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Press conference by the President of the Assembly of States Parties, H.E. Mr. Sidiki Kaba on the withdrawal from the Rome Statute

Transcript

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Dakar, Senegal

Part I: Opening remarks

Ladies and gentlemen,

We extend our thanks to you for having kindly accepted our invitation.

We have just seen the 20th century come to a close, a century which brought about immense economic, scientific, technological and technical advances, but which, at the same time, produced harmful extremist ideologies: two terrible world wars, devastating regional conflicts, and three genocides that still offend our collective memory.

The creation of the International Criminal Court (ICC) on 17 July 1998 signalled a sense of renewed hope for humanity based on fostering justice and peace. It is the first permanent international criminal court set up to try the most high-ranking perpetrators of the most serious crimes which violate the conscience of the world – genocide, war crimes, crimes against humanity and crimes of aggression.

The ICC marks an important step in the fight against impunity and builds on the historical legacy of the Nuremberg and Tokyo Tribunals, as well as on the legacy of the *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda.

A very large number of African States have acceded to the Rome Statute, having actively participated in the Diplomatic Conference held in Italy in 1998, which created this international court; a court which has given hope to the victims of mass crimes and atrocities, and hope to all those who are committed to justice that meets the requirements of impartiality, fairness and independence.

To date, 34 out of 54 African States have ratified the Rome Statute, making Africa the largest regional group engaged in the universal struggle against the scourge of impunity, which constitutes a serious threat to peace, stability and security in our societies.

It has been commonly acknowledged that impunity has been a major cause, if not the primary source, of almost all the crises and conflicts causing massive violations of human rights, and which have left in their wake processions of refugees in their thousands.

The criticism levelled at the ICC is that it is against Africa and only African nationals are being prosecuted and tried before that court, which has come to be considered selective and biased. There is no getting away from the facts. The fact

remains that it is African nationals who are currently facing trial at the Court, however, it must also be recalled that it is African States that have referred situations to the Court under article 17 of the Statute.

Today, we believe that international criminal justice is at a turning point, given the announcement by South Africa and Burundi of their withdrawal from the Rome Statute.

I speak in my capacity as the elected President of the Assembly of States Parties to the Rome Statute of the ICC. At the Summit of the African Union held in Kigali, President Macky Sall underlined again Senegal's position on the ICC. We endorse that position.

We regret these withdrawals.

But we must recognize that these are sovereign acts, made in conformity with the provisions of the Rome Statute and in accordance with the conditions of accession contained therein. These acts also comply with the Vienna Convention on the Law of Treaties of 1969.

Both of these countries, Burundi and South Africa, played an important role in the creation of the ICC, in particular, South Africa, which defeated apartheid and which has a long tradition of struggle against injustice and impunity.

Obviously, we cannot simply brush aside the concerns, criticisms, and even recriminations emanating from African countries. We need to give them serious consideration and, where necessary, take action to address them.

The withdrawal of these two countries will only take effect one year after the filing of the requisite instruments. We consider it important that strong initiatives be taken both by African States and by the international community in order to find a positive outcome to this situation.

And we would also like to take this possible chance and to seize this opportunity to make the following appeal:

1. That a dynamic consensus be found, through constructive dialogue within the Assembly of States Parties to the Rome Statute. We recall that the next session of the Assembly of States Parties to the Rome Statute will be held from 16 to 24 November 2016 in The Hague.

2. That those States which are currently members of this Assembly of States Parties remain committed to the promotion and defence of the values underpinning justice and peace, values which were key to the creation of the ICC.

3. That international and non-governmental organizations, as well as all other stakeholders including civil society, pool their efforts to give effect to the need for universal justice based on independence, impartiality and fairness. To this end, we need to reform and restructure the Security Council and the right of veto – harbinger of impunity, and of a selective, two-tier global justice system. It should be pointed out that the power of veto should not be considered a privilege but, rather, a responsibility. And it should not be possible to use this veto in instances involving the most serious crimes.

4. That there be universal ratification of the Rome Statute and universal incorporation of its provisions into the domestic law of States Parties, so as to give an equal and fair chance of justice to all victims throughout the world wherever they may be.

5. That the independence and integrity of the Court be defended against any political interference so as to ensure that justice is rendered solely on the basis of law and the rules of procedure provided for in the Statute.

6. That complementarity be developed through multifaceted cooperation so as to strengthen the competent national judicial systems to allow them to prosecute *in situ* perpetrators of crimes that fall within the jurisdiction of the Rome Statute. For the ICC is a court of last resort, that is complementary to national jurisdictions. It plays a subsidiary role with regard to national courts. If every State prosecuted the crimes listed under the Statute, the ICC would receive less referrals and its workload would decline. Thus, African nations would prosecute Africans on their own soil.

7. That those States which have not yet done so join the ICC, just as Palestine and El Salvador have recently done, to expand the universal movement against impunity in order to prevent mass crimes, avoid their recurrence and deter potential perpetrators.

Today more than ever there is an overwhelming need for universal justice at a time where we are seeing evil flourish and goodness in decline. These tragedies which unfold before us, before our very eyes, demand an unequivocal response from mankind, one which must safeguard the dignity of each human being as well as preserving peace and international security.

Part II

Clearly, the criticism being levelled at the International Criminal Court is that it is pushing forward a two-tier justice system, which is selective, discriminatory and even, on occasion, there has been talk of white man's justice. I have already spent time reflecting on this issue, and there have been various discussions on the matter in fora around the world, and indeed there is my book "Universal justice at issue – a white man's justice?" It is a thorny question, which keeps on coming back, and one which we will have to keep in mind when we hear it said that there are many African situations before the International Criminal Court, and that these cases only concern African nationals. This is the reality, it is a true statement, but we must simply point out that, at the outset, it was African States that chose to seize the International Criminal Court.

As you know, article 17 of the Rome Statute provides that if a State is not ready, i.e., is not in a position to prosecute a case, or is not willing to do so, the International Criminal Court may have jurisdiction. This brings me on to a further precision: the International Criminal Court does not have immediate jurisdiction. It is a subsidiary court; a court that is complementary to national courts. If national judiciaries are duly carrying out their functions, the International Criminal Court does not get involved. Thus, it only steps in if national courts are not carrying out their functions or if they request the Court to become involved. In the cases at hand, all of the initial cases brought before the International Criminal Court were instituted by African States and, with the slow pace of justice, it stands to reason that we have viewed the examination of these cases and considered that the final judgments have focused only on Africans. Let me state then that, obviously, we need a system of international justice that can judge the whole range of crimes being committed throughout the world, and prosecute nationals from all States that are in the throes of conflict, and that this can be achieved by the International Criminal Court if a national court has not passed judgment in a case.

We have also talked of a certain number of big powers that are members of the Security Council but are not parties to the Rome Statute – yes, this is true – but is it then correct to say that this calls into question the legitimacy of the International Criminal Court? I don't think so. What is in question today is the direction being taken, in other words, the prosecutions of the International Criminal Court, which we would have liked to see widened so as to encompass various other countries, to demonstrate that Africa is not the sole regional area whose nationals are being prosecuted. The Chief Prosecutor is currently carrying out investigations in a number of countries, such as Colombia and Honduras, and, soon, a trial will be held involving Georgia, in particular, with regard to crimes committed in South Ossetia. Thus, although at this specific moment in time there are a much greater number of African nationals before the International Criminal Court - an undeniably true statement - this situation is tempered by the fact that all of these cases which could have been tried in Africa have not been dealt with there, because it is African States which have brought them before the International Criminal Court.

Senegal was the first country worldwide to ratify the Rome Statute. By so doing, it opened the way to acceptance by 123 other States in the world. In short, Senegal believes, along with the group of countries which have ratified the Rome Statute, in the need to fight against impunity, in the need to defend the values of justice, the values of freedom, so that human dignity can be preserved by making sure that international crimes that offend our universal conscience are eradicated and that those responsible for these crimes are prosecuted and receive judgment.

It will be recalled that Senegal's acceptance of the Rome Statute was affirmed during the Presidency of Mr. Macky Sall, on the occasion of the Kigali Summit, where it was envisaged that the African Union would take a political position with regard to the withdrawal of African States from the International Criminal Court. There, he stated that membership of the International Criminal Court was a voluntary act. This is why I say to you today that the withdrawal by Burundi and South Africa constitutes an act of sovereignty, which is provided for in the Statute. The conditions of membership, just as the conditions for withdrawal, are also provided for under treaty law and under the 1969 Vienna Convention, which sets out the framework by which one can sign up to a convention, a treaty, a charter, and also the conditions according to which one can withdraw from such instruments.

So, the decision of these States, announced today, to withdraw is an act of sovereignty, but let me also say that, when you file a notice of withdrawal, the same governing conventions and Statutes provide that such withdrawal is only effective after the expiry of one year. Thus, if these States give notice of their intention to withdraw from the Rome Statute in 2016, it is not until 2017, a year after the formal notice was given, that we will announce that the withdrawal has taken effect. As I have already said, we must seize this opportunity to engage in a dialogue, a dialogue with those States that wish to leave the ICC, and to this end, we must listen to their complaints, their concerns, their criticisms – we must give them due consideration, because if our way of functioning does not match the expectations of a Member State, of one of our States Parties, we must be ready to listen. But I must emphasise where this process should take place: before the Assembly of States Parties; the Assembly of States Parties is the framework created by the Rome Statute providing a forum where different States can formulate their criticisms, provide observations, and propose legislative amendments aimed at making the Court more efficient, improving its functioning, so that it is better equipped to render justice with independence and impartiality.

So I would ask, and make an appeal to your States, which are on the point of leaving, you referred to a few States, if they have not already done so, if they are on the verge of doing so, to give a chance to dialogue, to negotiations, and to remain open to the possibility of discussions during the General Assembly of the Assembly of States Parties, which will take place at the session scheduled from 16 to 25 November, discussions on the whole range of issues, with the 124 States Parties, in an effort to find a dynamic consensus.

I wanted to say that this anticipatory message is squarely based on the fact that States are sovereign entities. We cannot force any State to accede to the Rome Statute, just as we cannot force any State to withdraw from that Statute. And it is on this basis that we will need to find points of commonality which will allow us all to find our place within a framework whose objective is to enable us to find the best outcome to a situation which represents a major concern.

Another question which has been asked regards the credibility of the ICC: I, for one, would like to make a distinction between two elements: there are political functions within the ICC and judicial functions. The political functions fall within my remit, in my capacity as President of the Assembly of States Parties, representing the 124 States Parties to the Rome Statute – speaking on behalf of those States to argue for the prevention of mass crimes, for the non-recurrence of crimes, and to express the will to build nations which, at the very least, are founded on justice and individual dignity. The ICC also encompasses a legislative function, which allows for the amendment of texts, the modification of rules of procedure so as to ensure that the Court can render justice with the greatest of efficiency; this function, in addition, allows for the judges to work in the best of conditions –

judges who swear an oath before me, in my capacity as President of the Assembly of States Parties – by making sure that their material needs are met, that they have aids and people to assist them, i.e. staff members, working within the Registry and the Secretariat, that they receive the best treatment within the International Criminal Court. But, there is another function beyond the strictly judicial one, to do with preservation; we must protect the Court from all political interference, because politics and a court's judicial function do not mix well together. This judicial function must be safeguarded, in other words, the Court must preserve its independence, integrity and impartiality. And we must strive – through the support of those men and women who serve the Court – not to undermine the principles underpinning its functioning, principles of law, principles of the rule of law.

As I said already there are 124 States Parties, a total of 124 States, the most recent two to join being El Salvador, which is the 124th State, and Palestine, which is the 123rd State. So, we number 124 States. That reflects our judicial function. The Court is free. When a decision is made to indict an individual, the Court is free to choose whether or not to take the matter to trial; for we have at our service judges of great technical ability and of high expertise, whose probity and integrity are under close scrutiny, such is the rigorous nature of the very exacting selection procedure, because one needs a structured majority in order for judges to get elected. In light of the above, it is my belief that it is necessary to make a distinction between these two functions, as this allows us to understand that the International Criminal Court functions with free-minded judges who only pledge allegiance to one sovereign: the law.

And you also asked whether it would be possible for these States to come back on their decisions. This is my hope. In other words, let me say to those States that have, today, expressed their wish to withdraw from the ICC, that there is still one year, a window of opportunity to engage in discussions is possible, a dialogue is possible, as well as a debate to try to set out clearly what exactly were the reasons which precipitated this wish to leave.

As you are all aware, when you work together in a unit and you create a society, which is sometimes known as *affectio societatis*, this justifies your common endeavour; if this *affectio societatis* were not present, you would go your separate ways. In the case of treaties, separation is always provided for, but we also see States return. And I should add that this is not the only crisis which the International Criminal Court has experienced. You may recall that President Clinton ratified the Rome Statute on 31 December 2000 and that, upon his successor's election to office, President Bush retracted that signature on 6 May 2002, with an exact same procedure involving signatures.

Thus, it is not the first time and indeed a big power has already been there: the United States. But, the United States now acts as an observer, and in that way participates in the activities of the Court. This is why I still have hope that the States that wish to leave might follow this example, and will be able to stay, to engage in fruitful negotiations which will result in the Court benefitting from the presence of all States, as the time comes for us to seek to attain universal acceptance of the Court; universality only becomes possible once a large majority of States participate in the Rome Statute. Further, universality is only possible if a large majority of States also participates in the process of integrating within their own positive law the values and norms of the Rome Statute, without which judgment would be impossible. But universal justice also requires that all of the countries of the world learn to reinforce their national judicial systems. If every nation did that, the International Criminal Court would necessarily become less useful, but it would always remain useful in cases where no other system of justice is available; and this reinforcement is needed so that the Court does not remain a

solitary institution. Universal justice must be able to find its path to justice, and if the path takes one to the International Criminal Court, then its existence will have proved useful.

This useful existence will help me resolve my problem; any country that builds its foundations without justice can only ever be a flawed country – with the same causes resulting in the same effects – it therefore goes without saying that, at that moment in time when the same type of crisis or conflict is bound to occur, the answer is a better justice built on the solidity of peace, the alternative is the creation of a flawed country – which can but engender more violence, exacerbated by the recurrence of the problem, which, in turn, will be an obstacle to reconciliation.

These are the points I wished to raise in answer to the first set of questions you put to me.

Part III

Should Africa have its own African Court?

As you are all aware, every State is sovereign, and criminal justice is, by its very nature, a "leveller" between States. States are under an obligation to prosecute crimes which occur within their own territory and it is often difficult to "pass on" this responsibility. This explains how, before the Nuremberg Tribunal, a member of the German authorities known at the time is said to have commented "each is lord in his own manor". Thus, the point is we should prosecute our own nationals in our home countries, and this constitutes justice par excellence. Currently, Africa has already taken on board the Maputo Protocol; we need an African criminal court which would prosecute the perpetrators of international crimes. There is an African Court of human rights, with its headquarters in Arusha; at the phase we are now at, the establishment of this Court is aimed at limiting the extent to which these crimes surpass national levels, and that these crimes be tried at a regional level. Obviously, the International Criminal Court envisages the existence of regional courts, because, as I mentioned to you, and please take good note, the Court is a Court of last resort. It would lose its raison d'être if all States prosecuted the crimes that fall within its jurisdiction. These crimes, let me reiterate, are war crimes, genocide, crimes against humanity and crimes of aggression. Ideally, even if one's own national is implicated in such a crime, the proper approach is to try him in your own courts. Once States take this on this approach, as I already mentioned, the principle of complementarity becomes effective, for example, the Hissène Habré case.

In that instance a trial was necessary because the International Court of Justice had found that Hissène Habré, being present in Senegal, should either be tried there or extradited; and the African Union requested that Senegal, in the name of Africa, prosecute Hissène Habré. I should add that one idea had been voiced that he should be tried in his own country, Chad. But, ultimately, to ensure that this trial be conducted in fair conditions in Senegal, the Extraordinary African Chambers were created. The trial which ensued, you no doubt followed, was widely considered to be a trial that fully respected international rules and norms, and a judgment was duly delivered. The message is that Africa can prosecute its own countrymen. As I have already noted, prosecutions should, where possible, first be conducted in one's home country, in situ, as this is a duty incumbent on every State to prosecute in the place where the crimes have occurred; and if a State is not in a position to prosecute, it can turn to regional justice. But this regional justice must respect the same international norms according to which no immunity is given. And although under this approach, which must be in conformity with the Act of the African Union, and which indeed is provided for by the Act of the African Union, such a regional court could of course be established in this sort of instance and could render a judgment, the fact remains that the ideal situation is always that of a home prosecution; and it is always true to say that a court created outside of one's own home country, in particular, the International Criminal Court, is a subsidiary court, which only becomes involved if national courts have failed to do the necessary work.

Well, turning to the question of the reasons why States may withdraw from the International Criminal Court and the reasons why they decided to come to the International Criminal Court, I would like to take a moment to provide some context. In Dakar, in February 1998, a conference was held which brought together various African States, in order to reflect on the possible conditions for criminal justice, as, at the time, there were a number of crisis points which threatened to shake the African continent. To the North, there was civil war, and to the west,

there were two civil wars surrounding us, and which were to lead to the outbreak of another war. In Sudan, in the Great Lakes region, civil wars were also raging. After having analysed the different potential causes that could explain the violence, such as underdevelopment, flawed development, the democratic deficit, poverty, we came to the view that impunity was perhaps one of the principal causes, and that justice can play a role in the resolution of the crisis situations which prevail in almost all African regions. This explains why so many leave and why the International Criminal Court gives hope that those responsible for these crises will be prosecuted. Those who instigated these crises and the reasons underlying these hotspots have not completely faded from view. And even if today we say that it is time to withdraw, telling ourselves that others are no longer present, we return to this sense of injustice.

As I had occasion to mention, I participated last year in a debate regarding the Security Council, where the discussion ran along the lines that the right of veto that the big powers possess should not be a privilege for them, but rather, a responsibility. This means that in instances where the big powers are involved in crimes, in Iraq, in Afghanistan, the Security Council should not defer consideration of the matter just because they have the power of veto. This creates a sense of injustice, a sense of a two-tier justice system to the benefit of big counties or selective justice to the detriment of small countries. This is why the right of veto should not be absolute. With regard to mass crimes, the right of veto should have no standing; this idea which is today actively being discussed, with a view to removing the sense of injustice – namely, that it is the small countries that are called to account by international justice. This is another element that we need to work on. It is the reason why, in the appeal I launched, I urged us to find a way forward, we must reinforce the International Criminal Court, both as a voluntary treaty-based institution, you join because you want to be member, but by the same token, you can also leave whenever you want to. Either way, it is a sovereign act, it is an act of freedom, an act that we cannot impose on anyone; and what we must also recall is that we need to work toward achieving universal justice.

We are very far from achieving universal justice. We are in the realm of international justice, i.e., our road is still very long and universal justice will only happen once the near-totality of States have acceded to the Rome Statute, which is quite a distant dream. For political, geo-strategic reasons, many countries, in particular, the big powers are not scared by this justice. But what is important for Africa, is that the will to prosecute and to fight against impunity are referred to in the Statute of the African Union. And it is important to fight against this impunity, and by doing so, we thereby preserve ourselves from all those who would place us in a situation involving violations of rights, as in this regard, there is no other solution than ending impunity.

There is only one weapon in our armoury, and that is dialogue, a weapon that I possess, and I said this very same thing on 8 December 2014 upon my election in New York as President of the Assembly of States Parties to the Rome Statute. There had already been an ongoing crisis for ten years, since 2005, which explains why the Sudan question was asked, and there followed another international crisis, already fully blown, so it was necessary to find a resolution to these crises and find a way for us to fully focus, within the Assembly of States Parties, on what was most essential, which is the prevention of crimes. Because it is easier to prevent than to cure, as we say about doctors after a death. Thus, we are putting in all of this effort so that the best solutions can be found in order to establish a type of justice that protects the rights of all, at a time when there is a great desire, a passion for justice, a quest for justice, so that vengeance does not get the upper hand, and we may create societies founded on the rule of law, on

individual freedoms, on the respect for the law, and, above all, essentially founded on tribunals, independent courts and tribunals, which render justice based on criteria to do with impartiality, fairness and, as would follow from this, efficiency. This to me is of key importance.

This is the message I wished to address to you, while thanking you for your attention and, in particular, thanking you for having kindly responded to our invitation.

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