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by Professor Ruti Teitel

The International Criminal Court (ICC) has faced vocal criticism from African leaders in recent months. It stands accused of having become a neo-colonial tool, used by powerful states to target Africans. In turn the ICC has reproached African states for failure to cooperate in a number of recent cases. The African Union (AU) threatened a withdrawal en masse from the ICC, a threat former UN Secretary General Kofi Annan called 'an affront to the victims.' UN Secretary General Ban Ki Moon ultimately persuaded the AU to back down but a sense of tension lingers.

Seen from a historical perspective current African condemnation of the ICC may well seem puzzling. African states provided one of the largest bases of support for the court, and were active in the negotiations leading to the 2002 Rome Statute, which established consensus that individuals should be accountable for genocide, war crimes and crimes against humanity.

Moreover, on the face of it, Africa seems well represented on the ICC's staff with several Africans holding key positions in the Court, including the new Chief Prosecutor Fatou Bensouda who is Gambian, and five judges, including the first Vice President and Deputy Registrar.

On the other hand, all eight cases opened by the ICC in the past decade have been in Africa. Still on closer inspection, four of the cases (in DRC, Uganda, CAR and Mali) involved state referrals. In Uganda, President Museveni sought ICC prosecution of the Lord's Resistance Army, while in DRC President Kabila turned over militia leaders including Bosco Ntaganda and Thomas Lubanga Dyilo (who has been convicted). These cases appear to reflect the 'complementarity' principle enshrined in the Rome Statute – namely that the ICC should only prosecute individuals in cases where the relevant state agrees on the norm and on the violator, but "is unable or unwilling" to implement the prosecution. The complementarity principle reflects the view that signatory states should have primary responsibility for prosecuting grave crimes in the first instance.

Other cases in Libya and Sudan, referred by the Security Council, proved more controversial as African leaders of non-signatory states suddenly found themselves on the opposite end of judicial intervention. In Sudan, Sitting President Omar Bashir was indicted on charges of genocide, crimes against humanity and war crimes in relation to violence in Darfur. For some, this case raised serious concerns about the desirability and feasibility of indicting a standing leader, and about possible unwanted effects upon peace negotiations and politics on the ground. In the case of Libya, the referral would go hand in hand with military intervention.

The Kenyan cases have proven even more divisive. In the wake of post 2008 election violence, rival political leaders, Uhuru Kenyatta and William Ruto, were charged with crimes against humanity by the ICC for their alleged roles in orchestrating the killing of thousands. Regrettably, the indictment served to create a political bond, and the former rivals went on to win high office in the next election, with Kenyatta and Ruto becoming President and Deputy President respectively. Nevertheless, the ICC continued to pursue the case, even though Kenya refused to cooperate, adopting a range of tactics designed to delay and disrupt the process including an unsuccessful appeal to the Security Council for a deferral and alleged pressure upon witnesses to dissuade them from cooperating with the Court.

The recent criticism of the ICC highlights two key concerns. First, whereas in early years the court was asked to pursue cases by relevant state parties to the Rome Statute, more recent cases have come to the court as a result of referrals made by the Security Council, and hence subject to more political concerns. Indeed, in the case of Kenya, the prosecution was initiated not by the UN Security Council but by the Office of the Prosecutor of the ICC under propio motuprovisions of the Rome Statute. The AU has questioned this move, pointing to lack of transparency as to the criteria determining the exercise of propio motu jurisdiction and arguing that, if allowed to proceed, the case would hand undue discretion to the Prosecutor.

The second issue goes to the prosecution of serving leaders. While the Rome Statute is a lex specialis in that it provides no immunity from prosecution to sitting officials, even at the highest political levels; nevertheless the default rule of customary international law, as articulated by the International Court of Justice in Congo v. Belgium is that sitting officials are entitled to immunity from prosecution in the domestic courts of other states, though not impunity

(they may be prosecuted once out of office). So far, it is unclear whether any rule of customary law has evolved with regard to immunity before international courts and tribunals but in any case the Rome Statute is clear on the question so far as the ICC is concerned.

As a way forward, it may well be worth considering the ICC in the context of the broader purposes of international criminal justice including, as the ICC President of the Assembly of State Parties Intelmann has suggested, peacemaking, stability and prevention. When states sign on to the Rome statute and its normative system, it is first and foremost their duty to prosecute at home. It may be prudent to explore arrangements for postponing prosecution in the case of sitting leaders, especially if they are democratically-elected and where prosecution is unlikely to prevent on-going or future atrocities. While, as noted the ICC's lex specialis does not confer immunity on sitting leaders, this fact does not preclude the Office of the Prosecutor from taking into account the special circumstances surrounding such prosecutions in deciding the timing and nature of prosecution, or how to apply the complementarity principle.

African criticism of the ICC should be addressed not as an all out questioning of the normativity of the Rome system but rather as one of implementation, which may require re-examining prosecutorial discretion especially when it comes to how to interpret complementarity in light of the broader objectives of international justice where standing leaders stand accused of grave crimes.

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