International Law Reflection 2017/2/EN

ÚSTAV MEZINÁRODNÍCH VZTAHŮ PRAHA
INSTITUTE OF INTERNATIONAL RELATIONS PRAGUE
Centre for International Law

All's wrong that starts wrong – withdrawals from the International Criminal Court

February 22, 2017

The Hague-based International Criminal Court, the world's first permanent judicial forum, created in 1998 by the adoption of the Rome Statute, has been living difficult times during the past months. After years of struggle since its operations have started in 2002, the second half of 2016 has brought withdrawals, threats for withdrawals, and even a visibly collective strategy for a mass withdrawal of African states from the system. What keeps states in a similar structure, what makes them seriously consider a withdrawal, and what is the possible future of the International Criminal Court (ICC)?

Africa and the ICC

The political struggle between the ICC and some of the African states has been raging for years, with hostile statements, denunciations and from various African leaders. The African Union has not surprisingly become a political actor in this: already in January 2016, it has aimed to create a strategy for a „collective withdrawal" from the ICC, while the process of creating its African „substitute" has started to become more and more real.

Then the situation has seemingly got even more serious. First Burundi, then South Africa have announced their withdrawal from the ICC, repeating claims that the Court is biased towards African states, while Gambia has made a complete turn, first withdrawing, then after domestic political changes, reversing its withdrawal. Additionally, a bit more exact was the reasoning of South Africa in 2015, first announcing its consideration of leaving the Statute, complaining about the criticism it had to encounter for not arresting Omar al-Bashir, president of Sudan, wanted by the ICC for genocide among other crimes. (Sudan is not a party to the Statute, the Court has jurisdiction based on a resolution by the UN Security Council). As a matter of fact, as a state party to the Rome Statute, South Africa is under the obligation to arrest anyone wanted by the Court.

One country, which is currently under ICC investigations, Kenya has also expressed some interest in leaving the system, similarly to Uganda and Namibia. On the other hand, seemingly there has not been an African-wide consensus over the question. For example, Nigeria and Botswana have restated their commitment to the ICC.

Is the Court really biased towards Africa? As the numbers show, it is currently conducting 10 ongoing investigations, nine out of them are related to situations in Africa (one in Georgia). On the other hand, its preliminary examinations cover other places, like Afghanistan, Colombia, Iraq, Palestine and Ukraine. Altogether I would find it hard to argue that the Court would be driven by any bias towards the continent. While this is obviously just a weak argument against the Court, the withdrawals have clearly broken a taboo, and resulted in a need of re-considering the situation and the future of the Court as well.

Collective African withdrawal?

The African Union's bi-annual summit, held in Addis Ababa in January 2017 has resulted in a disturbing AU decision on the ICC. Among other things, it has greeted the three withdrawals, and adopted „the ICC withdrawal strategy along with its

Annexes, and calls on member states to consider implementing its recommendations", which has immediately raised serious concerns about the future of the Court, at least related to Africa.

Contrary to its confusing title, the strategy is not a collective action plan, but rather a „memo" of possible withdrawal, which is a sovereign step, which is possible according to the constitutional provisions of single African states, with a reminder to the Vienna Convention on the Law of Treaties and Article 127 of the Statute, allowing for withdrawals. It also reminds states, that even in the case of a withdrawal, obligation to cooperate with the Court during ongoing examinations and investigations is obligatory. While the strategy does not impose any collective obligations on AU member states to withdraw from the ICC (the legality of which would be questionable anyway), its existence is a sign to be seriously considered.

Political motivations…?

The strategy itself has a questionable future and effect. Currently it seems, that it does not enjoy full acceptance among member states: some of them (Cape Verde, Liberia, Nigeria and Senegal) have entered reservations to the ICC withdrawal strategy, while some others have announced that they still study the decision. But the vast majority of them have not taken a position, meaning that they either agree or at least do not want to openly disagree to it, which is somewhat an alarming sign.

To understand the possible political motivations a bit more, it may be useful to examine the recent event related to Russia and the Court.

The Russian withdrawal

During November of 2016, Russia has announced that it withdraws its signature from the Rome Statute, the founding treaty of the ICC. The foreign minister has argued that the court "did not live up to the hopes associated with it and did not become truly independent", which argument is often echoed by states or political actors gaining the attention of the Court, or those who would deserve more of it. It is not hard to see the usual connection: the Russian step has followed the publication of a report by the prosecutor of the ICC, Fatou Bensouda, which has included some strong statements and legal points that had been found disturbing by the Russian government. It has stated for the first time, that the armed conflict on the territory of Ukraine has amounted to the level of an international armed conflict between Russia and Ukraine, it has qualified the situation of Crimea "an on-going state of occupation", and also addressed other issues (e.g. the MH17 incident, that we have also analysed in International Law Reflection #3).

Legal and political reasons and implications

Legally speaking, these statements seem to be quite evident, but they may have significant consequences. While Ukraine is not a party to the Statute, as a result of her two earlier declarations under Article 12, Paragraph (3), made on 17 April 2014 and on 8 September 2015, the ICC may exercise its jurisdiction over war crimes and crimes against humanity committed on its territory from 21 November 2013 onwards. The Court has been conducting a preliminary examination since the time of the first declaration, and these results may trigger the applicability of the Statute's provisions possibly leading to actual criminal investigations and cases in front of it.

At the same time, politically speaking, these statements are very strong, as they are clearly contradicting the Russian official narrative, according to which Russia does not have any troops in Ukraine, while Crimea had voluntarily joined Russia, by the will of its population, via a free and fair referendum. Of course, nobody takes this seriously in Ukraine or Europe, but Russia has made serious efforts to spread this image, including the invitation of some members of the European Parliament as "observers" for the referendum.

What did Russia exactly do and why? First of all, Russia has never actually ratified the Statute, meaning that is does not have any actual binding force over it, the Court cannot exercise any powers over Russia or actions conducted on its territory. However, it had signed it in 2000, meaning that while legally not being bound by it completely, according to Article 18 of the

Vienna Convention on the Law of Treaties it shall "refrain from acts which would defeat the object and purpose of a treaty". Seemingly, Russia wants to get rid of this obligation as well, or use this "withdrawal" to send a strong political message towards the Court itself.

The message is important related not only to the current Ukraine situation, but also to Syria, where Russia has been accused of war crimes and atrocities during its military intervention, namely against the Islamic State, but rather against armed groups hostile towards the government, a long-time ally of Russia. However, the Court's position is weaker in the situation of Syria, as the government will most probably not adopt declarations similar to Ukraine, and the UN Security Council (the only actor legally able to initiate proceedings of the ICC regarding a state non-party to the Statute) can be effectively blocked by a Russian veto.

At the same time, the current withdrawal does not block the Court from continuing its investigations or from initiating criminal proceedings: as the alleged crimes and violations investigated have been committed on the territory of Ukraine, the consent of which is secured by its declarations, the Court has jurisdiction. Of course, Russia may and probably would deny any cooperation with the Court, had its assistance been needed, for example regarding hearing witnesses or extraditing individuals accused with crimes. Withdrawal of the signature can gain a significance at this point: otherwise, denial of assistance could qualify as an act that could "defeat the object and purpose of the treaty".

The Russian move is not unprecedented though: the United States had also first signed the Rome Statute in 2000 under Bill Clinton, but his signature has in 2002 been revoked by his successor, George W. Bush, a step which has also been explained with political reasons, namely the concerns that proceedings of the Court could turn political and target Americans unfairly. While these threats have been traversed by numerous actors already at that time (see for example the open letter by Human Rights Watch), the United States has never signed or ratified the Statute ever since.

Seemingly, one sentence from the open letter of the Human Rights Watch has become very much real, which the executive director had addressed to the President: "Unsigning would also set a new international precedent that could come back to haunt the United States." With Russia, it has happened. The main difference is, that Russia has done it at the face of an imminent threat, while the United States seemingly had been more careful in advance.

Wrong start leads to wrong results

Foreign policy goals motivating foreign policy actions is a commonplace, expecting states to act otherwise is completely unrealistic. Still, foreign policy actions have effects, and from time to time, some of these may be disproportionate related to the gain wished to be achieved.

As the withdrawal of the signature of the United States, motivated by an indirect interest has become a very handy precedent to Russia, doing the same to serve a very direct one. Which, at the same time, has contributed to unprecedented actions by African states, who had earlier ratified the Statute, taking the legal obligations from it, still deciding to get rid of them in the face of their own actual, either direct or indirect interests.

All this raises serious concerns about states' determination towards some of the most fundamental principles that our current international order is built on, for example the idea that the most serious crimes shall not stay unpunished. The International Criminal Court as an institution may be subject to much criticism (some of which are accurate and needed), but the current situation sheds shadow not only to the future of the Court, but also the idea of development of international law and cooperation, when meeting states' vital, or even not so vital interests.

Tamás Lattmann

lattman@iir.cz

ÚSTAV MEZINÁRODNÍCH VZTAHŮ PRAHA
INSTITUTE OF INTERNATIONAL RELATIONS PRAGUE
Centre for International Law

The International Law Reflection series offers timely, concise, policy-oriented insights into burning international law issues. Its regular analyses zoom in on events of major significance, assess their international legal aspects and offer policy guidance to relevant decision-makers in the Czech Republic. As it draws on the academic expertise of IIR fellows and affiliated scholars, the purpose of the series is to provide additional context and analytical depth to information on international law issues and correspondingly to make readers better acquainted with international law. To find out more, visit **www.iir.cz**