



Beyond the ICC exit crisis

by Laura Kokko

The recent decisions by Burundi, the Gambia and South Africa to withdraw from the International Criminal Court (ICC) have prompted worries that more countries may leave the Hague-based tribunal which investigates war crimes, genocide and crimes against humanity.

These fears seemed well-founded when the Russian government announced its intent to withdraw its signature of the Rome Statute – the legal document which entered into force in 2002 and established the ICC – and Filipino President Rodrigo Duterte warned that his country might follow suit. There is also the possibility of further African withdrawals as leaders in Chad, Kenya, Namibia and Uganda have lately publically flirted with the idea of exiting, and some African leaders, acting within the framework of the African Union (AU), have called for a collective withdrawal from the ICC.

While it is clear that the ICC is facing important challenges to its credibility and legitimacy, the recent exits might not trigger a domino effect. First, this is not the first time that the ICC is facing a crisis. In fact, the court has been in a state of almost perpetual crisis since its inception. Indeed, its very establishment was initially deemed impossible due to a lack of support from key countries and even when it was established, it was presumed that it was unlikely to operate longer than a few years.

In 2002, the US government ‘unsigned’ the Rome Statute and undertook various efforts to prevent

US citizens from being prosecuted by the ICC. Yet the court managed later to improve relations with Washington. Meanwhile, Russia’s intent to withdraw is mostly symbolic, as Russia – like the US – has not ratified the treaty and is not under its jurisdiction.

African opposition to the ICC is not new, either: African leaders have repeatedly complained that the ICC is biased against the continent, prosecuting Africans while ignoring similar crimes committed elsewhere. And, over the years, the AU has issued a number of declarations expressing its discontent with the tribunal. Despite being a judicial institution, the ICC cannot avoid getting involved in political battles. Its survival therefore hinges on its ability to develop measures to manage the political crises it constantly faces.

Support and tacit approval

A second reason why a mass exit from the court is unlikely is because vocal criticism by a few countries has drowned out the continuous support by many others. The ICC still enjoys strong backing from civil society, while several African states have remained in favour. Some, like Botswana and Tunisia, reaffirmed their support for the court soon after the withdrawal of the three African states, as did many others during the 15th Assembly of the State Parties to the Rome Statute in November. In fact, a number of African countries took the floor in the meeting to reaffirm their support for

the ICC, thereby curbing speculations of an AU mass withdrawal. Even Uganda, one of the fiercest ICC critics, signalled its commitment to cooperate with the court.

It is also worth nuancing the argument of the African bias on which much criticism of the ICC is based. While it is true that nine out of ten situations currently under investigation – including all five trials and four convictions – and roughly half of the preliminary examinations involve African countries, many of these cases were referred to the ICC by the governments themselves (Central African Republic (CAR), Democratic Republic of Congo (DRC), Mali and Uganda). If actions speak louder than words, the ICC has enjoyed continued approval in Africa since its creation.

There are both principled and realpolitik reasons for the tacit African acceptance of the ICC. In addition to the determination to end impunity for atrocities, ICC referrals have also served the political interests of some countries which have instrumentalised the court to go after domestic opponents. It has clearly been in the Uganda government's interest to have the ICC indict the rebel commanders of the Lord's Resistance Army, responsible for a long-running insurgency in the north of the country. Similarly, the governments of CAR, DRC and Mali have benefited from the prosecution of rebel leaders active in their territories.

Against this background, it is not surprising that African opposition to the ICC only really emerged after the court started indicting sitting heads of state (Sudan in 2009, Kenya in 2010 and Libya in 2011). The withdrawal of South Africa followed a dispute over a visit by President Omar al-Bashir of Sudan, despite the fact that he was subject to an ICC arrest warrant. Leaving the ICC could make it easier for embattled President Jacob Zuma to fend off the judicial verdict of his own courts that might punish him for not apprehending an ICC fugitive.

The withdrawal of Burundi and the Gambia could have been, in part, motivated by the private interests of sitting heads of state. Burundi is already subject to a preliminary examination by the ICC that will likely find its top political leaders guilty of widespread violence against political opponents, while the Gambian president is suspected to be ready to use violence to silence his critics in the presidential elections this month. On this basis, it can be concluded that domestic considerations, rather than a concerted continental revolt,

play a dominant role in African decisions related to the ICC.

Exit is not the only option

A third reason why the ICC is unlikely to see many more withdrawals in the future is that state parties to the Rome Statute do not have to resort to such drastic measures to contest the body. In practice, the ICC always needs some level of state cooperation to conduct its investigations, and a closer look at the cases under examination reveals that states can significantly obstruct or delay ICC proceedings through informal everyday resistance.

Despite the fact that Sudanese President al-Bashir has been wanted by the tribunal for several years, he has been able to travel abroad and rule his country largely unimpeded. Even Western governments that denounced his regime have continued to engage his administration with soft diplomacy and peace talks instead of pursuing criminal justice. Another example is the proceedings involving Kenya: the charges against the Kenyan top leaders were dropped earlier this year due to the lack of evidence, leading one judge to suspect a “troubling incidence of witness interference and intolerable political meddling” in the national investigation.

Even though the recent withdrawals might not trigger a mass exodus, the current ICC crisis reveals some troubling issues. The most urgent include the political use of ICC referrals at both the domestic and international level, as well as the conflict over the immunity granted to sitting head of states under customary international law and the ICC's requirement that immunities are not invoked before the court.

This might imply seeking a definitive ruling from the International Court of Justice, for instance, for the prosecution of sitting heads of state, but the everyday difficulties of the ICC should not be forgotten, either. The possibility of national courts to obstruct ICC work is a less visible side of the ICC credibility crisis, but it is no less significant. The administrative problems that the court faces are also related to more structural questions of transparency and governance in the justice sector. Ultimately, enhancing the credibility and legitimacy of the ICC might finally boil down to finding practical solutions to its difficulty cooperating with national courts.

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