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The Techniques for Appeasing the Tension between the International Criminal Court (ICC) and the African Union (AU)

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Abstract

The issue of cooperation between the International Criminal Court and the African continent is nowadays widely discussed. The fact that the African Union has fiercely opposed the authority of the ICC, by non-cooperation and by threatening collective withdrawal in order to create a purely African Court, this article report some techniques for appeasing the tension between these two organizations, so that the repression of international crimes can exist on the African continent. It is not only a question of presenting the efforts already made by the ICC to reduce the problem with the African Union, but also of talking about the accompanying measures of the African Union to these members to judge the person responsible for the international crimes in Africa in order to avoid the application of the principle of complementarity of the Court.

Keywords

International Criminal Court (ICC), African Union (AU), Appeasing the Tension

1. Introduction

Crimes of international law are crimes that affect the entire international community whose repression is still covered by international criminal law. The fight against impunity for these crimes of international law and their repression are two goals the international community had set for itself after the two world wars. Despite the creation of the International Criminal Court in 2002 to judge the individuals accused of genocide, crimes against humanity, crimes of aggression and war crimes, we still hear of unimaginable horrors all over the world. In the

face of this phenomenon, many African leaders are criticizing the Court's way of intervening because only Africans have been judged by the International Criminal Court during the first decade of its entry into force (Bosco, 2013). These criticisms have resulted in the expression of the intention to withdraw the quality of the members of the Court. However, it is important to rectify the popular political discourse that the ICC targets Africa, as this has led to irrational, reckless and unjustified criticisms of the ICC.

At first, one might be tempted to follow the movement of some African leaders who view the ICC as a Western political machination designed to disproportionately punish Africans (Mbaku et al., 2016). The fact that African States are the subject of the majority of an investigation and prosecution by the Court suggests that the Court selectively applies international criminal law to Africans. In any event, a careful consideration by the International Court reveals that the assertion that the ICC is targeting Africa is flawed and legally unfounded, given the structural and technical problems that characterize the configuration of the Court. To better understand the subject, we will retrace the context of relations between the ICC and the African States; then, see the efforts made by the ICC to solve tension against the African Union; and finally, to conclude with the accompanying measure of the African Union to these members to try the person responsible for international crimes in Africa in order to avoid the application of the principle of complementarity of the Court.

2. Background

To understand the relationship between the ICC and Africa, it is important to mention that African countries frequently adhere to the Rome Statute. For, they actively participated in the Diplomatic Conference of Plenipotentiaries of 17 July 1998 to sign the Rome Statute by providing for the creation of the International Criminal Court. As a result, the creation of the ICC has benefited from the support of African states. In addition, Africa occupies most of the member states in the ICC. Of the 124 states parties to the ICC, 34 are African countries. This means that African states make up more than a quarter of the total number of States Parties to the ICC.

However, in recent years, many African leaders have been critical of those arrested by the ICC. Because so far, the ICC has indicted more than 20 Africans from eight countries including Uganda, Central African Republic, Democratic Republic of Congo, Libya, Darfur (Sudan), Ivory Coast, Mali and Kenya (ICC, under investigation situations). This situation makes African leaders mistrustful of the Court. As Robert Mugabe said during his nomination as head of the African Union in 2015 that: "the ICC is racist and despises the African world" (BBC News, 2013). In addition, the former president of the African Union Commission, Jean Ping, believed that "international justice seems to apply the rules of the fight against impunity only in Africa as if nothing else was happening, in Iraq, Gaza, Colombia or the Caucasus (African Union General Assembly, 2009).

Gambia has called the ICC a "Caucasian" Court and Kenyan leader Uhuru Kenyatta has criticized the Court for "pursuing weak and politicized cases" (Aljazeera News, 2016). And recently the current President of African Union Paul Kagame said that "the ICC was supposed to charge cases around the world, but it ended up covering only Africa. From the beginning, I said that there was a fraud base on which it was installed and how it would be used. I told people that it would be a tribunal to judge Africans, not people around the world. And I do not think I was wrong". And he still indexes this targeting against Africans: "There are many people around the world who should be judged by the Court. Some leaders of African countries who are judged by the ICC, whatever their trial, their crimes were committed in partnership with other countries, what the ICC does not try to discover. In 2009, African leaders arrived at the invitation of all African Union member states to leave the ICC collectively. And the African Union has repeatedly announced the withdrawal of African countries to the Rome Statute (African Union, 2009). However, it has been noted that the collective withdrawal of African countries to the ICC is no longer a mere threat, as in 2016, Burundi, South Africa and The Gambia have already officially declared their withdrawals to the ICC (Vernet & Pichon, 2018). Even South Africa and The Gambia have given up withdrawing from the Rome Statute. This threat has always existed within the African Union.

In analyzing these criticisms, African leaders seem to be desperate by the acts of the ICC, perhaps because they have been deceived by the Statute? The answer to this question is simple, it is impossible that they were deceived by the content of the Rome Statute, because the latter made it clear that the Court exercises its jurisdiction on the basis of the principles of nationality and territoriality, as well as in cases where the United Nations Security Council refers situations of heinous crimes to the ICC (Rome Statute, 'article 12 and 13). So, it can be argued that the attack by African leaders on the ICC is a mere excuse for circumventing accountability and transparency over the responsibility for human rights. In other words, by wishing to withdraw from the ICC, African leaders consider their political interests to be superior to international justice. That is, the decision to leave the ICC could lead not only to a mass exodus of African states, but also to commit heinous atrocities with impunity in Africa (Human Rights Watch Report, 2016). Subsequently, it should be mentioned that African leaders tend to unleash violence on their opponents simply to keep governing the state. And when they are accused of human rights violations, they invoke sovereignty or reject efforts to have their conduct investigated and sponsored by Western states. This explains the attacks of Kenya, Burundi and The Gambia against the ICC. The following section examines the ICC's efforts to solve the tension against the African Union.

3. Methodology of Study

The International Criminal Court is a permanent jurisdiction to try persons accused of genocide, crimes against humanity, crimes of aggression and war

crimes. The purpose of our work is to awaken the consciences of humanity through writings, to sensitize the African Union to take an important part in the suppression of atrocities in order to eradicate the crime and the impunity of those who violate the human rights, with a view to restoring all dignity to the human being in Africa. The data from the document was extracted from the online database on the ICC's official website and we used documentary, analytical, and synthetic methods to properly conduct our research. In this article, the context on relations between the ICC and the African States was used as a basis for analysis. The efforts made by the ICC are evoked to illustrate the techniques of easing tensions with the African Union, and finally, to finish with the accompanying measures of the African Union to its members to judge the head of the international crimes in Africa in order to avoid the application of the principle of complementarity of the Court.

4. The Efforts Already Made by the ICC to Reduce the Problem with the African Union

For some time, it has been noted that the ICC has made a lot of efforts to reduce the tension in African Union: which have manifested themselves in various ways, including the organization of seminars with all international organizations and civil society; the creation of the African Justice Group to end impunity in Africa; and finally, the universalization of prosecutions at the Court, which is one of the causes of the conflict between the two organizations. So for, more information on these efforts will be analyzed here one after the other.

4.1. Organization of Seminars with All International Organizations and Civil Society

Each year, the ICC holds judicial seminars aimed at discussing and sharing among the States Parties or non-Parties to the Rome Statute important issues related to the functioning and successes of the ICC and the Rome Statute system in it together (Vernet & Pichon, 2018), during which, the state actors and the civil society exchange in order to carry out coherent, strategic and prospective actions. In addition, they can discuss the independence of national, international and regional jurisdictions within a global system collectively aimed at ensuring the rule of law and, in particular, accountability and justice for the most serious crimes under international law.

During the judicial seminar on the complementarity and cooperation of national, regional and international jurisdictions, ICC President Judge Silvia Fernandez de Gurmendi said that "Since jurisdictions face similar challenges, it is necessary to engage a broader dialogue on how best to solve them", she added, "Our mandates and jurisdictions are separate, but we all share a common goal: to ensure accountability and resolve disputes through justice. (...) Ending impunity for genocide, crimes against humanity, war crimes and aggression is only possible with a shared vision and a shared commitment. I hope we will refine that vision today and strengthen that commitment" (ICC, 2018).

4.2. The Creation of the African Justice Group to End Impunity in Africa

At the end of 2015, the ICC, through its President Silva Fernandez, decided to create an African group for justice to end impunity in Africa. This newly established independent group is composed of high-level African experts specializing in the field of international criminal law and human rights. The objective of this group is to support efforts to strengthen justice and end impunity in Africa, through national and regional capacity building, advocacy, and increased cooperation between Africa and the ICC.

While on November 24, 2015, ICC President Silvia Fernandez, welcoming the establishment of this group, said: "I look forward to engaging with the Group. I am convinced that it can, as an independent group of well-known experts, play a very useful role in helping to identify and resolve the current difficulties, and bring new ideas and proposals for action. Linkages with Africa are crucial for the ICC, and the African Group for Justice and Ending Impunity can help to bring an important and independent voice to debates on how to move forward in the future".

Thus, during discussions between the members of the Group and President Silva Fernandez, the latter stressed the importance of strengthening national capacities. At the same time, she said, "The ICC is not an end to itself, it is a complementary jurisdiction, and the ultimate goal we all pursue is for the end of impunity. The ICC can only intervene if justice cannot be done by other means. It is essential, under the principle of complementarity enshrined in the Rome Statute, to strengthen the capacity of national jurisdictions to deal with international crimes" (ICC, 2015).

4.3. Universalization of Prosecution by the ICC

In the face of criticism from some African leaders of the focus of the ICC's prosecution in Africa, it must be acknowledged the ICC has already opened several preliminary investigations of countries outside the African continent (ICC, Situations and Cases). These include the situation in Afghanistan in 2007 on crimes against humanity allegedly committed since 1 May 2003, the situation in Colombia in 2004 until now on a crime against humanity allegedly committed since 1 November 2002, and on war crimes allegedly committed since 1 November 2009; the situation in Iraq on 9 February 2006 on war crimes allegedly committed by United Kingdom nationals in connection with the conflict in Iraq and the occupation from 2003 to 2008; the situation in Ukraine on 25 April 2014 on crimes against humanity allegedly committed as part of the Maidan Square protests in Kiev and other Ukrainian regions between 21 November, 2013 and 22 February, 2014; the situation in Palestine on the 16th of January, 2015, and the situation in Venezuela and the Philippines. However, the ICC announced a preliminary examination of the situation in Venezuela over alleged crimes allegedly committed since April 2017 in the context of demonstrations and related political unrest. And February 8, 2018

announced a preliminary examination of the situationin Philippines for the crimes alleged to have taken place since July 1, 2016, in the context of the "war on drugs" campaign.

Concerning the opening of these preliminary investigations, some African leaders say that a preliminary examination is not an investigation, but just a process of examining the available information in order to determine whether there is a basis for initiating an investigation against the criteria set by the Rome Statute. In particular, the prosecutor will analyze issues related to jurisdiction, admissibility and the interests of justice when making his decision, as provided for in Article 53 (1) of the Rome Statute. However, it was noted that the Prosecutor opened an investigation into the situation in Georgia on 27 January, 2016. This opening of an investigation marks a considerable step forward to contradict the claim of exclusivity in the exercise of its jurisdiction in Africa. So, we should stop saying that the ICC is only interested in Africa since it has already opened the situation of Georgia. In any case, it is Africa that has been interested in the ICC because the majority of the cases are the African States themselves who have seized the Court (Uganda, Democratic Republic of Congo, Central African Republic, Mali, and Ivory Coast). The case of Ivory Coast is unique, since the State was not a party, but had signed a declaration recognizing the ad hoc jurisdiction of the ICC in April 2003: it was President Alassane Ouattara who asked the prosecutor to seize. The Security Council only twice entered the Court (Sudan, Libya), with the support of the African states that were then members, and the prosecutor only self-managed once (Kenya), but only after that the Trial Chamber found that Kenya failed to prosecute the perpetrators of the crimes in its national judicial system (the principle of subsidiarity was therefore respected).

Despite the efforts of the ICC to alleviate the problems facing the African Union, it has been noted that these problems still exist between these two organizations, since the African Union does not stop calling on its members to withdraw collectively with the Rome Statute. And this has already begun towards the end of 2016 on the announcement of the withdrawal of the ICC made by the 03 African States including The Gambia, South Africa and Burundi. And it must be mentioned that South Africa and The Gambia have given up withdrawing from the Rome Statute, while Burundi has maintained its decision. But even though the African Union supports the withdrawal of its member states from the ICC, there are several African states that still support the action of this Court, including Burkina Faso, Botswana, Ghana, Liberia, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania, and Zambia (Cannon, Pkalya, & Maragia, 2017: p. 21). The question then is, where does the source of the problems come from? If the ICC is already doing its share of responsibility in mitigating these problems, what about the African Union?

5. The Accompanying Measure of the African Union to These Members

Some African heads of state argue that the Court legitimizes its action on Africa

on the basis of political instability and poor economic conditions in Africa. Indeed, one of the points legally justifying the intervention of the Court is the judicial weakness of national courts in Africa, because some judicial systems are marked by corruption, partiality, and lack of a mechanism for the protection of witnesses and so on. But, the African Union in its decisions of non-cooperation and collective withdrawal from the Rome Statute does not take these elements into cognizance, whereas it is precisely this aspect of national justice that must be resolved to allow effective repression of perpetrators of serious violations of international crimes.

Nevertheless, shortcomings in the judicial systems and its ultimate justification have served the ICC to intervene when the situation in Africa applies a variable application of the rule of complementarity. It is relevant to mention that this variability in the principle of complementarity is not neutral in conflicts with African states. Thus, it would be necessary for the African Union to seek ways to strengthen the capacity of African judicial institutions to improve cooperation with the ICC.

5.1. Strengthen the Capacity of African Judicial Institutions

As part of the fight against impunity for international crimes, national judicial systems play a leading role. These may be the courts of the countries where the crimes were committed, of the countries of which the perpetrators or victims are nationals, or of the States in whose territory there are international criminal suspects.

Although impunity is an omnipresent phenomenon in Africa, some African countries are against it and even want to condemn the perpetrators of international crimes committed in their territories, but cannot do it for lack of resources. These are the cases of Uganda, the Democratic Republic of Congo, the Central African Republic and Mali who have requested the intervention of the ICC pursuant to Article 14 (1) of the Rome Statute and the case of Ivory Coast, which accepted the jurisdiction of the Court with respect to crimes against humanity, genocide, aggression committed in Ivory Coast by the application of Article 12 (3) of the Rome Statute. But despite the many who want to respond to impunity, there are still some African states that sometimes prefer in the name of peace and security to find an amnesty (case of Burundi on Act No. 1/32 of 22 November 2006). While this inaction paves way for the intervention of the Court in Africa because, by virtue of the principle of judicial complementarity, the ICC only takes part in the repression as a last resort, that is, in the event of inaction of the State concerned (Rome Statute, Article 17 (1) (a)). Indeed, the inaction could be explained either by the lack of will of the State, or by the incapacity of the State to fulfill its obligation towards the international crimes (Human Rights Watch, 2004: p. 8). Thus, the capacity building of African courts must go through two essential stages: strengthening the will of the state and that of legal capacity.

In the first stage, in Africa, a court cannot function effectively without the goodwill of the state authorities, because it would face many evils, including corruption, political interference and many others. However, even if some African courts are malfunctioning, it is necessary to mention that the policy against impunity is common between the African Union and the ICC, that there should be some degree of understanding so that States cannot take into account political interests in favor of justice. The case of Kenya is an example of the lack of political will of a state that can prevent the functioning of justice where it was reported that between 2009 and 2010, politicians led the efforts to create a court special session to judge cases related to post-election violence 2007-2008 (ICC, Office of the Prosecutor). But since the prosecutor withdrew the charges against the Kenyan president and vice-president in 2015, no Kenyan movement has yet been engaged to prosecute the perpetrators of the violence when the African Union was based on the principle of complementarity to request a stay of proceedings (Roth, 2014). It is remarkable that the political will is lacking, that it is impossible to see an African state judge its president and vice-president even for serious crimes. On the other hand, this political will be seen from the moment when this accused no longer has any relation with the power in place, *i.e.* the opponent, or a mere military officer, etc. As in Uganda, for example, President Yoweri Museveni had himself seized the International Criminal Court on the case of Uganda, to get rid of the Lord's Resistance Army (LRA), while now he is at the head of the sling against the ICC. This gives the image that only the political will allows the application of justice in a state, because if the policy wants to judge, it will judge. So, in many African states, the will to try those responsible for international crimes depends entirely on the will of politicians.

The state will go hand in hand with legal capacity because one without the other cannot really allow the repression of perpetrators of international crimes in their own jurisdiction. The second step in strengthening the legal capacity of African courts requires States to have the appropriate technical means to prosecute the offenses concerned in a transparent and impartial manner. Because of this dysfunction, the internal judicial action suffers from the lack of confidence of the African population, which has only an image of national justice, that of a justice incapable of judging those responsible for international crimes because of their official position. The question of capacity also arises in the event of collapse of all or part of the State's judicial apparatus. In this situation, the African Union should contribute to strengthening the capacity of the State's jurisdiction in order to try the person responsible for international crimes committed in Africa so that the ICC cannot play the complementary role of the Court in seizing the case. Judicial capacity also presupposes that repressive states have mechanisms to protect the rights of defendants, witnesses and experts in international crimes (judges, prosecutors, lawyers). To this end, the African Union should encourage States to strengthen their judicial capacity so that the complementarity of the ICC cannot play a greater role. If the national state wishes to be able to repress freely, it must adopt these mechanisms

as was formerly granted to Rwanda before the referral of cases by the prosecutor of the International Criminal Tribunal for Rwanda (UN Security Council, Security Council Resolution 955), and then in Sierra Leone on the establishment of the Special Court for Sierra Leone to try those responsible for the crimes during the Sierra Leone civil war (UN Security Council, Security Council Resolution 1315). And also in Senegal on the case of Hussein Habre, even under the pressure of international decisions that Senegal has concluded with the African Union the agreement of August 22, 2012 for the creation of "extraordinary African Chambers within the jurisdictions Senegalese for the prosecution of international crimes committed in Chad during the period from June 7, 1982 to December 1, 1990 "to organize the trial of Hussein Habre from 2014" (African Union Assembly/AU/3 (VII)).

5.2. Improved Cooperation with the ICC

The cooperation of the Member States in the Rome Statute with the ICC is an obligation prescribed by the Rome Statute (Klamberg, 2017: p. 630). This cooperation is a crucial element of the effectiveness of the proceedings before the Court, since without the cooperation of States; the ICC cannot function properly. Indeed, the ICC is an institution without police force (executive) to the point of depending on States Parties or not for the investigation, arrest and surrender of the accused, etc.

Initially, African states have demonstrated their acceptance of international criminal justice through continued cooperation with the Court in cases referred by some African states. On the case of Ivory Coast for example, African states have cooperated in the extradition of Laurent Gbagbo and BleGoude to the ICC, while they do not do so on the case of President El Bashir. Thus, they were more dedicated and more willing to integrate international criminal justice in Africa. But over time, even selective cooperation in some cases has deteriorated because African states have realized that international criminal justice works only in one direction. At present, the relationship between the ICC and the African Union is such that African States have decided through the African Union not to cooperate with the Court despite their legal obligation to do so under the Rome Statute (African Union General Assembly, 2009).

In light of the decisions taken by the African Union, the ICC wishes to strengthen the former cooperation with the African States, since without it, its legal action would be ineffective. Then, it was this lack of cooperation that led to the withdrawal of the charges against the current President Uhuru Kenyatta and his Vice President because the States were not willing to allow investigations or the protection of witnesses. The problem of the subordination of witnesses and the lack of cooperation of the Kenyan authorities has shown the weakness of the Court in the conduct of these cases. In addition, the President of the International Federation of Human Rights Leagues (FIDH), Karim Lahidji, said that: "We regret that the unprecedented interference with important prosecution witnesses has played an important role in the lack of sufficient

evidence to support the charges against the accused. Kenya's persistent impunity prevails over accountability and fails victims of atrocities committed during post-election violence" (FIDH, 2016).

In spite of all that, the African Union should strengthen the relation between the ICC (Goodman & Mncwabe, 2011: p. 6), because this institution is necessary to ensure peace in Africa and especially in the world. As an international organization, the African Union plays a very important role in the improvement of peace in Africa. So instead of encouraging members to break with the Rome Statute, it should encourage member states to cooperate with the ICC, since both the African Union and the ICC should fight against impunity (African Union, Constitutive Act, Art 4 (h) and (o); Rome Statute, Art 5 and following). Regarding the improvement of cooperation between the two institutions, when international crimes take place on the territories of a country in Africa and we see that this country has difficulties or cannot even punish the head of these crimes, then, the African Union should create a hybrid tribunal that would be composed of judges and prosecutors some of whom would be appointed by the state where the crimes were committed and others by the African Union. This recommendation will be one of the ways to meet the criterion of complementarity of the ICC.

6. Conclusion

Despite all the difficulties faced by the ICC, its existence is paramount. Even criticized, it allows the application of international criminal law when states are not ready to do so. It is a dissuasive and necessary justice. As the President of the ICC Judge Silvia Fernández de Gurmendi said that "The Court is not perfect, but it is functioning and has matured. It fulfills its mission (UN, General Assembly Plenary October 2017). So, the African Union and the international system are two essential partners, if we want, on one hand, to consolidate the foundations of the ICC and, on the other hand, to render justice to the many African victims of international crimes.

Thus, in order to solve the problems between the ICC and Africa, it is in Africa's interest to fight against impunity for the most serious crimes to the extent that this threatens the establishment and entrenchment of democratic regimes based on the rule of law. It is therefore not necessary that African countries withdraw from the ICC. On the contrary, the African Union should support the Court so that it can do justice to international crimes in Africa. As we know that national judicial systems play a leading role in the fight against impunity for international crimes. In short, the African Union needs to assist African states to look for ways to strengthen the capacity of African judicial institutions to improve cooperation with the ICC.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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