

FRANCESCHI: ICC is on trial in Africa

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In Summary

- The relationship between Kenya and the ICC is not an international relationship in the traditional sense. It is rather a devolved relationship.
- We could brand the ICC mediocre, unfair and irrelevant; a Western tool for manipulation, but we freely signed and ratified the Rome Statute.
- Withdrawing from the ICC now in the midst of the process would be a misadvised step, legally and politically.

Law being about justice is intellectually engaging. It should never be taught in the afternoon, or worse, immediately after lunch.

Justice is one of the “cardinal” virtues. “Cardinal” comes from the Latin “cardo” meaning hinge. Virtue is the hinge of our personality.

Virtue, or Aretē in Greek, referred to “excellence of being.” It is essential for personal growth. The Greeks classified “cardinal” virtues into four: Justice, Self-control, Courage and Prudence.

Justice is a complex term. An attempt to define it comprehensively will send all to sleep.

"Justice is the ligament which holds civilised beings and civilised nations together," said Webster at the funeral of Justice Story, in 1845.

The Corpus Juris Civilis defined Justice as “a habit whereby a man renders to each one his/her due with constant and perpetual will”.

According to Kirk, the classical definition, which comes to us through Plato, Aristotle, St Ambrose, and St Augustine, is expressed in a single phrase: "to each his/her own."

Kirk added that “Justice is a certain rectitude of mind, whereby a person does what he ought to do in the circumstances confronting him/her.”

He challenges us by asking "Do we impart such rectitude of mind? And if we do not, will there be tolerable private or public order in the twenty-first century?"

What then is the place of justice in the ICC debate? Is the ICC seeking justice? Is the AU seeking justice by brushing ICC off its shoulders?

First we need to understand what the ICC is.

The ICC is not, according to law, a foreign court. Neither is it, in strict sense, an international organisation. It is a supranational court of subsidiary or complimentary nature, to which we bound ourselves willingly.

The relationship between Kenya and the ICC is not an international relationship in the traditional sense. It is rather a devolved relationship.

Part of our laws

We assumed the ICC as part of our Judiciary, for specific crimes under specific circumstances. This is what we ratified and what Article 2(6) of the Constitution made part of our laws.

Certainly, there are diverse opinions here, which are open to discussion. Probably the light will shine on the day a criminal chamber within the African Court of Justice and Human Rights becomes a reality. That is still a dream.

At any rate it is a terrible misunderstanding to label the ICC a foreign court; a Western tool of oppression as my respected former teacher, Senior Counsel Ahmednasir, declared last week.

Kenya ratified the Rome Statute on 15 March 2005. On that fateful day, Kenya imposed on itself the inalienable duty to enforce the Court's decisions as domestic decisions and joined the "Western manipulators."

We could brand the ICC mediocre, unfair and irrelevant; a Western tool for manipulation. But really, we freely signed and ratified the Rome Statute.

We imposed this burden on ourselves willingly, and we have to be men and women of our word; an honest country.

We were not alone in this ratification. Africa was the biggest single block to ratify the Statute with a total of 34 African States, against other blocks: 27 South American States, 25 Western European and others, 18 Eastern European and 18 Asian.

Africa accepted the ICC. Maybe it was fashionable. It was mass action by African States.

'Sovereignty' cannot be used as an argument against the ICC; as a tool to frustrate compliance. This is misguided.

Sovereignty in a modern democratic State refers to "autonomy" which is subject to checks and balances.

Back in 1923, the Permanent Court of International Justice said: “the right of entering into international engagements is an attribute of State sovereignty.”

Our ratification of the Rome Statute was an act of sovereignty.

Pandora box

In 2008, the Kenyan Parliament requested that the ICC should take charge of the mess created by the post election violence.

In December 2010 the ICC Prosecutor, Moreno-Ocampo, requested the Pre-Trial Chamber to summon six people.

The Pandora box was opened.

Members of Parliament lobbied for the government to “suspend any links, cooperation and assistance to the International Criminal Court forthwith”.

Now there is an ugly diplomatic impasse and the blame game is on. The rest of the story is all well reported.

Truth be told, most ICC cases and situations involve African States. Why? Are most atrocities still being committed on this Continent? Or is the ICC focused on Africa?

The ICC has homework to do. So does Africa. This is a matter for deep examination in a future piece.

At any rate, it seems unwise to support a continental withdrawal from the ICC. This is preposterous and it will haunt us.

Allow the defence to do its job. Let the process reach its natural end. The “Ocampo six” have gradually become the “Bensouda three.” If the evidence is circumstantial or weak the case will fall on its own.

Withdrawing from the ICC now in the midst of the process would be a misadvised step, legally and politically.

If we spurn the ICC now how do we know we will never ever need them again? How does Africa or any other continent know?

Let that “certain rectitude of mind prevail.”

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