



Africa and the Future of the International Criminal Court

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The future of the International Criminal Court (ICC) depends on its reputation in Africa. The withdrawal of Burundi, completed in October 2017, is an example of the problems with maintaining the legitimacy of the court on the continent, its major area of operation. If more African states follow, the ICC may not retain the prestige it has tried to build over the last two decades.

The establishment of the ICC in 1998 as the first permanent global criminal court is the biggest achievement of the international community in relation to combating genocide and war crimes. Investigations are initiated by member states after the completion of national judicial processes, by the UN Security Council (UNSC) or the ICC prosecutor. From its launch in 2002, the ICC has faced legitimacy issues. The non-ratification of the Rome Statute by the U.S., Russia, China, and Israel, it is often seen as a court covering weaker states, particularly those in Africa, the focus of all the proceedings in the court's first 14 years.

Evaluation of the ICC in Africa. The continent where the ICC has had its greatest success has been Africa. Côte d'Ivoire was the first non-party to the Rome Statute to accept ICC jurisdiction. It asked the court to investigate crimes against civilians during the post-election crisis of 2010/2011. The court is examining wrongdoings on both sides of the conflict, including supporters of the current leader. In cases involving Sudan (2009) and Libya (2011), proceedings were initiated for the first time at the UNSC's request. In 2013, Bosco Ntaganda, one of the most notorious Congolese warlords, presented himself to the U.S. embassy in Rwanda and surrendered to the ICC. His decision and the related withdrawal of his troops proved the ICC could influence a change in the field. The sentencing of Malian extremist Ahmad al-Faqi al-Mahdi in 2016 for the destruction of historic sites in Timbuktu, northern Mali, in 2012, was unprecedented. Attacks against world cultural heritage were categorised as war crimes and crimes against humanity.

However, the overall picture of the ICC's work on the continent is marred by its greatest, mainly symbolic, failures. On 4 March 2009, it issued an arrest warrant for sitting Sudanese President Omar al-Bashir in relation to war crimes alleged to have been perpetrated by pro-government forces in Darfur since 2003. Over the course of several weeks, the African Union (AU), Arab League, and the Organisation of the Islamic Conference criticised the court's warrant and granted al-Bashir *de facto* immunity to travel among their member states, including those who had ratified the Rome Statute and were thus obliged to arrest him. In another case, it proved impossible to properly investigate post-election ethnic violence in Kenya in 2007 in which 1,200 people died. In the subsequent trial of Uhuru Kenyatta, Kenya's president from 2013, and his deputy, William Ruto, was marred by attempts to corrupt or intimidate witnesses. At the end of 2014, the ICC closed the case for lack of evidence. While al-Bashir has proved the court's ineffectiveness in forcing his arrest, Kenyatta won in a courtroom in The Hague in part by ridiculing the accusations.

Threat of Mass Withdrawal of African States. Starting with the al-Bashir case, the ICC has come under increasing criticism in Africa. Ahead of the Kenyatta and Ruto trials, Kenyan diplomats launched a massive lobbying campaign on the continent, presenting the case as an example of Western states' anti-African

bias. On 13 October 2013, at Ethiopia's initiative, the AU called a special summit on the future of relations of the 34 African states-party to the statute. The real threat of mass de-ratification emerged. But with a lack of unanimity, the meeting ended with a resolution referring the matter to the UNSC for further consultations. However, the proposal to de-ratify the Rome Statute continues to be on the agenda of AU meetings. In October and November 2016, three states, Burundi, South Africa, and Gambia, initiated formal procedures to withdraw from the ICC. Gambia's president, Yahya Jammeh, in announcing the country was breaking ties with the ICC, called it the "International Caucasian Court". Kenya, Uganda, and Namibia were also close to renouncing the court. In January 2017, the AU called on its member states to withdraw from the ICC and declared the launch of talks with the UNSC on reform of the court. Only opposition from Nigeria and Senegal made the resolution nonbinding. So far, only Burundi has fully withdrawn. In January 2017, the new leaders of Gambia, wanting to improve the country's international image, reversed its move towards withdrawal. In South Africa, the Supreme Court halted it in February 2017. Senegal, Nigeria, and Botswana remain the firmest supporters of maintaining ICC jurisdiction in Africa, and last year, support for the ICC increased in Burkina Faso, Ghana, Tanzania, Zambia, Malawi, Liberia, and Sierra Leone.

Criticism of the court by African leaders is often designed for domestic political purposes. The "neo-colonialism" argument ignores the fact that African states contributed greatly to the creation and development of the court. Since 2012, Gambian Fatou Bensuda has been the chief prosecutor. On 11 March 2018, Judge Chile Eboe-Osuji, a Nigerian, became the court's president. The vast majority of ICC investigations in Africa have been initiated by the very states considering withdrawal. Their criticism appears to be more of a manifestation of solidarity among leaders who face human rights allegations than a reaction to public sentiment about the court. The Afrobarometer conducted during Kenyatta's trial indicated most Kenyans supported remaining in the ICC. In both Kenya and Burundi, the anti-ICC rhetoric only emerged after their leaders realised they could face trial.

The argument the court has undue interest in Africa is also not supported by facts. Since January 2016, an investigation began into alleged war crimes that accompanied the 2008 Russia-Georgia conflict. Cases involving Afghanistan, Colombia, Iraq, Palestine, the Philippines, Ukraine, and Venezuela are in progress, albeit at the initial stages.

Perspectives and Conclusions. Key African states are expected to re-define their stance on the ICC. It is probable that South Africa's new president, Cyril Ramaphosa, will undertake another attempt to break with the ICC. Relations with the court might be a bargaining chip for Joseph Kabila, who struggles to remain in power in the Democratic Republic of Congo and has also threatened to revise his country's relations with the UN.¹ The new Ethiopian government, which is being formed after the February resignation of Prime Minister Hailemariam Desalegn, may find itself under pressure to renew cooperation with the ICC.

There is no effective alternative to the ICC in Africa. On the AU level, the African Court on Human and Peoples' Rights, launched in 2006, cannot serve a similar function because of its limited resources and mandate. The expected formation of the African Court of Justice and Human Rights, which would have broader competences, is delayed. A positive example of holding authoritarian regimes to account came from a special court created by Senegal and the AU to try former Chadian President Hissène Habré. The public process and sentencing in 2016 were made possible because the events were from long ago and the defendant no longer had political allies.

With the problems the court faces in Africa and the threat of withdrawal recently declared by the Philippines, maintaining and developing the ICC's credibility should be a priority for the UNSC because it is an important instrument for answering the most severe human-rights violations in the world. It is also preferable for practical reasons. Recent conflicts with new alleged crimes, such as those involving the Rohingya refugee crisis in Myanmar or the genocide of Yazidis in Iraq, referring them to the ICC would be cheaper and faster than creating new *ad hoc* courts like those used for the former Yugoslavia or Rwanda. UNSC member states supportive of the ICC, including Poland and other EU states, have much responsibility to not allow a further erosion of the court's legitimacy in Africa. They can reassure African states of their cooperation with the court and push for greater engagement of the ICC outside that continent. They also can push back on accusations of a double standard in the court's practice involving the continent.

¹ J. Czerep, "Congo Crises Challenge the UN's Response," *PISM Bulletin*, No. 35 (1106), 26 February 2018, www.pism.pl/publications/bulletin/no-35-1106.