Roundtable Discussion

Approaching the Review Conference in Kampala: The International Criminal Court – Achievements and challenges

March 12, 2010

Embassy of the Federal Republic of Germany, Madrid.

Programme Chair: Bettina Ambach

Informal summary

Chaloka Beyani, London School of Economics, Department of Law.

Points of contention between the ICC and some African countries

African States in principle support the ICC and have done so from the beginning. At least 31 States from Africa have ratified the Statute without reservations.

There are some 25 African States that have adopted legislation that covers the crimes included in the Rome Statute in terms of article 5.

All the referrals to the Court have come from African States other than the referral by the Security Council. Little is known of the fact that the African Union actually has a mutual defense policy, they have a protocol on mutual defense and non-aggression in which the crime of aggression is defined. Related to that is the constitutive Act which under article 4 authorizes the Union to intervene whenever there is genocide, crimes against humanity and war crimes. From African practice the whole approach toward fighting impunity is anchored in those provisions.

Looking at the African concerns it is important to disaggregate different stakeholders. The loudest concern has come from the African Union meeting of July 2009, but Africa is a vast place, you have stakeholders that are non-States Parties to the Rome Statute who have clear interest in not cooperating with the ICC. You have the States Parties themselves who have a clear interest in cooperating with the ICC and some of them on record.

South Africa, Botswana and Uganda have stated quite positively that they will be guided by their obligations towards the ICC.

African civil society´s interest is often least known. They have formulated claims in terms of amendments to the Rome Statute; they would like to include corruption and trafficking in women and children as an international crime, although it is a transnational crime at the moment. In Kampala they will articulate those claims quite fully.
African civil society also expresses concerns about the conduct of the proceedings, especially in the Lubanga Case. After the Court ruled that the Prosecutor had to make known the basis and sources of the evidence to the defense, the militias who supported Lubanga in the Democratic Republic of Congo went around on the ground clearly terrorizing those who cooperated with the ICC and saying: “Well, now you will be known and because you will be known, the day of reckoning has come.” African civil society in conjunction with others then had to act to try and protect and give support to the victims.
So the way in which the Court operates and the way in which the victims are to be treated and protected is a clear concern for African civil society. It is also a clear concern for some of the States that have enacted legislation implementing the Rome Statute. Victims also want to participate in the proceedings, they want to be represented and yet it is also clear that the capacity of the Court to enable all these people to participate is limited.

As described, that stakeholder interest is largely unheard. What is heard are the concerns expressed through the African Union directly and these concerns relate to what is seen as political selectivity: Africa being selected politically as a theatre of experiment for the ICC.
There is also concern by civil society along the lines of selectivity. There are doubts about the selective way the Prosecutor has applied the gravity test in Northern Uganda. The Lords Resistance Army has been charged with crimes, but members of the Ugandan National Armed Forces who may have commited similar crimes may not have been charged.

There is a third claim that the investigations are politically motivated. This reaches back to Africa´s unhappy history with colonialism and domination and it leads to wider claims that the Court is part of a large political conspiracy to bring about Africa´s subjugation to the rest of the world. These essentially are political claims made by a number of political leaders in Africa and the reasons have very little to do with the way in which the Court has operated, because all the referrals have come from African States apart from the Sudan issue.

But what has made African Heads of States unhappy is the confusion between the role of the ICC, the application of universal jurisdiction by some European States, notably Spain and France, and thirdly the charges brought again by individual European States against African Heads of States over matters of corruption in relation to e.g. Congo-Brazzaville or Senegal. They see this as an assault on Africa or African Heads of States. But the ICC for its part has not done a great job in trying to say that its role is quite distinct from all these other measures that are going on.

Furthermore there is a political concern which goes to the root of the system of the international order post 1945 which is the referral by the Security Council in terms of the case against President Bashir of Sudan and in terms of article 13B of the Rome Statute. To most international lawyers the case is clearcut: The Security Council has primary responsibility for maintaining international peace and security. Its decision is binding on all the Member States of the United Nations, not the ICC States Parties, but of the UN as such. But what the African States have raised are fundamental issues which legally have some difficult solutions, politically they may have some impossible solutions. If solutions were to be applied, they would completely revert the whole system of the UN.
The argument is as follows: It is not acceptable that some members of the Security Council like the US who is not a party to the Rome Statute participate in the decision making that leads to referrals in relation to the Prosecutor to act. They see a political contradiction in terms that States who have elected to stay out of the Rome Statute nonetheless can participate in the decision making and require the Security Council to act. They also raised the issue that these decisions are made in relation to States that are not party to the Rome Statute, such as Sudan.
Those issues go to the root of the post war order system and to have to address them would require an overhaul of the UN system as a whole.

The final point is the issue of immunity which for African States is a huge problem. Most constitutions anchor the principle of immunity of the Head of State and the psychology continues even if there have been changes in some constitutions as well as internationally. The international changes obviously started in Nuremberg; that principle has been transferred to the Rome Statute. For the States Parties it is quite clear that they are bound by those provisions, for the non-States Parties it is also quite clear that if they are parties to certain international treaties which embody the principle of universal jurisdiction in terms of article 21 the issue of immunity may also not apply.

These are important issues in respect of which African States need practical engagement from the point of view of the ICC, from the point of view of other States, and perhaps the Assembly of States Parties is also an useful occasion to try to bring the issues of the immunities of Heads of States on board in the way in which the issues themselves may be handled under the ICC Statute and specific applicable treaties .

Transitional Justice mechanisms in Africa: How necessary is the ICC in Africa for justice to be rendered?

The whole question of the role of the ICC in Africa and its necessity must be seen in view of the demands of African people in general. They have suffered atrocities, they have experienced impunity, and so far the notion of accountability has not been brought to book.

The Truth and Reconciliation Commissions that have sprung up from South Africa, borrowed from Latin America on to Sierra Leone, DRC etc. arose at a specific point in history. Unless the military regimes in Latin America were forced to surrender power, there could not be a broad dispensation towards justice, democracy and good governance. That was the critical point.
The South Africans also grasped that point; they could not defeat the military regime, they could not liquidate it, so they had to give incentives to it to surrender power and the best way of doing that was taking the route of the Truth and Reconciliation Commission.
Elsewhere, where commissions have been undertaken, to some extent they have been a cover for avoiding the route of justice.

But also criminal justice is involved in truth seeking and truth telling, it is just that its methods are adversial. The whole process of cross-examination and having witnesses and victims in court is a point of arriving at the truth and to determine responsibility.

The truth commission does it differently; people go and self-tell what their role was but at the end of the day the truth ought to come out. At the end a finding or a statement that this person was involved in certain crimes means that that exposure is a condemnation for life. So everyone knows that this person did A, B, C.

In the context of justice that is not enough. You want this person to face justice in the sense of deterrence or imprisonment. So it is the end processes that are different.
If you take these two mechanisms, the Truth Commissions have certainly limited pedigree in terms of its existence. International criminal justice mechanisms are wider and broader and hence the need for the ICC.

It is true that there have always been traditional justice mechanisms, but international society including African society have moved a great deal. Their traditional justice mechanisms may transgress against certain notions of justice. There is a danger that traditional justice mechanisms may actually perpetrate the myth of superiority amongst ethnic groups.
No one actually knows what the Gachaca courts in Ruanda traditionally contained. They knew that this concept existed traditionally, but they didn´t know the elements of it. They had to reinvent the concept and give it content in circumstances where tradition has been outstripped by contemporary developments.

Immunity of Heads of States - a thing of the past?

States in the traditional system of international law have always enjoyed the monopoly of power, coercion and punitive measures over individuals. States have done so on their own basis of criminal jurisdiction with immunity for Heads of States and Heads of Government determining who is going to be prosecuted.
But when the European States emerged the capacity and competence of the State who exercised punitive measures over individuals was challenged.
It leads us to a transformation of international law from a system which is horizontal, decentralized and acting among States to a vertical system with institutions of global governance emerging and standing above States.
The realignment of those structures is the reason why the European Union or the African Union have emerged. So the consequence of this development is that the ICC as a global institution or as an institution that checks global governance has emerged to share the coercive powers that States always enjoyed on the basis of complementarity, the role of the Security Council, the referrals from States. That is the delicate balance of the Rome Statute which tries to accommodate what has happened.
But why did African States support this transformation? Partly they were fed up with the Ad-Hoc-tribunals of the Security Council, the Ruanda-, Yougoslavia- and Sierra Leone-tribunals. Smaller States without power in the Security Council wanted a standing mechanism in which they could participate. Participation was important for them because since colonialism

African States have only participated in the Law of the Sea and then in the Rome Statute as the second major international treaty where they made their views reflected. So if you look at the history from moving from the Ad-Hoc-Tribunals to the standing body of the ICC, then you come to the conclusion, that it actually does have a standing, whether you call it universal or not.

But the challenge is how to indict a sitting Head of State. How do you bring to international justice a sitting Head of State who is protected by his or her own power and military, because the alternatives are either you invade the country in order to arrest him or her, or you rely on article 98 according to which other States have an obligation to cooperate with the Court, but respecting the principles of international law and not breach them in matters of immunity. The tools are actually there within the Statute, but how to do it practically is the challenge. Maybe with time States will accept that this is a regular system of international behaviour and therefore they will comply with it.