An end to impunity:
Offenders will face justice either internationally or domestically

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Contrary to the common belief that international criminal justice is a neo-colonial imposition on Africa by the West, the struggle against impunity and for greater accountability is rooted in the liberation and anti-colonial struggles of the people of Africa and Asia.
A number of controversies have bedevilled international criminal justice in Africa and appear to have dented the fight against impunity and the battle to ensure that African leaders are held accountable. I characterise the controversies as a dent because, in my opinion, nothing can stop the relentless and inexorable rise of international criminal justice in Africa. Contrary to the common belief that international criminal justice is a neo-colonial imposition on Africa, the struggle against impunity and for greater accountability is rooted in the liberation and anti-colonial struggles of the people of Africa and Asia. It is the people of Africa who popularised human rights and used the gospel of human rights in their great struggles against the colonialists. The gross violations of human rights witnessed in recent times in places such as Rwanda, Sierra Leone, Kenya, Sudan, Zimbabwe, the Democratic Republic of Congo, Egypt, Tunisia, Angola, Libya and others are in reality a betrayal of the goals of the liberation struggles of the African people.

It is probably because of the consonance between the anti-colonial liberation struggles and human rights and the fight against impunity and for greater accountability that African people have had no difficulty relating to – and supporting – the concept of international criminal justice. This resulted in the Organization of African Unity Council of Ministers urging African states in 1998 to back the creation of the International Criminal Court (ICC). Their resolution was adopted by African Heads of State and Government in Burkina Faso later in the same year.

As a consequence of this philosophical consonance, there was a general acceptance in Africa of the concept of international criminal justice and support for the Rome Statute of the International Criminal Court. Already, 31 African countries have ratified the Statute – Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

The philosophical acceptance of international criminal justice by the people of Africa is evident from other developments as well. The first matters to be referred to the ICC after the Rome Statute came into force were referred by the Democratic Republic of the Congo, the Central African Republic and Uganda – all African countries. Following its electoral crisis, Ivory Coast – another African country – became one of the first nations to file a declaration of acceptance of the jurisdiction of the ICC in terms of the Rome Statute. Meanwhile, Sudan and Libya became the first two countries in the world to have situations referred to the ICC by the United Nations Security Council, which was done with the support of African countries and certainly with the support of the African people. The crisis in Zimbabwe – but for opposition from China and Russia – would also have been referred by the Security Council because of campaigns orchestrated by Zimbabwean people, Zimbabwean-based non-governmental organisations and other Africans, who supported the struggle for democracy in Zimbabwe.

Few people will have to be persuaded that Africa needs international criminal justice. The legitimacy, impartiality and effectiveness of African law enforcement institutions have been questioned for a long time, while the extent of corruption, abuse of power and human rights violations point to the need for stronger national institutions of accountability. The atrocities witnessed in Rwanda, Kenya and Sierra Leone were so severe and so shocking that most African people were left convinced that mechanisms should be put in place to ensure that these kinds of gross violations of human rights would not be repeated. But the independence of many national judiciaries remains in doubt, while the lack of adequate resources is a perennial problem. Political interference in the judiciary has also been a major cause for concern in many parts of Africa. Until these issues are addressed and until such time as African national institutions of accountability and adjudication are strong enough for us to be able to say that these countries are ‘willing and able’ to prosecute and hold perpetrators of crimes against humanity accountable, right thinking Africans will continue to see an important role for international criminal justice in Africa.

Indeed, despite the controversies surrounding the arrest warrant for Sudanese President Omar al-Bashir, the adoption of Security Council resolution 1970 in respect of Libya and the separate but concurrent military action, and the investigation into post-election violence in Kenya, the people of Africa will continue to show commitment to international criminal justice. In this regard, it is my forecast that recent African criticisms of the ICC will not undermine the concept of international criminal justice on the continent and will not protect the perpetrators of mass crimes, who will increasingly find themselves taken to court either internationally or domestically. I believe that the future is still bright for international criminal justice in Africa because:
The controversies surrounding the International Criminal Court have been fuelled not by ordinary African people but by African leaders – a number of whom view themselves as potential defendants before the ICC. However, the pressure that led African leaders to accept international criminal justice still exists because it is based on African peoples' support for the concept – and this will ensure ongoing backing for international criminal justice and the ICC, even as they come in for criticism from some elite quarters.

The philosophical consonance between the spirit and objectives of our anti-colonial and democratic struggles on the one hand and the rejection of impunity and the call for accountability on the other hand is such a strong a force in support of international criminal justice that it is not possible for African leaders to obliterate acceptance of the concept from the minds of ordinary African people.

The only developments that can render international criminal justice less relevant to Africa are the emergence of true democracy within African states and the creation of robustly independent and effective national institutions of justice and accountability.

As the older generation of African leaders leave power and younger leaders take over, there will be a greater acceptance of the role of international criminal justice. There will also be a greater understanding of the fact that the more countries do to ensure accountability for crimes against humanity at a domestic level, the less scope there will be for the involvement of the international criminal justice system. More importantly, younger and more democratic African leaders will welcome rather than condemn the efforts of the ICC to help fight impunity and enhance accountability in their countries.

It is acknowledged that there are severe limitations in relation to the jurisdiction of the ICC. In the absence of a declaration similar to the one by the new government of Ivory Coast, the only way the ICC can be seized with a situation in a country that is not party to the Rome Statute is through a referral by the UN Security Council as happened in respect of Sudan (Darfur) and Libya. Furthermore, the ICC can only deal with situations arising after the creation of the court in 2002. The jurisdiction of the ICC is also limited by the extreme nature of the offenses that it can deal with. However, despite these limitations, as more and more perpetrators of grave crimes face international criminal justice, pressure will grow in countries that have not yet ratified the Rome Statute or filed declarations of acceptance of the jurisdiction of the ICC to try offenders in their own domestic courts. Even more significantly, the drift towards accountability is likely to put new democratic governments under pressure to try offenders at a domestic level for grave crimes, including those committed before the Rome Statute came into force.

So to sum up – offenders be warned. International criminal justice and the ICC are here to stay and they will contribute to ending the era of impunity in Africa, despite the noisy complaints and criticisms we are hearing from the African Union today.

References

3. International Criminal Justice edited by Mark Elis and Richard Goldstone