

South Africa's Disappointment with the International Criminal Court: The Unfair Treatment of African People Caused an End to Cooperation

by

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Abstract

This paper argues that South Africa ignored the International Criminal Court's orders in 2015 and made plans to withdraw from the Rome Statute because the indictments of the leaders of Sudan, Libya, and Kenya violated international law regarding immunity for heads of state; the ICC is a political tool used to target Africa; the United States colludes with its European allies to control the ICC despite not being a signatory to the Rome Statute; the ICC prosecutes African people while ignoring similar crimes committed by others; and the history of racism and colonialism cause Africa to be skeptical of the intentions of Western nations that influence the ICC.

Introduction

The Rome Statute created the International Criminal Court to prosecute people for committing crimes viewed as serious by the international community. That includes genocide, crimes against humanity, war crimes, and crimes of aggression. More than half of the world's countries are signatories to the Rome Statute, and 34 are from Africa. Controversy has arisen because of the ICC's focus on prosecuting people in Africa to the virtual exclusion of others.

Until January 2016, all of the situations the ICC investigated occurred in Africa. The focus on Africa led many, including South Africa, to believe the ICC unfairly targets them. They feel the ICC prosecutes Africans not to hold people accountable for the crimes they commit, but to further the political agendas of powerful western countries. In 2015, South Africa refused to execute the ICC's arrest warrant for President Omar al-Bashir of Sudan, challenged the ICC's authority, and made plans to withdraw from the Rome Statute.

This paper will argue that South Africa ignored the International Criminal Court's orders in 2015 and made plans to withdraw from the Rome Statute because 1) The indictments of the leaders of Sudan, Libya, and Kenya violated international law regarding immunity for heads of state; 2) The ICC is a political tool used to target African people; 3) The United States colludes with its European allies to control the ICC despite not being a signatory to the Rome Statute; 4) The ICC prosecutes people in Africa while ignoring similar crimes committed by others; and 5) The history of racism and colonialism makes Africans skeptical of non-Africans.

History of the International Criminal Court

Although many people in Africa believe the ICC is biased against them, African people played an important role in the ICC's creation. James Crawford (2008) discussed the history of the court. He said the idea for an international criminal tribunal dates back to 1872 (678). More recently, the issue arose in 1953 with the involvement of the United Nations. No such tribunal was formed because of disagreements over the definition of aggression, along with concerns related to the Cold War. Trinidad and Tobago raised the issue again in 1989, and it was from those efforts that a process began, leading to the Rome Statute being created in 1998 (679).

Rowland J.V. Cole (2013) noted that African countries were instrumental in forming the ICC. They had the highest regional representation in the world among countries that signed the Rome Statute (671). The Southern African Development Community (SADC), of which South Africa is a member, is a regional organization in Africa. Sivu Maqungo said that South Africa and four other SADC countries joined others in an attempt to create the ICC in 1993. Cole said the SADC members devised 10 principles in September 1997 that were considered when forming the ICC. In February 1998, 25 African countries participated in a conference in Senegal where the Dakar Declaration was adopted. That declaration sought to ensure the independence of the ICC, and committed the countries to establishing the court (673).

Maqungo revealed that South Africa was a member of the Drafting Committee of the Rome Conference, and worked with others to form part of the Rome Statute. South Africa led the SADC in July 1998 when the organization approved a draft of the treaty. The principle of complementarity, as opposed to giving the court primary jurisdiction, was supported to recognize the sovereignty of countries. South Africa also wanted the Rome Statute to include a provision recognizing reconciliation and amnesty efforts. Provisions adopting complementarity and amnesty were included because of its efforts.

The Rome Statute entered into force on July 1, 2002. Although intended to be an independent organization, it is funded not only by its members but by other individuals and entities ("ICC – About the Court"). The ICC was to be a court of last resort that would only intervene if a national legal system either refused or was unwilling to prosecute. As of April 1, 2015, 123 countries have signed the Rome Statute ("ICC – ICC at a glance").

The ICC is a neoliberal institution. After numerous instances of extreme human rights violations and atrocities being committed throughout the world during the 20th century, different countries joined together to create the ICC. Regardless of where on earth the atrocities occurred, other countries were affected directly or indirectly, with some being ridiculed for their failure to act to protect vulnerable people. The world had become interdependent.

By creating the ICC, countries intended to promote their shared interest in maintaining international peace and security. Knowing that the violation of human rights in other countries could have global ramifications, they realized that it was to their benefit for those responsible to be held accountable. The interdependence between countries made them reliant upon one another for the maintenance of international security. The ICC could thus help all signatories to the Rome Statute achieve their shared goal of international peace and security, by prosecuting violators of human rights. However, South Africa would feel betrayed by the direction of the court, which would lead it to abandon the ICC as it felt the court had lost legitimacy.

African People: Targeted by the International Criminal Court

Article 13 of the Rome Statute sets three conditions under which the ICC can review a situation: a referral to its prosecutor by either a party to the treaty, the Security Council, or when the prosecutor chooses to initiate an investigation (United Nations Diplomatic Conference 1998). The ICC has investigated 10 situations covering 23 cases. Except for one investigation beginning in January 2016, all have involved African defendants. Sudan and Libya were referred by the Security Council, and Kenya was initiated by the ICC prosecutor (“Situations and Cases”).

As a neoliberal institution, the ICC was formed through a cooperative effort to benefit signatories to the Rome Statute. That effort failed because the ICC focused on Africa while ignoring crimes committed by powerful western countries who manipulate it through the Security Council. The AU speaks on behalf of all African countries, and has been outspoken in opposing the ICC. It urged its members to stop cooperating with the ICC. The conflict it and South Africa have with the ICC began when the ICC issued arrest warrants for al-Bashir for crimes against humanity, war crimes, and genocide. This situation would show how the ICC stopped benefitting its members, and took direction from non-signatories to its founding treaty.

Sudan and the ICC

In the mid-2000’s, violence was rampant in the Darfur region of Sudan. Media outlets throughout the world, along with celebrities who wanted to bring attention to the situation, portrayed the conflict as the result of the Arab government of Sudan enacting a policy of genocide against the Black African people of Darfur. The inference was that the violence was a manifestation of racism involving Black and White people. However, that was inaccurate and is a simplified explanation for what occurred.

Linda Fasulo (2015) said the violence resulted from a “complicated internal conflict involving the central government and rebel militias” that “produced death, misery, and destruction throughout an area larger than France” (130). In an April 23, 2006 *Washington Post* article, Emily Wax dispelled the notion that the situation in Darfur was the result of racism. Everyone involved was Black and Muslim. Wax said that Mahjoub Mohamed Saleh, a Sudanese Reporter, recalled the surprise of how Black Americans visiting Darfur thought there were no Arabs in the region because everyone was Black. Ignorance regarding what constitutes culture and ethnicity is important because of the role it plays in how inaccurately conflicts are viewed internationally. That is a reason why South Africa has concerns with how the ICC operates.

According to Wax, the conflict in Darfur involved an insurgency rooted in a rivalry between al-Bashir and an Islamic cleric, Hassan al-Turabi. Both men are political rivals, and al-Turabi is viewed as an extremist. He called Osama bin Laden a hero before the al-Qaeda attacks of September 11, 2001, and supported one of Darfur’s main rebel groups. Wax recalled Sudanese human rights lawyer Ghazi Suleiman explaining that “Darfur is simply the battlefield for a power struggle over Khartoum,” the capital of Sudan.

In September 2004, Secretary of State Colin Powell testified before the Senate Foreign Relations Committee, and he called the situation in Darfur genocide. Wax felt the declaration was unproductive. She said it emboldened the rebels in Darfur. They refused to negotiate with the Sudanese government, and they expected the United States to support them. The Sudanese government used the declaration as evidence of America’s bias against Islam and Arabs.

Powell’s declaration became the basis for the ICC prosecuting al-Bashir. He explained that under Article VIII of the Genocide Convention, parties to the treaty could ask the UN to act against genocide. Since the United States signed the treaty, Powell said the United States would seek authorization for a UN investigation from the Security Council (Powell 2004).

Six months after Powell’s speech, Security Council resolution 1593 referred the situation in Darfur to the ICC. Of the five permanent members of the Security Council, all voted for the resolution except the United States and China (“Security Council resolution 1593” 2005). Neither are signatories to the Rome Statute. Since Sudan is also a non-signatory, the United States and China should have vetoed the resolution, as both had a vested interest in not seeing the ICC investigate a non-signatory. The ICC would eventually indict al-Bashir.

Despite instigating al-Bashir’s indictment, the United States opposed the ICC. Margaret P. Karns, Karen A. Mingst, and Kendall W. Stiles (2015) said the United States feared its citizens being prosecuted, which it felt would infringe on its sovereignty. Due to it being a superpower, it felt it had exceptional international responsibilities that warranted Americans having immunity. To avoid its citizens being subject to ICC jurisdiction, the United States signed “bilateral immunity and impunity agreements” with more than one hundred countries. Those agreements were created under duress because the United States threatened to suspend foreign aid to countries that did not sign them (507).

Mahmood Mamdani (2010) said the bilateral agreements were signed after the United States threatened to veto UN peacekeeping operations if the Security Council did not grant it an exemption from prosecution. A one-year exemption was granted for countries that had not signed the Rome Statute. Canada called the exemption illegal (60).

The agreements said the countries involved would refuse to surrender the other country's citizens to the ICC, even if they were accused of committing crimes against humanity. Amnesty International condemned the agreements, and said they granted impunity. The complexity and partiality inherent in the Darfur situation was exemplified by an agreement reached between the United States and the ICC. If the United States did not object to the ICC intervening in Sudan, the ICC would only charge Sudanese officials and not the rebels opposing them. That was done despite the UN Commission on Darfur having accused the rebels of committing war crimes. According to Mamdani, that showed "the ICC is rapidly turning into a Western court to try African crimes against humanity...its approach is selective: it targets governments which are adversaries of the US and ignores US allies, effectively conferring impunity on them" (61).

A divided international system exists where state sovereignty is recognized throughout the world, but suspended in African and Middle Eastern countries deemed 'failed' or 'rogue' (54). Mamdani said that power has institutionalized war (56), which is no longer a confrontation between standing armies but the targeting of all aspects of society. War, counterinsurgency, and genocide all target civilians. However, the international humanitarian order separates genocide from war and counterinsurgency because they are viewed as normal developments between countries (57). That is important to note because it exposes American hypocrisy and shows the double-standard applied to African people.

The importance of labels is shown by the international reaction to the situation in Darfur, and the war in Iraq. Mamdani said that Iraq and Darfur were examples of counterinsurgencies. He noted that the United States accused Sudan of genocide despite having created the violence in Iraq. Deaths in Darfur were overestimated. Although the United States General Accountability Office said deaths resulting from the conflict ranged between 70,000 and 400,000, Mamdani feels they were closer to 70,000. In contrast, he noted that the deaths following America's invasion of Iraq ranged from 400,000 to 1,033,000 (58).

Secretary-General of the United Nations Ban Ki-moon visited Darfur, and noted the complexity of the situation in a *Washington Post* article on September 14, 2007. He said it "was a society at war with itself" where rebels battled the government, ethnicities fought ethnicities, and warlords fought warlords. The situation was destabilizing the region while being an environmental crisis caused by desertification, ecological degradation, and scarcity of resources. During his visit Ki-moon met with Sudanese officials, villagers affected by the fighting, humanitarian aid workers, and leaders of countries that border Sudan.

After speaking to them, he reached the conclusion that peace required the consideration of all factors, and that a political settlement was required. He said that al-Bashir gave an unqualified commission to peace, and he chastised both sides in the conflict by saying they needed to exercise restraint and facilitate negotiations.

Ki-moon's assessment of how to resolve the situation in Darfur contrasts with that begun when Powell declared genocide. Instead of a negotiated settlement being reached between the Sudanese government and rebels, the rebels refused to negotiate, and al-Bashir was indicted by the ICC. Arrest warrants were issued for him in 2009 and 2010 for crimes against humanity, war crimes, and genocide. It was the first time the ICC issued warrants for a current head of state. That occurred as the United States engaged in a war in Iraq that lacked international legitimacy, and resulted in more death there than occurred in Darfur.

Mamdani said that labels have different meanings. They are used to demonize those who commit some forms of violence, while giving immunity to others who commit mass violence. Humanitarian intervention has become politically motivated (59). Western countries use it to justify war, and as an excuse to remove African leaders they are not friendly with.

South Africa views the ICC with contempt because its indictment of al-Bashir was politically motivated. It sees the ICC as a tool used by powerful countries in the West to remove African leaders they do not like. Those feelings are held by other African countries, along with the AU. This case serves as the primary reason for the ICC being viewed as an illegitimate institution whose warrants are being repeatedly ignored by African countries.

Yannis Karagiannis (2013) said that international organizations set standards of behavior and monitored them to ensure they are being complied with. Cooperation is intended to provide an authoritative resolution of issues (52). But with the United States influencing how the ICC operates despite not being a party to its treaty, the ICC ceased being a neoliberal institution that benefited its members. It became a conduit used by the United States and its allies to promote their political agenda. The situation in Libya would prove that.

Libya and the ICC

The fact that South Africa is a signatory to the Rome Statute shows that it once believed in the mission of the ICC. However, those sentiments changed. The way the United States and its allies reacted to events that occurred in Libya in 2011 caused South Africa to permanently change how it viewed the ICC. America and its allies showed that they would abuse their power and ignore the law to achieve their political aims – and make a bad situation worse.

Geif Ulfstein and Hege Føsund Christiansen (2013) said the events leading to the Libyan Civil War began on February 15, 2011 when demonstrators protested the arrest of a human rights activist in the city of Benghazi. On February 17, 2011, a 'Day of Rage' was declared where Libyans protested, demanding democracy and human rights protections. The Libyan government acted violently towards the protestors, which led to an armed rebellion. Protestors seized control of several cities and established the National Transitional Council. Government forces retook many areas. The UN Office of the High Commissioner for Human Rights reported human rights abuses to include beatings, rapes, murders, and forced disappearances (159).

Libya's actions were condemned by the UN and regional organizations in Africa and the Middle East. On February 26, 2011, the entire Security Council approved resolution 1970, which referred the situation in Libya to the ICC. South Africa was a member of the Security Council. The resolution also enacted a travel ban against Libyan leader Colonel Muammar Gaddafi and many of his relatives ("Security Council resolution 1970" 2011). It failed to end the violence.

A pivotal event occurred on March 17, 2011. During a radio broadcast, Gaddafi threatened civilians living in areas controlled by rebels (Ulfstein and Christiansen 2013, 160). The Security Council passed resolution 1973. Paragraph 4 authorized "Member States...acting nationally or through regional organizations or arrangements...to take all necessary measures...to protect civilians and civilian populated areas under threat of attack." Paragraph 6 authorized a no-fly zone. Although South Africa voted for resolution 1973, the other BRICS members abstained from voting; South Africa would later regret its vote. The United States, United Kingdom, and France also voted for it ("Security Council resolution 1973" 2011).

Ulfstein and Christiansen said that on March 19, 2011, the United States, United Kingdom, and France attacked the Libyan government. The North Atlantic Treaty Organization (NATO) took command of the operation, which became Operation Unified Protector. China and Russia condemned the attacks as did the AU, which believed that only dialogue could bring peace. South African President Jacob Zuma attempted to broker peace on April 11, 2011. He suggested an immediate ceasefire after which negotiations would begin. Gaddafi agreed to the terms, but Chairman Mustafa Abdul Jalil of the National Transitional Council rejected them. He wanted Gaddafi to relinquish power and withdraw his forces, and Jalil disliked the proposed end to NATO air strikes. The NATO secretary General Anders Fogh Rasmussen wanted the NATO air strikes to continue, as he felt it was too soon for a ceasefire to be implemented (161).

On April 14, 2011, the truth behind Security Council resolutions 1970 and 1973 was revealed. President Barack Obama of the United States, Prime Minister David Cameron of the United Kingdom, and President Nicolas Sarkozy of France wrote a joint letter that appeared in the *New York Times*. They said their duty and mandate "under U.N. Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Qaddafi in force."

That statement was deceptive because it implied they were uninterested in regime change. However, their intent to force regime change became evident as they continued. They suggested at least eight times that Gaddafi would not be allowed to continue leading Libya. Actions intended to force regime change began shortly thereafter.

The following day, the Russian Foreign Minister Sergei Lavrov expressed a desire for the Libyan Civil War to be resolved through diplomacy. The UN had not authorized regime change. Russian President Vladimir Putin accused NATO of exceeding the mandate authorized by Security Council resolution 1973 by trying to kill Gaddafi. That statement proved prophetic because on April 30, one of Gaddafi's sons and three of his grandchildren were killed during a NATO bombing mission (Ulstein and Christiansen 2013, 166). Arrest warrants for murder and persecution were issued against Gaddafi and his son Saif al-Islam by the ICC on June 27, 2011 ("ICC – Libya"). However, NATO would not allow the ICC to take custody of them.

Sarah Whitson (2012), the executive director of the Middle East and North Africa Division of Human Rights Watch, gave a detailed accounting of the events that followed the issuance of arrest warrants. Gaddafi's son Khamis was killed on August 29 while fleeing Tripoli. NATO likely killed him during an attack. On October 17, 2011, Saif al-Islam was injured during a NATO attack. On October 20, 2011, a 50-vehicle convoy left an area named District Two. Included in the convoy were Gaddafi, his son Mutassim Gaddafi, their associates, and some wounded people and non-combatants. Upon reaching an open area, NATO fighter planes attacked the convoy, which became trapped by militias on the ground. Many in the convoy were killed, including non-combatants. After the attack, 53 bodies would be found – 28 of which were burned beyond recognition – and 14 vehicles were destroyed.

Gaddafi and his associates fled into a nearby compound after the attack, according to Whitson. Mutassim left with several of their entourage in an attempt to find an escape route for everyone. Gaddafi and others ran to an open field where they were caught by militiamen. Video footage showed Gaddafi being beaten and sodomized. Militiamen admitted to Human Rights Watch that they shot Gaddafi during a dispute over where to take him.

The NATO bombing preceding Gaddafi's capture led to the murder of 103 members of his convoy. Whitson said that some of those murdered were executed with gunshots to the head. Approximately 140 Gaddafi supporters were captured alive, and 66 of them were later executed. Many of them had their hands tied behind their backs, and video showed 29 of them being beaten by militiamen before their execution. Rebels videotaped Gaddafi's son Mutassim alive after his capture, yet he was dead several hours later. His body had wounds that were not present in the video. Human Rights Watch suggested the ICC pressure Libyan authorities to prosecute the war crimes committed against Gaddafi and his associates, and for the ICC to investigate and prosecute if the Libyans refused. It noted that the Libya's transitional government has yet to investigate the serious crimes that occurred. And nearly five years later, the ICC has failed to investigate the war crimes committed by the rebels.

Western countries used the ICC as a political tool, and the ICC's actions showed that it was biased and selective with whom it chose to prosecute. Since the United States and its European allies disliked Gaddafi and decided that ending his rule was best for Libya, they concocted a plan to use Security Council resolutions to enact regime change. Former Deputy UN Secretary-General Mark Malloch-Brown, as told by Fasulo, said the NATO airstrikes succeeded in protecting civilians, but they did not end. They helped rebels counterattack the Libyan government and seize control of the country. The airstrikes greatly exceeded the scope of the Security Council resolution authorizing them. They became an exercise in regime change that confirmed the fears of those who felt that "you can never give these guys an unlimited mandate for intervention to rescue civilians from imminent threat without them turning into a broader mandate to serve their own political objectives" (63-64). Other countries supported protecting Libyan civilians, but soon realized they were misled.

On October 27, 2011, Baso Sangqu – South Africa's ambassador to the UN – spoke to the press and he was clearly annoyed. He was pleased that the Security Council had lifted a no-fly zone in Libya, which he felt was unnecessary once NATO had secured Libyan airspace. However, he advised that South Africa believed the implementation of resolution 1973 had exceeded its intent. Along with the AU, it wanted the violence to end through peaceful means. That did not occur because others preferred to use a "path of death and destruction over the path of peace." Sangqu criticized the Security Council by saying it should not welcome "death and destruction." He said that in the future, Security Council resolutions should be viewed as "sacrosanct and they must be implemented in the letter and the spirit." The danger in how NATO misused resolution 1973 had long-term ramifications, as South Africa and other Security Council members abstained from voting in similar situations, such as with regard to Syria. They preferred peace and wanted to prevent the problems in Libya from arising elsewhere.

Neoliberal idealism that created the ICC had been violated. The ICC no longer served the collective interest of its members, but the individual interests of some. France and the United Kingdom were members that conspired with a non-member – the United States – to cause regime change in a non-member country. Etel Solingen (2008) said that neoliberal institutionalism involves countries managing their increasing interdependence by creating institutions to advance their interests (263). Despite the increased efficiency, information sharing, and a reduction in conflict, the improvements are challenged when powerful countries benefit the most (264).

The United States and its allies proved that Solingen's assessment was correct. They arrogantly assumed that removing Gaddafi would benefit them. Their shortsightedness prevented them from foreseeing the weakening of the ICC if African countries stopped cooperating with it. They were blinded to the possibility of terrorists murdering their citizens while using Libya as a base of operations. It was beyond their comprehension to imagine countries like South Africa viewing them with skepticism, and refusing to approve resolutions that would address the crisis in Syria, which resulted in waves of migrants flooding across their borders. South Africa lost faith in the ICC and its western manipulators, and its view of the ICC was forever changed.

Kenya and the ICC

The ICC's prosecution of Kenyan President Uhuru Kenyatta was similar to those of President Omar al-Bashir and Colonel Muammar Gaddafi. All three involved international laws governing immunity for heads of state, and the unfair way the ICC prosecuted some people for human rights violations while ignoring the commission of those crimes by others. However, the Kenyan case also shared a connection with South Africa. It showed the ICC lacked respect for African peace efforts, which further solidified South Africa's disdain for the ICC.

Kenya is a party to the Rome Statute. Manisuli Ssenyonjo (2013) said that following the presidential election of December 27, 2007, violence erupted between ethnic groups. Some of the violence was planned and organized. Politicians and business leaders were accused of being responsible for it. The violence resulted in the murders of over 1,000 people, hundreds were raped, and 350,000 were forcibly displaced (396).

Thomas Obel Hansen (2011) said that former UN Secretary-General Kofi Annan led mediation efforts. That enabled a peaceful settlement (3), resulting in a coalition government being formed. The parties also agreed to address Kenya's legacy of political violence, begin criminal prosecutions, establish a reconciliation commission, and enable a constitutional review process. A Commission of Inquiry into Post-Election Violence recommended the creation of a special tribunal to prosecute people responsible for the violence. However, Kenyan leaders rejected the tribunal. That led Annan to deliver the names of those believed responsible for the violence to Luis Moreno-Ocampo, the ICC prosecutor. Moreno-Ocampo requested and received authorization from the ICC's Pre-Trial Chamber II to investigate the situation in Kenya (4).

According to Ssenyonjo, ICC judge Hans-Peter Kaul dissented because he did not believe that serious crimes had been committed as part of state policy. Despite his reservations, several Kenyans were indicted, including Kenyatta, who was the deputy prime minister at the time. Kenya requested a deferral from the Security Council. The AU supported the request so that Kenya could conduct its own prosecutions, and allow peace efforts to proceed. However, the Security Council rejected the request (398). Kenya appealed to the East African Court of Justice (EACJ). The EACJ said the indictments would not solve the underlying issues that caused the violence. Many Kenyans, the EACJ, and the AU did not support the prosecution (400).

Kenyatta voluntarily appeared before the court on April 8, 2011, and evidentiary hearings were held between September 21 and October 5, 2011. On January 23, 2012, the charges against Kenyatta and his codefendants were confirmed ("Case Information Sheet" 2015). Nevertheless, the prosecution of Kenyatta ended on December 5, 2014 when charges were dropped. Fatou Bensouda, the new ICC prosecutor, said there was not enough evidence to prove Kenyatta's guilt beyond a reasonable doubt.

She suggested the prosecution faltered due to a lack of cooperation with the ICC by Kenya (“Notice of withdrawal” 2014). However, the prosecution failed for other reasons. They include deficiencies in how the ICC investigates cases, and the failure of the ICC to acknowledge the different ways people in Africa resolve conflict.

Catherine Gegout (2013) described the ICC as a political actor that selectively prosecutes (806). The ICC is inconsistent with how it applies international law, which leads to its prosecutions being unfair. It strategically chooses who to prosecute based on subjective criteria including the likelihood of success, and the strength of its evidence. Institutional limitations help ensure ICC investigations will be unfair. The ICC can only investigate cases in areas where local legal systems exist, in places where travel is feasible, and where government officials will protect its investigators. That limits the types of people ICC investigators can interview. The Kenyan investigation was viewed as unfair by many because the ICC prosecutor ignored crimes committed by the worst offenders, and prosecuted those who could easily be apprehended (807).

The ICC and its western supporters also lack an understating of African cultural practices. Steve Akoth (2015) visited areas of Kenya that had been affected by the violence. He found that people were reluctant to speak about the past, because it aroused feelings they had already dealt with. A chief became hostile when Akoth asked him about the violence, and said that everyone had moved on. According to the chief, people were more concerned with daily survival than with the ICC’s prosecutions. The chief felt that bringing up the past was a way of dividing people (230). Women who sought assistance from the chief did not want to be asked about the past, and said they were able to travel far to see the chief because they had moved on from the past. A man who had been victimized by the violence said that moving on was best because it is what the Kenyan leaders wanted, and those who refused would be societal outcasts (231). Reconciliation was important for Kenyan society. The ICC seems unable to understand that, but Kenya is not the only place where that has occurred.

Mamdani spoke of how the post-apartheid transition in South Africa set a precedent for survivors’ justice. When apartheid ended, South Africa’s new leaders agreed to forgive their mistreatment as long as past wrongs were acknowledged. There would also be no prosecutions for what had occurred. However, the victims would not forget their mistreatment so that change would ensure a successful societal transition. Mamdani noted that the successful transition would not have occurred if the ICC had existed to prevent the post-apartheid transition, by prosecuting people. Survivors’ justice makes peace a priority over punishment, and explores different forms of justice to ensure that reconciliation lasts (63). The ICC should consider that instead of forcing prosecutions on African people who prefer to exercise forgiveness.

With the ICC prosecuting three African heads of state while ignoring human rights violations committed by rebels and westerners, it irreparably damaged its relationship with South Africa. Coupled with its lack of respect for African peace efforts, the ICC proved Mamdani correct when he said the ICC has become a forum used by western countries to target their adversaries while granting immunity to their allies. The neoliberal thinking that brought countries together to create the ICC was no longer applicable.

The ICC lost legitimacy among the African countries that helped create it. They were unfairly targeted by the ICC, and stopped cooperating with it. South Africa is one of those countries. In order to understand why South Africa turned against an institution it was instrumental in creating, it is necessary to discuss Pan-Africanism.

Bonding Inherent in Pan-Africanism

Colonialism in Africa and the Trans-Atlantic Slave Trade resulted in centuries of human rights violations being committed against Black people. Only within the past 50 years have Black people been freed from colonialism and slavery. Because of their mistreatment, many Black people have developed a spirit of unity. They are suspicious of White people, and view international institutions like the ICC with skepticism. That has resulted in them uniting to oppose efforts targeting individual Black people, even if those individuals have done wrong.

What is Pan-Africanism?

Cheryl Sterling (2015) said that Pan-Africanism developed from Edward Blyden's exploration of people who had been oppressed by White people. It became an enduring system of belief despite constraints placed on it by the white supremacist power structure (122). Pan-Africanism arose from the desire of the enslaved to return to Africa and involved their cultural, social, philosophical, and psychic being. A spirit of unity among Black and African people transcends social and geographical boundaries as a result of the common experience of being oppressed through racism, slavery, and colonialism (129).

While observing the mistreatment of Black people during the 19th century, Blyden developed the idea that there were common traits and modes of behavior that linked all African people. Those commonalities were the result of a shared sense of misery, and they were a rejection of the limits white supremacy placed on Black people (130). Pan-African thought developed further in the 20th century and became a norm in the behavior of African people.

Kwame Nkrumah, the first president of Ghana, was a strong Pan-Africanist. In a 1963 speech before the Organization of African Unity (OAU) – the predecessor to the AU – he spoke about the necessity of unity among African people. He said that African people needed to control their economic and social affairs.

They needed to be free from the “crushing and humiliating neo-colonialist controls and interference” that prevented Africa’s economic. Pan-African unity was needed to facilitate peace and security in Africa, and it would fulfill the desire of African people to eliminate boundaries that separated them.

Pan-Africanism is important because it shows why African people unite against outsiders. “Mixing with colonialism” was how Nkrumah described outside intervention, which he viewed as a hindrance to African unity. That unity became institutionalized as time transpired, and the OAU became the AU. It would show why South Africa would turn against an institution created by a treaty it was a party to, and give its loyalty to other African people and the AU.

African Union vs. International Criminal Court

Except for Morocco, all African countries are members of the AU. The *Constitutive Act of the African Union* (2000) governs the AU, and Pan-African thought is present throughout it. Beginning with its preamble, the document professes to be “inspired” by “Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation.” It recalled “the historic struggles waged by” African people “for political independence, human dignity and economic emancipation.” Homage was given to the OAU which “played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa.” African people are “guided by our common vision of a united and strong Africa and by the need to build a partnership between governments.”

The preamble serves to unite African countries under Pan-Africanism. Article 3 extended the importance of Pan-Africanism within the AU, by stating its objectives. Subsection (a) declares an objective to “achieve greater unity and solidarity between African countries and the peoples of Africa.” Subsection (b) says the AU is to “defend the sovereignty, territorial integrity and independence of its Member States,” while subsection (d) says it will “promote and defend African common positions on issues of interest to the continent and its peoples.” With Pan-Africanism thoroughly enshrined in the AU’s governing document, conflict with outsiders was likely to occur. That was made certain by Article 23(2), which says “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions.”

Max du Plessis, Tiyanjana Maluwa, and Annie O’Reilly (2013) noted that even though two-thirds of AU members are parties to the Rome Statute, the Assembly of the AU has repeatedly criticized the ICC (2). The AU’s dislike for the ICC evolved over time. Belgium issued an arrest warrant in 2000 for the Democratic Republic of Congo’s minister of foreign affairs. Conflict arose between Africa and Europe over the issue of sovereign immunity. In 2008, an aide to President Paul Kagame of Rwanda was arrested in Germany on a French warrant for involvement in the 1994 genocide.

Kagame accused European countries of using universal jurisdiction to humiliate African leaders. The AU issued a resolution denouncing western countries for abusing the concept of universal jurisdiction. It urged its members to not cooperate with western countries who issued arrest warrants against African officials (3). African resistance to the AU was solidified when the ICC indicted al-Bashir.

During the Fifteenth Ordinary Session of the Assembly of the Union in July 2010, the AU showed its support for African leaders indicted by the ICC. It adopted a statement mandating that members not help the ICC arrest al-Bashir; urged unity in asking the Security Council to allow the UN General Assembly to refer situations to the ICC, and criticized ICC prosecutor Luis Moreno-Ocampo for being disrespectful towards al-Bashir (“Decision on the” 2010).

Gegout said that between the time of his indictment and 2012, al-Bashir left Sudan and traveled to numerous African countries – Rome Statute signatories and non-signatories (806). That incurred condemnation from the ICC towards parties to its treaty that hosted al-Bashir. Cole said the indictment annoyed the AU because al-Bashir is a current head of state. As such, he has immunity from foreign courts under customary international law (685).

Article 98(1) of the Rome Statute says the ICC “may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.” A January 9, 2012 AU press release strongly condemned the ICC. It showed how the ICC exceeds its jurisdiction and violates international law.

The AU accused the ICC’s Pre-Trial Chamber I of violating customary international law by ruling that Chad, Malawi, and the AU could not use Article 98(1) to justify their failure to arrest al-Bashir. It also ignored Article 23(2) of the AU Constitutive Act, which mandates that AU members comply with its decisions and policies. Furthermore, the AU argued that immunities granted under international law applied to both foreign domestic courts and international tribunals. Treaties are not binding on non-parties because they are agreements between those that agree to them. The AU said the International Court of Justice had already decided that treaties cannot deprive non-parties of rights they normally possess. As such, al-Bashir enjoyed immunity since the Security Council had not removed it. The AU believes in fighting impunity for human rights violators, but opposes “ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa” (“On the Decisions” 2012).

For nearly 150 years, Pan-African thought unified Black people. Within the past 50 years, it has been institutionalized through the OAU/AU. The AU has become a neoliberal institution that facilitates cooperation among African countries in areas of mutual concern. African people have begun ignoring the ICC, and the AU has replaced it.

Since it is a member of the AU, South Africa must adhere to its decisions. There are also aspects of international law that it must follow, but which the ICC has chosen to ignore. That has led to South Africa siding with other African people against the ICC, even though the ICC's stated mission is something South Africa agrees with. However, since the ICC has allowed itself to be controlled by western countries as it targets people in Africa, South Africa has chosen to side with an accused human rights violator rather than those seeking to prosecute him.

South Africa Loses Faith in the International Criminal Court

South Africa's relationship with the ICC has gone from cooperative to hostile. As shown, South Africa played an important role in the ICC's creation. It is also a defender of human rights, which is a requirement it must adhere to as a member of the AU. The ICC exists to hold people accountable for violating human rights, and South Africa has historically supported the ICC's actions. However, South Africa's view of the ICC changed when the court indicted al-Bashir.

Plessis, Maluwa, and O'Reilly said that when an inauguration was planned for President Jacob Zuma of South Africa in 2009, all African heads of state – including al-Bashir – were invited to attend. That was done despite South Africa being a party to the Rome Statute. Civil society representatives objected to al-Bashir attending the inauguration, and threatened legal action to prevent that from occurring. South Africa then determined that it would be obligated to arrest al-Bashir, and the Sudanese president chose not to visit South Africa (4).

Gaddafi's indictment and deposition represented a significant change in South Africa's relationship with the ICC. As South Africa's UN ambassador alluded to, the Security Council used South Africa to manipulate the ICC into targeting Gaddafi. The motivating forces behind those actions were the United States, United Kingdom, and France. They acted through NATO to force regime change, and were complicit with Libyan rebels in committing war crimes. The result was South Africa ending its cooperation with the ICC. It viewed western countries on the Security Council with skepticism because they chose "death and destruction" over peace.

South Africa Welcomes al-Bashir, and Helps Him Leave Unharm

In June 2015, al-Bashir visited South Africa to attend an AU Summit. Human rights advocates criticized South Africa for not arresting al-Bashir. The visit was shortened after a South African court got involved. With assistance from the South African government, al-Bashir left South Africa without detention and returned to Sudan.

On June 14, 2015, a human rights organization called the Southern Africa Litigation Centre (SALC) filed an action against 12 South African officials in the High Court of South Africa, Gauteng Division. In the filing, the SALC accused the officials of failing to arrest al-Bashir, which was inconsistent with South Africa's constitution.

It wanted the officials to arrest al-Bashir pending a formal request from the ICC for his surrender (4). The respondents said cabinet officials had granted al-Bashir immunity from arrest, which absolved South Africa of a duty to arrest al-Bashir pursuant to the ICC's warrants. The court prohibited al-Bashir from leaving South Africa until it issued a final order (5). However, as previously stated, al-Bashir was allowed to leave with help from the South African government.

Even though al-Bashir had left South Africa, the court issued a ruling. It said that because Article 86 of the Rome Statute obligated signatories to cooperate with the ICC, and Article 89(1) allows the ICC to request cooperation from any country (9), South African officials were obligated to cooperate with the ICC through South Africa's own Implementation Act. Speaking for the respondents, the Director-General of Justice and Constitutional Development said that in order to host the AU Summit, South Africa was required to sign an agreement (11) that granted attendees privileges and immunities (11). Those privileges and immunities were given to representatives of AU members by Article V(1)(a) and (g) of the General Convention on the Privileges and Immunities of the OAU (12). The minister also invoked the Vienna Convention on Diplomatic Relations, which she argued granted immunities that had the force of law (13).

Arguments used by South Africa to justify its failure to arrest al-Bashir were correct, and those of the plaintiff were flawed. South Africa's Implementation of the Rome Statute of the International Criminal Court (Implementation Act) incorporated the Rome Statute into its domestic laws. Chapter 3(2) says that both conventional and customary international law can be applied to any act related to the Rome Statute being heard by a South African court. Heads of state have immunity under customary international law. Chapter 2(5)(1) says that no prosecution can be initiated without permission from the National Director for Public Prosecutions. Chapter 4(8) and (9) says that any ICC request for the arrest of someone has to go through the Director-General of Justice and Constitutional Development, then the National Director, who is the only official able to apply for a South African arrest warrant (Parliament of the Republic 2002). None of that occurred with regard to al-Bashir's visit and the case brought by the SALC.

South Africa Prepares to End its Relationship with the ICC

The African National Congress is a liberation movement that formed in 1912. Its purpose is aligned with Pan-Africanism, and it seeks to unite African people and bring about political, social, and economic change. Throughout its history it fought racism and oppression through organized and armed resistance to apartheid. Its goal is to liberate African people and Black people from political and economic bondage ("What is the African" 2015).

The attempt by the SALC to have al-Bashir arrested reinforced South Africa's belief that legal systems were being manipulated to persecute African leaders. The ANC issued a statement saying the government's appeal of the case was dismissed, and the ANC did not agree with the ruling (Kodwa 2015). As a result, South Africa publicly proclaimed the end of its cooperation with the ICC, and stated its intention to withdraw from the Rome Statute.

Due to the controversy over al-Bashir's 2015 visit, the ANC's National Executive Committee (NEC), which leads the organization, strongly condemned the ICC. The NEC said the ICC is no longer useful for prosecuting crimes against humanity, which requires voluntary compliance from countries that are signatories. Non-signatories go unpunished as African and Eastern European countries are held accountable for their violations. The ANC called for a review of the Rome Statute because it wants all members of the UN to be forced to sign the Rome Statute. It feels that will ensure the ICC operates in a fair manner, and is independent in upholding justice ("High Court Order" 2015).

The National General Council (NGC) of the ANC, which monitors the direction of the organization, reiterated the ANC's respect for human rights and desire to end impunity for war crimes and genocide. However, it opposes the double standards and selective criteria of the ICC. It feels that permanent members of the Security Council who are not signatories to the Rome Statute have unlimited power to refer cases to the ICC. As such, it has asked the ANC-led government of South Africa to amend the Implementation Act to initiate South Africa's withdrawal from the ICC ("ANC NGC" 2015).

In an August 2015 discussion document, the ANC made many statements solidifying its opposition to the ICC. It expressed the view that the ICC selectively prosecutes African people. While urging the ICC to pursue cases outside of Africa, it said the Security Council should respect the work done by African people to promote peace. The ANC views the ICC's prosecutions as attacks on African countries, and says the ICC was arrogant for insisting that African countries execute its arrest warrants, which are not recognized by the AU (174). That is important because it shows that the AU is the neoliberal institution to whom South Africa is loyal, as opposed to the ICC.

The ANC feels that impartial bodies should prosecute human rights offenders. Although the ICC is supposed to serve that purpose, the ANC feels it has become a political tool used by non-signatories to persecute African leaders and affect regime change. As such, the ICC is being used as a court against Africa that dismisses the contributions African people make towards protecting human rights. Permanent members of the Security Council who are not parties to the Rome Statute are able to participate in discussions on referring cases to the ICC, even though their own citizens are not subject to ICC jurisdiction. The many examples showing how the ICC is unfair towards African people has led the ANC to declare that South Africa has no legitimate reason for remaining a member of the ICC. Condemnation directed at South Africa because of al-Bashir's 2015 visit symbolizes the condescending manner in which the ICC views Africa. By continuing to remain a member of the ICC while it is controlled by powerful countries, the ICC is given legitimacy that it does not deserve. Western countries control it by influencing how it operates, and through the large financial contributions, which are done to effect regime change in Africa. As a final means of severing its relationship with the ICC, the ANC said that Africa needs to empower the African Court of Justice and Human Rights so that African people can independently address international crimes occurring in Africa ("ANC International Relations" 2015, 175).

Conclusion

Since it began operating, the ICC has only prosecuted African people. Despite the views of some, conflict is not unique to Africa. There are conflicts just as violent occurring in other regions of the world. Some of the world's most powerful countries are participants in those conflicts. However, the ICC ignores their misconduct, which reminds many African people of past horrors they experienced. They view the ICC as an implementation of neocolonialism.

When South Africa signed the Rome Statute, it wanted perpetrators of serious crimes to be held accountable. Although it still wants that to occur, it wants the ICC to operate in a fair manner. Since only signatories to the Rome Statute are bound by its covenants, South Africa feels that non-signatories are being allowed to commit human rights violations with impunity. The unfairness in how the ICC operates is shown by powerful non-signatories to the Rome Statute having too much influence in deciding which cases get referred to the ICC, through their permanent status on the Security Council.

South Africa has ignored the ICC's orders, openly criticized the court, and stated its intent to withdraw from the Rome Statute. Why did South Africa ignore the International Criminal Court's orders throughout 2015 regarding the arrest of President Omar al-Bashir of Sudan during his visit to South Africa, and make plans to withdraw from the Rome Statute? This analytical paper showed that the prosecutions of the leaders of Sudan, Libya, and Kenya were politically motivated and violated international law. The ICC is a political tool used by the United States and its allies to remove African leaders they dislike. Even though the United States is a non-signatory to the Rome Statute, it has too much influence in how the ICC operates. Selective prosecution by the ICC has resulted in it holding some human rights violators accountable as others operate with impunity. That makes it an illegitimate institution. The historical mistreatment of African people has resulted in them protecting accused human rights violators instead of helping the ICC take custody of the accused.

The neoliberal compact that created ICC has been broken. South Africa no longer wants to be part of the ICC. Its decision to withdraw from the Rome Statute is because of the double standard and bias with which the ICC operates. And South Africa is not alone. Namibia preceded it in making plans to withdraw, and Kenya intends to do the same.

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