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COMMENTARY  
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US must stop piling pressure on Kenya  
Story by DAVID MUSILA

On March 15, Attorney-General Amos Wako deposited at the United Nations Headquarters in New York the instruments of ratification of the Rome Statute. Kenya, therefore, became the 98th member state of the International Criminal Court (ICC).

As a member of the Parliamentarians for Global Action Kenya Chapter, I take this opportunity to congratulate the Government for this timely move.

It is instructive to note that the ICC is the first permanent judicial institution aimed at putting to an end the impunity for genocide, crimes against humanity and war crimes.

I am, however, greatly disturbed that the United States, which has refused to ratify the Rome Statute, has continued to put pressure on the Kenya Government to sign a bilateral non-surrender agreement to provide immunity against prosecution in Kenya for US citizens who commit crimes against humanity.

In defence of his country's position on this matter, the respected US Ambassador to Kenya, Mr. William M. Bellamy, in his opinion piece of May 3, 2005 under the heading "America's stand on International (Criminal) Court" gave the impression that the proposed bilateral non-surrender agreement with Kenya was not aimed at avoiding impunity or escaping justice for crimes against humanity, genocide and war crimes.

If the US is genuinely committed to investigating and prosecuting international crimes, why is it that the proposed non-surrender agreement does not contain any binding obligation on the part of the US to investigate and prosecute these crimes?

In any case, there already exists such an obligation under international law which compels Kenya to exercise its sovereign right to investigate and prosecute should such atrocities be committed on Kenyan soil, regardless of the nationality of the perpetrator.

The proposed non-surrender agreement, if signed by our government would allow the US to have discretion as to whether or not to investigate serious crimes by their nationals, contrary to international law, which, as already stated, compels States to bring to justice any alleged perpetrator of such crimes.

In a nut-shell, what the proposed non-surrender agreement means is that should a US national be involved in crimes against humanity in Kenya, the Government would be obliged to surrender the suspect to the U.S with no guarantee of even an investigation into the crimes committed.

This would definitely amount to a violation of the principle of equality of all before the law, an essential principle of the rule of law.

One wonders why US nationals should be treated any differently from nationals of other countries.

Therefore, with the greatest respect to the opinion expressed by Ambassador Bellamy, the bilateral non-surrender agreement violates Article 98 and the letter and spirit of the Rome Statute.

Bearing in mind the right of the US to remain outside the system of the International Criminal Court, if individuals of US nationality commit serious international crimes in the territories of ICC States parties, there is no legitimate reason to offer them shelter from a mechanism specifically designed to fill the gap if, and when, national systems fail to establish accountability.

My point here is plain and simple: All persons should be treated equally before the law.

Therefore instead of the US Government pushing Kenya and other ICC States to sign non-surrender agreements, they should enter into negotiations with these States to seek a solution not be detrimental to the rule of law and the credibility of International Criminal Justice.

Indeed, it would suffice for the US to recognise that the principle of complementarity that governs relations between national courts and the International Criminal Court, assigns precedence to national courts including US Tribunals, vis-a-vis the ICC.

Finally contrary to the US claims that the ICC is an unchecked body, the ICC prosecutor is elected by a majority of ICC members States, to which he or she is accountable and which may decide to sanction him – even remove him from office.

The ICC is a court of last resort, intervening only in extreme situations like in the case of the Democratic Republic of Congo, the alleged genocide in Northern Uganda, Darfur (Sudan) and Cote d'Ivoire.

Law abiding nations have nothing to fear from the ICC. The US should therefore work with all countries to promote Justice for all.

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