and the Libyan Leader Muammar Gaddafi to the ICC, in spite of the fact that neither Sudan nor Libya were parties to the Rome Statute (RS). While this was going on, the ICC prosecutor, Luis Moreno Ocampo, on his own, decided to activate his proprio motu powers by initiating investigations against Uhuru Kenyatta, (the current president of Kenya) and indicting him together with his deputy, Willian Ruto for crimes against humanity, following the Kenya's post-election violence in 2007/2008. It must be noted that these referrals by the UNSC and the indictment of Kenyatta by Ocampo were not necessarily illegal, (because of the powers conferred by the Rome statute), but they greatly contributed to the prevailing distrust and insecurity of African leaders who continue to suspect the ICC as an imperialist tool and an instrument of regime change for Africans. (Tladi, 2009, p.57-69)

After almost 14 years of its existence, the ICC has indicted 39 individuals for various crimes against humanity, war crimes and genocides. Interestingly, all these individuals, including past and sitting presidents, are Africans. This did not go without controversy. Consequently, some notable African leaders have raised eyebrows and called into question the impartiality and objectivity in the operations of the ICC, especially considering the fact that the crimes for which the African leaders are being prosecuted are also possibly being committed elsewhere without the ICC doing much about it. (Plessis, 2008, p.24), (Human Right Watch, 2014)

This article looks at the role of the ICC in the delivery of international criminal justice and the perception of bias that continue to impinge on the credibility of the court in Africa. The study therefore asks whether the ICC is biased against African leaders and if so, whether African leaders are justified in pulling out from the Rome Statute. The study relies extensively on secondary sources of data. Materials from journals, publications by civil society organizations, news media reportages, CNN, Aljazeera, as well as other African media outlets such as TV3 (Ghana), African Union and other online sources. In spite of the reliance on these secondary sources, the study also refers constantly to the Rome Statute which established the ICC as well as the ICC official website.

What is the ICC?

If there was any regret in the first 50 years after the end of WWII, it was the fact that the international community stood by while human beings were at their worst. From Cambodia, Vietnam, Bangladesh, Kosovo, Bosnia, East Timor to Somalia, Rwanda, Uganda, Liberia and Sierra Leone, grievous atrocities have been committed by various groups of individuals whose only shield was the absence of adequate international regimes and juridical systems with sufficient deterrent or penal powers. In line with

this sad reality, the international community met in Rome, Italy in 1998 to deliberate on ways of dealing with conscience striking crimes such as crimes against humanity, war crimes, genocides and crimes of aggression. This meeting gave birth to the Rome Statute which established the ICC.

The ICC came into force in July, 2002 after it was ratified by 60 states. Currently, there are 124 members of the ICC. According to Du Plessis et al (2013), African leaders were very enthusiastic about the ICC in its formative years. Nearly one third of ICC membership consists of African states. Today, there are 45 African states that are signatories to the ICC with 34 states ratifying the ICC statute as State Parties. Although the ICC is regarded as a global court, some notable great powers are not party to it. For example, the United States of America, China, Russia, India have not ratified the Rome Statute.

It is worthy of note that the ICC is not an organ of the United Nations, even though it complements the work of the UN. ICC is a voluntary, treaty based, and independent body which exercises jurisdiction over citizens of member states. These member states can refer their own citizens or citizens of other state party to be tried by the ICC. The caveat however is that, the UNSC can also refer other individuals to the court irrespective of whether these individuals come from states that have ratified the RS.

The ICC has jurisdiction to try crimes against humanity, war crimes, genocides and crimes of aggression as specified in articles 5, 6 7 and 8 of the Rome Statute.

Crimes against humanity includes; murder, massacres, dehumanization, extermination, human experimentation, death squads, forced, disappearances, kidnappings, slavery, cannibalism, torture, rape and racial repression (If they are part of widespread and systematic practice)

War Crimes are crimes that are committed during war. E.g. intentionally killing civilians or prisoners, torture, taking hostages, perfidy, rape, using child soldiers, pillaging, and using weapons that cause superfluous injury or unnecessary suffering. Directing attacks against humanitarian workers or UN peacekeepers, killing a surrendered combatant, using poison weapons, using civilians as shield etc.

Genocide is the intentional action to destroy a people (usually defined as an ethnic, national, racial, or religious group) in whole or in part.

The international criminal court is currently headquartered in the Hague, Netherlands. Judges of the court are elected from member states. The Court has the Presidency, the Office of the Prosecutor, and the Registrar. Since the ICC has been operational, it has indicted 39 individuals including former and sitting presidents across Africa. Notable among these individuals are Charles Taylor (former president of Liberia), Laurent Gbagbo (Former president of Ivory Coast), Uhuru Kenyatta (current president of Kenya), Muammar Gaddafi (Former Libya Leader), Umar Al Bashir (president of Sudan), and DRC warlord Thomas Lubanga Dyilo, who was sentenced by the court to 14 years in prison.

LITERATURE REVIEW

The preponderance of existing literature on the ICC center on the perceptions of bias against Africa, the changing nature of international criminal jurisprudence, the evolving discrepancy between peace and justice, immunity and impunity especially in the context of Africa, and the general operational challenges facing the ICC as an institution. As noted earlier, the ICC is one of the modern institutions for delivering international criminal justice to perpetrators of the three main crimes which are; crimes against humanity, war crimes and genocides. Crime of aggression is yet to be clearly defined and may be added from 2017. Since the establishment of the court till now, the ICC has only prosecuted

African leaders even though the evidence of crimes punishable by the court are also possibly committed elsewhere. Human Right Watch (2014). This skew in justice delivery has created the impression that the ICC is a neocolonial institution, meant to recolonize Africa by constantly targeting leaders of states on the continent. (Du Plessis, 2008, p.24). Since its establishment by the RS, the ICC has been variously criticized for being bluntly biased against African states. This criticism is rooted in the fact that all the 39 leaders who have been indicted by the court for trial and those subsequently punished have all, without an exception, been Africans, and majority of cases that are currently under investigation by the court are of African states.

Perceptions of ICC bias against Africa

African states, together with African NGOs were very enthusiastic in the formation of the ICC according to Du Plessis et al (2013, p.3), Ogunfolu, A., & Assim, U. M. (2012). As Mbaku (2014) explains “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.” (p. 1) However, the strong support for the court by African leaders began to nosedive as perceptions and allegations of partiality and conscious targeting of Africans became so rife among leaders of the continent. In 2009, Benin’s President Boni Yayi said that “we have the feeling that this court (ICC) is chasing Africa” (Jalloh, C. C. 2011, p.203). During a press conference at the conclusion of the AU summit, the chairperson of the Assembly - Ethiopia’s Prime Minister Hailemariam Desalegn – said that the intention of the court “was to avoid any kind of impunity but now the process has degenerated to some kind of race-hunting rather than the fight against impunity.” (Derrso S, 2013).

These were not the only views expressed by Africans about the ICC. In 2013, Uhuru Kenyatta mentioned in an AU Summit that the ICC has “stopped being the home of justice the day it became the toy of

declining imperial powers.” (BBC, 2013) In 2014, the president of Uganda, Yoweri Museveni stated that “I supported the court at first... But they have turned it into a vessel for oppressing Africa again so I’m done with that court. I won’t work with them again” (Reuters, 2014). The chairperson of the AU Commission, Jean Ping said that rather than pursuing justice around the world, including in cases such as Columbia, Sri Lanka and Iraq, the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems. (Du Plessis, 2008, p.24). In response to a question from a journalist, AU chairman, Robert Mugabe exploded “This is not the headquarters of the ICC. We don’t want it in Africa.” (African News Agency, 2016)

Tladi, D. (2009) summarizes the feeling among some African leaders when he states that the. ‘ICC is seen as a Western imperial master exercising imperial power over African subjects.’(p. 57-69)

Leaders in Africa did not only express their disquiet about the ICC in speeches, they also showed it in actions. As Mbaku (2014) explains, “the African Union has asked its members to implement a policy of non-compliance and non-cooperation with the ICC.” (p.9) In addition, AU’s Assembly adopted a decision requesting the International Criminal Court to refer back to Kenya its cases against Kenyan President Uhuru Kenyatta and Vice President William Ruto. (Tladi, 2009, p.57-69). In 2015, South Africa defied the ICC by refusing to arrest Omar Al Bahir (The president of Sudan) when he visited the country for AU summit in 2015. (New York Time, 2015)

The question that is often asked is why do African leaders feel so persecuted by the ICC. To understand this, one needs to examine the work of the ICC since its inception. From 2002 when the Rome Statute came into force, the ICC has successfully indicted 39 individuals for various crimes against humanity, war crimes and genocides. Interestingly, all these 39 individuals are Africans. From Opposition leaders to rebel leaders, past presidents and sitting presidents,

the ICC is determined to bring to justice whoever is seen as culpable for crimes specified in Article 5 of the Rome Statute. Moreover, majority of investigations pending before the ICC are of African extraction. The problem for many African leaders is that these same crimes for which African leaders are being prosecuted are also being committed in several other places while the ICC has not been able to successfully prosecute any of those. Professor William Schabas, a professor of international law at Middlesex University corroborates this view when he asked why prosecute post-election violence in Kenya or recruitment of child soldiers in the Democratic Republic of the Congo, but not murder and torture of prisoners in Iraq or illegal settlements in the West Bank? (Schabas, 2011)

Again, Human Rights Watch indicates that “certain obvious non-African candidates for prosecution are from states that have never joined the court, such as Sri Lanka, North Korea, Uzbekistan, Israel, Palestine, Syria, or Iraq. The Security Council could have given the ICC jurisdiction over crimes in these cases, but the council’s permanent members have tended to shield nations they favor from the court’s attention” Human Right Watch (2014)

It is fair to state that the ICC has jurisdiction over citizens of State parties. That is, it can only investigate, try and instigate punitive actions against individuals of state parties. As the Bensouda, the current chief prosecutor of the ICC, explains to a Ghanaian based TV3 network, the ICC is not going after president Bush over the allegations of crimes in Iraq because the US is not a state party to the ICC. The same jurisdictional limitations extends to the situation in Syria, Israel, and other non-members of the ICC. However, it is striking to know that Article 13 (b) provides certain other instances where individuals that are not parties to the Rome Statute, could be brought under the jurisdiction of the ICC- that is if these individuals are referred

to the court by the United Nations Security Council (UNSC). Therefore, the UNSC could refer all these potential culprits if they are willing to do so. Moreover, the basic implication of this provision is the fact that the US, China and Russia could not be referred to the ICC because they are not party to the Court, but they can refer citizens of other countries to the ICC because of the privilege of being members of the UNSC.

It is based on this powers of referral that the UNSC referred Omar Al Bashir and Muammar Gaddafi to the ICC even though neither Sudan nor Libya was a member of the ICC. According to Dugard (2013), “the fact that these two situations that have been referred come from Africa tends to support the suggestion that there is an anti-African bias” in ICC. (p.563–570).

The Rome Statute also gives proprio motu powers to the ICC prosecutor which allows him to open investigations without referral by state parties or the UNSC. Incidentally, the two times that this power was exercised, it was used in the cases of Kenya and Côte d’Ivoire, both of which are African states.

But is the ICC always biased against Africa? The ICC on its part, explains that these disparaging criticism against the court does not lend itself to the facts on the ground. For example, the ICC maintains that it does not only focus on Africa as suggested by the critics because it has initiated examinations and investigations against other countries including Afghanistan, Georgia and Columbia and Palestine. Secondly, it maintains that, the ICC only proceeds with trial on certain conditions. One of those conditions is the fact that the crimes that are being alleged must fall within the jurisdiction of the ICC, it must be of a significant magnitude and, also when the concerned states have demonstrated their inability and or unwillingness to deal with these crimes domestically. In other words, the ICC works on the principle of complementarity, which is, it only acts when the states concerned are unable or unwilling to satisfactorily deal with the alleged

crimes themselves. Schabas (2011) explains that “the adoption of complementarity as the basis for the proposed ICC was an attempt balance the principle of state sovereignty and the need to establish international regime that effectively intervenes when states fail to carry their responsibilities in this regard” Schabas, W. A. (2011).

Furthermore, the ICC maintains that it enjoys a lot of support from many African states contrary to the perception of bias against the continent. With respect to the cases that have come before the ICC, majority have been referred by African states themselves. (Du Plessis et al, 2013, p.3). For example, the cases in Uganda, the Democratic Republic of Congo (DRC), the Central African Republic and Mali – the states themselves referred the cases. As a result, the ICC cannot be accused of being anti Africa when majority of referrals come from African states themselves.

Moreover, supporters of the court insist that the court cannot be said to be anti-Africa when Africans occupy high positions within its rank. For example, the current chief prosecutor of the ICC, Fatou Bensouda is an African from the Gambia. She became prosecutor after serving for eight years as a deputy chief prosecutor of the ICC. The current first vice president of ICC is also an African. African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalized. Africa currently has 34 members of the court-the highest number from one region.

ICC also maintains that the critics of the court are not mindful of the victims of the alleged crimes that are being investigated and punished by the ICC. They only choose to focus on the perpetrators instead of the victims that should be of primary concern. Fatou Bensouda states that Africa should instead be seen as taking the leadership in international criminal justice instead of being viewed as the victim. (TV3, 2016)

Peace vs. Justice, Impunity vs. Immunity argument

The ultimate goal of the ICC is to ensure justice for the victims of crimes specified under Article 5 of the Rome statute. However, the argument is often made that there are instances where the pursuit of justice could interfere with the peace building process. Thus, the cliché “there can be no peace without justice” does not hold in all cases. The possible clash of the ICC (which by design is pro justice) with Truth and Reconciliation Commissions (which is pro peace) was greatly debated in the formative process of the ICC. According to Robinson, the Rome statute did not explicitly deal with this potential conflict but leaves a lot of discretion to the ICC prosecutor to decide whether to defer to TRCs or take up prosecutorial options. (Robinson D, 2003, p.483). Robinson (2003) further determine that both the ICC and TRCs can complement each other without necessarily contradicting each other’s work. (p.484). One of the main arguments of the AU, with respect to the indictment of Omar Al Bashir, is that the ICC would interfere with the ongoing process to find lasting peace in Sudan. (Akhavan P, 2009, p.624-654) Igwe (2008) concedes that there is a “thin line between the need for justice and the quest for political settlement of conflicts on one hand and the deep-rooted causes of many Africa’s conflicts have limited the prospect of International Criminal Law in Africa” (Igwe, C. S, 2008, p.322). He therefore concluded that “while International Criminal Law has brought a number of war criminals and genocidiaries to justice in Africa, its prospects for peace, justice and deterrence remain elusive” (Igwe, C. S, 2008, p.294).

Another controversial issue is whether ICC should grant immunity from prosecution to sitting heads of state or presidents, and whether that immunity would not be tantamount to an endorsement of impunity. Supporters of “immunity argument” believe that presidents have been elected into office to serve their people with undivided attention. Consequently, if

these heads of state or presidents have to make appearances before the ICC, or possibly jailed by the ICC, the countries concerned may degenerate into serious violence and the objectives of the ICC may rather not be achieved. With the recent Kenyan example coupled with the various summary laws which grant immunity to sitting heads of state or presidents, the ICC’s position for non-immunity became even more controversial. The AU has passed a decision to prevent the ICC from trying sitting heads of state. On the other hand, the opponents of the “immunity argument” believe that the primary goal of the ICC is to punish impunity. As a consequence, if heads of state or presidents are granted immunity from prosecution, they would only be emboldened to suppress their own people and do everything possible to prolong their stay in power. In other words, the fear of prosecution would make them cling onto power thereby defeating the purpose of punishing impunity.

Universality principle and ICC jurisdiction

Ryngaert, C. (2009) examines the relationship between the principle of universal jurisdiction and the jurisdiction of the ICC in line with concerns about the need to expand the jurisdictional basis of the ICC’s Rome Statute to include the universality principle. In other words, he considers whether ICC should operate over every state because of the argument that crimes against humanity, war crimes and genocides are universal crimes which should be punished universally. Ryngaert concludes that there is no need to expand the jurisdiction *ratione territorii* of the ICC to include the universality principle because of “the danger that the widening of the jurisdictional scope could alienate prospective states parties, and the risk that co-operation of states non-parties will not be forthcoming.” (Ryngaert, C, 2009, p.511)

Discussion

It is not deniable that all the individuals that have been indicted by the ICC are Africans. However, this does not automatically translate into an ICC

bias against the continent. It is important to also know that the current leadership of the ICC is heavily represented by Africans. As indicated earlier, the current vice president as well as the current chief prosecutor of the court are all Africans. The implication is that if we conclude that the ICC is biased against Africa, then we should also state that Africans are themselves complicit in this bias and should therefore not complain. The table below shows the number of people indicted so far by the ICC and the continent they come from.

Country	Number of individuals	Region
Democratic Republic of Congo	6	Africa
Libya	3	Africa
Côte d'Ivoire	3	Africa
Uganda	5	Africa
Central African Republic	5	Africa
Sudan	7	Africa
Kenya	9	Africa
Mali	1	Africa

Secondly, it is important to bear in mind that the ICC does not automatically pick up cases for investigations and trial. There is a first deferral to the concerned states by the principle of complementarity. ICC only picks up cases when the concerned states have shown inability or unwillingness to do it themselves. Therefore, the fact that the ICC is taking up a lot of cases from Africa is an admission of inherent failures of African countries themselves to pick up and effectively punish the crimes specified under Article 5 of the Rome statute. This position is further corroborated by Bakum when he states that African states have demonstrated a “collective failure to properly govern themselves and administer justice fairly and timely.” (Bakum, J. M, 2014, p.11).

Thirdly, African leaders themselves are quick to go to the ICC instead of developing domestic institutions that can effectively deal with some of the crimes under the purview of the ICC. It is a fact that most of the cases before the ICC have been brought by African states themselves. Some leaders tend to go to the ICC just to get at their political

opponents, or score political points. Whatever the rationale is, African leaders are complicit in heightening the perception of bias against the continent.

Fourthly, it is not accurate to think that the ICC is not involved in cases elsewhere. Currently, the ICC is conducting a preliminary examination on various acts of criminality in Palestine, Afghanistan, Colombia, Iraq/UK, Registered Vessels of Comoros, Greece and Cambodia and Ukraine. The effectiveness of these examinations and investigations are a critical gauge of ICC.

In terms of finances, the ICC is constrained. Most states including African states do not honor their financial obligation to the court. With a 2016 budget of €139.5 million, the ICC is handicapped in conducting a thorough and effective examination, investigation and prosecution of all the cases that come before it.

Recommendations

The ICC is not a perfect institution. There are many shortcomings which need improvement. First of all, the perception of an African bias is real and ICC needs to work to redeem this damaging perception. One of the ways this can be done is a conscious effort of the ICC to expedite action on the many non-African cases currently pending before it. Justice must not only be done, it must also be seen to be done across board. This does not imply that the ICC should suddenly be silent on African cases, but the urgency to restore confidence in ICC is as important as the justice that emanates from the institution.

Secondly, The ICC is financed mainly by contributions of member states, as well as voluntary donations from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties. The ICC should look for innovative ways of raising enough resources to investigate and prosecute perpetrators of the three crimes under the mandate of the ICC.

Thirdly, the powers of deferral and referral of the UNSC should be revisited. At the time of establishing the ICC, the idea seemed good. However, after 14 years of operation, these powers have rather contributed to fueling the perception of bias against Africa. While the powers of referral allows the UNSC to refer individuals from non-member countries to the ICC, the powers of deferral empowers the UNSC to stop the ICC from conducting further investigation into a particular situation for at least one year. This has made the UNSC too powerful even though majority of UNSC members are not even party to the ICC.

Fourthly, African leaders should consciously work to develop the capacity of their own domestic judicial institutions to handle independently and efficiently the crimes that fall within the purview of the ICC, if they do not want an ICC interference.

Finally, democratically elected Head of States or presidents should not be brought before the court until his/her term of office expires.

Conclusion

Should African states pull out from the ICC? Not necessarily. Many African states have yet to develop effective, independent and impartial judicial institution to deal with international crimes such as genocides, crimes against humanity and war crimes. In many cases the justice is defined by the victors, who try with every available tool to demonize the vanquished and victims. The ICC is therefore a voice for the victims who in most cases number thousands. In other words, the court still has the potential to discourage heinous crimes against voiceless and innocent civilians. Currently, the African court on Human and Peoples Rights, i.e. the AU court, is not strengthened enough to handle with efficiency the cases involving the three crimes listed under Article 5 of the Rome statute.

Whether African leaders are unfairly targeted or not is an important question. However, what is more important is whether the crimes for which they are

being targeted are verifiable or not. If so, African citizens should encourage the ICC in pursuing criminals who engage in heinous crimes against Humanity, War crimes and Genocides. At the end, it is the civilians whose interest are being served.

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