Cracks in the International Criminal Court

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The International Criminal Court—established by an international treaty and operating since 2002 in The Hague—is under assault from within. South Africa, Burundi and Gambia have announced their intent to withdraw from the ICC (the first members to do so), and other African states, such as Kenya, are also on the brink.

When “nonaligned” nations begin deserting any international organization, it surely is in real trouble. But for reasons that have been clear since the Statute of Rome creating the ICC was negotiated, it has never been in America’s interest to see the court succeed. We should hope the African exodus continues.

The ostensible trigger for the withdrawal is that many African nations are unwilling to arrest and remand to the ICC Sudan’s President Omar al-Bashir, accused of genocide and war crimes, when he enters their sovereign territory. There is hardly a less sympathetic figure on the planet, outside of Islamic State and al Qaeda. However, the issue is emphatically not whether one favors “justice” for international wrongdoers, but whether the ICC—with its inherent illegitimacy—could ever be the right vehicle for the job.

Within the African Union (open to all countries on the continent) the issue is also made more complex by a rising feeling that the ICC is the latest European neocolonial pretext to interfere in their internal affairs. Since the court’s founding, all 39 public ICC indictments have been of Africans.

Given the European Union’s deepening travails, Europe hardly has the time, will or resources to dabble much in neocolonialism. Yet it is also true that the ICC has been the Western human-rights community’s dearest project, pursued with near-religious devotion in much of Europe and the U.S., and much less enthusiastically elsewhere.

Europeans happily embraced this additional effort to reduce their own sovereignty by joining an institution that could severely compromise their own justice systems. Yet only 124 of 193 U.N. members have joined. The U.S. removed its signature from the Rome Statute in 2002, and even [Barack Obama](http://www.wsj.com/news/author/4328) never re-signed, knowing that Senate ratification was impossible—Americans up to the president himself remain at risk of ICC prosecution if U.S. personnel are alleged to commit offenses on a member state’s territory.

Russia, China and India are the most prominent among nearly 70 other nations that have not become members, although something called “Palestine” has joined. This is hardly the trajectory of a viable international institution.

What Africa’s simmering discontent really exposes are the fundamental fallacies underlying the ICC project itself. The world is not one civil society, like a real country, within which disputes are resolved peacefully under the rule of law. Pretending that the globe is a nation under construction, and establishing institutions that pretend to perform like national legislatures, courts and executives, won’t make the world a country.

Even characterizing the ICC primarily as a court ignores the real problem. The Rome Statute’s actual danger is less the court than its prosecutor, which, as Americans understand the separation of powers, is not a judicial function but an executive one. Next to the power to wage war, prosecutorial authority is the most-potent, most-feared responsibility in any executive’s arsenal.

In the case of the ICC, its ability to prosecute democratically elected officials and their military commanders for allegations of war crimes or crimes against humanity could undercut the most fundamental responsibility of any government, the power of self-defense. This power, lodged in the ICC’s prosecutor, is what Africans are really protesting, and also why the U.S. will not join the ICC in the imaginable future.

The prosecutor is much like the “independent counsels” created in America by post-Watergate legislation. These prosecutors performed so irresponsibly and oppressively that a bipartisan congressional majority quietly allowed the statute to lapse. Americans now understand that political accountability—in the broad constitutional sense that federal prosecutorial legitimacy stems from the president’s election—is absolutely critical to responsible law-enforcement.

ICC advocates contend that the prosecutor is supervised by the court itself. Yet in the U.S., for instance, our separation of governmental powers specifically rejects judicial supervision of prosecutors—precisely because elected, and therefore politically accountable, officials must be vested with responsibility for prosecutorial decisions. ICC advocates also argue that the prosecutor is supervised by the Rome Statute’s 124 state parties.

This is purest fantasy. Anything supervised by 124 governments isn’t supervised by anyone, as the sprawling U.N. system demonstrates on virtually a daily basis. Particularly from an American perspective, the ICC’s lack of political accountability and dangerous potential to impede resolution of global conflicts proves it is not fit for purpose.

No wonder the ICC is well on the way to becoming yet another embarrassment like the International Court of Justice or the U.N. Human Rights Council.