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The International Criminal Court of Justice – International or African in nature?

LSE IDEAS

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“International law has made it plain that certain types of conduct are not acceptable conduct on the part of anyone.”

Judiciary committee of the British House of Lords (the United Kingdom’s supreme court) November 25, 1998

While the events in Libya came to a head with the (convenient) death of Muammar Gaddafi, the actions of the International Criminal Court in respect of Libya and its issuance of arrest warrants for Muammar Gadhafi and some of his lieutenants once again raised issues regarding the operations of the court. The establishment of the International Criminal Court of Justice was meant to serve as a check to the genocides and war crimes that were being perpetrated around the world where the offenders were hitherto safe from the

long arms of the law and able to live in relative peace within their borders. The court was thus meant to transcend territorial borders of states that were unable or unwilling to bring these ‘war criminals’ to trial by holding them to much higher standards.

Henry Kissinger writing in 2001 on the calls for the establishment of a court for universal jurisdiction raised some issues that seem to be relevant today. He noted that even though there was a need to hold those that commit human rights violations accountable, it is also important to note that we must also appreciate the place of ‘a consolidation of law, domestic peace and representative government in a country struggling to come to terms with a brutal past’^[1]. While his doubts about the logic of the establishment of the court have been overtaken by time, one issue that he raised seems to be relevant now as it was then, and this is the concern that legal principles might be used to settle political scores. This is an important point with some of the actions of the court notably the arrest warrants against Gaddafi that was supported by UN resolution 1973 for NATO to protect civilians seen as an attempt to settle past scores against the former Libyan leader.

While the purpose of the court remains a grand ideal, at the time of its establishment the major wars or areas of conflict remained in the developing worlds where massive underdevelopment and poverty ensured that the struggle for power was violently contested with human rights violations more the norm than the exception. A large number of these countries where these violations occurred were on the African continent in particular Sub Saharan Africa, so when African leaders ratified the ICC Rome statute, they were setting themselves to the standards set by the court and the western world. Whether they fully appreciated how the work of the ICC would affect them is still unclear but they now seem unwilling to accept the ICC’s investigations into various atrocities on the sub continent.

This unwillingness by African leaders to support the ICC began with the issuance of an arrest warrant for President Omar Al-Bashir of Sudan in 2009 that made them more aware of the operations of the court and what to expect if they fell foul of the court. This led to the emergence of a defiant voice from the African Union against observing the arrest warrant against Al-Bashir. As more African cases began appearing on the radar of the court, African leaders began to contend that the ICC was putting too much focus on pursuing only African cases at the neglect of other cases around the world, seeing this as another form of colonialism. This is supported by the fact that currently all the arrest warrants by the ICC are for African leaders and politicians, including the court’s investigations in the Central African Republic, Congo, Kenya, Libya, Sudan and Uganda. African leaders have pushed for the court to also investigate cases outside Africa, notably in Georgia, Honduras, Colombia and the Palestinian territories. While arguably it seems like the ICC is focusing on African countries, it must be noted that some African governments referred some of the cases to the ICC. These include the Democratic Republic of Congo, Northern Uganda and the Central African Republic, while the United Nations Security Council referred two other cases, Darfur and Libya, to the ICC.^[2] Importantly it should be noted that the reason the ICC is currently pursuing more African cases is because a large number of civil strife and conflict occur on the African continent than in other areas of the world so it should be expected that the ICC would be investigating a lot of these cases.

The question then is why were African countries quick to sign up to the idea of an international court especially since countries like the United States, Russia (signed but not ratified the statute), China and India have still refused to ratify the statute? Well it

can be argued that the African countries that have ratified the ICC statute might be seen to have been eager to jump on the idea of the establishment of the court as a way of improving their international standing due to the fact that they have little or no bargaining power or strategic importance on the international stage. Further compounding this is the fact that a lot of these countries are underdeveloped, with a huge dependence on International aid, which weakens the ability of some of them to go against the grain even if some policies might seem to affect them negatively.

Keppler (2011) does make a good argument on the need for the African states that are signed up to the ICC statute ensuring that they assist in arresting any war criminal that they find in their territory so as not to undermine the efforts of the court and thus ensure that victims of these atrocities get some justice. This argument is from a legal perspective, however we cannot ignore the political aspects of the court's actions and must appreciate that the activities of the ICC go beyond a legal issue and the political aspect of these actions must be considered. The court must be more sensitive to how its investigations will affect the politics of those countries', because such investigations might aggravate tensions in these countries as is the current case in Kenya where the trial of some politicians has been argued will put at risk the already fragile peace in the country. Cote d'Ivoire is also another country to watch with the pending trial of former President Laurent Gbagbo at the Hague causing rumblings from his supporters and with the divisions in the country, the case must be approached delicately. The court must take an approach of easing itself into the use of universal jurisdiction in certain cases so as not to aggravate the situation in some of the countries and must appreciate that political options might be available for the resolution of some of these conflicts.

While the issue of the partiality of the ICC seems to be the main concern for African leaders and there might be some truth about the bias, what should be of greater concern to them is why the continent remains the hotbed of violent conflict and contestations for power that have led to the deaths of thousands of people and displacements of many more, with no one being held accountable, at least at the national level, for the atrocities. If the African Union is serious about reversing the trend at the ICC then it must ensure greater accountability within its member states, a greater respect for the rule of law and focus on relieving the suffering of the sub continents poor and impoverished. The African Union had tried to do this with the African Peer review Mechanism that currently has 31 members. Established in 2003, the mechanism is meant to allow for countries signed up to it to be assessed based on amongst other things adherence to 'the rule of law; the equality of all citizens before the law; individual and collective freedoms; the right to participate in free, credible and democratic political processes; and adherence to the separation of powers, including protection for the independence of the judiciary and the effectiveness of parliaments'^[3]

All of these still remain unattainable on the African continent and with this there are fierce battles for the soul of many of these countries between the many ethnic groups resulting in violent conflicts that remain difficult to resolve and keep pushing the continent to the edge of the precipice. African leaders need to shift from a position of defiance to trying to build their own legal institutions or find local solutions that will be able to make those responsible for the atrocities on the continent accountable for their actions.

^[1] Kissinger, H. 2001. The Pitfalls of Universal Jurisdiction. Foreign Affairs, July / August 2001

^[2] see Keppler, E. 2011. Managing Setbacks for the International Criminal Court in Africa. Journal of African Law. School of Oriental and African Studies

^[3] http://en.wikipedia.org/wiki/African_Peer_Review_Mechanism

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