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# CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA
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## Five reasons why South Africa should not withdraw from the International Criminal Court Statute

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The brevity of President Bashir's visit to South Africa is disproportionate to its consequences. For one thing, it poses questions about South Africa's commitment to upholding the rule of law – both on the international and national plane. But if media reports are correct, the visit may have a much more far-reaching and lasting effect. According to reports, the ANC National Executive Committee has come to the conclusion that the International Criminal Court (ICC) is no longer useful to Africa, and that South Africa should undo its ratification and leave the fold of ICC state parties.

The Centre for Human Rights urges the governing party to reconsider its view on this matter, for the following reasons:

### 1 Justifiably indicted for crimes against humanity, President Bashir should not dictate our agenda

The timing of this push makes the conclusion inevitable that this insight has arisen in response to the Bashir debacle. For the ANC, then, this event marks a line in the sand. In the process, Bashir has come to personalize the growing discontent with the ICC's perceived anti-African bias, and to represent anti-Western sentiment, more generally. This sentiment has been expressed clearly by the Chairperson of the Portfolio Committee on International Relations and Cooperation, who cast those instituting the legal

challenge concerning Bashir in the role of opportunists who "pit African leaders against each other in the name of international law" (Statement, 15 June 2015).

This statement deflects attention away from the issue. Bashir's arrival in South Africa triggered an ICC request for his arrest. If one traces the causal roots, it is Bashir's involvement in human rights abuse of his own people, as well as his consistent refusal to "have his day in court" and answer and contest the charges, which set this in motion. Because he cannot argue on the basis of his innocence, he needs to make this matter political, and for this he depends on fellow African leaders.

But Bashir is no African hero. He has astutely exploited anti-Western sentiment among African leaders to serve one of his principal personal aims, which is to preserve his own impunity. He has never expressed interest in the AU's repeatedly-stated principle of eradicating impunity for gross violations. Sudan never ratified the ICC Statute. Sudan never engaged with effective prosecution of those responsible for the atrocities in Darfur. It is beyond doubt that Bashir had overseen the commission of mass atrocities in the Darfur region of his country.

There is little doubt that crimes against humanity were committed in Darfur, under Bashir's watch, and with his knowledge and approval. The AU's own human rights body, the African Commission on Human and Peoples' Rights, visited the country in 2004 and found that the government's "attacks on the civilian population are war crimes and crimes against humanity", on the basis that "villages were attacked indiscriminately by armed forces, using military aircraft, helicopters and vehicle of the Sudanese army". It further found that these "military attacks were then followed by attacks by militia, identified as the Janjawid, who killed people, burnt houses, looted property, stole cattle and other livestock, food, and raped women". The report's recommendations included an appeal that the Sudanese government should "immediately stop the military and aerial bombardment of the civilian population, and should take appropriate measures to protect the civilian population against attacks by armed groups".

*Do we as South Africans want to overturn our acceptance as a respected member of the community of nations in service of this dubious individual agenda?*

## 2 The alleged African bias of the ICC is more apparent than real

If the ICC has lost its use, then it clearly had some use at some time. What has changed? The main objective fact is that the ICC has since its establishment only indicted and convicted Africans. This claim is empirically correct but misleading. It is also unfortunate, and has given rise to interpretations of the skewed case load as selective justice targeting Africans as part of a neo colonial agenda.

Clearly, there are situations of gross human rights violations and perpetrators in other parts of the world, including in the United States and the United Kingdom. But the existence of a problem elsewhere does not make it disappear at home. Viewed from the perspective of victims, it does not matter that impunity reigns elsewhere. Victims want an end to impunity in the particular situation where their family and loved ones have been killed and maimed.

Cases may reach the ICC in three ways. (i) A state party to the ICC Statute may itself willingly submit a situation to the ICC for investigation and possible prosecution. (ii) The UN Security Council may, in the exercise of its mandate to maintain international peace and security, mandate an ICC investigation and prosecution. (iii) The Prosecutor may initiate a prosecution.

All 8 country situations being formally investigated involve Africans, 4 (Uganda, DRC, Central African Republic and Mali) were referred by the state itself; 2 (Darfur, Sudan; Libya) were initiated by SC resolution, and another 2 (Kenya, Côte d'Ivoire) were initiated by the ICC Prosecutor.

*The 4 self-referrals:* There can be few qualms about self-referral. It is precisely when the state views the situation as one where it is unable to effectively prosecute that the ICC should step in. That determination is best made by the state itself.

*The 2 UN Security Council referrals*: The main remaining charge is that the UN Security Council is biased in its referrals. It should for example have referred the situation in Syria, but the veto power of some of the permanent members has prevented such a referral. Africa is right in pushing for reform of this global body, stuck in post World War hegemony. Legitimate and important as it is, Security Council reform is a different debate. Although SC action and inaction affects the ICC and its functioning, the doings of the SC cannot be blamed on the ICC. In other words, SC inaction limits the number of cases that are brought before the ICC, but it does not render the ICC "useless".

While it is a fact that the SC is biased and constrained by the veto power of the permanent five, it should be noted that all African non-permanent SC members voted in favour of the two "African" referrals: Gabon, Nigeria and South Africa supported the Libyan referral, while Algeria, Tanzania and Benin backed the Darfur referral.

*The 2 Prosecutor-initiated proceedings*: The proceedings in the Côte d'Ivoire are actually very similar to self-referral, because the country recognized the jurisdiction of the ICC in December 2010, after the outbreak of the civil war between forces loyal to Alassane Ouattara and Laurent Gbagbo. One can be cynical about Ouattara's intention, namely, to have his opponent investigated in order to strengthen his own position, but that is human nature and not the doings of the ICC.

This leaves Kenya as the only case in which the ICC Prosecutor initiated proceedings in the actual sense. It should however be taken into account that this route was only embarked upon after the Kenyan authorities had been granted sufficient time to take action to ensure accountability for the post-election violence of 2007.

While there may have been personal misgivings about the style and of the previous Prosecutor, the current is an African, the Gambian legal expert Ms. Bensouda, about whom few personal misgivings exist.

*Given that the situation has thus improved in recent times, and not deteriorated, what is the renewed imperative for withdrawal?*

## 3 The initial reasons for supporting the ICC have not changed

The underlying need for the ICC has not changed. The world, Africa, clamored for a court to ensure that those who commit the gravest crimes – genocide, crimes against humanity and war crimes – should not go unpunished. The likelihood of such perpetrators going unpunished is great, because they often operate in contexts where the criminal justice system has broken down, and where their prosecution and conviction under the national legal system is quite unlikely. This was the lesson from Rwanda, and the events in the former Yugoslavia. In those two instances, special (ad hoc) courts were set up. It was accepted that it is too costly to keep setting up courts for every situation that merits it: the idea became accepted that the world should have a world criminal court.

An African state, Senegal, was the first state to ratify the ICC Statute. South Africa followed closely on its heels, by ratifying it in November 2000. We went on to adopt legislation to facilitate the application of the Rome Statute, through the Implementation of the Rome Statute of the ICC Act (Act 27 of 2002 or "ICC Act"). This Act talks, in its preamble, of the concern for the suffering of many as a result of atrocities, and of South Africa's acceptance back into the community of nations.

Today, 34 of the total 123 state parties to the ICC Statute are from Africa. That is by some margin the largest regional representation. Like many countries in Africa, Senegal remains committed to pursuing accountability. It has cooperated with the African Union in respect of the prosecution of the former Chadian President, Hissène Habré, in a process which saw the setting up of an ad hoc Chamber to prosecute him. One of the main reasons for this ad hoc tribunal, was the fact that the ICC does not have jurisdiction over the crimes, which were been committed in the 1980s. Had the atrocities been committed after the establishment of the ICC, it would have had jurisdiction.

The ICC needs Africa, and Africa needs the ICC. This situation has not changed.

*Should we use our position as a leading democracy on the continent to set in motion a process that could see the demise of the very ICC that many African states, including South Africa, has so hard campaigned for?*

## 4 The yet-to-be-established African Criminal Court does not provide a feasible alternative

Perhaps the strongest argument for "getting rid of" the ICC could be that something else should take its place. That something else, the ICC's detractors in Africa argue, is the African Criminal Court. In fact, what is meant, is the yet-to-be-established African Court of Justice and Human and Peoples' Rights.

If it is established, this Court would have three chambers, one dealing with international crimes, one with inter-state disputes and one with human rights. The last chamber would be a limited continuation of the current African Human Rights Court, which sits in Arusha, Tanzania. At the moment, then, there is no continental court dealing with international crimes.

The future Court will be created in terms of an amendment to the current Court Protocol, which was adopted by the AU Assembly, in Malabo, Equatorial Guinea, in July last year. As ratifications by 15 African states are required for the Malabo Court Protocol to enter into force, and none has as yet been secured, its establishment is still a distant possibility.

Even if this Court would be established, it will be constrained in two significant ways.

First, it will not have jurisdiction over serving heads of state or "senior state officials". Article 46A*bis*, of the Malabo Court Protocol reads as follows: "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." Whatever the merits of an African-based court on criminal justice may be, it will be justifiably viewed with scepticism due to the conflict between this clause and the ICC Statute. Under article 27 of the Statute, in contrast, provides that "official capacity" as head of state or senior state official "shall in no case exempt a person from criminal responsibility".

Second, the jurisdiction of the Court will only kick in in respect of actions committed after its establishment.

Clearly, Bashir has nothing to fear from this alternative.

The historical record shows that the process towards an African Criminal Court has been driven by three main factors. One: The indictment of Bashir sent a signal about accountability for acts by heads of state. Two: European countries prosecuted some of those implicated in the Rwanda genocide under the principle of universal jurisdiction. Three: There were serious misgivings about the indictment of the Kenyan President (Kenyatta) and Deputy President (Ruto). Read together, these three factors create the strong impression that the whole move towards an African-owned and own criminal jurisdiction was embarked upon and supported primarily to undermine the ICC and the principle of accountability, and only in an ancillary sense as an attempt to create a viable alternative African-owned forum for accountability.

Insulating sitting leaders from accountability for the worst atrocities contradicts the position in the ICC Statute, which states clearly that holding high office is never a basis for immunity. The question must then be posed – is this the real reason for the adoption of this African treaty, to get around the spectre of prosecution of sitting heads of state and senior government officials? What makes this exemption all the more dubious, is the fact that, by its very nature, an international criminal court (whether at regional or global level) cannot prosecute all those involved in atrocities, and will therefore always be selective. With limited resources at its disposal, it has to focus on the "big fish", who inevitably include the most senior government officials or military commanders.

Although the AU made normative advances in respect of democratic governance, as codified in a treaty (the African Charter on Democracy, Elections and Governance), it is yet to come to terms with the syndrome of the Big-Man-endowed-with-historical-legitimacy. None of the AU standards unequivocally requires the principle of rotation, or set a limit to the head of the executive holding only two fixed terms. Leaders such as President Mugabe (in power for some 35 years, since 1980), Paul Biya (Cameroon, in power since 1982, thus, for some 33 years) and Obiang Nguema (President of Equatorial Guinea since 1979, thus, for 36 years) are stark reminders of the continuous presence of the "old guard" within the AU. Limiting possible prosecution for human rights atrocities may have the (unintended?) effect of encouraging leaders to relinquish power and discourage them from ever accepting the principle of term limits as part of AU law.

*Would we seriously want to replace the ICC with this flawed and far-off alternative?*

## 5 Withdrawal arguably is unconstitutional

Although a state party may "withdraw" from the ICC Statute, this should not be done lightly. Withdrawal from the ICC would only make sense if the domestic legislation, the ICC Act, is also abolished. However, abolishing this Act may well be unconstitutional.

The Preamble to our Constitution proclaims that "we, the people of South Africa, adopt this Constitution as the supreme law of the Republic so as to …build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." In an earlier case brought by the Southern African Litigation Centre (SALC), the Constitutional Court found that South Africa (through its Police Service) is required under international, as part of our responsibilities as a member of the family of nations, and under domestic law, to investigate high priority crimes like torture as a crime against humanity (*National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14)).

Abolishing the ICC Act would jeopardize the duty on the SAPS to investigate allegations of torture, as required by the Constitutional Court. Abolishing the Act would therefore be a retrogressive measure.

In any event, a withdrawing state is not absolved from "the obligations arising from this Statute while it was a Party to the Statute", including the obligation to arrest, if that obligation arose before the withdrawal becomes effective. Withdrawal may also not prejudice the "continued consideration of any matter which was already under consideration" by the Court before the withdrawal becomes effective. In other words, on-going prosecutions, such as those in respect of Kenya, are not affected by withdrawal.

*Do the conceivable benefits of withdrawal from the ICC Statute justify the likely harm such an act would cause to South Africa's reputation as a leading constitutional democracy?*

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