After South Africa's withdrawal, how does the ICC stay relevant?

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South Africa’s decision to leave the International Criminal Court (ICC) hardly spells the demise of the tribunal that tries the world’s worst crimes. But it is certainly a heavy blow to the young court.

“The existence of the court is not at stake,” says Luis Moreno Ocampo, the ICC’s first prosecutor. “But its relevance is a different matter.”

South Africa, whose justice minister announced last Friday that the government had launched the year-long process of withdrawal, is the first country to say it is leaving the ICC. But Burundi’s parliament voted last week to get out and a number of other African nations, from Kenya to Namibia, are making threatening noises.

Dewa Mavhinga, an Africa researcher at Human Rights Watch, warns of a “runaway train” on a continent that has always been central to the ICC’s raison d’etre.

In 2002, when the ICC was set up, Africa was the biggest backer of the court, which was set up to try cases of genocide, crimes against humanity, and war crimes when national courts would not or could not hear them. Today, accusations abound that the ICC is racist, colonial and “anti-African.”

## What has gone wrong?

Pretoria says it is leaving the ICC because the court does not allow diplomatic immunity for suspects it has indicted. South Africa last year welcomed Sudanese President Omar Bashir to an African Union summit on the grounds that local law offers immunity to sitting heads of state. The ICC indicted President Bashir in 2009 for allegedly directing atrocities in Darfur.

It has to be said that African leaders began turning against the court when they themselves and their peers began feeling its heat. After Bashir’s indictment, Kenyan president Uhuru Kenyatta and his vice president were indicted in 2013 for their reported role in stirring up severe electoral violence.

That year Ethiopian Foreign Minister Tedros Adhanom Ghebreyesus complained to an African Union (AU) summit that the ICC had “transformed itself into a political instrument targeting Africa and Africans.”

At first sight, that seems an easy case to make. All four men convicted, for crimes such as murder, rape, pillage, destroying cultural artifacts, and conscripting child soldiers, are Africans. All 32 men so far indicted are Africans. Nine of the ten investigations undertaken by the ICC prosecutor are in Africa.

But the reality is more complex.

Six of the nine situations under investigation in Africa were referred to the court by African governments themselves. The prosecutor was ordered to take up two others by the United Nations Security Council. In only one case, that of Kenya, did Mr. Moreno Ocampo lay charges on his own initiative.

“The prosecutor can’t be blamed for doing what states ask him to do, or what the UN Security Council directs him to do,” says Geoffrey Robertson, an international human rights lawyer who sat as an appeals judge on the Special UN tribunal for Sierra Leone.

The idea that the ICC unfairly picks on Africans mistakes the purpose of the court, says spokesman Fadi El Abdallah. “ICC intervention is not about targeting ten or fifteen suspects,” he says. “It is about protecting ten or fifteen thousand victims.”

And aside from that, El Abdallah points out, “there have been no referrals by the UN Security Council or by state parties [of the court] outside Africa,” except for one from Palestine last year.

In retrospect, some court observers wonder about the wisdom of indicting Bashir, a sitting head of state, in light of the resentment the move sparked among his fellow leaders.

“The message was incredibly important, that no one is above the law,” argues Laura Davis, a writer and consultant on matters of peace and justice. “Whether it was a smart thing to do is not so clear.”

It would have been more sensible, suggests Leslie Vinjamuri, head of the Centre on Conflict, Rights and Justice at the School of Oriental and African Studies in London, “if the court had delayed looking at heads of state until after they had left office … and the conflicts they were involved in had been resolved.” That way, she argues, the ICC could avoid getting in the way of possible peace initiatives.

## 'Tearing down the traffic light'?

There is also a widespread feeling that the ICC should spread its wings more widely. “There needs to be more action outside Africa for this to be seen as a truly international court,” says Allan Ngari, an analyst at the Institute for Security Studies in Johannesburg.

The ICC has clearly got that message. Earlier this year prosecutor Fatou Bensouda opened a formal investigation into allegations of war crimes by both sides during the war between Russia and Georgia in 2008. It was the first time the court had begun investigating a situation outside Africa.

Ms. Bensouda has also ordered preliminary examinations of allegations concerning Ukraine, the Palestinian territories, and British army behavior in Iraq.

This is all very positive, says Dr. Davis, but there is no doubt that the court is operating today in a very different international atmosphere from the one that prevailed at its birth 14 years ago. Then, she recalls, the movement promoting international justice flourished in the optimism of the post-cold war 1990s, and the hope that a cooperative world order was within reach.

Today, Davis guesses, amidst the prevailing “fear and uncertainty,” diplomats would not be able to create something like the ICC.
Moreno Ocampo too blames a retreat “from collective effort … to tribalism, retaliation,

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The ICC, he says, is like a stoplight. It is not always effective in preventing or punishing crimes against humanity; “sometimes the cars stop, and sometimes they don’t,” he acknowledges.

“South Africa is tearing down the traffic light,” says Moreno Ocampo. “My prediction is that there will be more accidents. The question is not whether the ICC needs Africa; it’s Africa that needs the ICC.”