



Impunity for the powerful: The African Union (AU) and the International Criminal Court (ICC)

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The decision by the African Union Extraordinary Assembly that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government” raised serious questions about the relationship between the AU and International Criminal Court. Criticisms of the ICC rounded on its alleged “selective justice” and use as an instrument of the former colonial powers. Yet of the 32 cases currently before the court, only 3 were referred from external sources. Thus, it is the case that African leaders are being referred for prosecution by fellow Africans. The debate now rages on as to whether the present stand is a matter of asserting independence or of closing ranks and covering up serious abuses. The struggle that unfolds will be of much greater significance internally in Africa than with any other, external actor.



On 17th October 2013 the heads of state of the African Union met in Addis Ababa for an extraordinary summit. Instead of discussing the on-going conflicts in Sudan, Democratic Republic of Congo, Somalia or the Central African Republic which cause tremendous human suffering and are displacing millions of people they called for immunity from prosecution for heads of state at the ICC. The Assembly decided that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government” (Number 10 (i) of the resolution) and that “the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current leaders of the Republic of Kenya, should be suspended until they complete their terms of office;” (Number 10 (ii)). The Assembly set up a contact group to consult with the members of the United Nations Security Council (UNSC) on this matter including the ICC case against Sudanese President Omar al-Bashir.

Article 27 of the Rome Statute (which regulates the ICC) does not allow for immunity of heads of state for ‘grave’ international crimes. However, the UNSC can defer cases under Article 16 of the Rome Statute, but only for 12 months and if the prosecution constitutes a threat to international peace and security. That is why many AU leaders in interviews referred to the difficult political situation in Kenya after the terrorist attack on the Westgate shopping centre in its capital Nairobi. They claim that at present the Kenyan leadership cannot leave the country for a trial in The Hague. Indeed, the call for impunity creates a difficult situation for the western powers in the UNSC because Kenya is an important ally in the fight against Islamic terrorism in Somalia and the recent attack on the Westgate shopping centre confirms the exposure of Kenya to terrorism.

President Uhuru Kenyatta of Kenya and his Deputy Samoei Ruto along with five others are charged by the ICC for crimes against humanity including murder, forceful removal of populations, mass rape and other sexual crimes in the aftermath of the 2007 general elections. Most elections in Kenya in the past have been characterized by post-election violence between different tribes. But this is no excuse for the alleged role the Kenyan leaders have played in stirring up this tribal violence. On the contrary: African states’ borders were set at the drawing board at the Berlin conference in 1884 without consideration to historical tribal areas. Therefore, nearly all of them have difficulties to establish a democratic system with majority rule when people vote along tribal lines and when tribal separatism is a constant danger to nation building. Those who play with tribal violence before or after elections should not lead an African state.

Former UN Secretary General Kofi Annan finally brokered a power sharing agreement that stopped the violence. Part of the agreement was the establishment of a commission of inquiry into the violence. That commission recommended that individuals implicated in the violence should be tried by a special tribunal. This was rejected by the Kenyan parliament. The report was subsequently

forwarded to the ICC which decided that the individuals mentioned in the report have a case to answer, among them Kanyatta and Ruto. The starting point for their prosecution, therefore, was not the interference of a non-African country but the recommendation of a Kenyan commission. The trial date is set for 12th November 2013 and President Zuma of South Africa announced to the press, that Kenyatta will not go to The Hague for the trial.

Currently 32 individuals are prosecuted in the ICC; all of them are from eight African countries. Former Liberian president Charles Taylor has been sentenced by the ICC to 50 years in prison. Along with Milosevic from Serbia he is the only other head of state tried at the ICC. This alleged emphasis on Africa has led to the perception among many Africans that the ICC is an instrument of former colonial powers and that it is one-sided in handling its affairs. African leaders support this feeling. AU chairman and Ethiopian Prime Minister Hailemariam Desalegne said the ICC had now “degenerated into race hunting” and Rwandan President Paul Kagame said that the “ICC has completely failed ... to uphold the principle of sovereign equality of states”.¹ Two years ago, Zimbabwean President Mugabe told the UN General Assembly that the ICC is turning a “blind eye” to crimes of Western leaders like George Bush and Tony Blair in the Iraq war. “Such selective justice has eroded the credibility of the ICC on the African continent”.²

Out of the 32 cases before the ICC only three have been initiated by external influence: the Kenyan and Sudanese cases were initiated by the prosecutor of the ICC and the Libyan case by the UNSC. The rest of the cases have been referred to the ICC by African states themselves. “So if Africans are prosecuting Africans at the ICC how can there be a bias against Africans at the ICC?”³ question two academics from South Africa. Nobel Peace Laureate Archbishop Emeritus Tutu accuses in an article for the Cape Times⁴: “African leaders behind the move to extract the continent from the jurisdiction of the ICC are effectively seeking a licence to kill, maim and oppress their people without consequences.”

The AU’s move for the impunity of its leaders is part of efforts to make Africa more independent. African problems should be solved by Africans themselves postulated years ago already former South African President Mbeki when he called for an African renaissance. In May this year, Africa’s independence was the central theme of the celebrations in Addis Ababa on the occasion of the foundation of the predecessor organisation of the AU, the OAU (Organisation of African Unity), 50 years ago. At this anniversary meeting African leaders took three decisive decisions: to create an AU

¹ Peter Fabricius: *Drop Kenya charges, UN urged*, in Cape Times, 28.05.13

² *Zimbabwe backs calls for ICC boycott*, in news 24, 12.10.2013

³ Motsoahae Thomas Thabane and Henri Homateni Shimutwiken: *The curious case of the ICC and Kenya*, in www.politicsweb.co.za, 09.10.2013

⁴ Desmond Tutu: *ICC is about justice, not race*, in Cape Times, 11.10.2013

rapid response force, to strive for economic independence from foreign donors, and to seek deferral of the ICC case against the Kenyan leaders.

African leaders were very critical when Western powers bombed Libya while they were still trying to negotiate a peace settlement with Gadhafi, still claiming today that a peaceful settlement in Libya would have been possible. In the case of Mali, however, they were in support of French troops which intervened and drove back Islamic forces. Both cases highlighted the urgent need for Africa to have its own rapid response force to deal with similar cases in the future and not to be dependent on forces from outside Africa.

At present, the AU mainly depends on foreign donations. Foreign countries fund 93% of AU programmes and nearly all of the costs of AMISON, the AU's peace keeping force in Somalia. The Chinese build the new AU headquarters in Addis Ababa. The new chairperson of the AU, the former foreign minister of South Africa, Dlamini-Zuma, is an outspoken critic of foreign dependency and she wants to change this. This was part of her election campaign against her predecessor, Gabon's Jean Ping who was accused of cooperating too closely with Western powers, especially the French. South Africa needed two rounds of meetings to push her nomination through. In a first move of window dressing she banned foreign donors from attending AU meetings. But neither did the African countries decide on fixed financial contributions to the AU nor did they set a target date for full financial independence. It will be even more difficult to collect the necessary funds for the establishment of an African rapid response force.

Comparing the lack of determination towards financial independence with the special efforts that are presently undertaken on the issue of the ICC case against the Kenyan leaders makes the calls for African independence sound hollow. The term 'independence' now appears to be a cover up for the protection of the powerful in Africa, for the leaders to "close ranks".⁵

The extraordinary summit has damaged the greater idea of African independence and the efforts that are connected with it, namely to make Africa economically more independent, more self-reliant, to make the AU stronger through the unity of its member states in order to be able to have a greater say at the UN, in world affairs and on whatever effects Africa's destiny. Dlamini-Zuma who started her chairmanship with these ideals is caught on the wrong foot right from the beginning of her term in office: instead of fighting for independence she is now seen as protecting the privileges of a few.

The damage to the credibility of the AU in matters of international justice will make it difficult for African leaders to follow up on criticism of Western powers. The Iraq war was started without a UN mandate and the killing of alleged terrorists through drones in countries with which the USA is not in

⁵ Peter Fabricius: *Was AU threat of withdrawal from ICC a red herring?*, in Cape Times, 14.10.2013

a declared war calls for international action. In that situation it should be noted that the USA is not a signatory to the Rome Statute of the ICC, i.e. its citizens cannot be prosecuted by the ICC.

More than twenty countries from Africa helped to found the ICC. Today, 34 of 122 countries that have ratified the Rome Statute are from Africa. The ICC was founded with the basic conviction that there should be no impunity for anybody, anywhere in the world. The AU leaders in Addis Ababa have damaged this principle and the African standing in World affairs. The AU has not yet called on its member states to withdraw from the ICC. The fight will go on which is according to Archbishop Tutu not a fight between Africa and the West, “this is a fight within Africa, for the soul of the continent”.⁶

⁶ Tutu, 11.10.2013