

The African Union and the International Criminal Court: counteracting the crisis

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In October 2016, South Africa became the first nation to withdraw from the Rome Statute of the International Criminal Court (ICC), after Burundi began taking steps to leave it. Kenya is likely to follow suit, as are other states, such as Uganda. This is unprecedented in the history of international criminal justice. How did we get here? Does South Africa's decision spell the beginning of the end for the ICC? And how can the damage already caused be mitigated?

The ICC is the centrepiece of the international criminal justice system: the first and only institution with permanent and universal jurisdiction. Established on 17 July 1998 by the Rome Statute, which entered into force on 1 July 2002, the court is mandated to prosecute those accused of the most serious international crimes—genocide, crimes against humanity and war crimes. Although the majority of states in the world are now states parties (124 of 193, 64 per cent)¹, some of the most powerful and populous ones are not, including three of the five permanent members of the United Nations Security Council (UNSC), China, Russia and the United States, and only a minority of the world's population falls under its jurisdiction.

There are three ways of bringing cases to the court: by a state party, by the court's prosecutor (*proprio motu*) or by the UNSC. The first two are applicable only if the state where the act occurred or of which the suspect is a national is a party to the Rome Statute or has accepted the jurisdiction of the court. A UNSC referral, however, can extend this jurisdiction and oblige even non-states parties to cooperate with the ICC.

The Office of the Prosecutor is currently investigating ten situations: in Uganda (since 2004), the Democratic Republic of the Congo (DRC, since 2004), Darfur in Sudan (since 2005), the Central African Republic (CAR, since 2007), Kenya (since 2010), Libya (since 2011), Côte d'Ivoire (since 2011), Mali (since 2013), another situation in CAR (since 2014) and more recently in Georgia (since 2016).² Until 27 January 2016 all the cases coming before the ICC concerned African states. This African

* I thank the editorial team of *International Affairs*, especially Heidi Pettersson, and two anonymous reviewers for comments that greatly improved the text.

¹ See the ICC website, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 1 Oct. 2016.)

² See the ICC website, <https://www.icc-cpi.int/Pages/Situations.aspx>.

focus has led to a stream of accusations of double standards, neo-colonialism and 'white justice', with the supposedly 'universal' court described as actually nothing more than an 'African Criminal Court'.³ Whether justified or not, these accusations have been growing over the past decade. In the most serious diplomatic crisis in the court's history, member states of the African Union are now regularly threatening to withdraw from the Rome Statute *en masse*. South Africa announced its withdrawal in October 2016 and other states are likely to follow suit.

Why is this important? Because unless measures are taken to limit the influence of the current anti-ICC offensive, it will gradually overpower Africa's silent majority and continue to weaken not only the ICC, but the entire international criminal justice system and its fight against impunity. The fight against impunity is not just a moral principle: it is also a way to achieve stability and prosperity. Today's unpunished crimes are the roots of tomorrow's conflicts.

The literature on the relationship between the ICC and Africa, and more specifically the African Union (AU), has been growing.⁴ However, this literature is mostly legal, despite the fact that international tribunals also shape and are shaped by politics.⁵ Being so highly politicized, international criminal justice is better understood from an interdisciplinary perspective, combining international law and International Relations. This article aims to set up a dialogue between these disciplines on post-atrocity justice.⁶ In order to understand and explain the current crisis between the ICC and the AU, this article adopts both an interdisciplinary and a pragmatic, policy-oriented approach, with the aim of producing concrete recommendations to counteract the crisis. It borrows its title from a 2015 *International Affairs* article in which Kirsten Ainley similarly attempted to expose, explain and solve another famous tension, between the ICC and R2P.⁷

In order to serve both the academic and the practitioner, this article first outlines the context of the diplomatic crisis between the AU and the ICC which, although not new, is becoming increasingly serious. It then responds to the AU's objections to the ICC, in particular those of 'Afro-centrism' and pursuing peace

³ Kai Ambos, 'Expanding the focus of the "African Criminal Court"', in William A. Schabas, Yvonne McDermott and Niamh Hayes, eds, *The Ashgate research companion to international criminal law: critical perspectives* (Burlington: Ashgate, 2013), pp. 499–529.

⁴ See e.g. Kamari Maxine Clarke, *Fictions of justice: the International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa* (New York: Cambridge University Press, 2009); Vincent O. Nmeielle, ed., *Africa and the future of international criminal justice* (The Hague: Eleven International, 2012); Kurt Mills, "'Bashir is dividing us": Africa and the International Criminal Court', *Human Rights Quarterly* 34: 2, 2012, pp. 404–47; Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, *Africa and the International Criminal Court, International Law 2013/01* (London: Chatham House, July 2013); Benson C. Olugbuo, 'The African Union, the United Nations Security Council and the politicisation of international justice in Africa', *African Journal of Legal Studies* 7: 3, 2014, pp. 372–7; Deslie Billich, 'The International Criminal Court and the African continent: prosecution of international crimes in national courts', in W. de Lint, M. Marmo and N. Chazal, eds, *Criminal justice in international society* (New York: Routledge, 2014), pp. 192–220; Jacky F. W. Nam, 'Jurisdictional conflicts between the ICC and the African Union: solution to the dilemma', *Denver Journal of International Law and Policy* 44: 1, 2015, pp. 41–66.

⁵ Duncan McCargo, 'Politics by other means? The virtual trials of the Khmer Rouge tribunal', *International Affairs* 87: 3, May 2011, p. 613.

⁶ Chandra Lekha Sriram, 'International law, International Relations theory and post-atrocity justice: towards a genuine dialogue', *International Affairs* 82: 3, May 2006, pp. 467–78.

⁷ Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: counteracting the crisis', *International Affairs* 91: 1, Jan. 2015, pp. 37–54.

over justice, and emphasizes that African states were instrumental in creating and sustaining the ICC. It finally formulates concrete recommendations to ease relations between the ICC and AU, such as to investigate more cases outside Africa, reinforce African national jurisdictions, create intermediary institutional structures, promote regional-level action, and rely more on ICC-friendly African states and African civil society.

Background (2005–2012)

The rejection of the ICC by certain African states has its roots in the case of Sudan. Minutes after the adoption of UNSC Resolution 1593 (2005), referring the situation in Darfur to the ICC,⁸ Sudan's Ambassador to the UN declared that the court 'was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority'.⁹ Two years later the court issued the first arrest warrants, prompting Sudan's Interior Minister to promise to 'cut the throat of any international official ... who tries to jail a Sudanese official in order to present him to the international justice'.¹⁰ When Sudan's President Omar al-Bashir was indicted for crimes against humanity and war crimes in 2009 and for genocide in 2010, the protests started to spread. Fuelled by other leaders' fear and Bashir's desire to embody 'a liberation movement against this new colonization',¹¹ a post-colonial, pan-African anti-ICC rhetoric emerged.

Reacting to Bashir's first indictment, the Senegalese President Abdoulaye Wade deplored the fact that the ICC prosecutes 'only Africans' and Jean Ping, chairperson of the AU's Commission, added that 'international justice seems to be applying its fight against impunity only to Africa as if nothing were happening elsewhere—in Iraq, Gaza, Colombia or in the Caucasus'.¹² Muammar Gaddafi, then serving as chairperson of the AU, described the ICC as an 'attempt by [the West] to re-colonise their former colonies', and 'a practice of First World terrorism'.¹³ The AU followed up by adopting an official policy of non-cooperation with the ICC.¹⁴ Botswana was the only state to distance itself from this statement (and would be the only one not to vote in favour of the May 2013 resolution in support of Kenya—see below).¹⁵

This same discourse was repeated two years later when it was Gaddafi's turn to be indicted, following the UNSC's referral of the situation in Libya to the ICC.¹⁶

⁸ S/RES/1593, 31 March 2005.

⁹ S/PV.5158, 31 March 2005.

¹⁰ 'Sudanese minister threatens action against international court proponents', *Al-Hayat*, 1 March 2007, quoted in Victor Peskin, 'The International Criminal Court, the Security Council, and the politics of impunity in Darfur', *Genocide Studies and Prevention* 4: 3, 2009, p. 309.

¹¹ Neil MacFarquhar and Marlise Simons, 'Bashir defies war crime arrest order', *New York Times*, 5 March 2009.

¹² 'Soudan: l'Union africaine veut interrompre la procédure contre Al-Bachir', *Le Monde*, 4 March 2009.

¹³ 'Sudan leader in Qatar for summit', BBC News, 29 March 2009.

¹⁴ AU Doc. Assembly/AU/13(XIII), 1–3 July 2009.

¹⁵ Botswana entered a reservation to the entire AU Decision on international jurisdiction, justice and the ICC (Doc. Assembly/AU/13(XXI), 26–27 May 2013).

¹⁶ S/RES/1970, 2011. See David Smith, 'New chief prosecutor defends international criminal court', *Guardian*, 23 May 2012.

Also in 2011, the prosecution of former Ivorian President Laurent Gbagbo, who was arrested and transferred to the ICC, further provoked the AU.

This criticism from Africa is not directed solely at the ICC but is occasionally also aimed at other international criminal justice institutions, for example when former Liberian President Charles Taylor's lead defence attorney described the Special Court for Sierra Leone prosecution as 'a 21st century form of neo-colonialism'.¹⁷

The Kenyan offensive (since 2012)

The African rejection of the ICC accelerated in 2012–13 with a major offensive from Kenya. The prosecutor used his *proprio motu* powers for the first time to initiate an investigation into the crimes allegedly committed during the violence which followed the 2007–2008 election in Kenya. Judges issued the first summons to appear in 2011, but only in the following year, when they decided to move the cases against politicians Uhuru Kenyatta and William Ruto to trial, did Nairobi organize a resistance, attempting to delay and undermine the ICC process by intimidating witnesses, and using the ICC's accusations as part of their political campaign to portray themselves as victims of a colonial, anti-African tool of the West. Kenyatta and Ruto, who were ministers at the time, cooperated on the former's presidential campaign in 2012–2013, which the ICC's charges actually helped them win.¹⁸

At the AU's 50th anniversary summit in May 2013, which Kenyatta and Ruto attended as newly elected president and vice-president of Kenya, the chairperson, Ethiopian Prime Minister Hailemariam Desalegn, said that ICC prosecutions had 'degenerated into some kind of race hunting'.¹⁹ The AU Peace and Security Council head Ramtane Lamamra denounced the ICC as 'a court of the North [trying] leaders from the South'.²⁰ The AU adopted a decision 'expressing concern at the threat that the indictment' of Kenyatta and Ruto 'may pose to the on-going efforts in the promotion of peace, national healing and reconciliation' in Kenya and the entire region, and requested that the ICC refer the cases back to Kenya.²¹

Five months later, Kenyatta initiated an extraordinary AU summit on the ICC to discuss a 'mass withdrawal' of African states parties from the Rome Statute. Ultimately the AU did not act on this threat, although it continued to brandish it in the following years, and still does so today. There are several reasons why the threat of mass withdrawal has not yet been carried out. First, withdrawal remains

¹⁷ Special Court for Sierra Leone, *The Prosecutor of the Special Court v. Charles Ghankay Taylor*, case no. SCSL-2003-01-T, Trial Chamber II, 9 March 2011, 11: 40: 04.

¹⁸ Rasna Warah, 'How the ICC helped, rather than hindered, the Uhuru–Ruto election', *Daily Nation*, 10 March 2013; Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): politics, the election and the law', *Journal of Eastern African Studies* 8: 1, 2014, pp. 35–6; Gabrielle Lynch, 'The International Criminal Court and the making of a Kenyan president', *Current History* 114: 772, 2015, pp. 183–8.

¹⁹ 'African Union accuses ICC of "hunting" Africans', BBC News, 27 May 2013.

²⁰ 'Ethiopian leader accuses international court of racist bias', Reuters, 27 May 2013.

²¹ AU Doc. Assembly/AU/Dec.482(XXI), 26–27 May 2013.

a national decision that the AU cannot impose on its members. African states themselves are divided on the issue. Certain states are resistant to what they see as Kenyan efforts to ‘continentalize’ a national problem.²² Others see the ICC as a tool of their own influence. The AU’s backlash against the court since the arrest warrant against Bashir has, moreover, not dissuaded other African states from ratifying the Rome Statute, as Seychelles did in 2010, followed by Tunisia and Cape Verde in 2011 and Côte d’Ivoire in 2013.

Second, while hostility to the court is widespread, this does not necessarily equate to an intention to withdraw. Most of the hostile states clearly distinguish their criticisms of the court from a move to withdraw, which they do not desire.

Third, even when the Kenyan Senate and Assembly voted for withdrawal in 2013, the government did not bring the decision into effect by notifying the United Nations Secretary-General (UNSG) as required by the Rome Statute (article 127). This casts doubt on Kenya’s commitment to withdraw and limits the example it sets to other African states. However, South Africa’s withdrawal in October 2016 (see below) creates a precedent and could encourage Kenya’s cabinet to finally proceed in the near future.

Even though the extraordinary summit of 2013 did not lead to a mass withdrawal, it was still a diplomatic victory for Kenya. It led to the creation of an open-ended ministerial committee charged with discussing ICC issues with the UNSC, especially the request that the Kenyan cases be deferred in accordance with article 16 of the Rome Statute.²³ The UNSC’s refusal of this request in November 2013 was felt as an affront at the AU.²⁴ Overall, then, 2013 was a very fraught year, leading Sanji Mmasenono Monageng of Botswana, First Vice-President and judge at the ICC, to claim that the relationship between Africa and the ICC has ‘probably never been as tense and strained as it is today’.²⁵

In December 2014 the ICC finally dropped all charges against President Kenyatta owing to a lack of evidence against him. This first victory for the Kenyan leadership has been described as the ‘ICC’s biggest setback’, and ‘a blow to the court, which has yet to prove it can hold the powerful to account’.²⁶

²² As Prosecutor Bensouda was told in meetings with the presidents of Chad, DRC, Mali and Senegal, and the Minister of Foreign Affairs of Guinea, in 2013 (diplomatic source).

²³ Art. 16 controversially grants the UNSC the power to defer ICC prosecutions. It has been used only once to date, in Resolution 1422 in 2002, by giving immunity from ICC jurisdiction to ‘current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation’, and was renewed in 2003 (Resolution 1487). See e.g. Marc Weller, ‘Undoing the global constitution: UN Security Council action on the International Criminal Court’, *International Affairs* 78: 4, July 2002, pp. 693–712; Louise Arbour, ‘The relationship between the ICC and the UN Security Council’, *Global Governance* 20: 2, 2014, pp. 195–201; Kamari Maxine Clarke and Sarah-Jane Koulen, ‘The legal politics of the article 16 decision: the International Criminal Court, the UN Security Council and ontologies of a contemporary compromise’, *African Journal of Legal Studies* 7: 3, 2014, pp. 297–319; Abel S. Knottnerus, ‘The Security Council and the International Criminal Court: the unsolved puzzle of article 16’, *Netherlands International Law Review* 61: 2, 2014, pp. 195–224.

²⁴ S/PV.7060, 15 Nov. 2013.

²⁵ Vesper-Gräse, ‘Conference report “Africa and the International Criminal Court” by the South African–German Centre for Transnational Criminal Justice’, *Zeitschrift für Internationale Strafrechtsdogmatik* 3/2014, p. 146.

²⁶ *Africa Research Bulletin*, 1–31 Dec. 2014.

The spread of rejection (2015–16)

Bashir, too, benefited from the anti-ICC sentiment led by Kenya. Originally, the arrest warrants issued against him entailed, at a minimum, a travel ban: Prosecutor Moreno Ocampo wanted to place him under ‘country arrest’ in Sudan. The idea of impeding ‘foreign travel for dictators and other international criminals’ was inspired by precedents such as the case of Augusto Pinochet.²⁷ However, in this case no such restrictions were enforced and Bashir moved around the continent with impunity, including on the territory of ICC states parties who thus violated their international commitments by receiving him (Chad, Djibouti, DRC, Kenya, Malawi, Nigeria and Uganda).

In June 2015, South Africa joined the list of those states parties receiving Bashir, as well as the rebel camp against the ICC. This came as a surprise since South Africa, along with Botswana, Ghana, Lesotho and Senegal, had been one of the first supporters of the court. In 2002 it resisted American pressure to sign the Bush administration’s bilateral immunity agreement²⁸, when Botswana and Senegal capitulated. Its unconditional support for the ICC helped forge South Africa’s reputation as a progressive country and a promoter of human rights.²⁹ President Jacob Zuma, elected in 2009, initially followed this line. In May 2009 he publicly recognized his obligation to arrest Bashir should the latter attend his inauguration, dissuading Bashir from coming. The year after, in a joint communiqué with the European Union, South Africa declared that the ICC constituted ‘an important development for international justice and a basis to advance peace’,³⁰ and at the AU summit in 2013 Pretoria urged other African countries not to leave the Rome Statute.

However, in June 2015 Zuma welcomed Bashir for the AU’s 25th summit, attracting sharp international criticism. Within South Africa, a tribunal judged the government’s failure to be a violation of its constitutional obligation, and this judgment was confirmed by the Supreme Court of Appeal on 15 March 2016. The tribunal forbade the Sudanese President to leave the country, although he was already on the plane home when the judgment was issued. A political crisis ensued in which the opposition themselves attempted to impeach Zuma for helping a ‘mass murderer’ to escape justice. In his defence, Zuma invoked the immunity of serving heads of state, contradicting his own position before his inauguration ceremony in 2009. To evade this contradiction, Zuma finally threatened to withdraw South Africa from the ICC. His party, the African National Congress (ANC), confirmed the intention to withdraw in October 2015, and at the end of the January 2016 AU

²⁷ Marc Weller, ‘On the hazards of foreign travel for dictators and other international criminals’, *International Affairs* 75: 3, May 1999, pp. 599–617.

²⁸ Between 2002 and 2007, the G. W. Bush administration concluded Bilateral Immunity Agreements (also called non-surrender agreements) with over 100 states, to remove US nationals from the reach of the ICC. These states, often pressured or threatened, committed not to hand over Americans to the court without the permission of the US.

²⁹ J. Andrew Grant and Spencer Hamilton, ‘Norm dynamics and international organisations: South Africa in the African Union and International Criminal Court’, *Commonwealth and Comparative Politics* 54: 2, 2016, p. 172.

³⁰ Third South Africa–European Union summit, joint communiqué, Brussels, 28 Sept. 2010, http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146680.pdf.

summit Zuma stated that ‘South Africa is seriously reviewing its participation in the Rome Statute and will announce its decision in due course’.³¹

South Africa’s about-turn is not the only instance of an African country having invited and hosted Bashir after initially refusing to do so. Uganda decided not to invite him to an AU summit in Kampala in 2010 but then invited him in 2015 and 2016. While the change of heart may have been encouraged by the growing anti-ICC sentiment, its main reason was political: from the 1980s Uganda and Sudan were fighting a proxy war over the status of South Sudan through rebel groups. Since the independence of the world’s youngest (albeit arguably failed) state in 2011, the relationship has gradually improved, especially since 2015.

Similarly, South Africa’s change of stance can be explained by reference to both a clash of norms (commitment to the ICC vs state officials’ immunity from international prosecution)³² and a clash of interests (a progressive internationalist foreign policy vs acceptance on the continent).³³ South Africa also seeks to move away from the European camp and closer to its fellow BRICS members, all of which are critical of the ICC.³⁴ Whatever its motives, the shift in position of this regional heavyweight risks prompting others to change as well, thus affecting the balance between pro- and anti-ICC African states.

Furthermore, the anti-ICC movement is spreading across the continent as a whole. Although it seemed initially to be led by a few East African states (Ethiopia, Kenya, Rwanda, Sudan and Uganda), it is increasingly difficult to downplay it by invoking the geographical divide. Idriss Déby, who succeeded Robert Mugabe as head of the AU, is less aggressive than his predecessor—who proposed to ‘set [up] our ICC to try Europeans’, because ‘they committed crimes, colonial crimes galore’³⁵—but still maintains the same accusation of a ‘double standard’.³⁶ Gabon ceased to express support for the court, claiming that ‘[its] position with respect to the ICC is that of the African Union’³⁷—which did not prevent it from asking the Office of the Prosecutor, on 21 September 2016, to open an investigation into the situation in Gabon since May 2016 (the Prosecutor opened a preliminary examination a week later). To a lot of African heads of state, the ICC is both a pretext for their populist postcolonial discourse and a tool potentially useful against their opposition (see next section).

³¹ ‘SA cautiously mulls ICC participation’, <http://www.sanews.gov.za/south-africa-world/sa-cautiously-mulls-icc-participation>, 4 Feb. 2016.

³² Grant and Hamilton, ‘Norm dynamics and international organisations’, p. 174.

³³ Chris Alden and Maxi Schoeman, ‘South Africa in the company of giants: the search for leadership in a transforming global order’, *International Affairs* 89: 1, Jan. 2013, p. 125.

³⁴ Floor Keuleers, ‘South Africa’s relationship with the International Criminal Court: moving closer to the BRICS?’, *CCS Commentaries* (Stellenbosch: Centre for Chinese Studies, 7 March 2016).

³⁵ Robert Mugabe, quoted in ‘African ICC must try Europeans: Mugabe’, *The Chronicle* (Zimbabwe), 19 June 2015.

³⁶ Following the 26th summit, he declared that: ‘What we observed is that the ICC focuses much more on African leaders and African heads of state and even sitting African presidents, whereas elsewhere in the world a lot of things are taking place, many blatant violations of human rights, but nobody is speaking about it. Therefore there is a double standard here.’ See ‘Top talking points from the AU summit’, *ISS*, 8 Feb. 2016, <https://www.issafrica.org/pscreport/on-the-agenda/top-talking-points-from-the-au-summit>.

³⁷ Government spokesman at press conference, 22 Feb. 2016, http://www.seneweb.com/news/Politique/retrait-massif-des-etats-africains-de-la_n_174933.html.

The majority of African states remain silent bystanders in the ICC debate, torn between contradictory normative pressures from the court and from the AU. As is well known by social psychologists, the phenomena of the ‘silent majority’³⁸ and ‘unresponsive bystander’³⁹ arise from the dilution of responsibility and the pressure of behaving in a socially acceptable (in this case, continentally acceptable) way.

Senegal, which is one of the champions of the ICC in Africa, as the first state to sign the Rome Statute in 1999 and current president of the ICC’s Assembly of States Parties (ASP), is concerned by the changing winds. Dakar is aware that the risk of withdrawal is grave and that its consequences would be disastrous.⁴⁰ Its equal devotion to the ICC and to African solidarity places Senegal on the horns of a dilemma.

At the close of the 26th AU summit on 31 January 2016, a few days after the ICC began its proceedings against Laurent Gbagbo, the AU adopted Kenyatta’s proposed resolution including the preparation of a roadmap for collective withdrawal from the ICC; at the same time it labelled the year 2016 ‘The African Year of Human Rights’. This was hardly a new idea, but it is gaining strength and is now taken more seriously than previously, with South Africa rallying support.

On 5 April 2016, ICC judges terminated the case against Vice-President Ruto and former journalist Joshua Arap Sang for the same reasons that the charges against Kenyatta were withdrawn 16 months earlier, with the Nigerian chief judge, Chile Eboe-Osuji, citing ‘a troubling incidence of witness interference and intolerable political meddling’.⁴¹ Although the Kenyatta case had been driving the AU’s rebellion against the ICC for several years, its termination did not even temporarily ease the tension. First, even though the presidency now seems out of the court’s reach, Kenya is still under investigation, with three arrest warrants against Kenyans accused of witness tampering. On 19 September 2016, the ICC issued a finding of non-cooperation, accusing Kenya of failing to comply with its obligation to cooperate with the ICC, and referred the case to the ASP. Heated debates will probably take place during its 15th session (16–24 November 2016). Second, the court’s capitulation was perceived by the anti-ICC camp as a confirmation that their hard line was working. Kenyatta’s first reaction after Ruto’s case collapsed was to explain that ‘the strong position taken by the AU and its member states enabled us to succeed’.⁴² Therefore, it encouraged them to continue.

More generally, as Rashid Abdi explains, ‘Kenya has given the world a rule book on how to beat the ICC’, with three steps: victimization (Kenyatta and Ruto instrumentalized the ICC’s prosecution to gain sympathy, votes and, finally, power); a diplomatic offensive (portraying the court as a neo-colonial tool

³⁸ A term popularized by President Nixon in a speech of 3 Nov. 1969.

³⁹ First theorized by Bibb Latané and John M. Darley, ‘Apathy’, *American Scientist* 57: 2, 1969, pp. 244–68.

⁴⁰ Interview, *L’Express*, 27 Jan. 2016.

⁴¹ Marlise Simons and Jeffrey Gettleman, ‘International Criminal Court drops case against Kenya’s William Ruto’, *New York Times*, 5 April 2016.

⁴² ‘Strong stance by AU, members [sic] states helped Kenya win ICC cases—Uhuru’, *The Star* (Kenya), 7 April 2016.

'hunting' Africans); and interference with witnesses (intimidating, bribing or even killing them) to weaken the case.⁴³

Only a week after the ICC terminated the case, on 11 April 2016, the open-ended ministerial committee met in Addis Ababa to discuss its strategy against the ICC. It settled on three demands, which if unmet would supposedly trigger the AU members' collective withdrawal: 'immunity for sitting Heads of States and Government and senior government officials; intervention of ICC on African cases only after submission of the cases by the AU and/or by AU judicial institutions, and the reduction of the powers of the Prosecutor'.⁴⁴ These clearly unacceptable conditions, which have no chance of being passed by the next ASP, were nothing more than a strategy to create the conditions to recommend collective withdrawal.

The participation of Bashir in Ugandan President Museveni's swearing-in ceremony on 13 May 2016 was another provocation. Uganda, a state party to the Rome Statute, 'which itself had already called upon and benefitted from ICC proceedings', as the EU recalled in a statement following the visit,⁴⁵ thereby violated its international commitments. In his speech, Museveni described the ICC as 'a bunch of useless people who should not be taken seriously. We've no business with ICC and so we welcome our brother from Sudan President al-Bashir'.⁴⁶ There is apparently no intention to defuse the situation.

Then came the thunderclap. On 21 October 2016, South Africa announced that it had notified the UNSG it was withdrawing from the Rome Statute, becoming the first country actually to leave the ICC.⁴⁷ This came as a surprise to many observers, who believed Zuma would be more reluctant to tarnish his image as Africa's spokesman for human rights and the leader of a responsible emergent power. His decision may have been hastened by Pierre Nkurunziza's signature, on 18 October, of a 'law concerning the withdrawal' of Burundi from the Rome Statute, after both the Senate and the Assembly voted in favour of leaving the court.

Their reasons were different. Nkurunziza wanted to escape the preliminary examination started in April 2016 into allegations of a number of crimes committed in Burundi since early 2015. Unlike Burundi, South Africa has never been the subject of ICC's attention. Zuma was considering leaving it to escape not the Court, but the embarrassment of having been caught violating its international obligations, and the internal crisis that followed. All Burundi had to do to formalize its withdrawal was to send a written notification to the UNSG, and it would have become the first nation to withdraw from the ICC. South Africa, a respectable regional leader with a global reach, could not let Burundi, a small pariah state, be the first to make such a historic move. Therefore, it submitted its 'instrument of withdrawal' to the UNSG before Burundi, incidentally skipping the parliamentary step.

⁴³ David Pilling, 'International justice has a problem in Africa', *Financial Times*, 13 April 2016.

⁴⁴ EU delegation to the African Union, 'Follow-up to heads of mission report on the AU summit decision on the International Criminal Court', report, April 2016 (restricted EU internal document).

⁴⁵ EU, statement by the spokesperson on the visit of Sudanese President Al-Bashir to Uganda, 13 May 2016.

⁴⁶ 'Museveni rips into ICC', *The Chronicle* (Zimbabwe), 13 May 2016.

⁴⁷ 'South Africa to withdraw from war crimes court', BBC News, 21 Oct. 2016, <http://www.bbc.co.uk/news/world-africa-37724724>.

However, such a decision will not go unchallenged: the opposition and civil society are already challenging the legal validity of the government's decision, on the grounds that an executive act of that sort is unconstitutional unless parliament first authorizes it. Given the majority ANC enjoys in parliament, this may not change the endgame, but an *ex post*—instead of an *ex ante*—consultation could be considered as a *fait accompli* and have a political cost. Already confronted with a revolt inside his own party and student protests, Zuma will think twice before risking his political capital for an unpopular measure.

Having outlined the history of the tensions between the AU and the ICC, in order to understand the roots and evolution of the present diplomatic crisis, the following sections will respond to the main objections in the anti-ICC propaganda.

Responding to the 'Afro-centrist' objection

Although Africa has not been the first or the only focus of international criminal justice (recall the Nuremberg and Tokyo military tribunals, the International Criminal Tribunal for the Former Yugoslavia, the special panels for serious crimes in East Timor, the Regulation 64 panels in the courts of Kosovo, the extraordinary chambers in the courts of Cambodia, the Special Tribunal for Lebanon), the ICC's Afro-centrism is a reality that should not be denied; it can, nevertheless, be explained and nuanced.

First, this Afro-centrism is in part a consequence of *objective facts*. First and foremost, since the court came into force in 2002 the greatest concentration of crimes falling within the ICC's competence (genocide, crimes against humanity, war crimes) have taken place on the African continent. That is not to say that such crimes do not take place elsewhere, just that a case that comes to the prosecutor's attention is statistically most likely to be African. Moreover, the ICC's policy is to base its decisions on which cases to pursue on the gravity of the situations under consideration. Certain non-African situations, such as those in Venezuela and Iraq, were discarded as not being serious enough, while all African situations before the ICC are precisely distinguished by their scale, owing to the numbers of victims (2.5 million in Darfur, 2 million in DRC, 1.3 million in Uganda).⁴⁸

The number of victims is only one criterion in the complex debate on the gravity threshold for admissibility.⁴⁹ In 2008 an ICC pre-trial chamber set forth a 'sufficient gravity' test, requiring that the crime be systematic or large-scale, adding that 'due consideration must be given to the social alarm such conduct may have caused in the international community'.⁵⁰ However, it did not explain what it meant by 'social alarm', a non-quantitative criterion that was later rejected by the Appeals Chamber for being too subjective and contingent, though it is

⁴⁸ Rebecca Davis, 'Analysis: is the International Criminal Court biased against Africa?', *Daily Maverick*, 19 June 2015.

⁴⁹ See e.g. Margaret M. deGuzman, 'Gravity and the legitimacy of the International Criminal Court', *Fordham International Law Journal* 32: 8, 2008, pp. 1400–65.

⁵⁰ ICC, Pre-Trial Chamber I, situation in the DRC in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, no. ICC-01/04-01/06, 24 Feb. 2006, para. 46.

still used in the literature. This is certainly not the place to enter into a doctrinal debate, but it is important to note that not all factors contributing to prosecutorial discretion are political, and legal issues, such as interpretation of the gravity threshold, also play a role.

A second objective cause is the large number of African parties to the Rome Statute. With 34 signatories (more than half the states on the continent), the African contingent is the largest in the ASP (Latin America and Caribbean states number 28, western Europe and other states 25, Asia–Pacific states 19 and east European states 18).⁵¹ Such enthusiastic support can be traced to the end of the Cold War, when newly independent African countries sought to demonstrate a commitment to good governance and membership of the ‘new world order’ by signing international treaties. This is much to Africa’s credit, but is a second reason why it is the continent most statistically exposed to proceedings.

Another reason is the principle of complementarity: the ICC can intervene only where there has been no investigation, prosecution or trial in relation to the case (Rome Statute, article 17(1)(a)).⁵² In the words of the Prosecutor’s office, it can ‘exercise jurisdiction only when a state is unable or unwilling to genuinely investigate and prosecute the perpetrators’.⁵³ Many African states simply do not have solid judicial systems and therefore lack the capacity to act. It is no coincidence that all African cases before the ICC are in the most ‘fragile’ countries in the world; indeed, the Fragile State Index’s calculations of state ‘fragility’ are actually based in part on states’ judicial capacity. All these states fall either in the ‘Very High Alert’ (CAR, Sudan), ‘High Alert’ (Côte d’Ivoire, DRC) or ‘Alert’ (Kenya, Libya, Mali, Uganda) categories.⁵⁴

Nor is the problem solely one of capacity; many states also lack the will to act. ‘The unfortunate reality is that African countries have shown unwillingness to prosecute ... If the national systems are willing to prosecute crimes, then the ICC will have no business interfering in any country at all,’ explained the Director of the Complementarity and Cooperation Division of the ICC in April 2016.⁵⁵ Admittedly other states, particularly in the West, often have the capacity but not always the will to prosecute, but this is harder to demonstrate.

Moreover, Africa also lacks an operational regional jurisdiction like the European Court of Human Rights and the Inter-American Court of Human Rights, which, by adding an additional level between the state and the ‘international community’, could limit the reach of the ICC (see below).

Second, Afro-centrism can also be explained by *subjective decisions*. It bears repetition that in most cases—CAR, Côte d’Ivoire, DRC, Mali, Uganda—the African

⁵¹ See the ICC website, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

⁵² See Darryl Robinson, ‘The mysterious mysteriousness of complementarity’, *Criminal Law Forum* 21: 1, 2010, pp. 67–102.

⁵³ ICC, Statement of the Prosecutor correcting assertions contained in article published by *The Telegraph*, 4 July 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=160704-otp-stat>.

⁵⁴ <http://fsi.fundforpeace.org/rankings-2015>.

⁵⁵ Ramon Oladimeji, ‘ICC not biased against African countries—Bensouda’, *Punch* (Nigeria), 12 April 2016.

states concerned brought the cases to the court themselves.⁵⁶ The Prosecutor himself referred only one case to the court, that of Kenya, and then only after the Trial Chamber had established that Kenya had failed to prosecute the perpetrators of the crimes in its national judicial system. In October 2008 the Kenyan Inquiry Commission recommended the creation of a domestic tribunal. It is only because the Kenyan parliament failed to implement that recommendation that the commission sent the names of six individuals to the ICC's Prosecutor in July 2009. There were also domestic calls by political figures for an ICC investigation. Therefore, even though technically the investigation was opened *proprio motu*, it was triggered by Kenya itself.

As for the UNSC, it has taken cases to the court only twice, over Sudan and Libya, but in both instances with the support of African states in the Council at the time. Unlike the ad hoc tribunals (the International Criminal Tribunals for the Former Yugoslavia and Rwanda, ICTY and ICTR) established in 1993 and 1994 respectively by the UNSC, the ICC is not a UN offshoot, and is intended to be 'independent'. Therefore, its relationship with the UNSC, which has the power of referral and deferral, was one of the most contentious issues in the negotiations of the Rome Statute and remains so in the literature.⁵⁷ Behind the ICC–UNSC relationship is that between justice and peace, referrals promoting justice in the name of peace (presuming that the ICC can play a role in maintaining international peace and security), and deferrals relying on the opposite presumption that justice can hinder peace (see the next section). In this context, the AU attempts to have it both ways, criticizing the UNSC's power to refer a situation to the court (Libya, Sudan) as an intolerable political instrumentalization, while asking the same UNSC to defer cases before the ICC (Kenya, Libya, Sudan).⁵⁸ The acceptable political instrumentalization is obviously whichever favours heads of state.

The court's first three cases (CAR, DRC, Uganda) were African because of a convergence of interests. The Prosecutor, Moreno Ocampo, needed quickly to find cases to establish the new court's legitimacy, as well as his own. Of the three ways of bringing cases to the court (by a state party, by the Prosecutor or by the UNSC), the first option appeared the easiest and most legitimate, respecting state sovereignty, while the other two options would prove to be vulnerable to the post-colonialist critique. The Prosecutor hence found states parties ready to

⁵⁶ Côte d'Ivoire was not an ICC party at the time, but signed a declaration recognizing the court's ad hoc competence in April 2003: it was President Alassane Ouattara who asked the Prosecutor to take the case. Côte d'Ivoire ratified the Rome Statute and then became a party in 2013.

⁵⁷ See e.g. David Bosco, *Rough justice: the International Criminal Court in a world of power politics* (Oxford: Oxford University Press, 2014); Arbour, 'The relationship between the ICC and the UN Security Council'; Deborah Ruiz Verduzco, 'The relationship between the ICC and the United Nations Security Council', in Carsten Stahn, ed., *The law and practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 30–64; David Scheffer, 'The United Nations Security Council and international criminal justice', in William Schabas, ed., *The Cambridge companion to international criminal law* (Cambridge: Cambridge University Press, 2016), pp. 178–98.

⁵⁸ Juliet Okoth, 'Africa, the United Nations Security Council and the International Criminal Court: the question of deferrals', in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, eds, *Africa and the International Criminal Court* (The Hague: T. M. C. Asser Press, 2014), pp. 195–209.

provide cases. The respective African heads of state, Bozizé, Kabila and Museveni, saw in the ICC a way to weaken their opposition and consolidate their power, while simultaneously cultivating their images as champions of the fight against impunity. African states' motives in joining and using the ICC are complex. An intention to use the court against their political opponents was not the only reason, since they risk exposing themselves in the process, and do not need the ICC to prosecute rebels. However, because domestic prosecutions will always be denounced as biased and untrustworthy by rebels, they do need the ICC to give credibility to their declared commitment to fighting violence.⁵⁹

These states therefore brought the cases against rebel groups to the court themselves, beginning a practice of 'self-referral' which, while compatible with the Rome Statute, is not expressly provided for in the text, where states parties referring cases of other states parties was envisaged. The first Prosecutor nevertheless encouraged these self-referrals, as they were a part of his strategy.⁶⁰ He played along with the heads of state by agreeing to prosecute only the rebels and to ignore crimes committed by the regimes' forces,⁶¹ taking care not to investigate leads which would subject the regimes to scrutiny. In the DRC, for example, the decision to concentrate on the Ituri region rather than neighbouring Kivu was probably taken to reduce the evidence implicating Kabila.⁶² This strategy served the interests of the Prosecutor, the heads of state and even the ICC itself, which was able to demonstrate the ability to cooperate closely with states that is crucial if it is to function effectively.

In other words, the African heads of state initially supported the court as a means to defeat their rebels. When the court subsequently escaped their control, with cases brought either by the UNSC (Darfur/Sudan and Libya) or by the Prosecutor himself (Kenya), and began to take an interest in leaders, they immediately opposed it.

This political instrumentalization of the court was not limited to the first three cases. According to Pierre Hazan, in the Côte d'Ivoire case the Prosecutor Fatou Bensouda chose similarly to investigate only ex-President Gbagbo, not President Ouattara and his troops. The essential problem is therefore not the desire of certain African leaders to free themselves from an adversarial court, but rather the strategy of the Prosecutor's office, which 'played the African governments' game, only indicting opposition leaders and heads of armed groups'.⁶³ In the current backlash against the court there is therefore 'a profound irony: with the exception of Uhuru Kenyatta (although his charging paradoxically contributed to his

⁵⁹ Beth A. Simmons and Allison Danner, 'Credible commitments and the International Criminal Court', *International Organization* 64: 2, 2010, pp. 225–56.

⁶⁰ P. Gaeta, 'Is the practice of "self-referrals" a sound start for the ICC?', *Journal of International Criminal Justice* 2: 4, 2004, pp. 949–52; Andreas T. Müller and Ignaz Stegmüller, 'Self-referrals on trial: from panacea to patient', *Journal of International Criminal Justice* 8: 5, 2010, pp. 1267–94.

⁶¹ Bosco, *Rough justice*, pp. 97–8.

⁶² Phil Clark, 'Law, politics and pragmatism: the ICC and case selection in Uganda and the Democratic Republic of Congo', in Nicholas Waddell and Phil Clark, *Courting conflict? Justice, peace and the ICC in Africa* (London: Royal African Society, 2008), p. 40.

⁶³ Pierre Hazan, 'Les bonnes et mauvaises raisons de la fronde africaine à l'égard de la Cour pénale internationale', *Le Monde*, 10 Feb. 2016.

election as president) and Omar al-Bashir, the ICC has served the interests of African governments (too) well'.⁶⁴

Having explained the objective and subjective reasons behind the ICC's Afro-centrism, it is also possible, and necessary, to nuance it. First, the ICC has already shown an interest in other cases outside Africa: the Office of the Prosecutor is conducting preliminary examinations in Afghanistan, Colombia, Palestine, Ukraine, on the British military intervention in Iraq, on registered vessels of Greece and Cambodia, and it has opened an investigation regarding a situation in Georgia. One can therefore no longer say that all the court's cases are African, or that powerful states are not investigated.

Now that the ICC is investigating in Georgia, Russia should be expected to join the post-colonialist critics' camp. The de-Africanization of the cases before the court will symmetrically be accompanied by a de-Africanization (and an expansion) of the anti-ICC movement. Although the Prosecutor's office is equally interested in alleged crimes committed by all three of the parties involved in the armed conflict (Georgia, Russia and South Ossetia),⁶⁵ the de facto President of South Ossetia accused the court of exhibiting 'double standards',⁶⁶ while in Moscow the Ministry of Foreign Affairs spokesman declared that Russia would be forced to 'fundamentally review its attitude towards the ICC'.⁶⁷ Being already hostile to the ICC, and determined to sabotage the other ongoing preliminary examination on Ukraine, Moscow will fuel the anti-ICC narrative.

Furthermore, it is up to African states themselves to reduce the court's disproportionate attention to their continent. As the largest contingent of states parties, they wield significant influence. Discounting those states that oppose the court out of fear and those that seek to weaken it, it is possible to take the majority of other states at their word: if they really want a universal court, no longer centred on Africa, then they need to push it in this direction, rather than threaten to leave it. However, they have always been doing the opposite: not only have African states parties only referred African situations to the ICC Prosecutor, although they are free to draw his/her attention to any other continent, but they have also only ever referred situations in their own country (Uganda, DRC, Côte d'Ivoire, Mali, CAR twice, the Comoros and Gabon). In other words, African states practice only self-referral: they are not only centred on Africa, but on themselves, using the ICC when they think it can help weakening their opposition, and denouncing it the rest of the time. If they are sincerely preoccupied with the ICC's Afro-centrism, they should refer non-African situations to the court, and support UNSC's non-African referrals. In the case of Syria, for example, very few of them supported the efforts to persuade the UNSC to take the case to the ICC.⁶⁸ One cannot reasonably

⁶⁴ Hazan, 'Les bonnes et mauvaises raisons'.

⁶⁵ Statement of the Prosecutor of the ICC, 27 Jan. 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-01-2016-georgia>.

⁶⁶ 'South Ossetian leader accuses Hague court of double standards in probe to 2008 war', TASS, 8 Feb. 2016.

⁶⁷ Kevin Jon Heller, 'Russia's short-sighted approach to the Georgia investigation', *Opinio Juris*, 13 Feb. 2016, <http://opiniojuris.org/2016/02/13/russias-short-sighted-approach-to-the-icc/>.

⁶⁸ On 19 May 2014, 58 states called on the UNSC to adopt a French draft resolution referring Syria to the ICC, of which only seven were members of the AU (Botswana, Cape Verde, Côte d'Ivoire, Ghana, Libya, Seychelles,

denounce the court for bias while doing nothing to change it.

Finally, the extent to which Afro-centrism is a problem is a matter of perspective. Like all criticisms of 'double standards', the post-colonialist critique of the ICC seems to apply the principle of 'all or nothing', presuming that as the court does nothing elsewhere, it should do nothing in Africa. Yet just because other mass crimes are committed elsewhere, it clearly does not entail that crimes in Africa should go unpunished. Furthermore, the argument can be inverted. Afro-centrism may exist, but it is not a bias *against* Africa, as seen by the culprits of the crimes and those who feel targeted by the court. From the perspective of the victims, it is instead a bias *in favour* of Africa: Afro-centrism means that only African victims have received the ICC's attention, and non-African victims have been ignored.⁶⁹

The more pertinent question, then, is less why African situations have been investigated, and more why non-African ones, with the recent exception of Georgia, have not. There are again objective reasons, such as the jurisdictional limits of the ICC. Such a critique is based on a misunderstanding: the ICC does not have universal jurisdiction and the Prosecutor cannot act wherever he or she wants. As many mass atrocities happen in countries that are not states parties, the only way to refer such matters to the ICC would be through the UNSC, and this route makes the matter very political, as the Russian–Chinese veto demonstrated in the case of Syria in 2014. In situations such as that of Syria, the blame lies not with the ICC, but with the UNSC.

However, the blame does not lie with the UNSC for situations such as those in Afghanistan and Iraq, which fall under the court's jurisdiction. In fact, both situations are currently under preliminary examination by the Prosecutor's office of alleged war crimes committed by UK nationals between 2003 and 2008 in Iraq, and of alleged crimes against humanity and war crimes committed since 2003 in Afghanistan. Even though these are not yet, and may never become, investigations, it cannot be said that the Prosecutor's office focuses entirely on Africa.

In Syria, where the ICC is powerless, such a failure of collective 'responsibility to prosecute'⁷⁰ delegitimizes both the ICC and the UNSC, and should be condemned. However, one should be careful not to go too far the other way and fall into judicial romanticism (*fiat justitia et pereat mundus*: let there be justice, though the world perish),⁷¹ which is not only naive but potentially dangerous.

Tunisia). The UNSC included only one African state at the time, Nigeria, which voted in favour, as did all members except Russia and China, which vetoed the draft resolution.

⁶⁹ Hazan, 'Les bonnes et mauvaises raisons'. See also Fatou Bensouda, quoted in Smith, 'New chief prosecutor defends international criminal court'.

⁷⁰ Andrea Birdsall, 'The responsibility to prosecute and the ICC: a problematic relationship?', *Criminal Law Forum* 26: 1, 2015, pp. 51–72.

⁷¹ An old maxim attributed to Emperor Ferdinand I (1503–1564) by Johannes Manilius in his book *Locorum Communium Collectanea* (1563). See Payam Akhavan, 'Beyond impunity: can international criminal justice prevent future atrocities?', *American Journal of International Law* 95: 1, 2001, p. 31, and 'Are international criminal tribunals a disincentive to peace? Reconciling judicial romanticism with political realism', *Human Rights Quarterly* 31: 3, 2009, pp. 624–54. On the concept of 'judicial romanticism', see Patrice C. McMahon and David P. Forsythe, 'The ICTY's impact on Serbia: judicial romanticism meets network politics', *Human Rights Quarterly* 30: 2, 2008, p. 414, n. 5.

The aim should be to reconcile the ideal of international criminal justice with political realism, acknowledging that ‘there are *realpolitik* issues in the prosecutor’s work’.⁷²

Responding to the ‘primacy of peace over justice’ objection

The second argument in the African anti-ICC propaganda is that the court’s work is a threat to peace and security. This has been regularly invoked since 2005, including recently. In a letter to the UNSG in February 2016, the Vice-President of the African Commission, the Kenyan Erastus Mwencha, explained:

The continent is grappling with conflicts in Burundi, DRC, Libya, South Sudan, Somalia and [the] Darfur region including a resurgence of terrorist activities in Kenya, Nigeria and Mali just to mention a few. [In this context], it had become ever more imperative that the attention of our Leaders is not distracted with incessant cases before the ICC to the detriment and threat of instability to our countries and our dear continent.⁷³

Many officials are ‘playing the terrorism card’, to which they know the West is sensitive. However, such claims do not stand up to scrutiny. This is once again an old argument, which rests on the famous dilemma of peace and justice: in ending an armed conflict, either peace must be given priority at the price of justice (through amnesties and secret arrangements), or justice must be given priority at the price of peace, running the risk that criminal proceedings rekindle the conflict.⁷⁴

This was the same argument of the politicians who wanted to impede the work of the ICTY. They feared that the arrest of Milosevic would release ‘rivers of blood’, that Mladic’s arrest would provoke ‘terrorist attacks’, that Ojdanic’s would cause the Montenegrin government to fall and that Bobetko’s would do the same in Croatia; that the arrest of four Serb generals would provoke a ‘bloodbath’, that Karadzic’s arrest would unleash a ‘serious political crisis’, and that Krajisnik’s would ‘radicalise the political environment’, ‘strengthen the anti-European feelings of the citizens, and encourage the local extremists’.⁷⁵ However, none of the arrests had such consequences. The ICTY has succeeded in arresting everyone it was pursuing without ever threatening international peace and security, thanks to states’ careful cooperation.

In Uganda, the Lord’s Resistance Army (LRA) was protected by Sudan, allowing it to take refuge in the south of the country, beyond the reach of the Ugandan army. However, the referral of the situation to the ICC by the Ugandan government in 2003 changed everything. Only four months later Sudan signed a protocol allowing

⁷² M. Cherif Bassiouni and Douglass Hansen, ‘The inevitable practice of the Office of the Prosecutor’, in *Africa debate: is the ICC targeting Africa inappropriately?*, <http://icforum.com/africa>. See also Bosco, *Rough justice*.

⁷³ Permanent Observer Mission of the AU to the UN, NY/AU/POL/14/104/16, 12 Feb. 2016.

⁷⁴ See e.g. Linda M. Keller, ‘The false dichotomy of peace versus justice and the International Criminal Court’, *Hague Justice Journal* 3: 1, 2008, pp. 12–47; Janine N. Clark, ‘Peace, justice and the International Criminal Court’, *Journal of International Criminal Justice* 9: 3, 2011, pp. 521–45; Catherine Gegout, ‘The International Criminal Court: limits, potential and conditions for the promotion of justice and peace’, *Third World Quarterly* 34: 5, 2013, pp. 800–18; Patrick S. Wegner, *The International Criminal Court in ongoing intrastate conflicts: navigating the peace–justice divide* (Cambridge: Cambridge University Press, 2015).

⁷⁵ Akhavan, ‘Beyond impunity’, p. 14.

the Ugandan Army to eliminate the LRA bases in southern Sudan. The threat of international justice seemingly deterred the Sudanese government from continuing to support the LRA, weakening the movement and making it more vulnerable.⁷⁶ In 2005 the ICG concluded that ‘the ICC has already had a positive impact on the peace process’.⁷⁷ The issuing of arrest warrants ultimately encouraged the LRA to engage more seriously in the peace process—also disproving fears that these warrants would undermine the negotiations.⁷⁸ In February 2008 the LRA signed an agreement on accountability and reconciliation with the Ugandan government. While the LRA leaders initially intended to escape the ICC’s jurisdiction under the principle of complementarity, it is unlikely that they would have signed this agreement without the threat of ICC action. Therefore, Uganda is another case which disproves the claim that the ICC is a threat to peace.⁷⁹

In Darfur, where the ‘peace vs justice’ discourse was similarly used, the results are the same. The ICC’s arrest warrants have not had an adverse effect in the region. In February 2009 Bashir even concluded a ceasefire agreement with one of the Darfuri rebel groups. It is difficult to prove that this development was directly attributable to the ICC, but it probably contributed. There were fears that the ICC’s actions in Darfur would sacrifice peace in the name of justice, or that its inaction would sacrifice justice in the name of peace. Ultimately, it probably brought about neither ‘peace nor justice’,⁸⁰ neither exacerbating nor ameliorating the situation, and its strongest effects were most likely on academic debates rather than the lives of Darfuris.

In the Libyan case, following the UNSC’s referral to the ICC, the AU claimed that the arrest warrant against Gaddafi ‘seriously complicates the efforts aimed at finding a negotiated political solution to the crisis’, and asked the UNSC to suspend the work of the ICC.⁸¹ However, there was no credible political solution at the time, and Gaddafi’s lack of goodwill hastened military intervention.⁸²

Overall, the accusation that the ICC threatens peace and security has been shown to lack any empirical justification; indeed, there is evidence to the contrary. The peace vs justice dilemma is more theoretical than practical.

African states’ instrumental role in creating and sustaining the ICC

While refuting the arguments of the anti-ICC movement, it is important to emphasize the positive aspects of Africa’s relationship with the court, in particular the significant role played by African states in the court’s creation and develop-

⁷⁶ Akhavan, ‘Are international criminal tribunals a disincentive to peace?’, pp. 641–6.

⁷⁷ International Crisis Group, *Shock therapy for northern Uganda’s peace process*, Africa Briefing no. 23 (Brussels, 11 April 2005), p. 5.

⁷⁸ Robert C. Johansen, ‘The contribution of international judicial processes to peacebuilding’, in Daniel Philpott and Gerard Powers, eds, *Strategies of peace* (Oxford: Oxford University Press, 2010), p. 196.

⁷⁹ Janine N. Clark, ‘The ICC, Uganda and the LRA: re-framing the debate’, *African Studies* 69: 1, 2010, pp. 141–60.

⁸⁰ Lutz Oette, ‘Peace and justice, or neither? The repercussions of the al-Bashir case for international criminal justice in Africa and beyond’, *Journal of International Criminal Justice* 8: 2, 2010, p. 364.

⁸¹ AU Doc. EX.CL/670(XIX), 1 July 2011, p. 2.

⁸² Jean-Baptiste Jeangène Vilmer, ‘Ten myths about the 2011 intervention in Libya’, *Washington Quarterly* 39: 2, 2016, pp. 26–7.

ment. The ICC and AU developed side by side, conceived in 1998 and 1999 respectively, and both came into force in 2002. They share also a number of values. Today, as noted above, there are 34 African states parties to the ICC, comprising more than half of the continent and a larger contingent than any other; 22 of them are founding members. The first review conference of the ICC was held in Africa (Kampala, 2010), and Africans currently occupy several key posts in the court: the Prosecutor Fatou Bensouda is Gambian (and indeed, the AU applied great pressure to ensure that the then sole African candidate for this position would be elected); the first vice-president of the court is a judge from Kenya, four judges are African; and the Assembly's president, the Senegalese Justice Minister, was elected in 2014 for three years and is the first African to hold the post.

At the end of the 1990s, African states were motivated by two main factors: the trauma of the Rwandan genocide and the desire to deter the predatory tendencies of powerful states. The latter concern has been addressed by the definition of the crime of aggression in 2010 (although the court does not exercise jurisdiction over the crime of aggression yet).⁸³ During the negotiations to found the court, they therefore campaigned alongside African civil society, including around 800 NGOs. When Senegal joined the court in 1999 Africa was able to boast having the first state party. In 2004 the AU again vigorously defended the court and called for the universal ratification of its 2004–2007 strategic plan.

This amicable relationship changed in 2009 with Bashir's arrest warrant. At that time, the ICC already had a number of suspects in custody, among them Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui and Jean-Pierre Bemba, and had issued arrest warrants against others—all Africans. Yet neither the AU nor individual African states protested. The fact that the anti-ICC sentiment was triggered only by the arrest warrant against Bashir confirms that the AU has no problem with the ICC targeting Africans, only powerful ones, especially heads of state and senior state officials.⁸⁴ It could well be argued that it is not the ICC that is guilty of discrimination, but rather African states themselves.

Furthermore, heads of state should not be confused with their populations: the hostility to the ICC comes not from 'Africa' but rather from certain African leaders, simply out of fear of being next on the list. They play on anti-colonial populism, which is often strongly echoed in the African press.⁸⁵ The anti-ICC propaganda has been entirely created by a handful of heads of states seeking to escape its reach. However, their discourse can be persuasive, and so it remains

⁸³ The minimum of 30 ratifications of the Kampala amendments was reached with the Palestinian ratification on 27 June 2016, but a decision by the majority of two-thirds of states parties is still needed to activate the court's jurisdiction after 1 January 2017, and several powerful states have concerns about activation.

⁸⁴ Manuel J. Ventura and Amelia J. Bleeker, 'Universal jurisdiction, African perceptions of the International Criminal Court and the new AU protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights', in Evelyn A. Ankumah, ed., *The International Criminal Court and Africa: one decade on* (Cambridge/Antwerp/Portland: Intersentia, 2016), pp. 441–60.

⁸⁵ In March 2012, *New African*, the bestselling pan-African magazine on the continent, devoted its cover story to this theme. Entitled 'ICC vs. Africa: the scales of injustice', it was largely written by David Hoile, a militant British apologist for the Sudanese President and author of a tirade against the ICC, which he presents as 'Europe's Guantanamo Bay' (*The International Criminal Court: Europe's Guantanamo Bay?*, London: Africa Research Centre, 2010).

unclear to what extent these perceptions are genuinely shared among African populations.⁸⁶

African civil society, which played an important role in the establishment of the ICC,⁸⁷ remains largely active in support of the court. In July 2009, following the AU decision that its members should cease cooperating with the court, a statement from 164 African NGOs in more than 30 countries called on the states to reaffirm their commitment to the ICC.⁸⁸ In another letter of October 2013 to AU foreign ministers, 130 African NGOs in 34 different countries demanded support for the ICC and underlined the catastrophic consequences of withdrawal for the continent's population.⁸⁹ In a letter of 26 February 2016, the Africa Liberal Network, an organization consisting of 44 political parties in 30 African countries—the largest such body on the continent—also condemned the threat of a mass withdrawal.⁹⁰ This support from civil society helps emphasize that behind the high-profile cases there are 25,000 victims participating in ICC proceedings, and over 180,000 beneficiaries of the Trust Fund for Victims.⁹¹ For these victims and those close to them, the ICC is the most legitimate institution upon which they can depend. Since the crimes which concern the ICC are mass crimes, which first and foremost concern wide populations, the African leaders who wish to withdraw from the Rome Statute and pretend to be democrats should consult with their populations through referendums, under the attentive eye of AU observers.

Moreover, a withdrawal from the Rome Statute not only goes against the Constitutive Act of the AU, which includes an article on the promotion and protection of human rights and the fight against impunity; it also does not allow defendants to escape cases that are already under way. Withdrawal from the statute, which takes effect at the earliest one year after the state party notifies the UNSG (article 127), is not suspensive. It does not remove the obligations to which the state submitted with respect to procedures which opened before the date the withdrawal comes into force. That is why, in the case of Burundi where the country began taking steps to leave the Rome Statute in order to escape the current preliminary examination, the Prosecutor should open a full investigation as soon as possible, and in any case within the year following the notice Burundi has not yet sent to the UNSG. If the Prosecutor believes she has sufficient legal

⁸⁶ Margaret M. deGuzman, 'Is the ICC targeting Africa inappropriately?', in *Africa debate: is the ICC targeting Africa inappropriately?*.

⁸⁷ Rowland J. V. Cole, 'Africa's relationship with the International Criminal Court: more political than legal', *Melbourne Journal of International Law* 14: 2, 2013, pp. 675–6.

⁸⁸ <https://www.hrw.org/news/2009/07/30/africa-reaffirm-support-international-criminal-court>.

⁸⁹ 'Letter to foreign ministers on support for the ICC in advance of extraordinary AU summit', Human Rights Watch, 4 Oct. 2013, <https://www.hrw.org/news/2013/10/04/letter-foreign-ministers-support-icc-advance-extraordinary-au-summit>.

⁹⁰ Luke Akal, 'ALN condemns alleged AU proposal to withdraw from the ICC', Africa Liberal Network, 26 Feb. 2016, <http://www.africaliberalnetwork.org/2016/02/aln-condemns-alleged-au-proposal-to-withdraw-from-the-icc/>. See also the op-ed by the Africa Group for Justice and Accountability, an independent group of African experts, among them Dapo Akande (University of Oxford), Navi Pillay (former UN High Commissioner for Human Rights) and Richard Goldstone (former ICTY and ICTR Chief Prosecutor): 'The International Criminal Court is vital to our fight against impunity in Africa', *Guardian*, 17 July 2016.

⁹¹ Shehzad Charania, 'The International Criminal Court at 14', *Opinio Juris* blog, 4 Aug. 2016, <http://opiniojuris.org/2016/08/04/the-international-criminal-court-at-14/>.

grounds to do so, she could open the investigation on her own authority, which would take more time as it requires a preliminary authorization of the Pre-Trial Chamber, or another state party could refer the case to the court, which would allow her to start investigating without delay. Even though it is doubtful that Burundi would cooperate, with the risk of this becoming another dormant case, it would be advisable for the Prosecutor to send the message to other states parties that they cannot leave the court simply to avoid being investigated.

These discursive elements play an important role in the debate as the AU and the ICC fight to promote their competing narratives. However, discourse alone will not solve the diplomatic crisis, and so to this end the remaining pages of this article will formulate proposals.

How are relations between the ICC and AU to be eased?

To pacify relations between the ICC and AU in the long term, the following actions should be pursued. First, the ICC should investigate more cases outside Africa. The Georgian case is a good start—indeed, it is a turning-point in the court's history, which must be emphasized—but it is certainly not enough on its own. The Prosecutor's office must ensure that appropriate non-African cases go beyond mere preliminary inquiries. This is, of course, in line with the court's mission to conduct its work with independence and impartiality, and so should not be seen as a reaction to the AU's behaviour; that would be an admission of bias which, as has been shown, is not true. However, the gradual de-Africanization of the court would deprive the ICC's opponents of one of their most popular arguments, and would strengthen the ICC.

Second, the domestic judicial capacity of states that are unable to investigate or prosecute crimes themselves should be enhanced. Such a reinforcement of national jurisdiction depends upon assistance from the Prosecutor's office in encouraging national proceedings when possible by providing information, working with officials and experts from the countries in question, and acting as a catalyst for action with NGOs and other actors. This is often referred to as 'positive complementarity'.⁹² However, because mass crimes usually occur in countries with little or no domestic capacity to investigate and prosecute, often such a capacity must first be built. It then requires assistance from states and civil society to implement legal reform, capacity-building and infrastructure investment. Unfortunately, 'the states least affected by violence are usually the most capable of doing so, while the states most affected by violence are usually the least able'.⁹³ Ironically, supporting 'African solutions to African problems', reinforcing national jurisdictions to allow African states to conduct proceedings by themselves, therefore requires external assistance. Such African solutions may not always exist, and so they should be facilitated, with care taken to anticipate

⁹² ICC, *Prosecutorial Strategy 2009–2012* (The Hague, 1 Feb. 2010), para. 17. See also Justine Tillier, 'The ICC Prosecutor and positive complementarity: strengthening the rule of law?', *International Criminal Law Review* 13: 3, 2013, pp. 507–91.

⁹³ Bassiouni and Hansen, 'The inevitable practice of the Office of the Prosecutor'.

the inevitable accusations of neo-colonial interference. Enhancement of domestic capacity is a long-term and only a partial solution, and should therefore be implemented alongside other measures.

Third, intermediary institutional structures should be established to increase ICC–AU cooperation. These could take the following forms:⁹⁴

1. *ICC chambers in Africa*. Nothing in the Rome Statute forbids the ICC to conduct parts of its work outside The Hague and, in Resolution 1593 on Darfur, the UNSC invited the ICC and AU ‘to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity’. The phrase ‘in the region’ should not be understood narrowly as *in situ*, that is, in the country where the situation under investigation is located. As the ICC’s ruling against *in situ* trials demonstrated, that would pose risks for the security of victims and witnesses, as well as the stability of local communities. However, the ICC could, for example, negotiate access to the ICTR (Tanzania), the Special Court for Sierra Leone or the Extraordinary African Chambers (Senegal). Regional venues, one in eastern Africa and at least one in western Africa, could provide the advantages of *in situ* trials (reducing the ICC’s ‘foreign’ image and providing greater access to evidence, victims and witnesses) without the risks.

2. *An ICC liaison office at the AU*, such as the ICC has at the UN. This simple measure, supported by African civil society, would streamline relations between the two organizations. However, for the moment it has been rejected by the AU.

3. *An AU–ICC cooperation agreement*, such as the one the ICC has already signed with the UN and EU. An agreement project was finalized in 2005 but the deterioration in relations has not allowed it to advance.

4. *A mixed chamber of African and international judges in the African Court of Justice and Human and Peoples’ Rights (ACJHPR)*. The ACJHPR was established in 2008 through the fusion of the Court of Justice of the African Union and the African Court on Human and Peoples’ Rights. However, ratified by only five member states, it has not entered into force yet. The Malabo Protocol, adopted in June 2014, establishes a criminal chamber within the ACJHPR, but this will enter into force only 30 days after 15 AU member states have ratified it. Nine states have signed the protocol but none has yet ratified it, and so it has not yet entered into force, preventing the court from becoming operational. In April 2016 the open-ended ministerial committee asked its members (Algeria, Burundi, Ethiopia, Nigeria, South Africa and Uganda) to set an example by ratifying, and Kenya has already promised to use part of the US\$1 million it has pledged for the criminal chamber to lobby for ratification. South Africa’s withdrawal could be another incentive for ratification, for the states tempted to follow this precedent while not being strong

⁹⁴ See Olugbuo, ‘The African Union, the United Nations Security Council and the politicisation of international justice in Africa’, pp. 372–7.

(South Africa) or isolated (Burundi) enough to do it without the pretext of an African alternative to the ICC.

The Malabo Protocol itself, however, is flawed. On the one hand it represents an important step towards a continental platform for international criminal justice, which should not be underestimated.⁹⁵ On the other hand, it suffers from a number of weaknesses: it has imprecise definitions of offences, particularly of ‘terrorism’ and unconstitutional changes of government; its sources of funds are unclear; it does not mention the ICC; and, above all, it guarantees the immunity of not only serving heads of state or government but also ‘anybody acting or entitled to act in such capacity, or other senior state officials based on their functions’ (article 46 A bis). This formulation is very wide and would exclude far too many people from prosecution.

This is no coincidence, for the Malabo Protocol is clearly intended by its promoters as an African *alternative* to the ICC. The Senegalese Minister of Justice and current President of the ASP at the ICC opposed the project for this reason. The states hostile to the ICC hope the ACJHPR will serve as a shield between them and the court, but it would be unfair to reduce the initiative to its obstructionist dimension. The ACJHPR was conceived before the UNSC’s 2005 Darfur referral turned African leaders against the court, and it featured in the AU’s May 2004 strategic plan.⁹⁶ The deterioration of relations with the ICC certainly catalysed the process but did not begin it.⁹⁷

It is important to show that the West is open to projects which go beyond the ‘national jurisdiction vs ICC’ binary. However, the Malabo Protocol should not be encouraged, primarily because of the extension of immunity it prescribes. Moreover, there is an incompatibility between the protocol and the Rome Statute, such that entering into the protocol may create a problem of jurisdictional superiority and may result in a breach of international law by ICC states parties.⁹⁸

It is preferable to focus on regional initiatives such as the Extraordinary African Chambers, while acknowledging that the success of this one—Hissène Habré was condemned to life imprisonment on 30 May 2016 after an exemplary trial—depended heavily on Senegal’s political will and may not be easily reproduced elsewhere.

Finally, any strategy should rely on two pillars: on the one hand, African states parties who support—or at least do not oppose—the ICC. These states recently demonstrated their strength by preventing the 27th AU summit in July 2016 from announcing mass withdrawal. Indeed, the question of the ICC did not even make it on to the agenda, thanks to the resistance of a handful of states (Algeria, Botswana, Côte d’Ivoire, Nigeria, Senegal and Tunisia). These should be encouraged to be more vocal at AU meetings and to exercise greater influence over the

⁹⁵ Allan Ngari, ‘Beyond the ICC: how international criminal justice can thrive in Africa’, *ISS Today*, 29 April 2016.

⁹⁶ AU, *Strategic Plan of the African Union Commission: vision and mission of the African Union* (Addis Ababa, May 2004).

⁹⁷ Olugbuo, ‘The African Union, the United Nations Security Council and the politicisation of international justice in Africa’, p. 370.

⁹⁸ Nam, ‘Jurisdictional conflicts between the ICC and the African Union’.

AU agenda, which has been dominated by a few opponents and non-states parties. At the same time, it should also be made clear that the relevant forum for discussion of the issue is not the AU, where more than a third of states are non-parties, but the ASP, which contains all and only states parties.

On the other hand, any strategy to defend the ICC should also draw on African civil society (NGOs, think-tanks, charismatic public figures). Important African voices should be encouraged to defend the ICC in the public debate, as Kofi Annan has done in recent months.⁹⁹ The organization of an international conference on 'Africa and international criminal justice' (broadly understood, so as not to restrict the subject to the ICC) by an African think-tank and/or a key ICC-friendly African state, such as Botswana or Senegal, could also help.

Conclusions

As a liberal institution in a realist world, the ICC is hampered by many constraints. It is already suffering from a credibility problem for several reasons: the scarcity of prosecutions (in almost 15 years of existence, only four individuals have been found guilty), its limited material capacity (a budget of €139.5 million for 2016), the perceived risk of political manipulation, a questionable deterrent effect¹⁰⁰ and, most of all, unrealistic expectations of it, for example that it not only punishes criminals but also pacifies the world, which naturally condemns it always to disappointment. To fight such a perception in a difficult context, the ICC could invoke its social legitimacy: that is, that while it is not universal and is certainly not consensual, it has at least the support of the majority of states, with 124 states parties to the Rome Statute. In that context, the backlash of many of the 34 African states—with South Africa's withdrawal setting a significant precedent—is a major blow that should be taken seriously.

This article began by outlining the context of the current crisis since 2005. Doing so is particularly important to make it clear that the crisis goes back far beyond the post-2013 Kenyan offensive, and therefore cannot be expected to end with it. The African backlash against the ICC is a substantial movement which is gaining force. Of course, the AU rhetoric is often excessively aggressive and largely unrepresentative of African views, and the risk of an actual mass withdrawal is probably low. South Africa's withdrawal could be followed by that of Burundi, Kenya, and perhaps Uganda, but the risk of a domino effect is low, as withdrawing from the ICC is costly: it potentially involves retaliatory measures, such as cutbacks in EU or US development aid. Therefore, only states seeing more substantial benefits in withdrawing—for example because they are directly targeted by the ICC—are likely to go down this path. It is vital not to overreact, which would be counter-productive. However, it is equally important not to disregard the issue. The ICC

⁹⁹ e.g. at the International Center for Transitional Justice conference in Addis Ababa on 18 April 2016, and in an interview to the *Financial Times* on 16 June 2016.

¹⁰⁰ For a recent attempt to disprove the dominant presumption that the ICC has no deterrent effect, or only a speculative one that has yet to be proved, see Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court deter atrocity?', *International Organization*, vol. 70, Summer 2016, pp. 443–75.

must be acknowledged to have an image problem in Africa. Perceptions matter and the problem must be addressed.

It is not too late for the ICC to overcome the crisis. First, the battle of narratives could be waged with greater vigour. The AU has formulated two main objections to the ICC, to which this article responded: the ‘Afro-centrist’ objection, and the ‘peace vs justice’ objection. Besides responding to these objections, this article has also suggested a positive discourse for the court to employ, recalling the important role that African states played in its creation and development. These discursive elements are essential in order to render the debate more rational and accurate, but are certainly insufficient to solve the diplomatic crisis. For this reason, the article has also formulated concrete recommendations for practical action to ease relations between the ICC and AU, such as investigating more outside Africa, reinforcing African national jurisdictions, creating intermediary institutional structures, promoting regional-level action, and relying more on ICC-friendly African states and African civil society.

Finally, it is important to stress that there is here no dichotomy between ideal illusions of international justice and the constraints of *realpolitik*: the ICC greatly needs the states, but the states also need the ICC. The problem is that the states do not always realize this *yet*, as justice and politics do not have the same temporal focus. Justice works on past abuses, while diplomats are concerned about the immediate future. In justice, time moves slowly—trials can last for years—while in politics time is fast. Peace and justice could be incompatible on a short timescale, when one decision must be taken which would affect the interests of peace or justice. In the long term, however, peace and justice converge. Indictments make it difficult for the negotiators to work in the short term; but in the long term, justice is essential for a lasting peace. For peace to be more than the absence of conflict, ‘negative peace’, and to be instead what Galtung called ‘positive peace’, involving ‘the integration of human society’,¹⁰¹ peace must include justice. Therefore, the peace versus justice dilemma that underpins the AU–ICC relationship is actually a dilemma between two kinds of peace: an immediate peace, and a lasting peace. Ultimately, it is a matter of patience, and our ability to make long-term decisions.

This article was finalized on 25 October 2016.

¹⁰¹ Johann Galtung, ‘An editorial’, *Journal of Peace Research* 1: 1, 1964, p. 2.