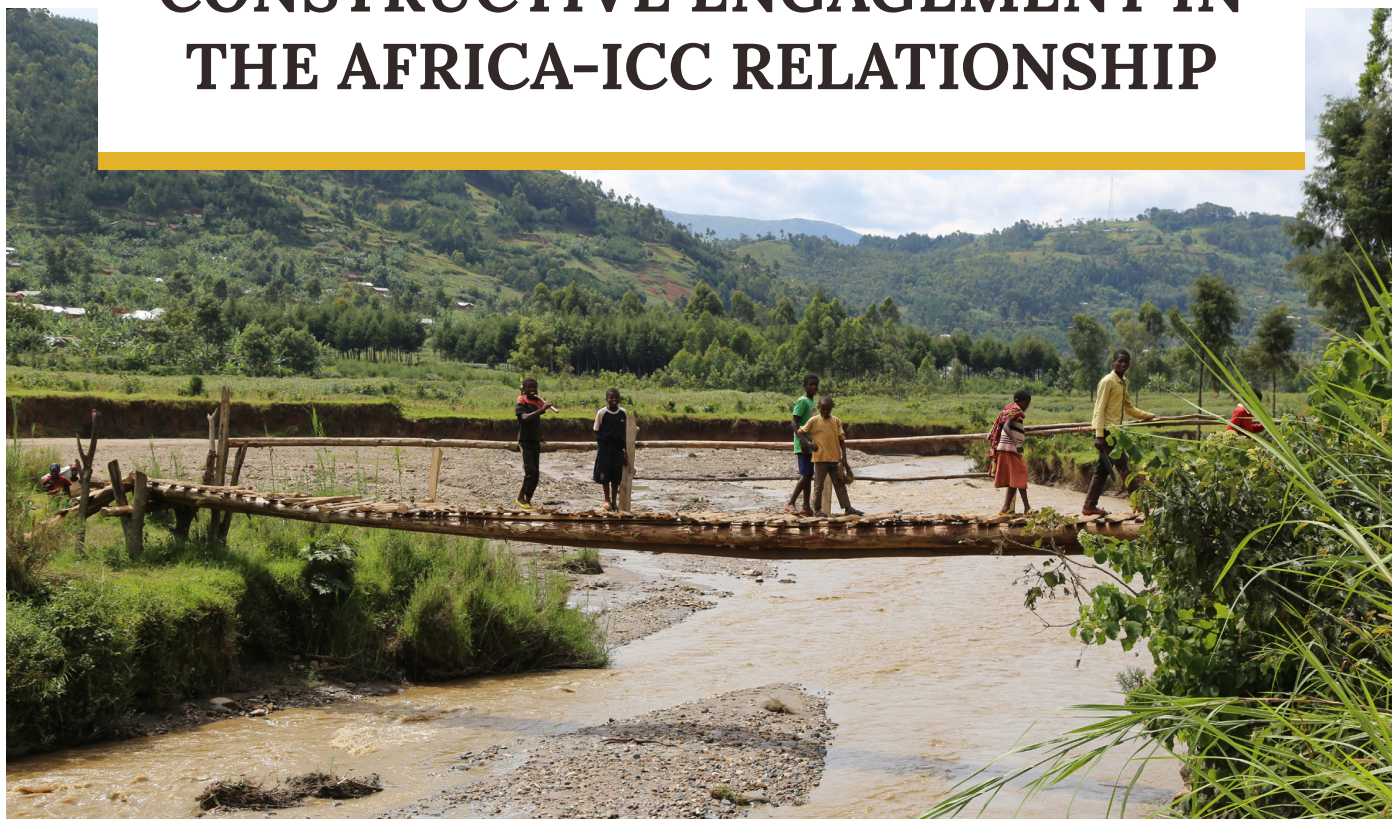


Building Bridges and Reaching Compromise

CONSTRUCTIVE ENGAGEMENT IN THE AFRICA-ICC RELATIONSHIP



WAYAMO FOUNDATION POLICY REPORT | 2018

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- PART 1 -

Concerns and
perceptions surrounding
the International
Criminal Court

- PART 2 -

The ICC, the UN Security
Council, and Head of
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- PART 3 -

The ICC, Peace and
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The ICC in Context, and
Reforming the Court
from Within

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INTRODUCTION – THE NEED FOR CONTINUED ENGAGEMENT



The relationship between **Africa** and the **International Criminal Court (ICC)** has received a tremendous amount of attention in recent years. Not only have dozens of articles and reports been written on the subject, but numerous conferences, symposia and diplomatic meetings have sought to assess the crux of the relationship and the concerns that African states and communities have regarding the Court.¹ Despite all of this time, effort, and energy, it cannot be said today that the problems at the heart of this relationship have been resolved.

Over many years, the **Wayamo Foundation** has engaged with scholars, researchers, diplomats, practitioners, human rights advocates and political figures on the subject of the Africa-ICC relationship. Indeed, understanding and improving the relationship is a core feature of Wayamo's mandate. This report thus represents much of the knowledge regarding the relationship that the Wayamo Foundation has built up and gleaned over the last year. This policy report

was further inspired in part by discussions held during the **South African-German International Justice Dialogue**. The event was initiated by the **German Ministry of Foreign Affairs** and organised by the Wayamo Foundation.² It was held under Chatham House Rules, from 27-28 March 2017 in Pretoria.

In the following pages, the report focuses on four key topics that have proven central to the relationship between the Court and the African continent:

1. Perceptions regarding the ICC;
2. The relationship between the Court, the Security Council and Head of State Immunity;
3. The Peace-Justice debate; and
4. Reforms of the ICC.

The report offers analysis as well as recommendations on each of these critical subjects.

Above all else, this report urges continued engagement on the Africa-ICC relationship by all relevant actors, including **ICC member states, the Court itself, civil society organisations, scholars and researchers**, as well as **victims and their representatives**. Only through positive engagement can the legitimate concerns of African states and African communities be heard. Only through dialogue and negotiation can a better and more effective ICC be realized.

¹ For in-depth analysis of the ICC-Africa relationship, see:

- Arnould, V. (2017) *A Court in Crisis? The ICC in Africa and Beyond*. Egmont Institute [online]. Available at: egmontinstitute.be/a-court-in-crisis-the-icc-in-africa-and-beyond (Accessed: 14 May 2018);
- Clarke, K. M., Knottnerus, A. S. and De Volder, E. (eds.) (2016) *Africa and the ICC — Perceptions of Justice*. Cambridge University Press;
- Du Plessis, M., Maluwa, T. and O'Reilly, A. (2013) *Africa and the International Criminal Court*. Chatham House [online]. Available at: chathamhouse.org/publications/papers/view/193415 (Accessed: 14 May 2018);
- Jalloh, C. C. and Bantekas, I. (eds.) (2018) *The International Criminal Court and Africa*. Oxford University Press.
- Mills, K. and Bloomfield, A. (2018) *African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm*. *Review of International Studies*, 44(1), 101-127.

² The Wayamo Foundation would like to extend its gratitude to Jemima Njeri for her work in putting together a report on the Dialogue and transcribing some of the presentations during the Dialogue. It also thanks Michael Benedict for his work in editing drafts of the report.

CONCERNS AND PERCEPTIONS SURROUNDING THE INTERNATIONAL CRIMINAL COURT



*The **International Criminal Court (ICC)** has had a strained relationship with certain African states and the **African Union (AU)**. There are various perspectives and explanations for the existing tensions. The following section discusses some of the prevalent concerns and perceptions surrounding the ICC and its work in Africa, their origins, how they have affected the relationship between Africa and the Court, and what might be done to ‘set the record straight’.*

The Africa-ICC relationship: Perceptions and Misperceptions

There is a panoply of ongoing concerns and (mis) perceptions regarding the **ICC**’s role in and impact on Africa. Many media outlets and observers have described the current situation facing the ICC as a “*crisis*”, particularly following the notification of withdrawal of three African states (Burundi, South Africa, and The Gambia) from the ICC in late 2016. Some of this has now been tempered. Following elections in which **Yahya Jammeh** was defeated and eventually forced to flee to Equatorial Guinea, the new President of The Gambia, Adama Barrow, committed the country to remain in the ICC and withdrew the country’s notification of withdrawal from the ICC.¹ In the face of legal challenges from its judicial community, South Africa also withdrew its notice of withdrawal from the ICC, although the future of its membership in the Court remains uncertain.² **Burundi** is thus the only African state that has definitively withdrawn from the ICC, a decision that came into force in October 2017.³ There is now an ever-present challenge — and opportunity — to reflect on perceptions and misperceptions about the Court.

¹ Pap, S. and Jahateh, L. (2017) “Gambia Announces Plans to Stay in International Criminal Court”, *Reuters* (World News), 13 February [online]. Available at: uk.reuters.com/article/uk-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUKKBN15S2HD (Accessed: 14 May 2018).

² Onishi, N. (2017) “South Africa Reverses Withdrawal From International Criminal Court”, *The New York Times* (Africa), 8 March [online]. Available at: nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html (Accessed: 14 May 2018).

³ “Burundi becomes first nation to leave international criminal court”, *The Guardian* (Africa), 28 October 2017 [online]. Available at: theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court (Accessed: 14 May 2018).

Note that the ICC opened an official investigation into the situation in Burundi prior to the country’s withdrawal.

Assessments of the ICC-Africa relationship have often lacked nuance, something that has, in turn, undermined more sober reflections on the Court's work across the continent. A stubborn and binary view of the relationship persists, one which typically presents a barbaric Africa characterised predominantly by dictators seeking impunity, juxtaposed against a benevolent ICC acting on behalf of all victims. Viewing the ICC-Africa relationship in this way serves neither to advance international criminal justice, nor to further an understanding of the relationship between the Court and the continent.

The presentation of the ICC-Africa relationship in such a damaging dichotomous light is particularly evident in many media reports. In addition, many who are deeply committed to justice and who work towards achieving its aims tend to take this binary view, since it is more accessible and seen as "*advocacy-friendly*". Too often, the ICC and its proponents have not helped to alleviate this situation by clearly communicating the Court's mandate to a broader-based audience, preferring instead to rely on arguments which, far from helping improve the ICC-Africa relationship, have insisted that any tensions are likely due to a handful of "*dictators*" and that many African states have invited the Court to intervene via self-referrals.⁴

Needless to say, one cannot dismiss the fact that, from some quarters at least, anti-ICC sentiment emerges from an appetite for impunity. It seems clear, for example, that Burundi withdrew from the ICC to protect its government officials from the Court's scrutiny. Another narrative portrays the ICC as a racist institution intervening '*against*' African states.⁵ Again, states (and their allies) that have been the target of ICC investigations have often led the way with such allegations.⁶ However, neither of these rhetorically

flourished and blanket positions are useful.

One success of the Court is giving perpetrators of atrocities cause for concern about the prospect of being targeted by the ICC. State and non-State actors who believe this to be a distinct possibility, or who have already been the subject of an ICC arrest warrant, will seek to undermine the Court by drumming up and tapping into anti-ICC sentiment. At the same time, reducing all African criticisms of the ICC to a simple quest for impunity is disingenuous, and risks damaging the Court and **Rome Statute system**. Many of the ICC's most cogent critics are proponents of justice and accountability but are disenchanted or disappointed with the Court's record and impact.

More latitude in understanding and framing the Africa-ICC relationship is needed. The ongoing lack of nuance has several effects: firstly, by treating the continent as an indivisible whole, it unnecessarily entrenches polarising divisions between the Court and African governments and communities. In reality, it is clear that within Africa, positions on the ICC vary widely, ranging from fully supportive to harshly critical. Whereas some states see the Court as an integral part of a functioning global system, others see it as a useful means to castigate and stigmatise domestic opponents.⁷ Some view it as a threat, whilst others may simply view it as largely irrelevant to their political prerogatives. Communities within African states also have divergent views of the Court, though these are rarely understood or studied in any comprehensive manner. Some view the Court positively and believe that it has done well in combating impunity; others have been left disappointed by what they see as the ICC's unfulfilled expectations, are concerned that the ICC has targeted only certain actors and not others, and have voiced worries over the Court's impacts on peace processes and domestic political situations.

Despite the multiplicity of complex and competing interests, within the debate over the Africa-ICC

⁴ "ICC debate: Africa vs 'Infamous Caucasian Court'?", *Al Jazeera* (Africa), 28 October 2016 [online]. Available at: aljazeera.com/news/2016/10/icc-debate-africa-infamous-caucasian-court-161028142708060.html (Accessed: 14 May 2018).

⁵ "African Union accuses ICC of 'hunting' Africans", *BBC* (Africa), 27 May 2013 [online]. Available at: bbc.com/news/world-africa-22681894 (Accessed: 14 May 2018).

⁶ For example, Kenyan President Uhuru Kenyatta, whose case at the ICC was eventually withdrawn, described the Court is a "toy of declining imperial powers" Gathara, P. (2014) "Did Kenya get justice at the ICC?", *Al Jazeera* (Opin-

ion), 7 December [online]. Available at: aljazeera.com/indepth/opinion/2014/12/did-kenya-get-justice-at-icc-201412754837787870.html (Accessed: 14 May 2018).

⁷ Kersten, M. (2016) *Justice in conflict: the effects of the International Criminal Court's interventions on ending wars and building peace*. Oxford University Press.

Preliminary Examinations
Afghanistan
Colombia
Gabon
Guinea
Iraq/UK
Nigeria
Palestine
The Philippines
Ukraine
Venezuela
Situations under Investigation
Uganda
The Democratic Republic of the Congo
Darfur, Sudan
Central African Republic
The Republic of Kenya
Libya
Côte d'Ivoire
Mali
Central African Republic II
Georgia
Burundi

Table: ICC situations and cases

relationship the continent is too often reduced to a singular edifice. This has the effect of encouraging recourse to deeply problematic and over-simplified narratives, and narrowing the space for discussion about the varying views in Africa, thereby limiting the possibility of engaging in constructive conversation and identifying practical solutions.

Secondly, in framing the options as “*ICC justice versus impunity*”, the intellectual space for difficult and broader conversations is often reduced. This includes, but is not limited to, critical debates on the meaning of justice, the types of justice that the ICC can and cannot provide, and the expectations raised by international criminal justice through various proclamations about what it can achieve.⁸

It is important to note that the misgivings voiced about the ICC are rarely those of victims. By focusing on States, their governments and, in particular on heads of state, the voices of other important actors are often silenced and a state-centred discourse perpetuated. While heads of state, individually and collectively (e.g., through the AU or UN), have ample opportunity to express their concerns and extensive publicity is given to these views, it is the complex and multi-faceted voices of victims that need greater attention.

It is therefore necessary to engage with victims and hold conversations regarding approaches to justice. It is likewise important to engage with other actors, including the **ICC Office of the Prosecutor (OTP)**, as well as the lawyers, civil society, activists, survivors and people working with them, in order to establish what victims are truly seeking. For instance, whereas some northern Ugandan survivors want former Lord’s Resistance Army commander, **Dominic Ongwen**, to be sentenced to prison, others would prefer to see him granted an amnesty and more resources and attention instead devoted to education for their children or other forms of development. Rather than posing a threat to international criminal justice, understanding these positions — and respecting them — should enrich debates about how accountability can and should be achieved.

Genuine differences of opinion about justice, accountability, and the ICC’s role therein, should not be ignored. Nor should one forget whom the Court is serving. It is vital to recognise that in framing the international justice conversation in a binary fashion, the multiplicity of potential harms, needs, and demands of victims and survivors of ICC crimes are too often neglected or altogether excluded. Recognising this reality is the first step towards changing it.

Finally, when issues are presented as a simplistic duality of good (the ICC and its champions) versus evil (the Court’s critics and detractors), or alternatively, evil (the ICC) versus good (African governments), an opportunity

⁸ On the importance of managing expectations, see:

Cronin-Furman, K. (2013) *Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity*. International Journal of Transitional Justice, 7(3), 434-454.

to engage critically is missed. Crimes have been committed in Africa and around the globe. Accordingly, the challenge is to build an ICC that is able to respond fairly and credibly to the global, rather than a merely continental, demand for effective accountability and impartial justice.

Understanding the ICC's Case Selectivity

When looking at the perceptions relating to the ICC's impacts in Africa, one also needs to reflect on how the African cases came before the ICC. Of the eleven situations before the ICC, five have been the result of self-referral, two have been the consequence of a **United Nations Security Council (UNSC)** referral, and four have been initiated *proprio motu* (on the Prosecutor's own volition). Such factual information, despite being repeatedly used in defence of the Court, has never benefited from the kind of coverage so freely given to the provocative statements made by high officials (such as the Ethiopian prime minister famously charging the ICC with race hunting in 2013).⁹ The Court has not been, and will never be, able to match the resources used by powerful governments to make their positions on the ICC widely known. The result is that negative and misleading information about the Court and its investigations often prevails.

Some of the reasons for these misperceptions resonate with public expectations, expectations that are based on past experiences and often seen through the lens of post-colonialism. Such notions legitimise claims that the ICC is targeting Africa. Additionally, legitimate concerns about the Court play a key role in the perceptions of the ICC as being "*biased*" or "*targeting*" African states. While the ICC is not targeting Africa, it is a difficult impression to fight against due to its lack of attention to alleged crimes committed by individuals from powerful governments outside the continent. Compounding this is the reality that, in the sixteen years of the Court's existence, not a single non-African has been indicted by the ICC.

The reality that powerful states such as the USA, China,

and Russia have not joined the ICC also plays into debates on the ICC's relationship with Africa, as do suggestions by the Prosecutor that the Court is part of the "*Responsibility to Protect*" toolbox.¹⁰ As permanent member states of the United Nations Security Council, these three super powers can block Council action to refer situations to the ICC on the basis of political considerations. In addition, when the UNSC has referred situations to the ICC in the past (**Darfur** in 2005¹¹ and **Libya** in 2011¹²), these states have tailored their referrals to ensure that their citizens would be protected from any investigation or prosecution by the Court. In short, in their capacity as non-member states of the ICC, all three have an disproportionate ability to determine where the Court will and will not investigate. This only reinforces perceptions of the ICC being unfair towards Africans.

Regarding the selection of situations under investigation by the ICC, it is useful to distinguish two aspects:

- Firstly, the reason(s) why the ICC has intervened in specific African states; and
- Secondly, the reason(s) why it has not intervened in other situations that warrant investigation.

Of the Court's eleven investigations in Africa, five have been the result of self-referrals, whereby the ICC has been requested by the relevant African State to investigate crimes on that state's territory. This is often held up by the ICC and its proponents as a defence of the Court's interventions on the continent, i.e., the ICC was "*invited*". African states, however, have generally been most concerned not with investigations that followed self-referrals but those investigations initiated *proprio motu* or following a Security Council referral and which resulted in government officials being targeted.¹³

¹⁰ Ainley, K. (2015) *The Responsibility to Protect and the International Criminal Court: counteracting the crisis*. International Affairs, 91(1), 37-54.

¹¹ United Nations Security Council resolution 1593 (2005), S/RES/1593, 31 March [online]. Available at: icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf (Accessed: 14 May 2018).

¹² United Nations Security Council resolution 1970 (2011), S/RES/1970, 26 February [online]. Available at: securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20RES%201970.pdf (Accessed: 14 May 2018).

¹³ Kersten, M. (2017) "Between Disdain and Dependency — Uganda's Controversial Place in the ICC-Africa Relationship", *Justice in Conflict*, 29 March [online]. Available at: justiceinconflict.org/2017/03/29/

⁹ "African Union accuses ICC of 'hunting' Africans", *BBC (Africa)*, op. cit.

It is evident that all of the situations under investigation by the ICC warrant the institution's attention; they are situations where international crimes of sufficient gravity have been committed and where accountability for those crimes remains elusive. However, what such a defence of the ICC does not address is why the Court has not opened official investigations in all but one situation outside the continent (Georgia). While repeating the assertion that African states invited the ICC is thus important in setting the record straight, it is nonetheless essential to understand that it has also done little to assuage the concerns of those who view the Court's attention as being disproportionately focused on Africa. It is time for a change in both tone and message.

There is currently only one official ICC investigation outside Africa — **Georgia** — and several other preliminary examinations in countries outside the continent, including **Afghanistan** (where alleged war crimes by US forces are under examination), **Colombia**, **Palestine**, **Venezuela**, the **Philippines**, as well as crimes allegedly committed by the **United Kingdom's** armed forces deployed in Iraq. These preliminary examinations, particularly in the wake of ICC Prosecutor's request to open an investigation into the situation in Afghanistan in late 2017, may foreshadow a significant shift in the Court's geographic focus.

In many situations, the limitations of the ICC's jurisdiction are evident. Many situations are in dire need of accountability, e.g., **Syria**, **Myanmar** and **North Korea**. However, as none of these states is a member of the Court, and the UNSC is either unwilling or unable to refer them to the ICC, the Court is powerless to intervene. This remains a concern, as it gives the impression that international justice does not occur on a level playing ground. This negative consequence of global power dynamics is unfortunately not likely to change in the foreseeable future. However, there are ways of preventing these realities from undermining the relationship between African constituents and states and the ICC.

As things currently stand, the selectivity of the UNSC is blamed on the ICC. To help counter this, governments

and proponents of international criminal justice should push for reforms to address the uneven distribution of accountability that results from the actions (and inaction) of the Security Council. This includes getting the UNSC to effectively address ICC-Africa issues, rather than leaving it up to the Court alone to answer for Security Council referrals. In so doing, African states would be laying the most significant problem before the actors that have, at least to a significant extent, caused it. The ICC cannot and should not be expected to carry the load resulting from UNSC failures. Here, ICC member states should call for and support high-level engagement between the **African Union (AU)** and the Security Council regarding the latter's use of the Court. They could do so by a collective resolution at the **ICC's Assembly of States Parties (ASP)**, thus lending support to and expressing solidarity with the legitimate desire to improve the relationship between the Court and Council, and, by extension, between African states and the ICC. More should likewise be done to ensure that no UNSC referral includes provisions for impunity for citizens of non-member states. Such carve-outs are rightly offensive to African critics of the Court and proponents of equitable accountability worldwide. The ICC should also consider being more outspoken in its opposition to referrals, which may, by excluding citizens of non-member states, entrench selective justice.

At the same time, civil society actors should be encouraged to continue playing an important role in bringing the voices of victims to the fore and in working to counter the backlash against the ICC. New strategies are required to give greater prominence to victims, who are too often left out of debates on the ICC.

With regard to the ICC, it is not sufficient for the institution and its supporters to complain that they are simply misunderstood by the media. A far more proactive strategy should be developed, one that seeks to tell the Court's story as well as educate the public about its work. The ICC Prosecutor and President should be encouraged to use media platforms more regularly, e.g., by employing a leading newspaper column to transmit the Court's message. Like previous tribunals, representatives from the ICC's various organs should consider holding regular media activities where the institution's work can be described in easily understandable terms and questions from the global

media can be thoroughly answered. While the ICC has increased its social media activity, more can be done, especially given social media's capacity to offset the influence of actors who have many more resources to expend on traditional media platforms.

Another means of improving the relationship would be to create an ICC liaison office in Addis Ababa and an AU office at the ICC. This would be helpful in ensuring effective lines of communication between the two entities on the challenges facing the ICC and its relationship with Africa. It would also help pro-ICC states and the Court to work actively together to tackle misperceptions about the ICC. Meetings in Addis Ababa with ambassadors, AU staff and ICC representatives would be an important means of diffusing the tensions and tackling legitimate concerns in a co-operative, respectful and productive manner.

Popularising positive developments relating to the ICC and Africa is of critical importance. The reality is that negative developments, such as The Gambia's withdrawal from the ICC under Jammeh, receive far more media attention than do positive developments, such as the country's subsequent re-commitment to the ICC under Barrow. Other notable developments which need to be publicised include those occasions where states speak out against attacks on the ICC in the wake of threatened or actual withdrawals because, as a rule, this chorus of support goes unheralded in the media.

Similarly, coverage of the recent AU decision to adopt a so-called "**ICC Withdrawal Strategy**"¹⁴ was misleading in the extreme. Indeed, the adopted Strategy was far from being any such thing, and was ultimately subjected to numerous reservations from AU member states.¹⁵ In essence, the Strategy was largely a series of reform proposals, many of which were constructive and intended to act as a foundation to improve the ICC, both as an institution and in its relationship with African states. Moreover, mass withdrawal — something

threatened by some African states — was explicitly condemned. However, because of its incendiary title, the report led to widespread coverage of an ICC facing a "*crisis*" of a mass exodus of member states from its ranks.¹⁶ This is a stark reminder of the need to invest resources in encouraging states to frame their ICC policies through positive, rather than negative, rhetoric. The "*ICC Withdrawal Strategy*" could have been better and more accurately entitled the "*ICC Reform Strategy*".¹⁷

While the ICC may not be able to match states or other entities in funding its communications strategies, it can benefit from smart, strategic communications that both advocate its mission and help dispel widespread misconceptions about its work — without relying on clichés or singularly unsuccessful claims, such as the argument that its operations on the continent are due to it being invited via self-referrals.

The ICC and the AU — The Need for Engagement

It is essential that, rather than the traditional confrontational approach with lines drawn in the sand, all the relevant actors — states, the ICC, the Security Council, community leaders, etc. — approach the issue of ICC-African relations with a far greater willingness to listen and understand the others' positions. All sides must learn and strive, wherever possible, to achieve compromises that further the project of global justice.

The AU's "*ICC Withdrawal Strategy*" contains a number of legal and political strategies available to the **AU's Open-Ended Committee of Ministers** on the ICC. The document contains strategies for engaging with the Court, the Assembly of States Parties of the ICC (ASP) and its subsidiary organs, the President of the Assembly of States Parties (PASP), the OTP, the Presidency of the ICC, and the UNSC.

¹⁴ African Union, Withdrawal Strategy Document (2017) [online]. Available at: hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf (Accessed: 14 May 2018).

¹⁵ Keppler, E. (2017) "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye", *Human Rights Watch*, 1 February [online]. Available at: hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye (Accessed: 14 May 2018).

¹⁶ "African Union backs mass withdrawal from ICC", *BBC (Africa)*, 1 February 2017 [online]. Available at: bbc.com/news/world-africa-38826073 (Accessed: 14 May 2018).

¹⁷ Kersten, M. (2017) "Not All it's Cracked Up to Be – The African Union's 'ICC Withdrawal Strategy'", *Justice in Conflict*, 6 February [online]. Available at: justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy (Accessed: 14 May 2018).

As suggested above, much of the criticism of the ICC by African constituencies and states (as well as those beyond the African continent) centre on the role of the UNSC. The AU has had numerous tense engagements with the Council regarding requests for deferral in relation to investigations in Darfur, Libya and Kenya. Such requests have generally fallen on deaf ears, leaving states with a sense of not having received the respect due from UNSC member states. Similarly, the AU Open-Ended Committee has been trying, unsuccessfully, to meet with the members of the UNSC to discuss issues pertaining to the ICC.¹⁸ The Committee has, at times, felt slighted by the Security Council, as their concerns remained largely unaddressed and the Council has refused to meet Committee members at the highest levels. While this behaviour is solely and exclusively the result of Security Council machinations, it ultimately undermines the Court and its relationship with African states.

Still, it is evident that the AU and many of its member states remain open to engagement. The Withdrawal Strategy makes this clear, as does the confirmation of support for the ICC by numerous AU member states following its adoption.¹⁹ In light of this, it is necessary to seize the opportunities to engage specifically with the ASP and its President on concerns that can be resolved at the ASP level. If the opportunity for engagement follows a more nuanced approach, it could provide an opportunity for deliberating constructively and proposing reforms to improve, rather than undermine, the functioning of the ICC.

An underlying issue facing many African states is the lack of the requisite capacity and, at times, political will to address international crimes. The latter is particularly true in cases where states, such as Burundi, are themselves alleged to have committed atrocities amounting to international crimes. A lack of capacity has also led states, like the **Central African Republic (CAR)** and **Mali**, to refer themselves to the ICC. In addition to a lack of judicial and investigatorial

capacities, many states do not have the necessary national legislation to prosecute core international crimes effectively, while others are at various stages of enacting such legislation. Even where investigations and prosecutions in countries with relevant legislation have taken place, this has not been without its challenges. This is, of course, not an issue unique to African states. Investigating and prosecuting international crimes is resource-intensive, politically charged, and immensely difficult — no matter where it takes place. More resources must be devoted to building the capacity of domestic judiciaries to genuinely and effectively investigate and prosecute international crimes committed on their territory.

Withdrawal from the ICC is clearly not a feasible option for addressing these gaps, nor would it further the trend of African leadership in issues of international justice. Instead, withdrawals may serve to threaten the existence of national legal frameworks designed to address international crimes. The Court is, inevitably, imperfect. It needs reforms and improvements, ranging from the witness protection system to communications and outreach, victims' representation, resource allocation, and reparations. However, withdrawing from the Rome Statute, attacking the Court, and spreading misperceptions about the ICC detract from efforts to address the issues and concerns of international criminal justice constructively. Indeed, through the ICC's pronounced policy of positive complementarity, whereby the Court seeks to galvanise and encourage domestic investigations and prosecutions of international crimes, states may be able to gain effective access to resources and expertise to achieve justice for international crimes committed against their citizens. Relinquishing membership means losing the benefits of a working relationship with the Court.

Finally, it is worth stressing that, for many victims of international crimes, the ICC may, in many instances, also be the only viable option for access to justice. In this context, ICC member states have a role in ensuring the effective functioning of the Court; and Africa, as the largest bloc of states parties to the Rome Statute, and the one with most cases before the Court, has a unique opportunity to improve the ICC through continued and constructive engagement.

¹⁸ Lamony, S. (2016) "Gabon Refers Itself to the ICC as Others Threaten to Withdraw", *Justice in Conflict*, 19 October [online]. Available at: justiceinconflict.org/2016/10/19/gabon-refers-itself-to-the-icc-as-others-threaten-to-withdraw (Accessed: 14 May 2018).

¹⁹ African Union, Withdrawal Strategy Document (2017), op. cit.

THE ICC, THE UN SECURITY COUNCIL, AND HEAD OF STATE IMMUNITY



What is the relationship between the **ICC** and the **UNSC** and how has it influenced African criticism of the ICC?

What can the ICC and relevant actors do to ameliorate this relationship and address concerns for African states?

What are the current tensions regarding Head of State immunity at the ICC?

Can they be rectified and, if so, how?

The ICC's UNSC-Related Challenges

The relationship between the **ICC** and the **UNSC** goes to the very heart of many of the problems in the ICC-Africa relationship.¹ It is crucial to analyse when, why, and where these tensions emerged. Disagreement over the relationship between the Security Council and the ICC was already at the core of discussions at the Rome Statute conference.² The **USA**, in particular, was opposed to the notion of a fully independent ICC Chief Prosecutor, and wanted to ensure that the Court's jurisdiction could solely be triggered by the Council.³ In the end, a compromise was found whereby the Council could refer situations to the ICC but so too could states and, in cases where the Court already had jurisdiction, the ICC Prosecutor could seek to open an investigation *proprio motu*. Additionally, the UNSC can temporarily put a halt to ICC prosecutions and investigations under Article 16 of the Rome Statute, though this requires a positive vote from (at least) nine members of the Council Members and a single veto from one of the Permanent 5 Members can jettison an attempt to defer an ICC investigation or prosecution. In other words, any political intrusion into an ongoing investigation by the Prosecutor of the ICC would require a very high threshold. It is worth stressing here that it was the promise of an independent Court and Prosecutor that galvanised African states and developing nations into joining the ICC.

¹ Arbour, L. (2014) *The Relationship between the ICC and the UN Security Council*. Global Governance: A Review of Multilateralism and International Organizations, 20(2), 195-201.

² Glasius, M. (2006) *The International Criminal Court: A global civil society achievement*. Routledge.

³ Schabas, W. A. (2004) *United States Hostility to the International Criminal Court: It's all about the security council*. European Journal of International Law, 15(4), 701-720.

For many in and outside of Africa, reform of the Council itself is at the core of criticisms of the UNSC. However, given the unlikelihood of this occurring in the near future, means of improving the ICC-Security Council relationship and helping to ensure that the political baggage of Council decision-making does not infect the ICC's standing and reputation are critical. The Court's relationship with the UNSC needs to be reformed, but the Council's lack of representativeness and its ineffectiveness in many cases should not be used by African states as a pretext to withdraw from the ICC. The evident failures of the Security Council pre-date the ICC and, despite this, African states have invested heavily in a just and fair international order as well as the international criminal justice project. The Council's shortcomings should not be conflated with the work of the ICC; it would be counter-productive to *'throw the baby out with the bath water'*. On the contrary, more needs to be done to shield and insulate the Court from the damaging political machinations of the Council — and African states can and should take the lead in doing so. Again, constructive engagement with both Court and Council is called for.

The core concerns of African states regarding the Council's relationship with the Court are understandable. Indeed, it is important to stress that they are relevant to all proponents of international criminal justice within and beyond the African continent. Put another way, no proponent of the ICC is content with the role played thus far by a selective, politicised and unrepresentative body like the UNSC. However, the possibility of the **AU** largely ending all attempts to engage actively with the Security Council on these issues is worrying and potentially counter-productive. Notably, disengagement is not reflected in the *"ICC Withdrawal Strategy"* itself. On the contrary, it encourages ongoing engagement with the Council on the part of AU states. The Council must also do its part to ensure that constructive dialogue persists.

The nature of Security Council referrals remains problematic. In particular, the lack of funding for

Court initiatives deriving from referrals, as well as the exemptions to ensure immunity for citizens of non-member states, have sparked criticisms of the ICC-Security Council relationship. These are manifest infringements of the **OTP's** capacity to investigate and prosecute effectively and impartially. It should be clear that the Prosecutor is not duty-bound to accept all referrals; discretionary powers are recognised by the **Rome Statute** and the Prosecutor should be encouraged to use all means at his/her disposal to distance the Court, legally and politically, from any overt attempt to politicise the OTP's mandate via UNSC referrals. The prosecutor has on several occasions voiced her criticism of the UNSC's failure to support their own referral, albeit without any results.⁴ But the Prosecutor has been hesitant to confront the Security Council when it comes to interpreting and acting upon Council referrals, particularly with respect to the carve-out for citizens of non-member states. Doing so would demonstrate to African states and proponents of international justice that the Court is willing to confront the legally questionable and politically tailored elements of UNSC referrals.

Another critical issue pertains to the implementation or non-implementation of Article 16 under Chapter VII of the Rome Statute with regard to ICC situations.⁵ African states have, on a number of occasions, requested that the Security Council exercise its ability to defer situations under ICC investigation (for 12 months, renewably). However, states perceive an unwillingness on the part of the Council to engage genuinely with deferral requests. The core criticism among African

⁴ "Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)", *The International Criminal Court*, 13 December 2016 [online]. Available at: icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur (Accessed: 14 May 2018).

⁵ For a thorough analysis of Article 16 in relation to the Africa-ICC relationship, see: Akande, D., du Plessis, M. and Jalloh, C. (2010). *Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC*. Florida International University Legal Studies Research Paper, 17(33).

states is thus that their views on this matter have not been sufficiently heard or considered. There has been little-to-no transparency from the Council on decisions not to exercise Article 16 or, in some instances, to even debate the matter. This issue also speaks to an ongoing question regarding Article 16, namely: how far should the UNSC be allowed to exercise such authority over an independent body and under what conditions would invoking Article 16 be justified? Some believe that it should never be able to do so. Others submit that Article 16 should only be invoked in extreme cases where it can be clearly demonstrated that an ICC investigation or prosecution would otherwise threaten international peace and security. It is clear that if Article 16 were to be exercised, it should be done in such a way that establishes precisely how prosecutions might affect ongoing peace processes and how deferring such investigations or prosecutions would contribute positively to peace process or conflict resolution. This did not occur when deferrals were requested by African states in the cases of **Kenya, Darfur** or **Libya**. Much more thought should be given to the conditions under which Article 16 can be invoked and what the beneficiaries of its invocation should be required to achieve in the intervening twelve months. This current lacuna offers the possibility of collaborative efforts among regional and international scholars and diplomats to develop guidelines on the application of Article 16.

The issue of immunities for heads of state, and of non-member states in particular, remains controversial for many African states and, indeed, for scholars of international criminal justice who have come to contradictory and conflicting conclusions on the issue.⁶ There have been numerous situations where

the ICC has dealt with the non-cooperation of states in arresting and surrendering fugitives. An instance of this is provided by the cases of **Malawi, Chad, South Africa**, and **Jordan**, all of which hosted Sudanese President **Omar al-Bashir**, who is wanted on charges of war crimes, crimes against humanity, and genocide allegedly perpetrated in Darfur. States, including ICC member states, argue that customary international law, as well as their diplomatic relationship with Bashir, are in conflict with their obligations to the Court. While ICC judges have ruled on the issue of non-cooperation and on the specific issue of Bashir's immunity on numerous occasions, no resolution has been attained.

It is essential that states explore avenues within the Rome Statute regime to resolve the matter of head of state immunity before the ICC. Notably in this regard, the African Union has resolved "*to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law*".⁷ It is likely that the AU will request the UN General Assembly to put forward a question to the **ICJ** in September 2018. What remains unclear is the scope of the question that might be put forward to the ICJ. But there is reason for cautious optimism that an ICJ opinion could provide a degree of clarity on the obligations of states with regards to head of state immunity as well as to the ICC. Critically, this is not about weakening the ICC or about impunity versus justice, but about finding a middle ground that respects the Rome Statute and helps to ensure the efficacy of the international criminal justice project.

The issue of head of state immunity also goes to the core of the ICC-Security Council relationship. One issue worth reflecting upon in this context is the proposal made by the South African government on rules and procedures with regard to Article 97 of the Rome Statute, which pertains to consultations between the Court and states when the execution of a surrender "*would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another*

⁶ See:

- Akande, D. (2009) *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*. *Journal of International Criminal Justice*, 7(2), 333-352.
- Kiyani, A. G. (2013) *Al-Bashir & the ICC: The Problem of Head of State Immunity*. *Chinese Journal of International Law*, 12(3), 467-508.
- Du Plessis, M. (2017) *Africa and the International Criminal Court*. Chatham House [online]. Available at: chathamhouse.org/expert/comment/time-resolve-debate-over-immunity-and-international-criminal-court (Accessed: 14 May 2018);
- Gaeta, P. and Labuda, P.I. (2018) 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases' in Jalloh, C.C. and Bantekas, I. (eds.) *The International Criminal Court and Africa*, pp.138-162.

⁷ African Union (2018) *Assembly/AU/Dec.672(XXX)* [online]. Available at: au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf (Accessed: 14 May 2018).



State".⁸ South Africa proposed "[t]hat clear rules and procedures be developed on the application of Article 97 requests by States Parties to the Court for consultations to resolve problems that they may experience which may impede or prevent the execution of cooperation requests by the Court".⁹ Pretoria's primary concern pertained to its refusal to surrender and arrest Sudanese President Omar al-Bashir to the ICC and thus to its alleged inability to surrender heads of state to the ICC as a result of competing legal obligations (*see below*). While there is a broad consensus among advocates of international criminal justice that the government of South Africa erred in claiming that it could not arrest Bashir, this proposal remains sensible and would improve the functioning of the Court.

South Africa, the ICC, and the Bashir Question

The South African decision not to enforce the arrest warrant against Sudanese President Omar al-Bashir during his visit in June 2015 is an instructive example of the arguments regarding the ongoing issue of head of state immunity before the ICC.

The main argument put forward by the South African government for failing to arrest Omar al-Bashir was that doing so would contradict the government's obligations under customary international law to provide Bashir, a sitting head of state of a non-member state of the ICC, with immunity while visiting the country. Nonetheless, the South African Constitution is clear: customary law will only apply when it does not clash with constitutional law or domestic law. Moreover, it makes little sense to afford immunity to heads of state under customary law when the Rome Statute and South Africa's ICC Act contradict this.

⁸ The International Criminal Court (1998) 'Article 97' in *Rome Statute of the International Criminal Court*, A/CONF.183/9.

⁹ International Criminal Court Assembly of States Parties (2015), 'Annex I' in *List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly*, ICC-ASP/14/35 [online]. Available at: asp.icc-cpi.int/iccdocs/asp_docs/asp14/icc-asp-14-35-eng.pdf

In terms of the Rome Statute, there remains an apparent conflict between Articles 27 and 98, a conflict that African states have raised on numerous occasions.

Article 27 speaks to the irrelevance of official capacity and states that the Rome Statute shall “*apply equally to all persons without any distinction based on official capacity and that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*”.¹⁰

Article 98 states that “*the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity*”.¹¹

It further states that “*the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender*”.¹²

The relationship between these two articles goes to the heart of disagreements over the surrender of indicted leaders such as Bashir. Importantly, African states have shown a willingness to engage and find a resolution to potential tensions between Articles 27 and 98. In January 2018, the African Union declared that it would “*request the ICC Assembly of States Parties to convene a working group of experts from its member states to propose a declaratory/interpretative clarification of the relationship between Article 27 (irrelevance of official*

capacity) and Article 98 (Cooperation with respect to waiver of immunity and consent to Surrender) and other contested issues relating to the conflicting obligations of States Parties to cooperate with the ICC”.¹³

A number of additional possible lessons can be drawn from how the question of head of state immunity played out in South African courts with respect to Bashir.

- Firstly, amongst proponents of international criminal justice, there is a clear consensus that Bashir is a wanted criminal and must answer the charges against him.
- Secondly, the international community needs to adjust its expectations of international law and understand and appreciate what it can actually achieve.

The ICC may be impotent in enforcing its warrant against Bashir but, despite his increasingly regular visits to states across the world, the Sudanese President cannot travel wherever he wants, due to the fact that he is constrained by the ICC arrest warrant. While it should not be overstated, in light of the ultimate aim of achieving justice for the victims of Bashir's alleged crimes, this is nevertheless a small but important victory for international justice, in that courts are still here to make the world a smaller place for perpetrators of mass atrocities.

Following Burundi's notice of withdrawal from the ICC in October 2016, and eight months after the South African Supreme Court of Appeal's ruling that Pretoria's failure to arrest Bashir was unlawful, South Africa announced that it too would withdraw from the ICC. In the process of depositing its withdrawal at the UN, the South African government indicated that it had thereby absolved itself of legally tackling the Bashir matter. This claim was successfully challenged in court by **Civil Society Organisations (CSOs)** and parliamentarians¹⁴, since withdrawal from the Rome Statute does not absolve South Africa of its duty under domestic law to arrest Bashir. In addition, the constitutionally

¹⁰ The International Criminal Court (1998) 'Article 27' in *Rome Statute of the International Criminal Court*, A/CONF.183/9.

¹¹ The International Criminal Court (1998) 'Article 98' in *Rome Statute of the International Criminal Court*, A/CONF.183/9.

¹² The International Criminal Court (1998) 'Article 98', op. cit.

¹³ African Union (2018), op. cit.

¹⁴ *Democratic Alliance v Minister of International Relations and Cooperation and Others* (2017) 83145/2016 (South Africa), ZAGPPHC 53; 2017 (3) SA 212 (GP) [online]. Available at: saflii.org/za/cases/ZAGPPHC/2017/53.pdf (Accessed: 14 May 2018).

mandated process of withdrawal, which would require that Parliament debate any withdrawal bill prior to an executive order to withdraw South Africa from the ICC, had not been followed by the government. This highlights the importance of the domestic rule of law, civil society, and courts in achieving accountability for international crimes. All three are fundamental to the international criminal justice project.

On two occasions — the failure to arrest Bashir and then the failure to follow the correct withdrawal procedure — domestic courts castigated the South African government. In all of the judgments, the courts noted the importance of the international criminal justice system and its role in the fight against impunity.¹⁵ It is important to recall here that CSOs brought these cases in very trying circumstances: the **Southern Africa Litigation Centre** faced severe criticism from, for example, **African National Congress** members who falsely accused it of being a front for the American Central Intelligence Agency.

When dealing with such issues of international criminal justice, it is important to recognise, firstly, that the courts have a role to play. However, these matters cannot always be left to the courts. Whilst judicial institutions are essential, it is unsustainable for them to be the sole champions of international justice. Governments need to be reminded that justice and the rule of law are also about good governance and that, if they want to take decisions, such as withdrawing from the ICC, they need to consult the public and allow for vigorous debate. This was patently not the case in South Africa.

In addition, the South African government failed to explain the urgency of or justification for withdrawal. The reasons cited for the country's proposed withdrawal and failure to arrest Bashir include the contention that there is an alternative African court with criminal

jurisdiction over international crimes, a questionable assertion given the country's failure to sign or ratify the **Malabo Protocol**. With fifteen ratifications, the Malabo Protocol would come into force and indeed create such a court.

That said, there is also a need to think about alternative ways of resolving the impasse. It is more useful to have South Africa, and indeed all ICC member states, engage and remain part of the system, than to abandon it. South Africa can and should play a leading role in galvanising a compromise on the issues raised in the wake of Bashir's visit. It is in an ideal political and legal position to do so. There are numerous means "*to move the ball forward*", for African states and the AU. This could include pushing the UNSC to interpret its own resolutions and state clearly whether or not referrals of a non-member state include a waiver of head of state immunity. Referring any outstanding legal questions pertaining to head of state immunity and the Rome Statute to the International Court of Justice as the African Union has pledged to do is another option. While South Africa decided not to appeal the Pre-Trial Chamber's June 2017 judgement against South Africa over the non-surrender of Bashir to the ICC, the ICC Appeal's Chamber will rule in a similar case regarding the visit — and non-surrender — of Bashir to Jordan in 2017. Notably, ICC Judges in this instance have invited *amicus curiae* from various parties including, explicitly, the African Union.¹⁶ This represents a welcome and potentially fruitful means of continued engagement between African states and the ICC on the matter of head of state immunity before the Court.

Above all, the lesson of Bashir's visit was that there is a clear and pressing need to find compromises that keep states in the ICC whilst bolstering the effectiveness and positive impacts of the Court itself.

¹⁵

- *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (2016) 867/15 (South Africa), ZASCA 17; 2016 (4) BCLR 487 (SCA) [online]. Available at: saflii.org/za/cases/ZASCA/2016/17.pdf (Accessed: 14 May 2018).
- *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* (2015) 27740/2015 (South Africa), ZAGPPHC 402 [online]. Available at: saflii.org/za/cases/ZAGPPHC/2015/402.pdf (Accessed: 14 May 2018).

¹⁶ The International Criminal Court (2018) 'Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)' in *the Case of The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2 [online]. Available at: icc-cpi.int/CourtRecords/CR2018_01892.pdf (Accessed: 14 May 2018).

THE ICC, PEACE AND JUSTICE IN AFRICA



How do **ICC** interventions affect conflict resolution and peace-making?

How have the tensions and alleged contradictions between the pursuits of peace and justice informed concerns regarding the role of the ICC in Africa?

Can the tensions between achieving justice and ending wars be resolved? How should the ICC communicate its mandate and the limitations of its role?

The “*peace versus justice*” debate is a long-standing conversation that has accompanied many, if not most, developments in international criminal justice.¹ While international criminal justice was historically pursued following the end of active hostilities, today it is increasingly employed as a response to and purposed means of contributing to the resolution of ongoing conflicts.

Two broad positions define the peace-justice debate.

- The first is that there is “*no peace without justice*”. It suggests that international criminal justice is indispensable to the establishment and maintenance of peace and essential to ending violence by deterring crimes and marginalising perpetrators;
- The second, that there is “*no justice without peace*”, argues that an end to hostilities must be prioritised and that accountability may have to wait for peace to be secured before it is pursued, lest it undermine stability.

The debate between these two positions has been accentuated by the **ICC**’s — not entirely uncontroversial — penchant for intervening in situations of ongoing violent political conflict. Yet the empirical record on the actual effects of the ICC remains unclear. It is notable that, with reference to the relationship between peace and justice, the ICC President has soberly reflected that, “*there is no real answer to this*”.²

¹ See:

- Rachel, K. and Mobekk, E. I. R. I. N. (2007) *Peace and Justice: Seeking Accountability After War*. Cambridge: Polity Press;
- Wegner, P. S. (2015) *The international criminal court in ongoing intra-state conflicts: navigating the peace-justice divide*. Cambridge University Press;
- Kersten, M. (no date) *Justice in Conflict* [online]. Available at: justinconflict.org (Accessed: 14 May 2018);
- Hayner, P. (2018) *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict*. Routledge.

² Kersten, M., (2018) ‘A Step Back to Take a Step Forward — The Future of Justice in Conflict’ in Killingsworth, M. (eds.), *Who do the Laws of War*

The peace-justice debate has played an important role within the context of the Africa-ICC relationship. Some states, like **South Africa**, have argued that their interests in securing peace and acting as a peacemaker require it to meet with indicted individuals such as **Bashir**. More generally, the views of many victims and affected communities on what they see as the effects of the ICC on peace processes have often been neglected by the ICC. This was the case, for example, in northern Uganda, where the Court and its proponents espoused the positive effects which they believed the ICC's intervention would have but often neglected the concerns of communities, who felt that the Court might undermine a fragile peace process.³ This neglect has fuelled scepticism of the Court amongst some communities, a sentiment that feeds into the strained Africa-ICC relationship. This points to the need to improve the Court's outreach and communications efforts, and to accept the varied experiences and voices of conflict-affected communities.

Understanding the AU's Position on Peace and Justice

While the peace-justice debate resonates in quarters beyond the African continent, the fact that African states have been the primary theatre for ICC interventions means that African states and communities have had to grapple directly with the possible tensions between ICC accountability and conflict resolution.

Protect?: Civility, Barbarism and the Evolution of International Humanitarian Law, Cambridge University Press.

³ See:

- Apuuli, K. P. (2006) *The ICC arrest warrants for the Lord's Resistance Army leaders and peace prospects for Northern Uganda*. Journal of International Criminal Justice, 4(1), 179-187.
- Hovil, L. and Quinn, J. R., (2005) *Peace First, Justice Later: Traditional Justice in Northern Uganda*. Refugee Law Project, Working Paper No. 17 [online]. Available at: refugeelawproject.org/files/working_papers/RLP.WP17.pdf (Accessed: 14 May 2018).
- Branch, A. (2007) *Uganda's civil war and the politics of ICC intervention*. Ethics & International Affairs, 21(2), 179-198.

Frequently, ICC investigations and prosecutions are viewed as either a deterrent to violence and atrocities or as an incentive for potentially targeted belligerents to continue fighting. The drafters of the **Rome Statute** understood that the Court would operate with this tension and included two pivotal provisions to assist the balancing peace and justice:

- Article 16 on the deferral of investigations and/or prosecutions; and
- Article 53 (1), whereby the prosecutor may decline to initiate an investigation in the "*interests of justice*".

There are also other strategies that could be used at the discretion of the Prosecutor, such as keeping warrants of arrest under seal as well as timing the issuance and publication of an arrest warrant in order to be sensitive to developments in a peace process.

As mentioned above, Article 16 was envisaged as means of defusing potential tensions between the pursuit of ICC justice and the goal of protecting international peace and security. It is notable that African states have requested Article 16 deferrals in all of the situations referred to the ICC by the **UNSC** (in addition to the Kenyan situation). Rather than putting a full stop to relevant ICC investigations and prosecutions, such deferrals would put them on hold until the situation was no longer a threat to peace and security. Yet, the efforts of African states have been rebuffed. In some instances, such as the request of a deferral of the ICC's investigations in **Kenya**, which was voted upon by the UNSC despite not posing any threat to international peace and security, this may have been sensible. In the other cases, however, the UNSC has generally ignored the concerns of African states when rejecting an Article 16 deferral. This has led some African states, notably **South Africa**, to request an amendment to the Rome Statute which would vest the UN General Assembly with the power to defer ICC cases in the event that the UNSC has failed to act within the **AU's** proposed timeframe of six months. While interest in this proposed amendment—even on the part of its original promoters—has waned, insofar as it would promote greater democratic diffusion of authority within the Rome Statute system,



the amendment should be carefully considered and explored. Moreover, it would afford another way in which South Africa could demonstrate leadership as an ICC member state.

The meaning of “*interests of justice*” under Article 53 remains unclear and the **Prosecutor** has never applied this Article with respect to an ongoing peace process or conflict-resolution efforts. A 2009 OTP Policy Paper attempted to draw a distinction between “*interests of justice*” and “*interests of peace*”, which it saw as the prerogative of political entities such as the UNSC.⁴ Whilst evidently true, this argument belies the regularly invoked rhetoric that the ICC is indispensable, and even a “*road to peace*”.⁵ Given the staying power and

purchase of arguments within the peace-justice debate, plus the clear need to ensure that both peace and justice are achieved without one undermining the other, it would be useful for the OTP, as well as researchers, to re-invigorate the debate surrounding the “*interests of justice*”, and how guidelines on Article 53(1) might apply to contexts where fragile peace processes were ongoing. In the meantime, it would be useful for ICC staff to invoke fewer causal claims regarding the relationship between peace and justice. **ICC President Fernandez’s** observations on the lack of clarity on the relationship between peace and justice, is both candid and welcome in this regard.

For some states and in some contexts, the default position has been to argue for a sequencing of peace and justice.⁶ In this regard, it is important to stress

⁴ The ICC’s Office of the Prosecutor (2007) *Policy Paper on the Interests of Justice* [online]. Available at: icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (Accessed: 14 May 2018).

⁵ Bensouda, F. (2013) “International Justice and Diplomacy”, *The New York Times* (Global Opinion), 19 March [online]. Available at: nytimes.com

[com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html](http://nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html) (Accessed: 14 May 2018).

⁶ Snyder, J. and Vinjamuri, L. (2004) *Trials and errors: Principle and*

that both of the above-mentioned provisions are not permanent measures. A deferral under Article 16 can only “freeze” an ICC investigation or prosecution for 12 months but must be renewed when this period has elapsed. Under Article 53, the Prosecutor may always re-open the investigation at any time. Moreover, any sequencing of peace and justice must take care not to create perverse incentives whereby the authors of political violence retain the means to perpetrate atrocities in order to pressure the UNSC or other actors for an extension of an Article 16 deferral or other sequencing measure.

It is not impossible for states to be leaders in both the peace and justice enterprises. While the **South African government of Jacob Zuma** has contended that the relationship between peace and justice is central to its decision to withdraw from the ICC, successive South African governments have historically viewed the country’s role as a peace mediator and an ICC member state as manageable and reconcilable. For instance, in signing and ratifying the Rome Statute whilst engaging in the mediation of conflicts as far afield as **Burundi**, **Côte d’Ivoire** and **Liberia**, former President Nelson Mandela viewed both the ICC’s and South Africa’s efforts at peace-making as compatible, rather than conflicting, endeavours. In general, South Africa has been perceived as a leader in both fields. It is also important to stress that nothing in the Rome Statute precludes South African envoys — or those of any other African ICC member state — from playing a direct role in peace negotiations in situations such as **Darfur**.

It is important to avoid using the “*peace versus justice*” debate as a red herring. The Bashir case and its effects on conflict resolution and peace in Darfur was cited by South Africa as part of its decision to withdraw from the ICC, insisting that its obligations under the Rome Statute prevent it from playing an active role in this process. This is problematic, given that peace negotiations have stalled or failed on numerous occasions as a result of a number of factors beyond the ICC’s control and irrelevant to the Court’s investigations. The purchase of the “*peace versus justice*” debate leaves the ICC susceptible to criticism by certain actors who invoke

the debate for reasons that have little, or nothing, to do with fostering peace.

It is far from clear whether the ICC has had any significant impact on the current impasse. Still, the Court and its proponents have often insisted that the ICC has invariably positive effects on peace. More can be done to offer sober reflection on the Court’s impact(s). Effective outreach plays a critical role in shaping the perceptions surrounding the ICC’s involvement in conflict situations. Yet it is the OTP that is responsible for the bulk of ICC communications, by going into situations and propagating its own narratives, including the purportedly positive effects that the Court will have on a range of issues beyond criminal justice, including peace, reconciliation, development, etc. It is only at a much later stage that other organs of the Court, such as the **Victims and Witnesses Unit**, Registry and Presidency, tend to engage. This creates a distorted perception of what the ICC is doing in conflict situations. Of course the OTP plays an important role in showing the face of the Court but the other organs and the multiplicity of voices and perspectives they represent should also be involved. In general, more tempered rhetoric on what the ICC can achieve — and can’t achieve — would be advisable and would potentially create fertile ground to identify and elevate the positive effects the Court may have whilst minimizing the possible harm of its interventions.

Neither the view that peace should precede justice nor the ongoing concern that international criminal justice might undermine peace processes is per se at odds with the need for justice and accountability. Yet too often the two are seen as somehow diametrically opposed. In reality, however, the functioning relationship between peace and justice remains largely unknown, and indeed the ICC may have both positive and negative effects on peace processes and conflict resolution. What is needed, therefore, is an appreciation of the limitations of the ICC along with greater dialogue and co-ordination between those involved in peace-making and those involved in international criminal justice. This would not only respect the ongoing concerns of states and communities in Africa (and beyond), but it would also have the potential of transforming the all too often empty slogan of “*no peace without justice*” into a distinct possibility for states emerging from war.

THE ICC IN CONTEXT, AND REFORMING THE COURT FROM WITHIN



Challenges and Opportunities in International Criminal Justice

Institutions and tribunals set up to address international crimes have faced tremendous political resistance from leaders and their allies seeking to avoid accountability. They have been confronted by the double standards of global powers which render the **ICC** impotent in countries such as **Syria** and **North Korea**. They have suffered from institutional growing pains and failures that have hurt the perception of such courts and their efforts. Today, they are confronted with growing international populism and a political landscape often indifferent or, worse, actively opposed to justice. Despite these immense challenges, there remains a large appetite for international criminal justice, and that the project, albeit imperfect, is here to stay. What remains to be done is to reform and improve the developing system of international criminal justice.

In this context, it is important to stress that, while the ICC acts as a lightning rod for criticism, the Court is but one facet of a multi-layered network of judicial and quasi-judicial institutions seeking to highlight and address atrocity crimes and large-scale violence. Developments and successes at the domestic and regional levels, as well as the emergence of a new generation of hybrid courts, must also be considered in the context of constructing a global system of international justice. The ICC is not *'the only game in town'*.¹

¹ See:

- Hobbs, H. (2015) *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*. Chicago Journal of International Law, 16, 482.
- Van Schaack, B. (2015) *The Building Blocks of Hybrid Justice*. Stanford Public Law, Working Paper No. 2705110.
- Kersten, M. (2017) 'As the Pendulum Swings - The Revival of the Hybrid Tribunal', in Christensen, M. J. and Levi, R. (eds.) *The Institutions*

*With the **ICC** in its 16th year, what are the avenues available to States Parties to address their concerns from within the Rome Statute system?*

What legal avenues exist to rectify shortcomings and blind spots in the Rome Statute?

It is important to recall here that there have been developments of alternative forms of legal redress for grave crimes, which may suggest a somewhat more positive future for international justice. National authorities have been successfully investigating, prosecuting and trying atrocity crimes in **Bosnia, Uganda, Senegal, Colombia**, the **Democratic Republic of Congo (DRC)**, the **CAR, Rwanda**, and many other states. In Central America, the efforts of the UN-backed **International Commission Against Impunity in Guatemala** to strengthen the country's prosecutors and judges, helped bring about the conviction of former military strongman, **Efraín Ríos Montt**, for genocide in 2013. It also led to more recent trials for crimes that took place during Guatemala's civil war. The **Extraordinary African Chambers** were created in Senegal to investigate and prosecute **former Chadian President Hissène Habré** for war crimes and crimes against humanity committed during the 1980s, and has now successfully convicted him. The arduous, victimised process of bringing Habré to account has inspired others, including victims in **The Gambia**, to push for some similar recourse to justice. The hybrid model being developed in the CAR and the potential for a **Hybrid Court for South Sudan** both show promise. While the **Malabo Protocol** has yet to be ratified by the required threshold of 15 states, it too could eventually transform the **African Court for Human and Peoples' Rights** into an effective, complementary forum for the prosecution of international — as well as transnational organized — crimes.

The ICC can and does have a critical role in this system. It has been observed, for instance, that a number of judges in the DRC remain enthusiastic about the ICC, to the extent of even citing ICC jurisprudence in their own rulings. The **Rome Statute** played a pivotal role in the prosecution of militia leaders in **Kavuma** for the rape of young children.² It has also been used in non-

member states, such as India, to bolster the definitions of international crimes in domestic legislation.³ In the CAR, authorities have consistently reiterated that the new hybrid court, the **Special Criminal Court**, will be complementary to ongoing investigations by the ICC in the country.

Furthermore, important initiatives are under way, even in states where justice and accountability institutions are absent. While **Security Council** inaction has prevented referrals to the ICC of the situation in Syria, several European states, including **Germany, Spain**, and **Sweden**, are exercising national jurisdiction over individuals accused of atrocities in **Syria**.⁴ The Commission for International Justice and Accountability has collected thousands of pieces of documentary evidence of crimes committed in Syria since 2012 and has them ready for any eventual trial.⁵ In addition, in

Justice Monitor (News), 5 February [online]. Available at: ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo (Accessed: 14 May 2018).

³ Ramanathan, U. (2014) "The surprising impact of the Rome Statute in India", *openDemocracy* (openGlobalRights), 7 November [online]. Available at: ijmonitor.org/2018/02/the-kavumu-trial-complementarity-in-action-in-the-democratic-republic-of-congo (Accessed: 14 May 2018).

⁴ See:

- Jones, S. (2017) "Spanish court to investigate Syrian 'state terrorism' by Assad regime", *The Guardian* (Spain), 27 March [online]. Available at: theguardian.com/world/2017/mar/27/spanish-court-syria-state-terrorism-assad-regime-mrs-ah (Accessed: 14 May 2018).
- Human Rights Watch (2017) "These are the Crimes we are Fleeing - Justice for Syria in Swedish and German Courts" [online]. Available at: hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts (Accessed: 14 May 2018).
- Barnard, A. (2017) "Syrian Soldier Is Guilty of War Crime, a First in the 6-Year Conflict" *The New York Times* (Middle East), 3 October [online]. Available at: nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html (Accessed: 14 May 2018).

⁵ See:

- Borger, J. (2015) "Syria's truth smugglers", *The Guardian* (Syria), 12 May [online]. Available at: theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes (Accessed: 14 May 2018).
- Taub, B. (2016) "The Assad Files: Capturing the top-secret documents that tie the Syrian regime to mass torture and killings", *The New Yorker* (A Reporter At Large), 18 April [online]. Available at: newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed (Accessed: 14 May 2018).

of *International and Transnational Crime*. Routledge.

² Perissi, D. and Taquet, E. (2018) "The Kavumu Trial: Complementarity in Action in the Democratic Republic of Congo", *International*

December 2016, the **UN General Assembly** launched a new investigative body, the **International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic**, mandated to gather evidence for eventual prosecution across a variety of possible jurisdictions, and, in 2017, a Spanish judge invoked the principle of universal jurisdiction in ordering an investigation into high-level officials from the Assad regime.⁶

All of the above-mentioned strategies are not without their flaws. All have faced challenges of legitimacy, many face the perception of one-sided victor's justice, and all are likely to confront resistance from government and military officials determined to avoid accountability for their own crimes. Although it is an overstatement to say that opposition to international criminal justice stems from self-interested autocrats and perpetrators of atrocity, it cannot be denied that such actors do exist and do seek to undermine the very institutions that might hold them to account. If the blind-spots of the international justice system and the ICC's limitations are filled by other initiatives, organisations, and institutions at the domestic, regional and international level, the impunity gap will close.

Reforming the ICC from Within

The ICC is not a static institution. Some critiques of the ICC are constructive, pointing to the ways in which the ICC can be reformed and improved as an institution. Ultimately, the Court's effectiveness will be linked to its ability to be sufficiently well-resourced to fulfil its mandate. The question of resources at the ICC is an ever-present and critical issue. In light of the concerns of African member states, more needs to be done to address the budgetary issues facing the ICC. The Court simply cannot do "*more*" if it is poorly resourced; and the Prosecutor has admitted as much by the **OTP's** issuance of its **Basic Size document**, clearly outlining that it can only conduct a limited number of

investigations and prosecutions at any given time.⁷ Even so, the ICC's budget, and that of the OTP in particular, has not kept pace in order to match the institution's growing workload. There is a need to take a careful look at the ICC budget process and issues surrounding its lack of resources — and to ask whether there might be more room for African states to engage in discussions about these concerns. Discussions about resources at the ICC are often dominated by the states that make the biggest donations, yet this is a process that should be more accessible to other states.

In line with concerns about reform, in 2014 the ASP asked the Court to develop performance indicators. In November 2015, the Court issued its first report on performance indicators and the following four key goals were identified:

- A.** The Court's proceedings are expeditious, fair and transparent at every stage;
- B.** The ICC's leadership and management are effective;
- C.** The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and,
- D.** Victims have adequate access to the Court.⁸

With respect to goal **A**, it has been observed that fairness can be measured in many ways, e.g., individual proceedings and hearings must be fair, expeditious and transparent. But the issue of "*fairness*" is very much a concern affecting the debate between Africa and ICC. More leeway should be provided to inject concerns from African states and communities into the discussion in order to influence what the indicators might be and how they could be measured. Similarly, with regard to goal **B**, whilst the question of "*effectiveness*" can be narrowly defined to take into consideration how recruitment is undertaken, it can also include other factors, such as the effectiveness of ICC leadership itself. This is an area

⁷ The International Criminal Court Assembly of States Parties (2015) *Report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21 [online]. Available at: legal-tools.org/doc/b27d2a/pdf (Accessed: 14 May 2018).

⁸ The International Criminal Court (2015) "Report of the Court on the Development of Performance Indicators for the International Criminal Court", 12 December [online]. Available at: icc-cpi.int/itemsDocuments/Court_report-development_of_performance_indicators-ENG.pdf (Accessed: 14 May 2018).

⁶ UN News (2016) "Syria: UN approves mechanism to lay groundwork for investigations into possible war crimes", 22 December [online]. Available at: news.un.org/en/story/2016/12/548392-syria-un-approves-mechanism-lay-groundwork-investigations-possible-war-crimes (Accessed: 14 May 2018).

of concern for states and opens up the possibility of the performance-indicator process being used to help address some of the concerns of African states.

In November 2016, the ICC issued a subsequent report containing more data and further specifications.⁹ Currently, it would seem that the ICC's performance indicators are all very narrowly confined and, in addition, that the Court is trying to avoid offending states (e.g. state co-operation has not been included as an indicator). The ICC Study Group on Governance held three meetings to discuss performance indicators in 2016 and will continue to examine the matter.¹⁰ This should be fostered as a useful forum for African states (and all the member states involved) to voice their concerns regarding the Court's functions and work.

It is important to stress that the ICC's future will always be in negotiation and that, to improve the Court, the views of its member states must be consistently heard and considered. Nonetheless, this does not mean that the views of particular states will, or can, always be accepted. No single state or subset of states can ever be allowed to hijack the Court's development, and everything must be done to shield the institution from undue political influence, particularly where this might lead to greater impunity or accountability blind spots.

States Parties can be proactive and positively reform the ICC from within. By definition, reform is a difficult process and there is broad consensus that the Rome Statute should not be fully re-opened or re-negotiated. Yet states retain the power to make important changes to the functioning of the Court and, in so doing, they must ensure that the views of affected communities and victims are represented: it is, after all, their Court.

Some reforms will be easier than others. Certain African states, and **Kenya** in particular, have argued that the

preambulary reference to complementarity in the Rome Statute should be a reference to regional, and not just domestic, courts. This is correct in principle as well as in practice, and states should move forward in affecting such change as well as thinking through how the principle of complementarity can be broadened to encompass the growing diversity of institutions and organizations offering a degree of accountability for international crimes at the local, domestic, regional, and international level.

Constructive legal amendments could possibly be made to the Rome Statute to meet the demands of states and international criminal justice as a whole. Some legal options are to be found in the "*Final Clauses*" of the Rome Statute. The first option is a dispute-resolution mechanism for disagreements between states envisaged under Article 119(2); this also provides for the possibility of negotiations between states seeking a resolution through the ASP and, possibly, an advisory opinion from the **ICJ** via the **ASP**. This could provide states with additional venue to resolve disputes such as that surrounding the question of head of state immunity of non-member states of the ICC, as well as enhance and streamline the way in which the Rome Statute is interpreted and applied.

Article 121 is also useful, as it permits ICC member states to propose amendments to the Statute. This mechanism should only be used in a manner that seeks to preserve justice and protect victims of egregious crimes. For amendments to be adopted, it ultimately amounts to a numbers game, since, in the absence of consensus, a two-thirds majority is required. Notably, if the 33 African states teamed up with the 28 Latin American and Caribbean states and the 19 Asia-Pacific states, this group could succeed in amending the Statute. This could be done at the ASP or at a Review Conference.

Amendments to the Rome Statute have been proposed on prior occasions. As mentioned above, in 2009 South Africa proposed an amendment to the Article 16 procedure for deferral of ICC cases, suggesting that the UN General Assembly should have the necessary authority where the Council considers the matter

⁹ International Criminal Court (2016) "Second Court's report on the development of performance indicators for the International Criminal Court", 11 November [online]. Available at: icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf (Accessed: 14 May 2018).

¹⁰ International Criminal Court (2016) *Report of the Bureau on the Study Group of Governance*, ICC-ASP/15/21 [online]. Available at: asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-21-ENG.pdf (Accessed: 14 May 2018).



and fails to act.¹¹ Despite being supported by the AU, there has been no movement on this, due in part to an alleged lack of leadership from proposing countries. However and as suggested above, perhaps the time has come to revisit this amendment to the Statute.

Article 123 governs the Review of the Statute. By way of example, the 2010 **Kampala Review Conference**, at which a definition of the crime of aggression was reached, presented an opportunity to reflect on the Statute. The first week of the Conference was devoted to taking stock of the ICC's first eight years and included a review of the topics of complementarity, co-operation, the impact of the Rome Statute system on victims and affected communities, and peace and justice. Ultimately, however, it was the amendments to the crime of aggression that took centre stage.

That said, it is by no means implausible to imagine a future Review Conference where, in a spirit of co-operation, a productive assessment could be made of the ICC's record to date, along with possible ways and means of reforming and improving the institution. Such a gathering could act as the central stage for the legitimate concerns of African states and communities to be heard and their proposals to be negotiated and potentially implemented.

A further provision relevant to reforming the ICC from within is Article 122, which allows amendments of an institutional nature, including, for example, the service and required qualifications and nominations of judges. This is vital, given that these issues have been raised before by States Parties in relation to the selection of judicial officers at the Court.

Working groups can also be crucial in this process, as

¹¹ Akande, D., du Plessis, M. and Jalloh, C. (2010), op. cit., 6.

they represent useful opportunities for engagement. For instance, the **South African government** submitted a request on 23 May 2016 for a working group to be established to discuss Article 97 consultations and the relationship between Articles 27 and 98. With regard to Articles 27 and 98, the Bureau of the ASP could not find “*consensus on establishing such a working group*” and cited “*importance of preserving the independence of the Court and the integrity of the Rome Statute and of avoiding any interference in the work of the Court*”.¹² However, the Bureau of the ASP agreed to set up a group that was restricted to discussing Article 97 alone.¹³ In August, September, and November of that same year, this working group held three meetings which were open to all States Parties and were attended by representatives of all of the Court’s organs.¹⁴ As a result of the meetings and consultations, a text geared to improving the implementation of Article 97 consultations and drawing up recommendations for that year’s ASP, was included in the final 2016 ASP Omnibus Resolution. As noted above, in early 2018, the African Union agitated once again for the creation of an ASP working group to examine the relationship between Articles 27 and 98 with the aim of elaborating an interpretative declaration on the relationship between the two Articles.¹⁵ However, given past apprehension of the ASP to establish such an entity, it remains unclear how the latest request of the **AU** will be received — and how it might relate to a simultaneous request for the ICJ to consider the same subject matter as the proposed working group. If it is to be created, a balance will have to be struck whereby the group can function whilst preserving the integrity and independence of the Court.

Working groups are, of course, limited. If there is no appetite to discuss a particular issue, they will falter. It is important to stress that working groups cannot usurp

the functions of judges and making a determination on the issue of immunity is a judicial function. As Article 119(1) states, some matters are the exclusive preserve of the judges.

While trying and testing options is important, one must also accept that things cannot change overnight. The ICC, the only permanent accountability mechanism, is arguably one of the most ambitious justice projects of our time. There are no quick fixes but these provisions do provide options that should be investigated and tested as a means of improving the Court whilst addressing concerns voiced by African states. Rather than abandoning the ICC, States Parties should seek to engage, positively and constructively, and improve the Court.

Implementing reforms of the ICC

The ICC can also be improved from within the organs of the institution. The institutional elements of the ICC encapsulate questions about the parties with which the Court is entering into agreements. Currently, there are only two agreements, one concluded with the host state (**The Netherlands**) and the other with the UN. Given that there are other important regional institutions around the world, some have wondered why the ICC has made no attempt to reach agreements with important regional groupings, including the AU. This is a first measure of internal institutional change that should be considered, as it could create a positive forum for engagement between the AU and ICC, and in so doing, address some of the concerns harboured by African states.

In addition, the Court’s composition could also benefit from reforms. The **Co-ordination Council** which comprises the President, Prosecutor and Registrar, is mandated to “*discuss and co-ordinate on, where necessary, the administrative activities of the organs of the Court*”.¹⁶ This Council could help streamline the Court’s processes, e.g., vis-à-vis the Committee on Budget and Finance. Currently, this Committee engages

¹² International Criminal Court, Bureau of the Assembly of States Parties (2016) “Third Meeting”, 3 June [online]. Available at: asp.icc-cpi.int/iccdocs/asp_docs/bureau/icc-asp-2016-bureau-03-03jun2016.pdf (Accessed: 14 May 2018).

¹³ International Criminal Court, Bureau of the Assembly of States Parties (2016) op. cit.

¹⁴ International Criminal Court, Assembly of States Parties (2016) *Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court*, ICC-ASP/15/35 [online]. Available at: asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-35-ENG.pdf (Accessed: 14 May 2018).

¹⁵ African Union (2018), op. cit.

¹⁶ International Criminal Court, Assembly of States Parties (2010) *Report of the Court on measures to increase clarity on the responsibilities of the different organs*, ICC-ASP/9/CBF.1/12, 5 [online]. Available at: icc-cpi.int/NR/rdonlyres/84F21CDA-047C-4660-9109-41AC334C0EA0/282297/GovernanceReportEng.pdf (Accessed: 14 May 2018).

in unstructured discussions ranging from salary scale across to case-selection, two disparate issues that have nothing in common but nevertheless require focus and attention. Indeed, as soon as any matter has some secondary financial consequence, it tends to be channelled to the **Budget and Finance Committee**, something that was in no way part of this Committee's intended purpose. The Court could sharpen discussions at this level.

The judicial functions of the ICC could also be reformed and improved, particularly with regard to changes to the Court's **Rules of Procedure and Evidence**. While the judges themselves are not empowered to amend these, other means to achieve this are available.

The ICC judges have recently implemented change in the form of the February 2017 **Chambers Practice Manual**¹⁷, which constitutes a serious, practical attempt to address some of the complaints and concerns that have been raised by African states and communities, among others. For instance, the Manual states that Chambers should not require the presentation of in-depth evidence-analysis charts. In the past, presentation of such charts resulted in lengthy documents that were difficult to read (some were over 400 pages long), with nothing whatsoever to show that they actually enhanced the trials. The removal of this requirement is a good example of how internal reform can be implemented to improve the effectiveness and efficiency of trials.

While the Court is still a relatively young institution with a limited number of cases, the judges should be more forthcoming, more ambitious, and less hidebound through an excess of prudence. At the end of the day, many important decisions are made solely by the judges, as witnessed by the **Bashir case** and **South Africa's non-compliance hearing** in June 2017. They must be prepared to take full responsibility.

In addition, the Court itself could make new proposals to the ASP. When a fundamental issue is being debated, for example, the Court could ask for the matter to be heard by a larger group of judges than the usual three. It would be worthwhile for the Court to discuss whether there might be other legal areas in which the Rules of Procedure and Evidence warrant amending. However, this depends solely and exclusively on the institution's willingness to tackle reform.

Finally, with regard to the Court's judicial proceedings, there is significant room for improvement. This includes admission of *amicus curiae* briefs, something that the AU itself has submitted in prior years at the ICC.¹⁸ The Court is rather restrictive in this regard: in the case of South Africa's non-compliance hearing, only one civil society *amicus* brief (from the Southern Africa Litigation Centre) was accepted.¹⁹ Other civil society applicants were rejected, thereby sending out the unfortunate message that the Court sees no need for advice on this contentious issue. More modesty in this regard would go a long way: it would remove any doubt as to whether the Court was considering all relevant information and perspectives. In this context, the invitation of *amicus curiae* by the ICC's Appeals Chamber from a broad range of actors—including a specific invitation directed at the African Union—to share opinions and observations on the legality of al-Bashir's visit to Jordan, is strategically useful and highly welcome.²⁰

¹⁸ International Criminal Court, Appeals Chamber (2015) *The African Union's Amicus Curiae Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties*, ICC-01/09-01/11 [online]. Available at: icc-cpi.int/CourtRecords/CR2015_19745.pdf (Accessed: 14 May 2018).

¹⁹ International Criminal Court (2018) "Al Bashir case: ICC Appeals Chamber invites observations from International Organisations, States Parties and Professors of International Law on legal matters raised by Jordan", ICC-02/05-01/09 [online]. Available at: legal-tools.org/doc/3b50b8/pdf (Accessed: 14 May 2018).

²⁰ International Criminal Court (2018) "Al Bashir case: ICC Appeals Chamber invites observations from International Organisations, States Parties and Professors of International Law on legal matters raised by Jordan", ICC-CPI-20180329-PR1375, 29 March [online]. Available at: icc-cpi.int/Pages/item.aspx?name=pr1375 (Accessed: 14 May 2018).

¹⁷ International Criminal Court (2017) "Chambers Practice Manual", May [online]. Available at: icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf (Accessed: 14 May 2018).



In respect of the OTP, there are many regulations pertaining to preliminary examinations which could do with further elucidation. This could be done without involving the ASP, inasmuch as the ASP has created a Working Group on Amendments, which has thus far failed to produce tangible results other than the insertion of wording in ASP resolutions that request further consideration of amendments. If an amendment proposal is allowed to linger for 10 years or more, it raises questions about whether the tool is being used in a fitting manner. Hence, the Court and its organs should be more courageous in pushing back the limits and proposing reforms that could be implemented without going through the ASP.

There is more that could be done and the willingness to implement reforms needs to be enhanced and fostered. Just as there is no place for brazen attempts to undermine the ICC, there is no place for stubborn refusal to change from within. The Court and its organs can do a lot towards bringing about true reforms from within, yet there must be a willingness to engage, thoroughly and genuinely, with possible amendments and changes. There is a way to move forward, which lies in finding compromises that strengthen the ICC and ensure that the concerns of African states and communities are truly heard.

ANNEX:

LIST OF PARTICIPANTS FROM SOUTH AFRICAN-GERMAN JUSTICE DIALOGUE



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Dire Tladi, Professor of International Law, University of Pretoria; Special Adviser to the Minister of International Relations and Cooperation and Member of the UN International Law Commission

Howard Varney, Senior Consultant, International Centre for Transitional Justice, Advocate of Johannesburg Bar

Frans Viljoen, Director Centre for Human Rights, University of Pretoria

Note: The list below reflects the positions held by the participants at the time of the Dialogue.

Notes:

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