

18th October 2013

African Union Requests Security Council to Defer Cases of Kenyatta and Ruto

By Michelle McKenna, Junior Fellow – Human Security Centre

Global Governance, Issue 4, No. 4.

On Saturday 12th October, the African Union held an extraordinary session in Addis Ababa, Ethiopia, to consider Africa's relationship with the International Criminal Court. The outcome of that debate was a request from the African Union to the Security Council to defer the cases of Kenya's President Uhuru Kenyatta and Vice President William Ruto until they have completed their terms in office.

Last month the African Union announced that they were to hold an extraordinary summit on proposed mass withdrawal from the International Criminal Court in response to continued dissatisfaction with the workings of the court. On Saturday 12th October this extraordinary session was held and the assembly of states parties did not vote to leave the court, but rather requested that the Security Council defer proceedings against the Kenyan President and Vice President. This call comes in light of the African Union's continued opposition to sitting Heads of State being tried before an international court.

The cases of President Uhuru Kenyatta and Vice President William Ruto before the ICC are ones that have received much media attention. In September this year, the Kenyan parliament passed a proposal to set in motion the steps to withdraw from the ICC in opposition to the prosecution of their President. Now the rest of the African Union states appear to have jumped on the bandwagon. The AU has a long-standing battle with the court as it feels like the court is unfairly targeting the continent and this first attempted prosecution of a sitting Head of State has just added more fuel to the Union's fire. It was originally thought that the AU was going to attempt a mass withdrawal from the court in protest, but it did not get the support of enough members to go ahead with this motion. 34 of the African Union's 54 members are parties to the Rome Statute, the founding document of the ICC. There were many renowned figures in the world that were opposed to African states withdrawing from the ICC, not least Archbishop Desmond Tutu. Tutu thought that it would be a tragedy for Africa if they voted to withdraw from the court as it would be a victory for impunity and there could be no peace without justice. Furthermore, Tutu was of the opinion that the ICC was in fact actually Africa's court due to high membership on the continent and prominence of African

18th October 2013

officials. The number of African leaders put on trial was an indictment of the leadership and democracy in Africa, in his opinion, rather than an indictment of the court. President Kenyatta clearly disagreed with this sentiment, as could be seen from his speech at the AU summit on Saturday.

The outcome of the extraordinary session was instead a call from the African Union to the Security Council to defer the cases of Kenyatta and Ruto until they finish their respective terms of office. The trial of Vice President Ruto is already underway, with the trial of President Kenyatta due to start in November. Article 16 of the Rome Statute allows the Security Council to defer a prosecution for an initial 12 months if they believe the trial represents a threat to international peace and security. The AU called upon Kenya to write to the UNSC and request this directly with the backing of all African states parties to the ICC. They have also set up a contact group of the Executive Council to consult directly with the Security Council. The AU believes that prosecuting Kenyatta and Ruto whilst in office would prevent them from being able to fulfil their constitutional duties in Kenya, including national and regional security affairs. In light of the Westgate terror attack it cannot be denied that this would appear to be true. However, the court showed leniency in that case and suspended Ruto's trial for a week to allow him to return to the country. This shows a clear desire on the court's part to cooperate with Kenya, in my opinion, and reduce the disruption that the trial is causing. There is now a fear following the AU summit and the Westgate attack that Kenyatta may not appear at The Hague for his trial.

In addition to requesting that the SC defer the case of Kenyatta, the Assembly of States Parties declared that no serving AU Head of State or Government would be required to appear before an international court whilst still in office. Whilst this is a basic principle of customary international law that Heads of State have immunity within the courts of other states, this declaration by the AU throws up an interesting legal conundrum. The states parties to the ICC agreed in Article 27 of the Rome Statute that no Heads of State would have immunity before the court and states parties are obliged to comply with this. If African states follow the proclamation from the assembly of states parties and refuse to comply with the court following charges against a sitting Head of State then that state would fundamentally be breaching the Rome Statute. States who are parties to the African Union are also bound by decisions of the organisation and this could cause an issue if these obligations clash with one another. Kenyatta is not the only sitting Head of State that faces prosecution before the court. President Omar al-Bashir of Sudan has also been charged with

18th October 2013

crimes against humanity, but no trial appears imminent due to the court's inability to arrest him. This also throws up the issue of whether the Union would support Heads of State being prosecuted after they have left office. If they do then having the backing of AU states may encourage rogue leaders to continue in office for longer, at the potential detriment to their state. This has certainly worked in favour for Sudan's al-Bashir as numerous African states have refused to arrest him due to his immunity as Head of State.

It is clear that there is widespread dissatisfaction with the International Criminal Court in Africa. However, we must not forget that there have been many instances where the states themselves have referred their situation to the court for investigation and the court has achieved justice for the people of these countries. It must also be borne in mind that the African Union has no power to order states to withdraw from the court if they vote to do that en masse in the future, so any action taken would be largely symbolic. If the African Union starts to become uncooperative with the court – which their President claims they are not – and this one day leads to African states withdrawing from the court's jurisdiction then it really would be a “badge of shame” for the continent, as former UN Secretary General Kofi Annan put it, as it would allow impunity to remain on the continent. That is, of course, unless a proposed idea to expand the African Court of Human and Peoples' Rights to cover crimes against humanity and essentially form an international court for Africa in Africa goes ahead.

-

Michelle is contactable at: michelle.mckenna@hscentre.org

Please cite this article as:

Mckenna, M. (2013). 'African Union Requests Security Council to Defer Cases of Kenyatta and Ruto'. Human Security Centre Global Governance, Issue 4, No. 4.