



SACCORD

Zambia's Membership to the International Criminal Court

A Civil Society Position

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Introduction and Background to ICC

Human development is premised on the fact that an individual should be given the opportunity to fulfil their maximum potential and the State should recognize and protect the entitlements to achieve this potential. Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.¹

The International Criminal Court (ICC) is a permanent court established to investigate, prosecute and try individuals accused of committing the most serious of human rights violations and crimes of a nature that concern the international community. The ICC has jurisdiction to investigate and try genocide, crimes of aggression, crimes against humanity and war crimes. The main purpose of the establishment of the ICC was and still is to promote the rule of law and ensure that the gravest international crimes do not go unpunished regardless of who commits them.

Currently there is no direct regional alternative to the ICC. The ICC is a unique institution in the human rights protection framework as it is a Criminal Court while most regional judicial bodies are civil courts.

The African Court on Human and Peoples' Rights has been established to ensure the protection of human and peoples' rights in Africa, but its jurisdiction varies from that of the International Criminal Court in so far as international crimes are concerned. In 2008, a new regional court was established to replace the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, when the Protocol on the Statute of the African Court of Justice and Human Rights was signed by several African Union member countries. The Court is to have jurisdiction to hear cases and disputes submitted to it concerning the interpretation and application of the: African Charter on Human and Peoples' Rights, which is the main African human rights instrument as well as other questions of international law. However, only five countries have ratified the Protocol to date, and it shall only enter into force once 15 countries have ratified it. Additionally, the other regional systems should not be considered as an alternative to the ICC, as it is a court of last resort and therefore seeks to complement national or regional systems rather than replace them.

Jurisdiction and Nature of Crimes under the ICC²

¹<http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>

²<https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#organization>

The Jurisdiction of the ICC is set out in the Rome Statute. The Statute grants the court jurisdiction over four main crimes while the rules for procedure and mechanisms to cooperate with the ICC are developed by the Court. The jurisdiction of the court relates to cases of genocide, crimes against humanity, war crimes and the crimes of aggression.

➤ **Genocide**

The crime of genocide constitutes the intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.

➤ **Crimes against humanity**

Crimes against humanity are serious violations committed as part of a large-scale attack against any civilian population and include offences such as murder, rape, imprisonment, enforced disappearances, enslavement particularly of women and children, sexual slavery, torture, apartheid and deportation. Crimes against humanity are always systematic and widespread violations, whereas more usual arbitrary human rights violations cannot be considered as crimes against humanity.

➤ **War crimes**

These are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.

➤ **Crimes of aggression**

Aggression is the use of armed force by a State against the sovereignty, integrity or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010. For these amendments to enter into force, they must be ratified by at least 30 States and then voted upon by States Parties in 2017.

Composition of the ICC

The Rome Statute establishes a system that is comprised of three distinct organs. These are the Assembly of State Parties, Four Organs of the ICC and the Trust Fund for Victims.³The ICC is comprised of four organs namely The Presidency, The Judicial Divisions, Office of the Prosecutor and The Registry. Each performs a unique task and is independent. The 18 judges of the ICC include four from the African

³ As the AU decision relates to the withdrawal of members from the ICC, this position paper only examines the parameters of the Resolution of the AU and will not examine the other organs in the system.

region namely Joyce Aluoch (Kenya), Sanji Monageng (Botswana), Chile Eboe-Osuji (Nigeria) and Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo).

The ICC currently has 124 member states, including Canada, Australia, United Kingdom, France and Germany, and from the African region Botswana, Kenya, Tanzania, Namibia, Ghana and Nigeria among others. States that were signatories to the Rome Statute but have subsequently withdrawn their signatures include the United States, Russia and Sudan, and some of the non-signatories include China, India, Somalia and Iraq. For many of these countries the decision to remain outside the ICC or withdraw from it may have to do with their concerns of being taken under investigation themselves.

The Procedures and Stages of a Case at the ICC

A matter being considered by the ICC undergoes several stages and procedures: preliminary examinations, investigations, pre-trial stage, trial stage, appeal stage and enforcement of the sentence. The multi-stage process ensures that the cases are thoroughly investigated and the existence of the appeal mechanism safeguards a fair trial for the accused.

Regional Judicial Alternatives

The importance of regional and international human rights bodies cannot be overstated. Accountability at international level emphasises the universality of human rights. The African Union has made efforts to establish regional judicial bodies to address the human rights concerns on the African continent. The African Court of Justice was originally intended to be the “principal judicial organ of the Union” (Protocol of the Court of Justice of the African Union, Article 2.2) with authority to rule on disputes over interpretation of AU treaties. The African Court on Human and Peoples' Rights (the Court) is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights.

The African Court on Human and Peoples' Rights was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004.

A protocol to set up the Court of Justice was adopted in 2003, and entered into force in 2009. It was, however, superseded by a protocol creating the African Court of Justice and Human Rights, which will incorporate the already established African Court on Human and Peoples' Rights and have two chambers — one for general legal matters and one for rulings on the human rights treaties.⁴

Jurisdiction of the African Court on Human and Peoples' Rights

The court has jurisdiction to deal with cases submitted to it regarding the interpretation and application of the charter, protocol and any other relevant human rights ratified by the concerned state. The court may be requested by the member state, organ of the African union or any African

⁴<https://www.au.int/en/organs/cj>

organisation recognised by the African union can provide an opinion on any legal matter relating to the charter or any relevant human right instrument.

Currently the court has no jurisdiction to try international crimes such as genocide, crimes against humanity and war crimes, which means that it cannot be considered as a direct alternative to the ICC but rather a complementary system.

Differences and Similarities between ICC and African Court of Human and Peoples' Rights

Discussion on whether or not Zambia should withdraw membership from the ICC should only go forward if the African Union genuinely proposes a strong alternative institution to protect the rights of the African People. To establish whether there is a viable African alternative, we will look at the similarities and differences between the ICC and the African Court on Human and Peoples' Rights.

Similarities

- Both Courts draw their mandates from International Instruments to which member countries are signatory. This means that member countries have a discourse towards discussing and making changes to the way the court operates.
- Both Courts have the authority to pass binding decisions.
- Both Courts are established to complement local mechanisms for human rights protection rather than replace them.

Difference

- The jurisdiction of the Courts is different. The ICC deals with international crimes while the African Court of Human and Peoples' Rights deals with disputes regarding the interpretation and application of the charter and cannot hear matters involving the commission of international crimes.
- The procedures of the two courts are fundamentally different. Cases at the African Court of Human and Peoples' Rights do not undergo the detailed pre-trial investigative procedures that a case at the ICC undergoes. The difference in the procedures is also exemplified by the fact that there is no appeal mechanism from the decision of the African Court on Peoples' and Human Rights while an appeal can be made of a the initial decision of the ICC.
- The composition of the courts is also different. The work of the ICC is complimented by different specialized departments that carry out various functions at various staged of a meticulous investigation and hearing. The work of the African Court on Human and Peoples' Rights does not benefit from the resources available to the ICC. The court relies heavily on the evidence presented by the parties. This disadvantages the poorer party as they may not have the resources to adduce evidence and sustain a trial at international level.

The Zambian Perspective on the ICC

History of Zambia and the ICC

Zambia signed the Rome Statute in 1998 and ratified it in 2002. Since ratification there is very little history of engagement between Zambia and the ICC.

In 2009, Zambia submitted the name of Her Honourable Ladyship Madam Chibesakunda as a candidate for the position as judge at the ICC. In 2010, the Zambian Deputy Permanent Representative to the ICC made a statement at the 9th Assembly of the States Parties to the Rome Statute at which he reiterated Zambia's commitment to the ICC and emphasized the need for States Parties within themselves and in regional blocks take a leading role to ensure cooperation with the court.⁵

We would like to echo the recommendations made by Zambia at the 9th Assembly of the States Parties by stating Zambians as a people are committed to fighting impunity and should therefore not withdraw from the ICC. The work of the Court is as important now as it was when Zambia ratified the Rome Statute.

National Human Rights Protection Systems

Zambia is a dualist State which means that for international law to be applicable and justiciable in Zambia, it must be domesticated. Therefore for the Zambian people to enjoy the protection under international instruments, the various conventions and treaties to which Zambia is a States Party need to be domesticated.

The Zambian judicial system is one of the human rights protection mechanisms at national level through which people can seek redress and protection. The judiciary is established under the Constitution of Zambia which sets out principles to be applied by the Judiciary in the administration of Justice.

The Zambian judiciary is characterized by a backlog of cases, unclarity of jurisdiction with regards to human rights and implements a narrow bill of rights following the failure of the Referendum in 2016. It is therefore inadequate to deal with the gravest of human rights abuses as set out in international instruments.

There is National Human Rights Institute established to promote and protect the rights of all persons in Zambia. Although strengthened by the 2016 amendments to the Zambian Constitution, the Commission remains constrained and lacks the resources to carry out comprehensive promotion and protection of the rights of the people. The Commission is an administrative body and merely makes recommendations to remedy abuses. The Commission is therefore not equipped to deal with the type of human rights abuses envisaged to be protected under the Rome Statute.

There are various executive and administrative institutions established under various pieces of legislation to promote and protect the rights of people in Zambia. They are however ill-equipped to deal with international human rights abuses as they work within framework conditions that do not address the concerns on international human rights violations. Further, the level of influence potential perpetrators of these violations have over the national institutions means they cannot alone be recourse available to people who are victim of human rights abuses.

Benefits of the International Framework to the Citizen and States

⁵https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-GenDeba-Zambia-ENG.pdf

We are of the firm belief that any discourse on whether or not Zambia should withdraw from the ICC should be guided by what is in the best interest of the people of Zambia from a Human Rights perspective. The nature of human rights demands that people should have discourse to systems not in control by potential abusers of rights and that nations be held accountable to other nations on the protection of the people they are obligated to protect.

The international human rights framework allows citizens the right to pursue remedies even beyond national systems that may be compromised, ineffective or have limited national framework within which to operate such as is the case in Zambia.

H. E President Edgar Lungu said in his address to Parliament that we merely borrow from tomorrow's generation. To this end, the international human rights framework should be viewed as a framework to protect future generations from impunity. We wish to advise that the evils of withdrawal far outweigh the evils of belonging to the ICC. The danger of future generations being victims of impunity necessitates Zambia's belonging to the ICC.

Further, the ICC is a victim-centred court and therefore ensures that perpetrators are answerable for their actions regardless of status. In this unique system, victims can participate in ICC proceedings and receive reparations, including through the Trust Fund for Victims, to help rebuild their lives.

The international human rights framework also allows States Parties to legitimately seek support to end impunity carried out by non-state actors. Ratifying the Rome Statute commits nations to creating national laws to prosecute war crimes, genocide and crimes against humanity. Withdrawing would mean that Nations show less commitment to fighting these vices.

Recommendations

We would therefore like to make the following recommendations based on the overall proposal that Zambia should not withdraw from the ICC;

Targeted at the Zambian Government

We wish to reiterate that Zambia must remain a member of the ICC. As stated in this position paper, the potential benefits far outweigh the evils of not being a member State. According to its jurisdiction, the ICC can only take cases related to genocide, crimes against humanity, war crimes and crimes of aggression under their investigation, which means that Zambia is under no realistic threat of being investigated or prosecuted under ICC. Its mandate primarily provides protection for the people, and by remaining a member of ICC Zambia has a chance of showing its commitment and support to the international human rights protection regime. Zambia must continue to be an example of a Nation that respects and promotes Human Rights and is not afraid to be accountable to the international community and to allow its citizens recourse to international mechanisms.

There is need for the Zambian government to develop a Human Rights Based Approach Policies to govern decision making processes at national and international level. When dealing with human rights the government must be custodians of the interests of its people. This means the government must make decisions based on the best interest of the people whether the people know it or not.

There is need to strengthen the national human rights protection framework to ensure that violations of human rights are comprehensively dealt with at national level before appeals to international bodies are made. To this end, there need to be investment in the Judiciary and greater support to the Human Rights Commission of Zambia as well as other administrative and executive institutions. The government should review systems that ensure there are effective checks and balances and accountability amongst the various organs of the State as well as governance institutions.

There is need for Zambia to enact legislation that domesticates the provisions of all human rights treaties that reflect Zambian society. As stated already, Zambia is a dualist State and for people in Zambia to get the full benefit if the rights enshrined in international instruments, there is need to domesticate all the international instruments. Zambia must also take into consideration best practices in governance from an international and regional perspective so that it develops institutions that respond to the needs of the people before all else.

There is need for Zambia to establish administrative structures to complement cooperation with international bodies such as the ICC in line with the ICC recommendations to State Parties. Along with the domestication of international instruments, Zambia needs to strengthen existing administrative structures to increase interface and collaboration with international protection mechanisms. The Zambian Judiciary stands to benefit greatly from sharing information with other judicial bodies at both regional and international level. This will allow Zambia build a strong and independent Judiciary that is responsive of the needs of the people of Zambian and acts as custodians of the rights enjoyed by all persons.

Targeted at the AU

The AU should consider establishing more citizen-centred decision making policies to ensure that the protection of the citizens' human rights is the primary consideration behind decisions. The decision to leave the ICC would be in our view irrational considering the reasons forwarded. The evil of withdrawing is far greater than staying members of the ICC.

The AU should engage the Assembly of States Parties to the Rome Statute so that reforms are instituted to address some of the concerns raised as reasons for withdrawal. The AU had in the past issued statements expressing the desire to engage the ICC in order to initiate reforms. We would therefore recommend that the engagement with the ICC be exhausted before further decision is taken.

The AU should advocate for a permanent sit for Africa on the United Nations Security Council. This is in view of the fact that Africa is usually a recipient of most of the UN Security Council decisions. The African voice on the UN Security council ought to be amplified

The AU should further invest in regional human rights bodies to ensure that they are effective and are able to address the human rights situation in Africa. The African Court on Human and Peoples' Rights is as it is now, unable to address the offences that are within the jurisdiction of the ICC so that they are complimentary and do not seek to take away from each other. To this end the AU should invest in institutional learning between the courts so that the African human rights protection framework can be as comprehensive as the framework provided by the ICC.

There is need for the AU to specifically strengthen the African Court on Human and Peoples' Rights. We have also identified that the African Court on Human and Peoples' Rights is significantly weaker than international and other regional institutions with regards the protection from grave human rights violations and international human rights crimes. There will therefore be need to invest more to strengthen the institutional setup of the Court as well as strengthen cooperation between national judicial and administrative institutions to ensure they are complimentary.

Targeted at the ICC

There is need to address the concerns raised by African States regarding the links with the UN Security Council particularly with regards cases that are recommended by non-members.

There is need for the ICC to explore closer links with regional judicial bodies to ensure the principle of complementarity is not just on paper but actually exists.

There is need for the ICC to increase efficiency to show nations that contributions are being utilized effectively.

There is need for the ICC in conjunction with State Parties and the UN Agencies to raise awareness amongst citizens of State Parties.

Targeted at the African Court of Human Rights

The African Court on Human and People's Rights needs to strengthen internal procedures and review all the systems to ensure that State Parties are aware of the scope and understand the limitations of the Court as well as to ensure that the Court processes and systems are victim centred. To this end the court should take a leaf from the ICC and invest in investigative systems.

There is need for the African Court on Human and Peoples' Rights to establish closer links with national and regional human rights protection mechanisms. This will ensure that all the protection mechanisms are complementary.

➤ **Annexures:**

To support the contents of the discussion points and recommendations SACCORD will annex detailed responses to;

- The AU resolution,
- The concerns by Nations Advocating withdrawal from the ICC,

Annex 1

We have prepared a detailed response to the Resolution Passed by the AU as follows:

The AU Recommended: The adopted the withdrawal Strategy along with the Annexes and called on all member States to consider implementing its recommendations.

We have read through the Withdrawal Strategy and is of the view that the AU should engage the Assembly of States Parties to discuss to completion the issues raised before considering action as drastic as withdrawal. It is our considered view that none of the pending issues warrant a withdrawal. The Rome Statute and the ICC serve an important role in the human rights jurisprudence and withdrawing would place Africa's 1.2 billion people at risk of potential human rights abuses as the human right protection mechanisms at continental level are not adequate to deal with any potential breaches. Further, many national mechanisms do not adequately address the needs of the people they seek to protect.

Further, the AU needs to invest in strengthening the continental human rights protection mechanisms before it considers denying the people it was created to serve the right to seek redress. The AU should keep in mind that a continent's most valuable resource is its people. There is no investment too high with regards protecting the people. Therefore urging withdrawal on account of a perceived bias which and a curable institutional flaw does not merit a withdrawal.

Annex 2

Responses to the concerns raised by Nations Advocating Withdrawal from the Rome Statute.

1. Bias Against African Leaders

It is not enough to say that the ICC targets African Leaders. The AU should concern itself with the merits of the investigations on alleged violations of Human Rights abuses. The AU has not addressed the merits of the investigations and it is therefore troubling to advocate withdrawal from the ICC on that account. AU members are States Parties to the Rome Statute and therefore are part of the decision making organ of the body and should therefore be able to find discourse to rectify any flaws in the manner the ICC operates. An examination of the investigations carried out by the ICC will show that many of those cases have been at the insistence of the Countries concerned. Further, there have been human rights abuses in the cases investigated and the concern of AU members should be on African people and not avoiding investigation.

The AU members advocating withdrawal further cite the non-investigation or lack of progress in the investigations in other countries cannot also be cited as a reason for withdrawal. The essence of the ICC having in place specialized departments is that before a case is opened there must be evidence to show beyond reasonable doubt that the people accused of a crime have indeed committed an offence. It is not objective for the AU to wish prosecution upon people to even out investigations rather than address impunity.

2. Indictment of Sitting Presidents

History has shown time and time again that it is often those in power that tend to commit the gravest of atrocities. Being in office should not shield a person from liability for grave human rights abuses. It is for this reason that the AU should focus on protecting citizens rather than shielding individuals in office.

The ICC should not be considered a separate entity but should be seen as a court that compliments the national and regional institutions. This concern highlights a fundamental flaw with national and regional systems as they are often times biased towards those in high political office that may have perpetrated the offences. It should not be the interest of the AU to protect individuals or other office bearers but to protect the people of Africa.

3. Non Membership of Countries that Perpetrate Violations of Human Rights

Human rights protection demands that Nations take positive action to protect citizens. To point at the actions of States that are not part of States Parties to the Rome Statute takes away from the intentions of signing the treaty. A treaty is signed by a country to show its commitments towards promoting and protecting human rights. The fact that some countries have not signed the treaty does not invalidate the spirit with which it was developed. Pointing at other countries as the reason for advocating withdrawal is a hypocritical and betrays the intentions of the people who are to be protected under the Rome Statute.

4. Inefficiency of the Court

The ICC is an investment towards future peace. Citing the courts budget is again aimed at distracting the people about the intentions of withdrawing. More than half of the courts budget is financed by European Countries. Further, the cost of the ICC should be considered

by the cost paid by each individual country, and in the case of Zambia, the annual contribution is below ZMW150,000. This reason for withdrawal is African leaders placing a price on human rights and shows the lack of genuine commitment to protect the interests of the people.