

The Contribution African States Can Make to the ICC Review

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10 March 2010

In the short life of the International Criminal Court (ICC), the Review Conference of the Rome Statute scheduled to take place in Kampala from 31 May to 11 June 2010 represents an historic moment. Africa will not only host the Conference, but will also be central to the stocktaking exercise, as to date all of the situations investigated by the prosecutor involve African victims. This essay argues that African states should also seek to play an active role supporting the ICC during the months leading up to the Review Conference.

The support of African states for the ICC was crucial both during and after the Rome Diplomatic Conference in 1998, where delegates debated the wording of the ICC Statute. Three African states thereafter referred situations in their countries to the Court. The Minister of Justice of Kenya also invited the Prosecutor to use his powers under Article 15 to seek permission to investigate the crimes committed during the post-electoral violence in 2007. African states should therefore, as they did in Rome and subsequently, stand on the side of African victims, recognize that justice lays a firm foundation for lasting peace and act fully in support of the ICC. Initiatives that could harm the integrity of the Rome Statute such as considering the creation of a regional criminal court, might undermine the effectiveness of the ICC and its efforts to deliver justice to victims of the worst imaginable crimes in Africa and elsewhere.

Recently, the extent of African support for accountability rather than impunity has been clear. In July 2009 the African Union (AU) reiterated “the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent”. The ministers participating in the session of the AU–EU Troika on 14 October 2009 “underlined their commitment to fighting impunity at the national, regional and international level in conformity with the principles of international law”. The communiqué issued on 3 February 2010 reemphasised the AU’s “commitment to justice and its total rejection of impunity”. Widespread African support for the ICC has recently been highlighted by an Institute for Security Studies briefing paper in October 2009, following extensive consultation with African civil society. A number of African states, including Botswana, Kenya, Senegal, and South Africa have stated that they would comply with their obligations under the Rome

Statute to arrest and surrender anyone named in an ICC indictment, and Burkina Faso recently adopted legislation implementing the Rome Statute.

However, in many instances AU members have raised concerns that “the search for justice ... [should] be pursued in a manner not detrimental to the search for peace.” The contention that justice must be sacrificed to ensure peace and reconciliation must be rejected. Sustainable peace is based on rebuilding a society in which individuals can live their lives free from fear; in which perpetrators know that impunity will not be tolerated; and in which victims can see the perpetrators brought to justice and be provided with protective measures and reparations. As UN Secretary-General Ban Ki-moon said in a speech delivered on the 60th anniversary of the Geneva Conventions, “the debate on how to ‘reconcile’ peace and justice or how to ‘sequence’ them has lasted more than a decade. Today, we have achieved a conceptual breakthrough: the debate is no longer between peace and justice but between peace and what kind of justice.”

The Rome Statute is not perfect. It represents a delicate compromise, balancing many unrelated articles and provisions. However, at this early stage in the ICC’s history, any attempt to make substantive changes would be very risky and could destabilize the architecture designed in Rome. We should therefore reject the recent submission by South Africa on behalf of the AU to amend Article 16 of the Rome Statute in order to allow the UN General Assembly to defer cases for one year when the Security Council had failed to take such decision within a specified deadline. Any proposal of this nature sense must be opposed as it would allow the General Assembly to stand in the way of international justice.

Another set of concerns over recent reactions to the ICC in Africa regards the issue of immunities. Each state party to the Rome Statute has a legal obligation under Article 27 of the Statute to cooperate with the arrest and surrender of any person charged by the ICC, even if the accused is a head of state. However, the AU decision on 3 July 2009, calling upon states not to cooperate with the ICC in the Bashir case, could be misinterpreted as a sign that African states parties to the Rome Statute oppose the Court’s work to bring to justice those responsible for committing the worst imaginable crimes against African victims.

Although an analysis of the proposal to give the African Court of Justice and Human Rights jurisdiction over crimes under international law such as genocide, crimes against humanity and war crimes goes beyond the scope of this essay, such a decision would comport a huge cost to the AU, distract the

African Court from an effective pursuit of its mandate , and duplicate the work of the ICC, which already enjoys active contributions and widespread support among African states (30 out of the 110 states parties to the Rome Statute and 5 out of 18 ICC judges are African). Furthermore, the perception among African civil society seems to be that the proposal regarding the African Court has been put forward to score political points rather than address the need for justice and international accountability for crimes under international law committed in Africa.

AU member states that have ratified or signed the Rome Statute must now commence a constructive dialogue with the ICC, to promote greater understanding of its jurisdiction and role, and improve cooperation. In this light, the AU Assembly's encouragement to member states in its 3 July 2009 decision to improve state-to-state cooperation in the investigation and prosecution of crimes under international law should be greatly welcomed. Although there are a number of regional treaties providing for extradition and mutual legal assistance, there is no single international or regional treaty that has effective extradition and mutual legal assistance provisions with regard to all crimes under international law. The members of the AU should begin consultations internally and with the ICC on how to take this proposal forward.

The stock-taking component of the Review Conference this year offers an unparalleled opportunity for states to assess how vigorously and effectively the ICC has been fulfilling its responsibility to investigate and prosecute crimes under international law committed against victims when their own states fail to do so. It also is an unparalleled opportunity for each state participating in the Review Conference to assess how well it has been fulfilling its own complementarity obligations to investigate and prosecute these crimes and then to rededicate itself to bringing those responsible to justice. In short, Africa needs to re-discover its enthusiasm for the ICC as a necessary part of a comprehensive, long-term global action plan to end impunity.

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