



**SOUTHERN AFRICA
LITIGATION CENTRE**

AFRICA LEGAL AID

ICC Withdrawals: Is Africa Running Away from Justice?

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Panel

Moderator: Evelyn A. Ankumah

Executive Director, Africa Legal Aid (AFLA)

Justice Richard Goldstone

First Prosecutor of the ICTY and ICTR

Keynote: The Future of the ICC and the Role of African States

Angela Mudukuti

International Criminal Justice Lawyer at SALC

South Africa's withdrawal from the Rome Statute

Lambert Nigarura

National Burundi Coalition for the International Criminal Court

Burundi's withdrawal from the Rome Statute

Summary

Moderator: Evelyn A. Ankumah

Executive Director, Africa Legal Aid (AFLA)

Ms. Ankumah thanked the guests for their participation in this side event. She stated that AFLA is proud to convene it with the Southern Africa Litigation Centre and its very able and dynamic international criminal justice lawyer Angela Mudukuti.

She pointed out that the decisions from some African countries to withdraw from the ICC fall within their sovereign rights, and that the ICC Statute indeed allows states to withdraw. On the other hand, she emphasized that we are entitled to be concerned about such withdrawals, and that we are entitled to be curious about the motivations behind these decisions. We may also address them and come up with proposals on how to stop these withdrawals and perhaps even prevail upon Burundi, South Africa, and the Gambia to reconsider their decisions to withdraw from the ICC.

She then introduced keynote speaker Justice Richard Goldstone, who she called a pioneer in international criminal justice. She proudly stated how honoured and privileged she was for having him at this event. She believes that he does not need an introduction, but for the purposes of the event, she pointed out that he has been the first Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as a Justice of the Constitutional Court of South Africa.

Justice Richard Goldstone

First Prosecutor of the ICTY and ICTR

Keynote: The Future of the ICC and the Role of African States

Justice Goldstone shared his gratitude for being able to deliver the keynote at this side event. He started off by stating his optimism concerning the future of the ICC. He believes that if there had not been an ICC yet, efforts would be taken throughout the world to set one up, just as happened in the 90's. He called the recent withdrawal decisions from the Rome Statute serious and saddening for those who support international justice, especially for those who have been victims of war crimes or

other terrible human rights violations. In his opinion, it is obviously important to listen to the concerns that the African Union and a number of African states raise. However, he argued that the alleged bias of the ICC against Africa is nothing more than a weak straw on which the objections to the ICC hang.

He explained that the idea that heads of state should be treated in no different way than other people regarding international criminal justice was exported to Africa from Europe. The answer of heads of state should be to not put themselves in the position that they are alleged of international crimes. It grieves him that some African leaders, including his own, do anything to protect themselves, while they should be faced in an open court.

He argued that, because of the absence of any realistic possibilities for domestic justice for Sudan, the ICC is the only possibility to deliver justice in that situation. Furthermore, he opined that, the objection of the bias of the ICC is based on the imbalance in the jurisdiction of the ICC, and that this is of valid concern. He pointed out that that is not the fault of the ICC, but of large, powerful countries which do not like to be judged, such as the USA, India, Russia, and China. He noted that, the real objection therefore stems from the protection that is given to some states by the Security Council.

According to him, it is for that reason that the global community moved away from ad-hoc tribunals to the ICC. The problem with setting up ad-hoc tribunals is namely that the Security Council chooses which countries should face justice and which ones should not. He noted that this was the main reason to decide that the ICC should be separated from the United Nations. He did, however, point out that the SC does have the power to refer a situation to the Court.

He explained that there have been two cases where this actually happened, one in Libya and one in Sudan. There were objections from those states, as they did not ratify nor sign the Statute. This is where problems arise, according to Justice Goldstone, as the ICC is completely dependent on governmental cooperation to function. No orders or arrest warrants can be respected without such cooperation and willingness to comply. He remarked that the Libyan government at least has an excuse since it is hardly in control of its own territory. In Sudan however, the SC referral was demeaned by President Al-Bashir and his government, he pointed out. The SC itself could not do anything about it, since it was furthermore demeaned by China who protected Sudan. Consequently, the Prosecutor, in frustration, suspended the proceedings in respect of Sudan, he said.

Therefore, he wondered whether future referrals of the Security Council could actually be considered by the prosecution or by the judges. He called it unacceptable that the SC, under huge pressure from the United States, refuses to take any responsibility for the costs occasioned by the ICC in accepting a referral from the Council. He thinks that the ICC should really consider the circumstances in which they could be referred to. Nevertheless, the referrals are a request, and there is no way in which the Security Council can demand referral under the Statute, he pointed out.

He, furthermore, noted that the position of the three African states that gave a notice of withdrawal differ. In the cases of Burundi and the Gambia, he argued that withdrawals had been motivated by a desire to protect their leaders. The case of South Africa is however different according to him, as there is no suggestion of any war crimes committed in South Africa since the end of the apartheid regime. He thinks that the reason that led South Africa to withdraw is simply that their government

likes to have their matters in their own hands. It does not want to be told by its own court that it has acted unlawfully or unconstitutionally with regards to Al-Bashir.

He made a comparison to the United States at the time of President Roosevelt, who was slaughtered by his own Supreme Court regarding the New Deal Legislation. What would the reactions be if Roosevelt threatened to make its own appointments to the Court in order to have a majority there? He subsequently argued, that the expression of Trump to deal with the left winged Supreme Court is therefore a symptom of the same disease as the one that has driven South Africa to give a withdrawal notice.

Furthermore, he questioned the constitutionality of the withdrawal, because, to him, it appears to be inconsistent with domestic legislation, since South Africa adopted the Rome Statute and processed it under its domestic law. He does however not think that the executive time to take action is in conflict with national legislation, and that, if that is correct, the government is going to take a step back from the Court. He pointed out that a formal repeal of the law adopting the Rome Statute would take time. Time in which public debate is likely to arise.

He reminded the audience that he started out by saying that he is optimistic, and clarified that he had many political and moral reasons for that underlie this belief. Morally speaking, we need to have an International Criminal Court to bring an end to impunity for war criminals. He concluded that the moral reason is thus very strong. Furthermore, the world has a strong need for international justice being implemented, and the rule of international law being respected and strengthened. To conclude his keynote, Justice Goldstone shared his agreement with regards to the argument of some of the speakers in the plenary session: the answer to the struggles of the ICC is to stay within the system and debate the sources of these problems.

Ms. Ankumah thanked Justice Goldstone, and introduced Angela Mudukuti from the Southern Africa Litigation Centre as the next speaker. She stated that Ms. Mudukuti played an important role in the attempt to arrest the Sudanese President Al-Bashir.

Angela Mudukuti

International Criminal Justice Lawyer at SALC
South Africa's withdrawal from the Rome Statute

Ms. Mudukuti discussed South Africa's withdrawal from the Statute by providing background, context, and legal cases. On the 19th of October, South Africa deposited its instrument of withdrawal to the UN Secretary General. She pointed out that this decision was made unilaterally by the executive branch of the government, and that it has invoked a lot of criticism. To her, it seems that it all began when President Al-Bashir arrived in South Africa in June 2015. South Africa, as a signatory to the Statute, and having domesticated the Statute, had the duty to transfer him to The Hague. That did not happen, and the Southern Africa Litigation Centre (SALC) approached the domestic court on an urgent basis, requesting an arrest warrant to be issued for Al-Bashir. She explained that the state's first tactic was to seek postponement. To make sure that President Al-Bashir did not leave in the meantime, SALC issued that the Court order that all ports of entry were checked to ensure that Al-Bashir would not leave the Country.

Ms. Mudukuti and her team were back in court the next day. Both sides were heard and the Court ruled that South-Africa had the duty to arrest President Al-Bashir. Suddenly, state advocates

expressed that Al-Bashir left the country, which led to much disappointment and outrage of everybody else. Consequently, the State took the matter to appeal at the Supreme Court, which agreed with the judgement of the High Court that South Africa had the duty under both domestic and international law to arrest Al-Bashir. Ms. Mudtukuti explained that the State was unsatisfied and took the matter to the Constitutional Court, which is the highest court in the country. However, the State decided to withdraw from the case later. She concluded that this means that the previous judgement and thus the duty to arrest President Al-Bashir still stands.

She agreed with Justice Goldstone that the withdrawal of South Africa is a subject of constitutional scrutiny. A withdrawal has to take place in a correct fashion. In South Africa, that means that the parliament should be addressed and consulted first. That is where participation is facilitated, where regular debate can take place, and where civil societies can contribute to the discussion. She was saddened that by writing to the UN Secretary General without consulting the parliament, the government robbed the rest of South Africa of being part of the discussion. She stated that this is exactly what is being challenged now: the constitutionality of withdrawing from the Rome Statute. She believes that this is a violation of the South African constitution, which is the cornerstone of democracy.

Moreover, she discussed the reasons that South Africa has expressed for its withdrawal through their legal papers, through media meetings, and at the Assembly of State Parties of the ICC.

First of all, they alleged that there is already a regional court with criminal jurisdiction in existence. Ms. Mudukuti pointed out that this is simply not the case. There is no African criminal court. The Malabo Protocol is seeking to establish such a court, but there are several concerns about the Protocol and South Africa remains to even ratify it. She concluded, therefore, that there exists a justice vacuum at the regional level.

The South African government argued that if they withdraw from the Statute, they will no longer be liable if President Al Bashir returns to South Africa. Ms Mudukuti disagreed since article 127 of the Statute states that a state's duties remain intact for a year when leaving the Statute, which is in line with the Vienna Convention on the Law of Treaties.

Furthermore, the South African government argued that the Statute is hindering peace keeping. She refuted this argument as well. South Africa has signed the Statute in 2000 and peace keeping and mediation has continued since then despite the enactment of the Rome Statute.

Last of all, the state indicated that it exhausted all consultative matters in terms with the Rome Statute. Ms. Mudukuti argued, however, that South Africa did not propose any amendments to the Rome Statute, nor did they use the dispute mechanism of article 119. They did start discussions under article 97, but they withdrew from the process by handing in their notice of withdrawal.

For those reasons, she called the notice of withdrawal irrational since the justifications for the move do not make sense. Together with her team, she approached the Constitutional Court seeking their audience to hear the matter. The Court however declined because it would then be a court of first instance in the case, and thus the case went down to the High Court.

She noted that the High Court has indicated that it will hear the matter in December, and expressed that she hopes that the withdrawal can be stopped. Perhaps, it will just delay the inevitable, she said,

but then at least there will be a rigorous debate about the matter. South Africa would also like to withdraw the implementation act which domesticated the Statute. According to her, that would leave a justice void since there would then be no justice at the domestic level, not at the regional level, and also not at the international level.

She expressed the hope that the current litigation and advocacy efforts will prevent South Africa to withdraw from the Statute, or at best, that there will not be a justice gap at the domestic level. She concluded by sharing her concerns about these developments, and agreed with Justice Goldstone that it is the ordinary citizens who will suffer from grave crimes, and that we cannot allow this to happen.

Lambert Nigarura

National Burundi Coalition for the International Criminal Court

Burundi's withdrawal from the Rome Statute

Mr. Nigarura discussed Burundi's recent decision to withdraw from the ICC, which he thinks is of grave concern. He explained that the illegal third mandate of the current President was contested by civil parties and the political opposition. These protests led to an attempted coup d'état, which radicalized the government, resulting in mass victimization and ethnic propaganda. This propaganda assimilated political opposition and civil parties to be 'enemies of the country that have to be eliminated'. He argued that, the decision to withdraw from the ICC, and to stop any cooperation with the UN Commission of Human Rights, is a decision that aims to escape any prosecution by the ICC. Furthermore, Mr. Nigarura responded to the Burundian Ambassador to the Netherlands, who expressed during the plenary sessions of the ASP that Burundi wants to investigate and prosecute suspected perpetrators itself. He believes that even if Burundian government has the will to prosecute, their judiciary system is too limited to do that effectively.

Moreover, he highlighted the importance of the principle of Complementarity. In that regard, he believes setting up a criminal court for Africa would be a big step forward for international criminal justice in Africa, but wondered whether it would be feasible. Although the Rome Statute requires its provisions to be implemented under domestic law, he argued that a regional solution could also be seen as a way of insuring implementation.

He then went on by explaining that the view that the government expresses with regard to its withdrawal is based on flawed arguments. The government argues that a lot of the people who fled after the riots that flowed from the presidential election have conducted grave crimes themselves, and that those people are now trying to manipulate the ICC into starting investigations against the government. Mr. Nigarura affirmed that this is not true, that it is in fact the government which committed grave crimes, and that the only reason for them to withdraw from the Statute is to protect themselves from prosecution.

He furthermore highlighted the role that civil society is able to play in fighting impunity. Their fight for democratic values and governments should recognize this.

Ms. Ankumah thanked Mr. Nigarura for his explanations about the situation in Burundi, and invited the audience to participate in the subsequent discussion.

Questions, statements, and answers

Alphonse Muambi, and independent journalist, noted that the case of Burundi is a special one, and that the President of Burundi has committed many horrible crimes. He is however of the opinion that international criminal justice uses multiple standards, since the president of the Democratic Republic of Congo is killing a lot of people as well. Furthermore, he argued that Bush and Blair also committed horrible war crimes, and that we cannot accept that the ICC only prosecutes Africans while others enjoy impunity.

The next participant was wondering about the motivation of the Gambia to withdraw from the Rome Statute. It especially surprised him since the Prosecutor is from the Gambia. He also pointed out that the international community has an important role to play in protecting victims. Moreover, he criticised the slowness of ICC trials. He used the case regarding the DRC as an example, and hopes there comes a solution for the victims.

The next guest noted that the ICC only has a limited capacity, and cannot investigate every suspected perpetrator. She asked the panel whether they think that the concept of universal jurisdiction could serve as a solution for that problem.

Dorothy Makaza asked the panel what they think would be the best way forward for Africa, supposing that African states and NGO's lose the fight for support for the ICC. Should they focus on the creating support for the concept of universal jurisdiction? Should they push for an African criminal court?

Ms. Mudukuti answered that promoting universal jurisdiction is indeed a good suggestion. She pointed out that there was already an element of universal jurisdiction in the South African implementation act, which allowed them to bring cases to the domestic court of South Africa based on universal jurisdiction. She raised a case in which crimes against humanity perpetrated in Zimbabwe, against Zimbabweans, and by Zimbabweans was brought to prosecution in South Africa as an example. This was possible because witnesses, victims, and suspected perpetrators were present in South Africa. She argued that this is a viable option that needs to be pursued, but that there is a lot of work to be done in that regard.

She furthermore stated that the ICC is not perfect, but that structural engagement is needed in order to make it the court that we need. Moreover, she argued that more work has to be done on creating viable regional mechanisms. If an African court would be established, it must be a critical court that would not allow immunity for heads of state. According to her, it is even more important that work will be done at the domestic level. It needs to be ensured that lawmakers, lawyers, judges, and prosecutors, have the capacities to effectively implement international criminal law and international human rights law. She noted however that as long as there are gaps on the domestic and regional levels, the ICC is all that is left. She furthermore remarked that the Rome Statute only gives jurisdictional primacy to domestic jurisdiction, but that the question whether regional criminal courts should come into existence should perhaps also be addressed.

Justice Goldstone agreed with Ms. Mudukuti that the Rome Statute is clearly based on the principle of Complementarity, and that it must be attempted to try alleged war criminals at domestic courts as much as possible. In that context, he does not think that there could be any objections to strong

support for the creation of an African criminal court, as that would be completely consistent with the Rome Statute. He noted however that there is a long way to go in that regard, since the Malabo Protocol has hardly been ratified. Therefore, he concluded that the political will to create such a court is not strong enough. Furthermore, there is no money for it. He argued that international criminal justice is expensive. A fair trial costs money and there is no alternative for it.

As far as the way forward is concerned, he stated that civil society has a crucial role to play in this. He indicated that without NGO's lobbying for it, there would not be an International Criminal Court at all. It was the lobbying of civil society that led to the discussions in Rome. Another primary example of the influence of civil society, that Justice Goldstone pointed out, is the recognition of gender crimes in the Rome Statute. He noted that when he came to the ICTY in 1994, international criminal law did not recognize gender crimes, and that it was referred to only in the context of crimes against humanity. He explained that the female judges of the tribunals for Yugoslavia and Rwanda pushed their prosecutors into bringing gender crimes appropriately before the tribunals. He indicated that although rape is nothing new, it was not recognized in international justice for the simple reason that the rules were made by men, who assumed that rape and plunder would be inevitable consequences of war. Women organisations however ensured that the Rome Statute defined gender crimes appropriately.

With these examples in mind, Justice Goldstone expressed that he believes that civil society should not lose hope. He pointed out that because of the election of Donald Trump in the United States of America, civil societies there are getting more funding from the private sector. People want civil society to safeguard human rights. Justice Goldstone argued that he thinks that at the international level, this applies to the ICC. He concluded that the current crisis is a challenge that we should grab, and that if all human beings were pessimists, we would still live in caves.

The next participant highlighted the idea to create an African court, which he thinks it is a good proposition, if it is feasible. However, he argued that the concept of immunity is a big obstacle in the pursuit of ending impunity. Especially from the victim's perspective, it cannot continue like this. He believes that civil society has a role to play in addressing this problem.

As the topic of universal jurisdiction was touched upon earlier, Ms. Ankumah remarked that AFLA had just hosted a side event about the case of Hissène Habré, which was the first universal jurisdiction case on African soil, in Senegal. She believes that it was good to have an African court, the Extraordinary African Chambers, render a judgement on a former African leader. She argued however that it took a lot of time before that happened, and questioned whether victims can wait that long. She expressed that she does support the notion of African solutions to African problems, but that that should not just be a slogan.

Jutta von Falkenhausen, from the Union International des Avocats, expressed that she agreed with Justice Goldstone's assessment on the jurisdictional imbalances regarding the ICC. She did however add that the citizens of the powerful states that are evading the jurisdictional reach of the ICC are also hugely disadvantaged. As a response to the remark that Bush should be prosecuted for the alleged war crimes in the Middle East, she added that United States citizens who were sent to unjustified wars are also victims in that case. She emphasized that all states should support the ICC, also for that reason.

The next guest who contributed to the discussion asked Justice Goldstone what would happen when someone is sentenced to prison by the ICC and serves the sentence in a country that withdraws from the Rome Statute.

A representative of the American Coalition of the ICC mentioned that while sitting in the plenary sessions of the ASP, she frequently heard the opinion that concerns should be raised within the system and states should not withdraw from the ICC being expressed by states. According to her, however, the states that want to withdraw want to do so because their leaders will have immunity. It disturbed her that not one person said anything about this issue during the plenary session.

Lim, a legal intern of the Coalition of the ICC, noted that Ms. Mudukuti explained the reasons that the government of South Africa had put forward for its withdrawal very clearly. However, she was wondering what the real reasons for the withdrawal are. She said that according to many people, protecting Sudanese President Al-Bashir, who South Africa refused to arrest when he visited the latter state, is one of the major reasons. She asked Ms. Mudukuti whether she thinks if in the mind of the government officials of South Africa, all the criticism that they get is worth protecting one man.

Raymond Savadogo, PHD candidate at Leiden University, asked whether it is necessary to get rid of the immunity clause for heads of state in the Malabo Protocol.

Ms. Mudukuti affirmed that it is indeed necessary to remove the immunity clause for heads of state from the Malabo Protocol. She added that this immunity does not only apply to heads of state, but also to other senior government officials. The problem with that is that genocide, crimes against humanity, and war crimes, are always committed by senior government officials. Furthermore, she remarked, that Africa has a "president for life syndrome", and that it is thus likely that senior government officials die while they are still in office. Therefore, officials who are granted immunity while in office might never be prosecuted. Furthermore, it is inefficient to wait for decades until officials get out of office before prosecuting them, because memories fade, evidence disappears, and witnesses die. For those reasons, she claimed that there should be no immunity for senior government officials at all.

Subsequently, she stated that she did not know the real reasons of South Africa's withdrawal, and that she could only speculate. She thinks that South Africa is greatly concerned about how it is perceived on the continent, particularly because the AU has been issuing calls of non-cooperation with the ICC since 2009. South Africa previously disregarded that, according to her. As an example, she noted that President Zuma made explicitly clear during his inauguration in 2009 that the Sudanese President Al-Bashir would be arrested if he would come to South Africa. However, she does now get the feeling that South Africa is moving closer to the AU, and is trying to become a leader of the continent.

Justice Goldstone remarked on the opinion of the South African government that immunity for heads of state inhibits mediation. He explained that South Africa claims that it is trying to mediate peace in Sudan. He hopes that that is correct, as he perceives mediation as important, even in the most difficult situations. He questioned, however, why it was necessary for President Al-Bashir to come to South Africa. They could have reached for him in Sudan. Therefore, he believes, that this is not the real reason for the withdrawal. According to him, South Africa just had bad legal advice. They were

clearly being told that granting Al-Bashir immunity would save the day, and they were not being told that they were wrong.

Moreover, he stated that the question about people who might serve their ICC sentence in a country that withdrew from the Statute an interesting one. He noted that it does not apply yet, since there are no persons in prison in Burundi, the Gambia, or South Africa based on an ICC sentence. According to him, that country would be bound to keep the prisoner in prison. If it is not able to do so, it would have to hand that person back to the ICC for that sentence to be carried out in a different country. He admitted that he never thought of this before, but that this is certainly his immediate reaction to it.

Mr. Nigarura responded to the concern raised that nobody in the plenary session discussed the fact that states withdrew from the Rome Statute because the leaders would not enjoy immunity there. Mr. Nigarura argued that this is also Burundi's reason to withdraw. What disturbs him however is that it is not Burundi's people who withdrew, but merely a small group who took the power. According to him, only the ICC is able to prosecute the responsible people for the hundreds that have been killed in Burundi.

Ms. Ankumah added that, although she does not agree with it, some people seem to be in favour of immunity for heads of state. She asked Justice Goldstone to share his opinion on this matter. Furthermore, she asked him if it is even possible to prosecute a sitting head of state, and asked which arguments could be raised against those who say that there is no point in not granting immunity to heads of state when they cannot be brought to justice anyway.

Justice Goldstone expressed the opinion that priority should be given to prosecuting those who are most responsible for the victimization of people. These are often the leaders, since they give the orders. He reminded the audience that there were no complaints when the Serbian President Milosevic was indicted by the ICTY. Moreover, he pointed out that people forget that the first time that a former head of state was charged was at the Nuremberg trials. Karl Dönitz was appointed by Adolf Hitler to take over as head of state, and he was prosecuted. He emphasized that the guiltiest people should be brought to justice, not the underlings and the people who carry out the orders.

The next speaker wondered if when the Security Council makes a referral, it is able to actually ensure that investigations will indeed take place.

Justice Goldstone replied that when the Security Council makes a referral, it is capable of enforcing its orders under chapter VII of the UN Charter. The Council can also impose sanctions on states that do not carry out its orders. When a referral takes place, the Court is very acting, he noted. He concluded that the answer to the question lies not with ICC, but with the Council.