

The International Criminal Court: Your questions answered



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What is the International Criminal Court (ICC)?

The International Criminal Court is a legal body with permanent international jurisdiction to investigate and prosecute genocide, crimes against humanity and war crimes. The ICC was created by the Rome Statute, an international treaty concluded in July 1998. It began operation in July 2002. The ICC has 124 member states, 34 of which are in Africa. The ICC is intended to act as a court of last resort, stepping in only when national courts cannot or will not prosecute serious international crimes.

The ICC is currently the only mechanism available to prosecute political leaders of brutal authoritarian states who engage in crimes against humanity. In 2015, the African Union adopted a protocol to give the African Court of Justice and Human Rights authority to prosecute grave crimes, but that proposal grants immunity to sitting heads of state and other senior government officials. Furthermore, that protocol will need 15 ratifications before coming into force and so far it has not been ratified by any country.¹

Why are Burundi, South Africa, and The Gambia withdrawing from the ICC?

Burundi was the first country to declare its intention to withdraw from the ICC. The reason given by Burundi's government was that the ICC had become an instrument used by powerful countries to punish leaders who do not comply with the West.² However, the decision to withdraw was announced after ICC Prosecutor Fatou Bensouda opened a preliminary examination into possible crimes against humanity in Burundi since April 2015 when President Pierre Nkurunziza announced he would be running for a re-election. Hundreds of people have died in Burundi since Nkurunziza pursued and won a third term that many call unconstitutional. Since his candidacy was announced, there have been violent protests, forced disappearances and assassinations, and more than 260,000 people have fled the country.³ The Burundian justice system has failed to bring the persons responsible for these crimes to justice.⁴

South Africa was the second country to announce its intention to withdraw from the ICC. The announcement came after the South Africa court of appeal concluded that the government violated its international and domestic legal obligations in not arresting President Omar Hassan al-Bashir of

¹ Human Rights Watch, "AU: Activists Challenge Attacks on ICC", 6 July 2016, <www.hrw.org/news/2016/07/06/au-activists-challenge-attacks-icc>, last accessed 4 November 2016.

² Human Rights Watch, "Burundi: ICC Withdrawal Major Loss of Victims", 27 October 2016, <www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>, last accessed 4 November 2016.

³ The Guardian, "Burundi threatens to withdraw from international criminal court", 7 October 2016, <www.theguardian.com/world/2016/oct/07/burundi-threatens-to-withdraw-from-international-criminal-court>, last accessed 4 November 2016.

⁴ Human Rights Watch, "Burundi: ICC Withdrawal Major Loss of Victims", 27 October 2016.

Sudan in June 2015 when he was visiting South Africa.⁵ At a press conference, Justice Minister Michael Masutha justified the withdrawal on the basis that the Rome Statute “is in conflict and inconsistent with the provisions of the Diplomatic Immunities and Privileges Act”, a South African law that gives visiting leaders diplomatic immunity.⁶ Under the Rome Statute, countries have a legal obligation to arrest anyone sought by the ICC, including heads of state. According to Masutha, South Africa’s withdrawal from the ICC will ensure the country’s continued ability to conduct active diplomatic relations.

The Gambia was the third country to announce its withdrawal from the ICC. Information Minister Sheriff Bojang justified the withdrawal on the basis that the court has been used “for the persecution of Africans and especially their leaders” while ignoring crimes committed by the West. He went on to say, “There are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted.” The withdrawal, he said, “is warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans.”⁷ Gambian President Yahya Jammeh has also complained that ICC prosecutor Fatou Bensouda (who is Gambian) has declined to investigate the European Union for the deaths of thousands of African migrants trying to reach its shores.⁸ (The ICC Prosecutor met with President Jammeh, but the ICC has not commented on this meeting or on why it is not opening a preliminary investigation into the migrant issue – perhaps because the President’s public allegations included a charge that the EU was purposefully capsizing boats filled with African migrants, which may have been viewed as lacking in credibility, because he did not identify a particular state party but only the EU, or because of other jurisdictional problems.)

Although all three countries have expressed an intention to leave the ICC, their departure will not be immediate. It takes one year for a country to leave the ICC after a notice of withdrawal is formally received by the United Nations Secretary General.

Is the ICC biased against Africa?

Several African leaders have claimed that the ICC has disproportionately focussed on Africa. It is true that all of the total of its 10 investigations to date, with the exception of one case involving Georgia, have been in Africa.⁹ It is also true that all of the people the ICC has convicted so far are Africans.¹⁰

⁵ Human Rights Watch, “South Africa: Continent Wide Outcry at ICC Withdrawal”, 22 October 2016, <www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal>, last accessed 4 November 2016.

⁶ The Guardian, “South Africa to quit international criminal court”, 21 October 2016, <www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>, last accessed 4 November 2016.

⁷ The Independent, “Gambia joins South Africa and Burundi in exodus from International Criminal Court”, 26 October 2016, <www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html>, last accessed 4 November 2016.

⁸ Ibid.

⁹ International Criminal Court, “Situations under investigation”, <<https://www.icc-cpi.int/pages/situations.aspx>>, last accessed 7 November 2016.

¹⁰ International Criminal Court, “Reparation/Compensation stage”, <<https://www.icc-cpi.int/Pages/ReparationCompensation.aspx>>, last accessed 7 November 2016; International Criminal Court, “Appeals stage”, <<https://www.icc-cpi.int/Pages/Appeal.aspx>>, last accessed 7 November 2016.

However, there is more to this story. As a starting point, it is useful to know that there are three ways in which the ICC may acquire jurisdiction over a case: 1) a State Party can refer a matter to the court of its own volition; 2) the UN Security Council can refer a case; or 3) an ICC prosecutor can initiate an investigation into possible violations of the Rome Statute in the territory of a State Party, or in the territory of a non-State Party if it is invited to do so by the State in question or where the case is referred by the UN Security Council.

Additionally, the ICC's jurisdiction is limited to war crimes, crimes against humanity and genocide occurring since July 2002 – which leaves out matters such as piracy and acts of terrorism, which do not fall within these definitions. And finally, ICC intervention must respect the principle of complementarity, which means that it cannot exercise jurisdiction if a state is currently investigating or prosecuting a case, has previously done so, or has previously investigated a case and declined to prosecute (unless there is evidence that the state was unwilling or unable to act).¹¹ The ICC prosecutor will only instigate an investigation if there is sufficient evidence of crimes of sufficient gravity falling within the ICC's jurisdiction, if there are no genuine national proceedings and if an investigation would serve the interests of justice and the victims. It must also be remembered, as a practical matter, that the usefulness of state cooperation on issues such as access to crime scenes, victims and official records tends to favour self-referrals and voluntary acceptance of jurisdiction by non-State Parties, as opposed to investigations initiated by the ICC itself.¹²

Against this background, it must be noted that *six of the nine African cases handled by the court were brought to the court by African governments*: Central African Republic, Cote d'Ivoire, Democratic Republic of the Congo, Mali and Uganda.¹³ Two other African cases, involving Libya and Darfur, were referred to the court by the UN Security Council – and only Libya has challenged the jurisdiction of the court. (The Sudan has objected to the indictment of President al-Bashir and others, but it has not challenged the ICC's authority to deal with the matter.) Only one African case, involving Kenya, was initiated by the court's prosecutors and only after failed domestic attempts to implement accountability mechanisms in respect of the 2007-08 post-election violence. And even this case was, in a convoluted way, a form of self-referral by Kenya, necessitated because the country's political parties could not agree on domestic avenues in the aftermath of the electoral violence.¹⁴

¹¹ M. Cherif Bassiouni, Distinguished Research Professor of Law Emeritus, DePaul University College of Law and Douglass Hansen, Legal Officer, International Institute of Higher Studies in Criminal Sciences, "The Inevitable Practice of the Office of the Prosecutor", UCLA School of Law, Human Rights Forum, Invited Experts on Africa Question, March 2013-January 2014 <<http://iccforum.com/africa>>, last accessed 7 November 2016.

¹² Abdul Tejan-Cole, Executive Director, Open Society Initiative for West Africa (OSIWA), "Is the ICC's exclusively African case docket a legitimate and appropriate intervention or an unfair targeting of Africans?", UCLA School of Law, Human Rights Forum, Invited Experts on Africa Question, March 2013-January 2014 <<http://iccforum.com/africa>>, last accessed 7 November 2016.

¹³ Côte d'Ivoire accepted the Court's jurisdiction despite not being a state party to the Rome Statute at that time. It is noteworthy that the ICC recently obtained a guilty plea from a jihadist who destroyed antiquities in Mali, which marks the first time that destruction of a cultural heritage has been treated as a war crime. It has also convicted a former warlord from the Democratic Republic of Congo for using rape as a weapon of war. Somini Sengupta, "As 3 African Nations Vow to Exit, International Court Faces Its Own Trial", *New York Times*, 26 October 2016, <http://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?_r=0>, last accessed 7 November 2016.

¹⁴ *New York Times*, "South Africa to withdraw from international criminal court", 21 October 2016, <www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html>, last accessed 4 November 2016.

The ICC is currently in the process of conducting ten preliminary investigations in other countries – including Afghanistan, Columbia, Palestine and the Ukraine, as well as alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq.¹⁵ As Angela Mudukuti of the Southern Africa Litigation Centre states, “To say that the ICC is targeting Africa, I think, is a misrepresentation of the situation. It’s more Africans making use of the court they helped to create.”¹⁶

The other issue is that the ICC’s power is limited by disparities of political, economic and military power. Several of the world’s most powerful countries – including three permanent members of the UN Security Council: Russia, China and the United States, and their closest allies – have not joined the Court and have thus been able to avoid ICC scrutiny. The United States, for example, signed the Rome Statute but never ratified it. The permanent members of the UN Security Council have also used their veto power to block referral to the ICC of situations desperately in need of attention in countries that are not ICC members, including Syria.¹⁷

What other critiques have been levied against the ICC?

The most common critique of the ICC is that political considerations have prevented it from prosecuting some politicians who are guilty of crimes against humanity. In a world of unequal political, social and military power, it is difficult to hold the most powerful human rights abusers to account. However, since the ICC is dependent upon referrals by the UN Security Council in order to investigate violations which take place in non-State Parties, blame for the failure to investigate situations such as that in Syria, for example, lies not with the ICC but with the UN Security Council.

Another critique, raised by the African Union, is that it is unsound to arrest and prosecute a head of state because this would endanger the relative stability of the country.¹⁸ The AU has been calling for many years for the Rome Statute to be amended so that cases before the ICC against incumbent leaders can be deferred until their terms of office end.¹⁹ Namibia’s International Relations and Cooperation Minister Netumbo Nandi-Ndaitwah has expressed agreement with this position. “Sitting presidents should not be subject to prosecution, because they were democratically elected by the masses to lead them. And now out of nowhere you have an international instrument that interferes with the will of the people.”²⁰ The ICC has not taken up this suggestion to date. In any event, it must be asked what degree of stability is truly present when a sitting head of state is implicated in crimes against humanity.

What is Namibia’s position on the ICC?

Namibia has recently expressed an intention to withdraw from the ICC. The reason cited by Minister Nandi-Ndaitwah is that Namibia joined the ICC immediately after Independence due to the weakness

¹⁵ Human Rights Watch, “AU: Activists Challenge Attacks on ICC”, 6 July 2016.

¹⁶ Ibid.

¹⁷ Human Rights Watch, “Burundi: ICC Withdrawal Major Loss of Victims”, 27 October 2016.

¹⁸ Pierre de Vos, “Al-Bashir: flouting court orders are anti-poor and anti-democratic”, Constitutionally Speaking, 15 June 2015, < <http://constitutionallyspeaking.co.za/al-bashir-flouting-court-orders-are-anti-poor-and-anti-democratic/>>, last accessed 4 November 2016.

¹⁹ “Ndaitwah clarifies Namibia’s withdrawal from ICC”, *New Era*, 11 March 2016, < www.newera.com.na/2016/03/11/ndaitwah-clarifies-namibias-withdrawal-icc/>, last accessed 4 November 2016.

²⁰ Ibid.

of internal institutions at the time. According to the Minister, Namibia's participation in ICC activities is no longer a priority because the country now has its own robust and functional governance institutions.²¹

What are other African states saying?

Criticism of the ICC is by no means universal among African countries. Many countries are still vocal supporters of the international body. In July, during the AU summit, several African ICC members – Côte d'Ivoire, Nigeria, Senegal, and Tunisia – joined Botswana to expressly oppose an AU call for ICC withdrawal. Burkina Faso, Cape Verde, the Democratic Republic of Congo and Senegal entered reservations to the summit decision to continue consideration of a coordinated ICC withdrawal.²² Furthermore, as recently as October 2016, Gabon asked the ICC to look into possible war crimes on its territory.²³

Why is withdrawal from the ICC a gender issue?

For millennia, women and girls have suffered brutal forms of sexual and gender violence during armed conflict including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization. Such violence is often sanctioned, tolerated or even ordered by military, paramilitary or other governmental actors. Although the international community has made some strides in outlawing and punishing atrocities committed during armed conflict, gender-based violence in such conflicts has been consistently ignored. Previous international humanitarian law treaties – including the Hague Conventions respecting the Laws and Customs of War and the Nuremberg Charter contained in the Agreement for the Prosecution and Punishment of Major War Criminals after World War II – neglected all mention of sexual violence.²⁴

The creation of the ICC changed all that. The Rome Statute that established the ICC is the first international instrument to expressly include various forms of sexual and gender-based violence as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts. The Statute also criminalises persecution based on gender as a crime against humanity.²⁵

The Rome Statute is notable because it treats gender-based violence as a grave breach of the Geneva Convention. It also promotes women's interests by requiring gender balance and gender expertise on the Court.²⁶

Recognising the challenges of effective investigation and prosecution of sexual and gender-based crimes, the Office of the Prosecutor elevated prosecuting sexual and gender-based crimes to one of its key strategic goals in its Strategic Plan 2012-2015.²⁷

²¹ "Ndaitwah clarifies Namibia's withdrawal from ICC", *New Era*, 11 March 2016.

²² Human Rights Watch, "South Africa: Continent Wide Outcry at ICC Withdrawal", 22 October 2016.

²³ Somini Sengupta, "As 3 African Nations Vow to Exit, International Court Faces Its Own Trial", *New York Times*, 26 October 2016.

²⁴ Barbara Bedont and Katherine Hall Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", *The Brown Journal of World Affairs*, Vol. VI, Issue 1, 1999, pages 65-85.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ The Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, 2014.

The Rome Statute and the ICC represent important steps toward recognition and redress for victims of sexual and gender-based violence during conflict.

Why should Namibia stay in the ICC?

It is important for Namibia to remain party to the ICC as an example to other countries. Even if Namibia never needs the ICC to address human rights abuses within Namibia, staying will send a strong message to the international community that our country supports justice and condemns genocide, crimes against humanity and war crimes – including gender-based violence in conflict situations.

Namibia could also be influential in pushing from the inside for reforms to the ICC which could enhance its credibility. The chief of the International Criminal Court's oversight board – Sidiki Kaba, who is also Senegal's justice minister – recently called on African states not to withdraw from the ICC, but to rather “engage in dialogue” about change.²⁸ The Elders – an independent group of global leaders working together for peace and human rights, founded by Nelson Mandela – has also recently urged African nations to remain in, and indeed deepen their engagement with, the ICC, recalling Mandela’s statement at the time of signing the Rome Statute:

Our own continent has suffered enough horrors emanating from the inhumanity of human beings towards human beings. Who knows, many of these might not have occurred, or at least been minimised, had there been an effectively functioning International Criminal Court.²⁹

A meeting of member states of the ICC is set for 16-24 November 2016 – thus offering an opportunity for negotiation and consensus-building.³⁰ We urge Namibia to remain in the ICC and contribute to its development into an institution which can be effective at protecting human rights throughout the world.

²⁸ Associated Press, “ICC Oversight Chief Calls on South Africa, Burundi to Remain”, *New York Times*, 24 October 2016, <<http://www.nytimes.com/aponline/2016/10/24/world/africa/ap-af-senegal-icc-withdrawals.html>>, last accessed 7 November 2016.

²⁹ “The Elders urge all states to commit to universal, impartial International Criminal Court”, Press Release by The Elders, 26 October 2016, <<http://theelders.org/article/elders-urge-all-states-commit-universal-impartial-international-criminal-court>>, last accessed 7 November 2016.

³⁰ Associated Press, “ICC Oversight Chief Calls on South Africa, Burundi to Remain”, *New York Times*, 24 October 2016.