

# The International Criminal Court and Africa

## Contextualizing the Anti-ICC Narrative

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### Abstract

*This article critiques attempts by some in Africa to brand the International Criminal Court (ICC) as a neocolonial institution and stooge of the West. These arguments accuse the ICC of playing a double standard, being overly focused on trying African defendants, and warn that the Court risks exacerbating factionalism and ethnic divisions thereby threatening peace and reconciliation efforts. Although we neither defend nor champion the ICC's mandate, we deem such criticisms as hyperbole. At best, they attempt to whitewash the instrumental role played by African states in the birth of the Court and ignore the fact that many of the ICC cases were referred there by African governments. Furthermore, the current African narrative understates the ICC's potential to midwife local judiciaries and contribute positively towards conflict resolution in Africa through the promotion of at least a measure of accountability and offers of justice, thereby taming elite immunity and impunity in states where justice regimes are either weak or non-existent. Until African states strengthen their judiciaries to ensure such references to the ICC are indeed a last resort, the Court will continue to remain the only credible forum for states emerging from conflict and seeking justice and reconciliation.*

**Keywords:** International Criminal Court (ICC), security, African Union (AU), war crimes, international law.

### 1 Introduction

The International Criminal Court (ICC) was established on 17 July 1998 through a treaty signed in Rome by 120 states. It became operational after 60 countries ratified the Court's Statute (hereinafter "the Rome Statute") on 1 July 2002. Afri-

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can countries were involved in the negotiations of the treaty that created the ICC and today constitute the largest single bloc to ratify the Rome Statute.<sup>1</sup>

At the time of its founding, African countries generally supported the ICC, many viewing it as a potential venue they could utilize in solving many of the continent's intractable conflicts.<sup>2</sup> This initial optimism, enthusiasm and support for the Court has dissipated, however, as some African elites, a number of scholars and the African Union (AU) are unhappy that the ICC thus far has focused mostly on punishing African defendants<sup>3</sup> suspected of committing egregious violations of human rights. Some have pointed out that the Court is escalating factionalism and ethnicity,<sup>4</sup> by meting out justice selectively,<sup>5</sup> and warned that this could complicate local reconciliation efforts in Africa.<sup>6</sup> Others have alleged that the Court is susceptible to political manipulation<sup>7</sup> in that it has ignored atrocities committed by major world powers such as the United States and China.<sup>8</sup> While others have even gone further to argue that the ICC is being used as an agent of regime

- 1 Of the 124 ICC member states, 34 are from Africa, 19 Asia-Pacific, 18 Eastern Europe, 27 Latin America and the Caribbean, and 25 from Western Europe and other states. See United Nations, 'Rome Statute of the International Criminal Court', *United Nations Treaty Collection*, XVIII (10), 17 July 1998. See also B.A. Simmons & A. Danner, 'Credible Commitments and the International Criminal Court', *International Organization*, Vol. 64, No. 2, 2010, pp. 225-256. See also M. Syenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', *International Criminal Court Review*, Vol. 13, No. 2, 2013, pp. 385-428, at 385 (stating that "The African Union members supported the establishment of the International Criminal Court (ICC)") citation omitted.
- 2 C. Jalloh, 'Regionalizing International Criminal Law?', *International Criminal Law Review*, Vol. 9, No. 3, 2009, pp. 445-499. See also C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', *Criminal Law Forum*, Vol. 21, No. 1, 2010. See also E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law*, Vol. 56, No. 1, 2012, pp. 1-14, at 7.
- 3 T. Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' *The Institute for Justice and Reconciliation, Policy Brief No. 8*, 2013. See also M. Mamdani, 'Darfur, ICC and the New Humanitarian Order', *Pambazuka News*, Nairobi, 2008.
- 4 M. Adjami and G. Mushiata, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court', *ICJT Briefing*, The Rome Statute Review Conference, Kampala, 2010. Available at: <<https://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>> (last accessed 12 April 2017).
- 5 BBC, 'ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence', *BBC*, 5 December 2014. Available at: [www.bbc.com/news/world-africa-30347019](http://www.bbc.com/news/world-africa-30347019) (last accessed 12 April 2017). See also O. Imoedemhe, 'Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward', *African Journal of International and Comparative Law*, Vol. 23, No. 1, 2015, pp. 74-105, at 74.
- 6 N.J. Clark, 'Peace, Justice and the International Criminal Court: Possibilities and Limitations', *Journal of International Criminal Justice*, Vol. 9, No. 3, 2011, pp. 521-545.
- 7 K.S. Mwangi, 'Can the International Criminal Court Play Fair in Africa?' *Africa in Focus*, The Brookings Institute, 2013. Available at: <[www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi](http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi)> (last accessed 12 April 2017).
- 8 D. Akande, 'The Jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, Vol. 1, No. 3, 2003, pp. 618-650.

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change<sup>9</sup> and of entrenching neocolonialism;<sup>10</sup> and that the ICC Prosecutor has undermined the original intention of the Court as one of last resort rather than of first instance.<sup>11</sup>

Much of the existing literature on the ICC and Africa focuses on the Court's growing pains and failures, offering prescriptions for the Court or arguing for its closure.<sup>12</sup> This article does not seek to "fix" the ICC; rather, it responds to criticisms that certain Africans and African institutions have levelled against it. It specifically critiques efforts at casting the Court as neocolonial, administering justice selectively at the behest of Western powers. In this sense, the article seeks to add some context to the ongoing debate between the supporters and opponents of the ICC without necessarily offering support for or promoting the Court. Part I provides an exposition of the African anti-ICC narrative. A number of works have extensively highlighted Africa's contributions towards establishment of the Court and therefore we will not delve into that historical background.<sup>13</sup> However, we will reference it whenever it is relevant to and necessary for providing context to the current discourse. Part II challenges, contextualizes and responds to this narrative. While Africa's weak position vis-à-vis the ICC can be located in the Western-dominated international order,<sup>14</sup> African countries cannot escape responsibility for joining the Court or creating conditions that have warranted intrusion. Part III highlights some of the lessons Africa might learn from the ICC's nascent efforts to mete out justice. While not defending the ICC *per se*, we demonstrate that in some instances the ICC remains probably the only available institution

- 9 R. Cashman, 'The Geopolitics of International Criminal Justice', *9BRI Lobbying Forum*, 4 March 2014.
- 10 African Union, 'Extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa', in *Decisions and Declarations*, Addis Ababa, African Union, 2013, p. 2. Available at: <[www.au.int/en/sites/default/files/decisions/9655-ext\\_assembly\\_au\\_dec\\_decl\\_e\\_0.pdf](http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf)> (last accessed 12 April 2017).
- 11 B. Olugbuo, 'Positive Complementarity and the Fight Against Impunity in Africa', in C. Murungu & J. Biegon (Eds.), *Prosecuting International Crimes in Africa*, Pretoria, Pretoria University Law Press, 2011.
- 12 T. Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan', *Africa Development*, Vol. 40, No. 2, 2015, pp. 73-97. See also M.C. Kane, 'Accessible Judgments as a Practical Means to Reengage African Interest and Salvage the International Criminal Court', *African Journal of International Criminal Justice*, No. 1, 2015, pp. 6-46. See also T.O. Hansen, 'Critical Review of the ICC's Recent Practice concerning Admissibility Challenges and Complementarity', *Melbourne Journal of International Law*, Vol. 13, 2012, p. 217.
- 13 R.J.V. Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal', *Melbourne Journal of International Law*, Vol. 14, 2013, pp. 670-698, at 673-676.
- 14 See, e.g., B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, Vol. 15, No. 1, 2004, pp. 1-37, at 3. See also T. MacNamee, 'The ICC and Africa Between Aspiration and Reality: Making International Justice Work Better for Africa', in *Reflections on a High-level Roundtable*, 18-19 March 2014, Addis Ababa, Ethiopia, co-hosted by The Brenthurst Foundation and the Africa Center for Strategic Studies, pp. 1-17. Available at: <[www.nurembergacademy.org/fileadmin/user\\_upload/Kenya.pdf](http://www.nurembergacademy.org/fileadmin/user_upload/Kenya.pdf)> (last accessed 12 April 2017). In particular pp. 5-6, stating that "...the ICC is a politicised mechanism, no less rooted in the 'double standards' of the international system than other bodies heavily influenced by the Permanent Five (P5) of the United Nations Security Council (UNSC)."

that can provide a modicum of accountability and therefore an opportunity to tame elite impunity especially in African countries where justice regimes are either weak or non-existent. Part IV concludes the article.

## 2 Part I: “The ICC Is Biased against Africans” Narrative

The assaults against the ICC broadly encompass three themes: first, the Court’s handling of cases – in particular that of African defendants; second, the potential political and societal ramifications of the ICC’s trials; and third, the Court’s susceptibility to manipulation from outside the continent, particularly from the West. Although some of these criticisms are a natural result of unintended consequences of the Court’s nascent efforts and demonstrate its growing pains, critics have offered few viable alternatives on how to deal with egregious violations of human rights outside of the ICC’s framework. Some are quick to read conspiracy and to brand the ICC as part of a larger neocolonial project of instituting regime change and subjugating African political institutions.<sup>15</sup> The anxiety over the ICC’s operations is partly coloured by the continent’s historical legacy of slavery and colonialism.<sup>16</sup> In recent years, the AU has urged African countries not to enforce the ICC warrant for the arrest of Sudanese president Omar Al-Bashir, challenged the ICC’s piercing of head of state immunity and encouraged member states to refer serious violations of human rights to the African Court of Justice and Human Rights instead.<sup>17</sup> As demonstrated in Part II, however, if there is any conspiracy at play it is the various ways African elites<sup>18</sup> have colluded with the international community in establishing the Court in the first place and sometimes against their own self-interests. Many of these elites in some instances have ignored, co-opted or undermined their own judicial institutions to maintain their own power, which, ironically is a stepping stone to participating in international fora. African elites arguably have viewed the ICC, at least partially, as a tool for

15 C.C. Achaleke Taku, ‘International Politics and Policy Considerations for the Inappropriate Targeting of Africa by the ICC OTP’, in R.H. Steinberg (Ed.), *Contemporary Issues Facing the International Criminal Court*, Leiden, Brill, 2016, pp. 338-350. See also B. Malone, ‘Africans push UN to call off “racist” court’, *Al-Jazeera*, 15 November 2013. Available at: <[www.aljazeera.com/indepth/features/2013/11/africans-push-un-call-off-racist-court-2013111451110131757.html](http://www.aljazeera.com/indepth/features/2013/11/africans-push-un-call-off-racist-court-2013111451110131757.html)> (last accessed 12 April 2017).

16 Imoedemhe, 2015, p. 74.

17 Syenyonjo, 2013, p. 388, citations omitted; see also Keppler, 2012, pp. 1-14.

18 For the purposes of this article we agree with a definition of elites as individuals who “hold authoritative positions in powerful public and private organisations and influential movements and who therefore are able to affect strategic decisions regularly.” J. Higley, G.L. Field & K. Grøholt, *Elite Structure and Ideology: A Theory with Applications to Norway*. New York, Columbia University Press, 1976, p. 17. In addition, “elites are the principle decision makers in the latest or most resource-rich political, governmental, economic, military, professional, communications and cultural organisations and movements in society.” J. Higley & R. Gunther, *Elites and Democratic Consolidation in Latin America and Southern Europe*. New York, Cambridge University Press, 1992, p. 8.

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use in undercutting domestic political competitors although without much foresight or forethought on how they themselves might end up in the dock.<sup>19</sup>

A popular criticism of the ICC is the rhetoric that it is playing double standards by focusing on African defendants and largely ignoring atrocities committed outside the African continent. They cite the ICC's prosecutorial interventions in the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Sudan, Uganda, Libya, Côte d'Ivoire and Kenya,<sup>20</sup> as evidence supporting their angst against the Court. This antipathy towards the ICC is broadly shared by Africa's well-respected activists and scholars, as well as authoritarian "big men."<sup>21</sup> African scholar Mahmood Mamdani has called the ICC an "International Court for Trying Africans."<sup>22</sup> In 2012, Archbishop Desmond Tutu of South Africa refused to share a stage with former British prime minister Tony Blair allegedly to protest ICC's bias towards Africa.<sup>23</sup> In 2013, Ethiopian foreign affairs minister Tedros Adhanom Ghebreyesus, speaking as the chairman of the AU Executive Council, claimed that, "Far from promoting justice and reconciliation and contributing to the advancement of peace and stability on our continent, the court has transformed itself into a political instrument targeting Africa and Africans."<sup>24</sup> Yet, some have argued that support for the ICC – even among government officials – is still strong.<sup>25</sup>

The ICC has been assailed for lacking knowledge of or ignoring local political conditions where it is investigating atrocities. African critics have warned that such insensitivity towards domestic conditions might exacerbate factionalism and inflame ethnic tensions, undermining the Court's chance of paving the way for peace and reconciliation. The Court's selective focus on investigating egregious human rights violations in the Kivu region, for instance, may undermine broader reconciliation efforts in the DRC because it is limited in scope and assigns responsibility for atrocities only to people from that area. In addition, Adjami and Mushiata have argued that the ICC has taken sides in an otherwise highly politicized situation by prosecuting Jean-Pierre Bemba while ignoring atrocities com-

19 This is implicit, if not evident, from the AU's remaining mum where African states have referred matters to the ICC – such as in the cases of Uganda, the Central African Republic, the Democratic Republic of Congo and Mali – but opposing the ICC in respect to cases involving heads of states. See Syenyonjo, 2013, pp. 385-428, at 387, citations omitted.

20 Muriithi, 2013.

21 O. Van Cranenburgh, "Big Men" Rule: Presidential Power, Regime Type and Democracy in 30 African Countries', *Democratization*, Vol. 15, No. 5, 2008, pp. 952-973. See also M.F. Sihlongonyane, 'African Conflicts and Informal Power: Big Men and Networks', *Development in Practice*, Vol. 24, No. 8, 2014, pp. 1080-1081.

22 Mamdani, 2008.

23 Tutu's actions were reportedly based on Blair's bellicose actions that led to the war in Iraq, thus arguably making Blair a war criminal. See M. Du Plessis *et al.*, 'Africa and the International Criminal Court', *Criminal Justice*, Vol. 13, No. 3, 2013, pp. 563-570.

24 T. Maliti, 'African Foreign Ministers Consider Proposal to Audit Kenya's Progress in Reconciliation', *International Justice Monitor*, 11 October 2013. Available at: <<https://www.ijmonitor.org/2013/10/african-foreign-ministers-consider-proposal-to-audit-kenyas-progress-in-reconciliation>> (last accessed 12 April 2017).

25 Keppler, 2012.

mitted by the current government of the DRC.<sup>26</sup> They note that ICC's handling of the post-conflict situation in the DRC benefits President Joseph Kabila and his ruling cadre and seems less concerned about holding accountable those that bear the most significant responsibility for war crimes and crimes against humanity perpetrated during conflict.<sup>27</sup> The same can be said about the ICC's handling of perpetrators of the 2007-2008 post-election violence in Kenya, which initially focused its investigations and prosecutions across much of the political and tribal spectrum.<sup>28</sup> However, after the cases against President Uhuru Kenyatta and three other defendants collapsed (all affiliated with the ruling Party of National Unity/PNU), the Court was only left with cases against Deputy President William Ruto and radio journalist Joshua Arap Sang who hailed from the Kalenjin community and opposition Orange Democratic Movement (ODM) that ran against the PNU during the 2007 elections. An ICC guilty verdict against Ruto and Sang would have complicated matters locally and probably re-ignited ethnic tensions in a country where local grievances are ripe and tribal cleavages run deep. Ignoring unique local political conditions such as this could undermine the ICC's legitimacy because it reinforces the perception that the Court is selective in meting out justice and interested in retribution rather than promoting peace and reconciliation.<sup>29</sup>

The ICC has also been branded a Western stooge, one that has made Africa "a laboratory for politically motivated prosecutions" and turned Africans into "guinea pigs."<sup>30</sup> In 2011, the AU opposed the ICC's arrest warrants against alleged perpetrators of atrocities in Libya arguing that the warrants were issued under the direction of Western countries and their issuance would hamper reconciliation efforts between opposition groups and those supporting Libyan leader Muammar Gaddafi.<sup>31</sup> Echoing these criticisms of the ICC, in late 2014, Uganda's president Yoweri Museveni stated, "I will bring a motion to the African Union's next session. I want all of us [African Member States] to get out of that court of the West [ICC]. Let them [Westerners] stay with their court."<sup>32</sup> Africans are not alone in their antipathy for the Court. Other countries such as Russia have accused the ICC of being used as an instrument for carrying out regime change

26 Adjami & Mushiata, 2010.

27 *Ibid.*

28 BBC, 2014.

29 The ICC declared a mistrial in the remaining cases facing the two Kenyans from Kalenjin community, Deputy President William Ruto and Joshua Arap Sang, in April 2016, thus putting a temporary end to Kenyan cases at The Hague.

30 International Refugee Rights Initiative, 'International Justice or Western Conspiracy? The Response to ICC Charges against Bashir in Africa', *Refugee Rights News* 4, 5 July 2008, p. 5. Available at: <[www.refugee-rights.org/Publications/RRN/2008/July/RRN.July2008.pdf](http://www.refugee-rights.org/Publications/RRN/2008/July/RRN.July2008.pdf)> (last accessed 12 April 2017).

31 K. Ainly, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis', *International Affairs*, Vol. 91, No. 1, 2015, pp. 37-54; D. Miriri & A. Roche, 'Uganda's Museveni Calls on African Nations to Quit the ICC', *Reuters*, 12 December 2014. Available at: <[www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212](http://www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212)> (last accessed 12 April 2017).

32 *Ibid.*

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under the guise of protecting human rights<sup>33</sup> while China has characterized it as a “nastier manifestation of globalization.”<sup>34</sup>

At the centre of Africa’s uneasiness with the ICC is the narrative that major world powers such as the United States and China use their definitions of national interest to abstain from joining and/or supporting the Court, leading some to view these contingencies of foreign policy as an indication that the Court is there to punish weak and poor rather than rich and powerful countries. They may have a point. For example, China’s concerns about the ICC revolved around issues surrounding complementarity, war crimes in internal armed conflicts and inclusion of the crime of aggression within the jurisdiction of the ICC, which it argued limited the UN Security Council’s (UNSC) power.<sup>35</sup> The United States has taken elaborate steps to shield US citizens from the ICC’s reach,<sup>36</sup> including the American Servicemen’s Protection Act (ASPA), and multiple bilateral agreements that provide US nationals immunity from arrest or extradition and condition US humanitarian and military aid to compliance with these terms. In addition, with the United States and China both in possession of permanent seats in the UNSC, even should these states become signatories to the Rome Statute the very possibility of empowerment of the Court to prosecute Americans and Chinese is in doubt.

Lastly, critics argue that the ICC is susceptible to political influence<sup>37</sup> and as such biased towards Africans. The fact that Africa does not have a permanent seat in the UNSC, which has authority to refer cases to the ICC but yet not shown equal enthusiasm in attempting to address crimes occurring outside the continent, only bolsters that suspicion<sup>38</sup> – that the Court was set up to prosecute Africans only.<sup>39</sup> It should be noted, however, that African countries have also been as guilty in politicizing the ICC through referrals of cases, choice on when to cooperate or not cooperate with the Court or ratify the Rome Statute.

### 3 Part II: Challenging the “Bias” Narrative

#### 3.1 Understanding the ICC – Legal and Historical Perspectives

The ICC is a permanent international criminal court established by treaty to hold accountable those bearing the greatest responsibility for egregious violations of international humanitarian law – including genocide, war crimes and crimes

33 Cashman, 2014.

34 D. Hoile, *The International Criminal Court – Europe’s Guantanamo Bay?* London, Africa Research Centre, 2010.

35 L. Jianping & W. Zhixiang, ‘China’s attitude towards the ICC’, *Journal of International Criminal Justice*, Vol. 3, No. 3, 2005, pp. 608-620.

36 Akande, 2003, pp. 618-650.

37 Mwangi, 2013.

38 A. Changole, ‘Africa Demands United Nations Security Council Seat by 2023’, *Bloomberg*, 29 August 2016. Available at: <[www.bloomberg.com/news/articles/2016-08-29/africa-demands-united-nations-security-council-seat-by-2023](http://www.bloomberg.com/news/articles/2016-08-29/africa-demands-united-nations-security-council-seat-by-2023)> (last accessed 12 April 2017).

39 A. Mbata Mangu, ‘The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview’, *Africa Development*, Vol, 40, No. 2, 2015, pp. 7-32, at 28.

against humanity and in future the crime of aggression. Although it is not part of the UN system, the ICC has carved out a role for the UNSC. Under the Rome Statute, the ICC can begin investigating war crimes, crimes against humanity and genocide (and in future crimes against aggression): (a) pursuant to a referral from a member state to the ICC Office of the Prosecutor (OTP). Uganda did this in the Lord's Resistance Army (LRA) case;<sup>40</sup> (b) the OTP can, based on evidence at its disposal, investigate alleged violations of international humanitarian law *proprio motu* as it did in Kenya following the 2007-2008 post-election violence – the only such case to date;<sup>41</sup> and (c) through a reference from the UNSC as in the case of Sudan's Al-Bashir's for his alleged crimes against humanity committed in Darfur and elsewhere in Sudan<sup>42</sup> and the case of Libya for crimes allegedly committed during the Libyan civil war.

Unlike the International Court of Justice (ICJ), which adjudicates cases against states, the ICC asserts jurisdiction over individuals or human perpetrators.<sup>43</sup> In general, it should be remembered that the ICC is a treaty-based Court and cannot on its own assert universal jurisdiction on nationals of non-member states.<sup>44</sup> In international law, only states that have ratified the Rome Statute are bound by it under the doctrine of *pacta sunt servanda*. The ICC also is a voluntary court. States such as the United States that have exercised their sovereignty and abstained from joining it ideally are not bound by it. There are exceptions to this, however: first, the Rome Statute has empowered the UNSC to refer situations to the ICC for investigation and prosecution, potentially bringing defendants from non-ICC states such as Sudan and Libya under its jurisdiction.<sup>45</sup> This is quite limited though and restricted to cases where there is threat to international peace and security. Second, citizens or nationals of a non-state party to the Rome Statute can become subject to prosecution for crimes perpetrated in an ICC state party member brought vide a referral to the Court from the UNSC, a state party

40 P. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', *The American Journal of International Law*, Vol. 99, No. 2, 2005, pp. 403-421.

41 N. Leila Sadat & B. Cohen, *Impunity through Immunity: The Kenya Situation and the International Criminal Court*, Washington University in St. Louis, Legal Studies Research Papers Series, Paper No. 15-12-03, 2015.

42 Although Sudan is not a party to the Rome Statute it is obliged to cooperate with the ICC by virtue of Security Council Resolution 1593, which referred the situation in Darfur to the ICC. See D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice*, Vol. 7, No. 2, 2009, pp. 333-352, at 336.

43 See M.M. Khan & A.M.K. Marwat, 'International Criminal Court (ICC): An Analysis of its Successes and Failures and Challenges Faced by the ICC Tribunals for War Crimes', *The Dialogue*, Vol. 11, No. 3, pp. 242-256, at 243. See also T.Y.N. Wilson, 'The International Criminal Court: Creation, Competence, and Impact in Africa', *African Journal of Criminology & Justice Studies*, Vol. 3, No. 2, 2008, pp. 85-123, at 86.

44 A. Abass, 'The International Criminal Court and Universal Jurisdiction', *International Criminal Law Review*, Vol. 6, 2006, pp. 349-385. (Arguing that prosecution of nationals of non-member states does not create or result on ICC assuming universal jurisdiction.)

45 MacNamee, 2014, p. 6.



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or by an ICC Prosecutor's own initiative.<sup>46</sup> Lastly, a non-member state can consent to the ICC's jurisdiction as Cote D'Ivoire did.

It should be underscored that two other conditions – minus the issue of a UNSC resolution – must be met prior to the ICC obtaining jurisdiction over a case. First, a state must ratify the Rome Statute – something the majority of African states have performed as discussed earlier. Second, “[t]he principle of ‘complementarity’ requires that states ‘utilize the Court only as a last resort, after first attempting to litigate ICC crimes domestically in their local courts.’ It is only after the state is ‘unwilling or unable’ to charge the individuals who violated Article 5 in their own domestic courts that the ICC may exercise jurisdiction over the case.”<sup>47</sup> In other words, the Rome Statute encourages as well as requires states to attempt to address serious violations of human rights through their criminal systems before resorting to the ICC. This is why in the Kenyan case, the ICC initially counselled the Government of Kenya to establish a local court to prosecute perpetrators of the post-election violence and took over only after the Kenyan government failed to do so.<sup>48</sup> With this background in mind let us evaluate the arguments critics of Court have advanced.

### 3.2 Responding to Critics of the ICC

*Double Standards:* It is empirically accurate that virtually all of the cases before the ICC involve Africans. Some scholars have even noted that “It will not be an overstatement to argue that thus far the ICC has acted predominantly as a transnational criminal court for Africa.”<sup>49</sup> As of June 2015, the ICC was investigating situations in eight countries, and had issued three verdicts.<sup>50</sup> By November 2016, the Court had ten ongoing examinations, five of which involved African states.<sup>51</sup> There were ten situations under investigation, nine involving African countries

46 R. O’Kefee, ‘The United States and the ICC: The Force and Farce of the Legal Arguments’, *Cambridge Review of International Affairs*, Vol. 24, No. 3, 2011, pp. 335-355, at 336-337; see also I. Marinakis, ‘A Weak ICC: Can International Criminal Court Succeed Without U.S. Participation?’, *Eyes On the ICC*, Vol 5, No. 1, 2008, pp. 125-157, at 145-146; and Wilson, 2008, p. 105.

47 A. Joy Stein, ‘Reforming the Sentencing Regime for the Most Serious Crimes of Concern: The International Criminal Court through the lens of the Lubanga trial’, *Brooklyn Journal of International Law*, Vol. 39, 2014, pp. 521-562, at 526-527.

48 Plessis, 2010.

49 K.D. Magliveras & G.J. Naldi, ‘The International Criminal Court’s Involvement with Africa: Evaluation of A Fractious Relationship’, *Nordic Journal of International Law*, Vol. 82, No. 3, 2013, pp. 417-446, at 419.

50 Human Rights Watch, ‘International Criminal Court’, HRW, 2011. Available at: <<https://www.hrw.org/topic/international-justice/international-criminal-court>> (last accessed 12 April 2017).

51 The states were Comoros, Gabon, Nigeria, Guinea, Burundi. ‘Preliminary Examinations’, *International Criminal Court*. Available at: <<https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx>> (last accessed 12 April 2017).

(Georgia being the exception).<sup>52</sup> There were 13 cases at different stages of trial and five closed cases – all involving Africans.<sup>53</sup>

This has indeed developed into a public relations nightmare for a Court that ostensibly set out to deliver justice to victims of war crimes, genocide and crimes against humanity, globally. Given the above figures, is the ICC applying a double standard and unilaterally instigating investigations against Africans? At first glance, there are legitimate concerns insofar as the ICC has dared not investigate atrocities alleged to be committed by major powers and although the ICC Prosecutor has argued that her office has investigations in Afghanistan, in Colombia, in Palestine and in Ukraine.<sup>54</sup> Second, the involvement of the UNSC members who have refused to ratify the Rome Statute in referrals and other matters pertaining to the Court's operations should be disconcerting to anyone familiar with international politics and treaties. The ICC is an anomaly to the extent that the Rome Statute purports to allowing non-member states to enforce treaty obligations against State Parties as well as non-consenting parties. The near impossibility of the UNSC referring a Council member to the ICC underscores that problem and may reinforce Africans' perception of bias.<sup>55</sup> That said, African states' eagerness so far to refer cases to the ICC, which might signal either unwillingness or inability to handle such cases, waters down that argument. Except for Sudan's Al-Bashir indictment and the investigation in Libya that came at the urging of the UNSC, and the Kenyan case which the ICC brought on its own, all other investigations including situations in Uganda, Congo and Mali<sup>56</sup> have come at the urging, or encouragement, of African countries.

This, coupled with participation of majority of African countries information of the Court and at least 60% ratifying the Rome Statute, regardless of motivation or unconscionable demands from some Western countries, suggests that African signatories, too, have been partially responsible for the harm they claim the ICC is inflicting on them at the behest of Western imperial powers. Rather than being victims of the ICC, African States Parties have themselves failed to implement effective measures to prosecute the atrocity crimes within their national courts. First, they have failed to create credible judiciaries that could adjudicate gross violations of human rights and diminish the relevance of an external court like the ICC. Second, they have lacked strategic vision and foresight and signed treaties or international agreements sometimes against their national interests. In other words they have lacked sophistication in conceptualizing and

52 The states were DRC, Uganda, CAR, Sudan (Darfur), Kenya, Libya, Côte d'Ivoire, Mali, and CAR II. 'Situations under investigation', *International Criminal Court*. Available at: <<https://www.icc-cpi.int/Pages/Situations.aspx>> (last accessed 12 April 2017).

53 'Pre-Trial', *International Criminal Court*. Available at: <<https://www.icc-cpi.int/Pages/Pre-Trial.aspx>> (last accessed 12 April 2017).

54 'The International Criminal Court on Trial: A Conversation with Fatou Bensouda', *Foreign Affairs*, January/February 2017, p. 52.

55 See, e.g., K. Ambos, 'Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?', *Case Western Journal of International Law*, Vol. 42, 2009, pp. 404-448.

56 I. Stegmiller, 'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?', *Criminal Law Forum*, Vol. 24, No. 4, 2013, pp. 475-499.

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articulating sovereignty in ways that help them advance their national interests in an international order that is already stacked against them.<sup>57</sup> African countries' criticism of the ICC for not focusing on human rights violations in other regions also reflects such lack of vision and strategic thinking.<sup>58</sup> Such sentiment does not shed further light on how the continent can advance accountability for egregious violations of human rights where many local judiciaries are either weak or have limited expertise. It is therefore disingenuous for African elites and the AU to blame the ICC for prosecuting African defendants for serious violations of international human rights that they are either unable or unwilling to handle within their countries.<sup>59</sup> Unless there is evidence demonstrating that the ICC is prosecuting innocent people, or violating African defendants' due process rights, it is irrelevant that most of them happen to be of African origin. In essence, many of Africa's grievances against the ICC seem more political than legal<sup>60</sup> and sometimes at odds with the preferences of their own people.<sup>61</sup>

*Insensitivity to Local Social-Political Context:* This is probably the most compelling criticism of the Court and one that it would find difficulties addressing. Efforts to hold individuals responsible for atrocities often come after a war or conflict has subsided and with the cooperation of a local authority exercising a modicum of control. That one – often losing – side of conflict bears the brunt of post-war trial is real and one that has, for years, dogged international tribunals. For example, the International Criminal Tribunal for Rwanda (ICTR) has yet to prosecute President Paul Kagame's Rwandan Patriotic Front (RPF) for atrocities committed during the 1994 genocide in Rwanda, in part because of a public opposition from Kagame himself. The reality is that the ICC cannot do much without some local authority guaranteeing a modicum of security and safety of its investigators and, crucially, supporting ICC investigators and prosecutors. Yet, the reliance of such arrangements often tilts the balance of justice for one faction against

57 Chimni, 2004, p. 2 (discussing how international institutions have almost obliterated Third World countries' ability to promulgate their own economic policies). Contrast this with A. Bird-sall, 'The "Monster That We Need to Slay"? Global Governance, the United States, and the International Criminal Court', *Global Governance*, Vol. 16, 2010, pp. 451-469, at 453 (noting that "Changes in the US stance toward the ICC reflect differences of what is considered by the respective administrations to constitute the national interest and whether the ICC can be used as a tool to further it.")

58 See, e.g., the United States' objections to the ICC which some scholars have said are legally flawed but yet politically expedient. *Generally O'Kefee*, 2011, pp. 335-355.

59 J.W. Gichuki, 'African state sovereignty and the International Criminal Court: Case studies in analytical context', *African Journal of Democracy and Governance*, Vol. 1, No. 4, pp. 103-120, at 114. (Characterizing African states reaction to issuance of a warrant of arrest against al-Bashir as indication that those states were putting sovereignty above the interests of their own people.)

60 Cole, 2013, p. 672.

61 R. Lekalake & S. Buchanan-Clarke, 'Support for the International Criminal Court in Africa Evidence from Kenya', *Afrobarometer Policy Paper*, No. 23, August 2015, pp. 1-19, at 2 (stating that 61% of respondents surveyed in Kenya viewed ICC prosecutions important to fighting impunity, 55% viewed the Court as impartial and rejected efforts to withdraw. Majority of Africans surveyed also viewed the AU as less supportive to their countries).

others in ways that can undermine reconciliation.<sup>62</sup> The ICC ideally is less likely to indict individuals associated with a political establishment for which it depends on for security and cooperation. The Court, however, could revisit the issue once ruling elites and/or parties leave office and should therefore be careful as to how and to whom it grants immunity.

*A Stooqe of Western Imperialism:* The “ICC is biased against Africa” narrative is rooted in the Court’s record of focusing its investigations on relatively weaker and poorer countries such as those in sub-Saharan Africa that have ratified the Rome Statute. Critics point out that citizens of the United States, China and other more powerful states remain beyond reach of the Court’s long arm. There is some validity to these criticisms that underscores the lopsidedness of the current international order.<sup>63</sup> Yet equally blameworthy is sub-Saharan African countries’ penchant for joining international organizations, agreements or treaties without much thinking that such obligations may limit their sovereignty. While sub-Saharan African countries have legitimate reasons for feeling unfairly targeted by the ICC, their situation probably would not be any different even if the ICC had looked at other countries outside the region. Branding the ICC a stooqe of Western imperialism – even though, like other international institutions, it is susceptible to political influence – does not move the needle in terms of changing the underpinnings of the current global order. African countries’ voluntary participation in establishment of the court, and legally binding themselves through ratification of the Rome Statute, reflects a gap in the way sub-Saharan African states and Western countries view the system and define national interest. The United States, Russia<sup>64</sup> and other states have abstained from the Court out of national interest, consistent with international law doctrine *pacta sunt servanda* – states are bound only by treaties they enter and ratify. The behaviour of these states is also in tune with realists’ view of world politics – that powerful states affirm

62 C. Gegout, ‘The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace’, *Third World Quarterly*, Vol. 34, No. 5, 2013, pp. 800-818, at 801. doi: 10.1080/01436597.2013.800737.

63 C.C. Jalloh, D. Akande & M. Du Plessis, ‘Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court’, *African Journal of Legal Studies*, Vol. 4, No. 1, 2011, pp 5-50, at 9; For other examples of Africa’s weak position in the international system see generally B. Nega & G. Schneider, ‘International Financial Institutions and Democracy in Africa: The Case for Political Conditionality and Economic Unconditionality’, *Journal of Economic Issues*, Vol. XLV, No. 2, June 2011 and A. Arieff *et al.*, ‘International Criminal Court Cases in Africa: Status and Policy Issues’, *Congressional Research Service*, 22 July 2011, pp. 1-32 (noting United States interest in human rights violations in Africa and support for ICC trials, even though it is not a state party to the Rome Statute).

64 On 16 November 2016, Russia announced that it would formally withdraw its signature from the Rome Statute that established ICC. As reported by *The Guardian*, Russia took this step one day after the Court published a report classifying the Russian annexation of Crimea as an occupation. See S. Walker & O. Bowcott, ‘Russia Withdraws Signature from International Criminal Court Statute’, *The Guardian*, 16 November 2016. Available at: <<https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>> (last accessed 12 April 2017).

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international law when it suits them and ignore it when it does not.<sup>65</sup> The major disagreement many elites in African countries have with the ICC seems to be more about the Court's radical piercing of the African state's sovereignty rather than the Court's inability to address violations of international humanitarian laws committed by major powers or performed outside of Africa. Invoking the Rome Statute has unrivalled draconian consequences as its application strikes at the very seat of power and renders indicted African ruling elite fugitives outside of their own borders.<sup>66</sup>

There is no evidence that any country was forced to join negotiations or to ratify the Rome Statute, although a rich body of literature indicates there is unevenness in the way treaties are negotiated.<sup>67</sup> The United States, for instance, played a significant but oppositional role in negotiations leading to the formation of the Court.<sup>68</sup> For example, the United States – not a member of the ICC – successfully dissuaded some of these countries from ratifying the Rome Statute.<sup>69</sup> That African states, as a bloc, led the pack of states that have ratified the Rome Statute is an indictment on the continent itself. The decision-making authority of the ICC rests almost entirely on the willingness of states to resolve disputes on their soil amicably and with satisfactory justice (thereby making the ICC a court of last resort) and/or on their readiness to submit their disputes to the ICC for arbitration. The ICC's mandate contains no powers to enforce its own arrest war-

- 65 R.W. Stone, *Controlling Institutions: International Organizations and the Global Economy*, New York, Cambridge University Press, 2011; P. D'Anieri, *International Politics: Power and Purpose in Global Affairs*, Toronto, Nelson Education, 2016, p. 387; "... national interests are intersubjective understandings about what it takes to advance power, influence and wealth that survive the political process, given the distribution of power and knowledge in a society." Birdsall, 2010, pp. 451-469, at 453 (citing E. Adler, 'Seizing the Middle Ground: Constructivism and World Politics', *European Journal of International Relations*, Vol. 3, No. 3, 1997, pp. 319-363). *But see* B. Maragia, 'Almost There: Another Way of Conceptualizing and Explaining NGO's Quest for Legitimacy in Global Politics', *Non-State Actors and International Law*, Vol. 2, 2002, pp. 301-332, at 302 (discussing the changing ontology of global politics that challenges the realist view of international relations).
- 66 B.M. Hashimoto, 'Why Do Leaders Accept the International Criminal Court's Jurisdiction? Theory and Evidence', *New York University Working Papers*, 25 March 2013, pp. 1-34, at 1 (noting the ICC is the only global court tasked with prosecuting atrocities and the power to hold political and military elite responsible for them). Available at: <[http://politics.as.nyu.edu/docs/IO/28919/Hashimoto\\_Paper.pdf](http://politics.as.nyu.edu/docs/IO/28919/Hashimoto_Paper.pdf)> (last accessed on 25 March 2017). *But see* R. Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies', *Brooklyn Journal of International Law*, Vol. 41, No. 1, 2015, pp. 115-121 (discussing the African Court on Human and People's Rights established under the 1998 Protocol to the African Charter and its successor the African Court of Justice and Human Rights which allow complaints against member states but not against individuals or heads of states).
- 67 M.A. Pollack, 'Who Supports International Law, and Why? The United States, the European Union, and the international legal order', *International Journal of Constitutional Law*, Vol. 13, No. 4, 2015, pp. 873-900. *See also* J. Akokpari, 'The EU and Africa: The Political Economy of an Asymmetrical Partnership', in A. Montoute & K. Virk (Eds.), *The ACP Group and the EU Development Partnership*, Berlin, Springer International Publishing, 2017, pp. 55-77.
- 68 *See* Marinakis, 2008, pp. 148-152 (in respect to discussions on Article 16 and Article 98 Agreements).
- 69 A. Boyd, 'US Bludgeons Nations to Reject War Crimes Court', *Asian Times*, 16 March 2004. Available at: <<https://www.globalpolicy.org/component/content/article/164/28456.html>> (last accessed 12 April 2017).

rants – as the case of Sudan’s Al-Bashir attests. Some states such as South Africa have refused to arrest and extradite Al-Bashir to The Hague underscoring just how much the ICC is reliant on members enforcing its warrants. It is therefore disingenuous and hypocritical for African states to play the imperialism card when, in fact, most of the cases involving African defendants (Uganda, DRC, CAR and Mali) have been referred to the Court by African governments.<sup>70</sup> Even in the Kenya case – the only case where the ICC initiated investigations *proprio motu* – the Court gave the government opportunities to set up its own mechanism before it actually took over the cases.

### 3.3 *Missing the Big Picture*

The vitriol directed at the ICC misses two fundamental aspects of the Court that comport with the prevailing conditions in post-conflict societies in Africa. First, is the potential for the Court to contribute towards conflict resolution and peace-building while providing a measure of accountability to tame impunity especially in countries where the courts are either weak or no longer exist because of war, instability and other factors. Second, insofar as joining the ICC is voluntary and an exercise of sovereignty, states are similarly at liberty to set up and use their own courts.

With due respect to those who have complained about the ICC targeting only Africans, the empirical reality is that Africa has seen an inordinate number of conflicts in which violations of international humanitarian law have occurred.<sup>71</sup> For instance, a mapping of major armed conflicts in the world by Uppsala Conflict Data programme established that between 2001 and 2015, Africa accounted for the most conflicts in the world (with an all-time high of 35 violent, armed conflict incidents from 2000 to 2001), with the Middle East gaining ground in 2014 largely due to the crises in Syria and Iraq.<sup>72</sup> The same mapping established that Europe and the Americas recorded fewer incidents of armed violent conflicts. Many of the conflicts in Africa have resulted from the collapse in the 1990s of several African states under the weight of unpopular neoliberal policies that were touted by the IMF and The World Bank under the label Structural Adjustment Programs (SAPs). These policies led to the ouster of Africa’s “Big Men” such as Mobutu Sese Seko of Zaire (now DRC), as SAPs forced governments to scale back or scrap some essential services heightening competition for scarce resources. It is therefore not surprising that the list of the ICC’s most wanted criminals would

70 ‘Situations under Investigation’, *International Criminal Court*. Available at: <<https://www.icc-cpi.int/Pages/Situations.aspx>> (last accessed 12 April 2017).

71 K.M. Clarke, ‘African Question: Is the ICC targeting Africa inappropriately?’, *ICC Forum*, Topic for March 2013 – January 2014, 2014. Available at: <<http://iccforum.com/africa>> (last accessed 12 April 2017).

72 E. Melander, T. Pettersson & L. Themnér, ‘Organized Violence, 1989-2015’, *Journal of Peace Research*, Vol. 53, No. 5, 2016, pp. 727-742.

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include mostly Africans.<sup>73</sup> In fact, the ICC quipped in a Tweet in March 2016 that “had the ICC been established in the 1970s, it would have probably started its operations in Latin America – or in Europe had it been established in the 90s.”<sup>74</sup> As it is, the establishment of the ICC coincided with a particularly conflict-laden decade in the African chapter.

Many African states have weak<sup>75</sup> or corruptible judiciaries and institutions that in many cases lack competence to handle complex litigation and bring perpetrators of atrocities to justice. The fact is that commonly recognized principles that define the independence of the judiciary are regularly undermined in Africa.<sup>76</sup> These take various forms including politicization of judicial appointees, executive overreach, failure of constitutions to explicitly define the independence of the judiciary, as well as how to draw a balance between “judicial restraint”<sup>77</sup> and pleasing elites under whose pleasure they serve. These structural handicaps should underscore the usefulness and indeed necessity of the Court not only for sub-Saharan Africa but also for other countries that have similarly weak judiciaries or are emerging from conflict. Moreover, Africa’s attempt to constitute the

- 73 The five most wanted list includes President Al-Bashir of Sudan; Joseph Kony, alleged to be the commander-in-chief of the Lord’s Resistance Army (LRA) operating in Uganda, CAR etc.; Sylvestre Mudacumura, alleged to be the supreme commander of the Democratic Forces for the Liberation of Rwanda and whom the ICC says committed crimes in the DRC; former Cote d’Ivoire first lady, Simone Gbagbo, wanted over violence in the country after elections in 2010; and Sudan’s Ali Kushayb, said to be the leader of the Janjaweed militia allegedly behind war crimes and crimes against humanity in Sudan’s Darfur region. See C. Harris, ‘Five of the World’s Most-Wanted for Crimes against Humanity’, *Euro News*, 17 July 2015. Available at: <[www.euronews.com/2015/07/17/five-of-the-worlds-most-wanted-for-crimes-against-humanity/](http://www.euronews.com/2015/07/17/five-of-the-worlds-most-wanted-for-crimes-against-humanity/)> (last accessed 12 April 2017).
- 74 D. Pkalya, ‘Leaders Wrong in Claiming the ICC is Biased against Africans’, *Daily Nation*, Nairobi, 8 April 2016.
- 75 See G. Abraham, ‘R2P, the International Criminal Court and the Prevention of Mass Atrocities in Africa’, *Policy Briefing* 132, 2015. See also R. Ellett, ‘Rethinking Law and State Building in Sub-Saharan Africa’, *Law & Social Inquiry*, Vol. 41, No. 2, 2016, pp. 471-479.
- 76 These commonly recognized principles include independence, non-interference, assistance and protection, dignity, accessibility, effectiveness and the binding authority of court decisions. See P. Wendoh, *Summary Report of the Stakeholders’ Conference on the Independence of the Judiciary in Sub-Saharan Africa, held at Mt. Kenya Safari Club, Nanyuki, Kenya, October 3-7, 2006*, Nairobi, Konrad Adenauer Stiftung, 2006. Available at: <[www.kas.de/rspssa/en/events/23358/](http://www.kas.de/rspssa/en/events/23358/)> (last accessed 12 April 2017).
- 77 M.O.A. Alabi, ‘The Legislatures in Africa: A Trajectory of Weakness’, *African Journal of Political Science and International Relations*, Vol. 3, No. 5, 2009, pp. 233-241, at 239.

African Court of Justice and Human Rights as an alternative to the ICC, has yet to pan out.<sup>78</sup>

This leads to the second, aforementioned point that African states have the option to make the ICC truly a court of last resort. Leaders should exercise their state's sovereignty and create local mechanisms to hold their nationals accountable for gross violations of human rights. African leaders are yet to match their rhetoric with action. For example, Mali president Boubacar Keita noted that it is "up to Africans, not Europeans or Americans to judge their leaders."<sup>79</sup> Zimbabwe's president Robert Mugabe also has called on African states to establish their own "African ICC," to prosecute Western leaders who commit crimes on the continent.<sup>80</sup> Yet Mugabe and his Zimbabwe African National Union – Patriotic Front (ZANU-PF) party have stripped the local judiciary of any independence that could hold locals accountable for human rights violations. As such many African judiciaries rarely act with alacrity, are less than impartial, and often are beholden to interests that serve powerful minority interests.<sup>81</sup> Unless African countries enact reforms to guarantee their independence as Mauritius did<sup>82</sup> and, with less success, South Africa,<sup>83</sup> Africa probably would continue to depend on the ICC as a court of first instance rather than a court of last resort (as intended) to address egregious violations of international humanitarian law.

- 78 Liwanga, 2015, p. 120; *see generally* A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', *The European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 933-946, at 934 (expressing pessimism on whether the African Union would adopt a Protocol on extending jurisdiction of the Africa to try international crimes); and Wilson, 2008, p. 115 (highlighting weaknesses of Africa's judiciaries as a hindrance to handling the cases involving egregious violations of human rights with which the ICC is tasked to adjudicate). In theory there are multiple, existing courts in Africa, to include the African Court of Human and Peoples' Rights (AfCHPR), the African Court of Justice (ACJ) and the nascent African Court of Justice and Human Rights. *See* KPTJ, 'Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court,' *Kenya's for Peace with Truth and Justice*, 23 November 2016. Available at: <<http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf>> (last accessed 12 April 2017).
- 79 'Africa must set up own ICC to try Europeans, says Mugabe', *News24*, 19 June 2015. Available at: <[www.news24.com/Africa/News/Africa-must-set-up-own-ICC-to-try-Europeans-says-Mugabe-20150619](http://www.news24.com/Africa/News/Africa-must-set-up-own-ICC-to-try-Europeans-says-Mugabe-20150619)> (last accessed 12 April 2017).
- 80 J. Starkey, 'Mugabe Calls for Africa ICC', *The Times*, 23 June 2015. Available at: <[www.thetimes.co.uk/tto/news/world/africa/article4477111.ece](http://www.thetimes.co.uk/tto/news/world/africa/article4477111.ece)> (last accessed 12 April 2017).
- 81 M. Llanos *et al.*, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases', *Democratization*, Vol. 23, No. 7, 2015, pp. 1-21.
- 82 J. Ddamulira Mujuzi, 'Strengthening democracy through investigating, prosecuting and punishing corruption in Mauritius', *East African Journal of Peace & Human Rights*, Vol. 21, No. 2, 2015, pp. 282-326.
- 83 A. Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland*, PULP, 2014. Available at: <[www.pulp.up.ac.za/monographs/human-dignity-and-fundamental-rights-in-south-africa-and-ireland](http://www.pulp.up.ac.za/monographs/human-dignity-and-fundamental-rights-in-south-africa-and-ireland)> (last accessed 12 April 2017). *See also* J. Scutt, 'Rule of Law Reform and Development – Charting the Fragile Path of Progress', *The Denning Law Journal*, Vol. 27, 2015, pp. 337-344.



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### 3.4 Contextualizing Criticisms of the ICC in Africa

The ICC, like any Court or international organization, has weaknesses, which states parties could address through amendments to the Rome Statute. Jalloh, Akande and Du Plessis (2011), however, have presciently highlighted the failure of the UNSC to entertain the AU's request for the Council to invoke Article 16 of the Rome Statute and suspend the indictment against Sudan president Omar Al-Bashir.<sup>84</sup> This indicates that less powerful states have limited capacity to influence the future direction of the Court.<sup>85</sup> In a way, African countries have reason to worry that the UNSC – countries that have veto-wielding powers – can make referrals, which may compromise judicial authority,<sup>86</sup> yet these same countries are unlikely to send one of their own to the Court. Such involvement in referrals gives further reason for Africans to distrust the ICC. African states also lack knowledge compared to that of Western countries derived from intimate involvement in the creation of *ad hoc* tribunals.<sup>87</sup> Even assuming that the ICC reflects the dominance of powerful states in international relations, African countries are not without blemish. Focusing only on the foregoing criticisms may obfuscate what we see as African elites' naïve approach to international relations, particularly in negotiating treaties and articulating their national interests in the face of competition from other states.<sup>88</sup> The short-sighted view that the ICC likely will help them deal with domestic political opponents coupled with overreliance on expertise from Western-dominated NGOs appears to have led many of these countries to ratify the Rome Statute without much thought, let alone a realization that political elites also were tying a noose around their own necks.<sup>89</sup> The initial reference of cases such as the LRA, the DRC's Thomas Lubanga and Jean-Pierre Bemba did not attract opposition probably because these references helped the political

84 Because of UNSC inaction, the AU proposed an amendment to the Rome Statute to empower the UN General Assembly to act should the UNSC fail to act on a deferral request after six months. See, e.g., Jalloh, Akande & Du Plessis, 2011.

85 *Ibid.*

86 D. O'Callaghan, 'Is the International Criminal Court the Way Ahead?' *International Criminal Law*, Vol. 8, 2008, pp. 533-556, at 545 (noting that consent from the UNSC could fetter judicial institutionalism).

87 Wilson, 2008, p. 116.

88 Cole, 2013, p. 675 noting that African NGOs collaborated with their Western counterparts in negotiations of the Rome Statute and in urging African states to ratify it.

89 Magliveras & Naldi, 2013, p. 420. Also see Simmons & Danner, 2010, p. 226 (noting that "...the decision by some national leaders to join the Court seems potentially to run against their self-interest, since it is widely assumed the ICC will focus on prosecutions of high-level figures in countries where mass atrocities occur."); G. Lugano, 'Assessing the Acceptance of International Criminal Justice in Kenya', *International Nuremberg Principle Academy*, pp. 1-23, at 2 (noting that Moi's government signed the Rome Statute following pressure from local NGOs but while knowing that the ICC would not be called upon to investigate violence that occurred during the elections of 1992 and 1997. Additionally, no one could fathom a Kenyan being tried at the ICC when Kibaki's government ratified the Rome Statute in 2005). Available at: <[www.nurembergacademy.org/fileadmin/user\\_upload/Kenya.pdf](http://www.nurembergacademy.org/fileadmin/user_upload/Kenya.pdf)> (last accessed 12 April 2017). See also Hashimoto, 2013, p. 2 (arguing that "a prime motive for accepting the ICC's jurisdiction is to marginalize political competitors – the Thomas Lubangas of the world.").

establishment deal with errant opponents.<sup>90</sup> It is not surprising therefore that the disgruntlement in some African circles comes on the heels of the ICC's indictment of sitting heads of states like Sudan's Omar Al-Bashir and Kenya's Uhuru Kenyatta. Such reactions suggest that African elites have few qualms exposing their own nationals to jeopardy from an international court like the ICC to which they themselves are not ready to submit.

In essence, an analysis of the anti-ICC crusade currently popular in Harare, Pretoria and Kampala, is no more reflective of what states often do or are supposed to do – game the international system. In gaming the international system, however, African ruling elites often have undersold themselves by defining their national interests narrowly. The ICC is an example of this. Many African elites supported the Court thinking that it would help them punish political opponents (real or perceived), but shield them from accountability for crimes they may perpetrate on their own citizens.<sup>91</sup> Such thinking overlooks the fact that in so doing they would undermine the very foundations of the rule of law needed to tame impunity. Perhaps more troubling is the cavalier attitude of many African states that has led them to become perennially dependent on foreign aid and international institutions, without realizing that such dependence undermines their sovereignty. The Kenyan government's failure to establish a local tribunal to prosecute perpetrators of post-election violence is a classic illustration of a dependency mindset. Kenya refused to establish a local tribunal without much reflection on the legal consequences of the ICC taking over the cases. Such mindset echoes Peter Ekeh's 40-year-old postulation that African elites are themselves neocolonial in their protection of patrimonial interest at the expense of collective interests.<sup>92</sup>

90 Adjami & Mushiata, 2010.

91 To be fair, it is not just African leaders who have attempted to bypass or utilize the Court for their own purposes. The same argument could be made, albeit on a different structural level, that the US, China and other major powers have "gamed" the international system and international law to serve their own purposes.

92 P. Peter Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement', *Comparative Studies in Society and History*, Vol. 17, No. 1, 1975, pp. 91-112. See also P. Andrew Gwaza, 'African Union and International Criminal Court: The Trajectory to Peace and Security in Africa', *SSRN*, 19 August 2014. Available at: <<https://ssrn.com/abstract=2483017>> (last accessed 12 April 2017).

### 3.5 *The Court Is Here to Stay*

Absent from criticisms and calls for an exit from the Court is the fact that the cases before the ICC do not end just because African countries quit the Court.<sup>93</sup> This is because the investigations and cases came before the Court's ambit pursuant to the Rome Statute and the Court's assertion of jurisdiction thereunder. The obligations of state parties cannot be retroactively quashed; and therefore the Court would be obligated to continue investigating and adjudicating the cases before it. Similarly, a state party would be required to meet its obligations or face the consequences for non-compliance with treaty obligations under international law. As such, the threat heard in the chambers of the AU for all African signatories to leave the ICC *en masse* appears to be ill-informed political posturing. First, the Rome Statute binds individual countries – who also happen to be members of the AU – that have ratified, not the bloc itself. The legal ramifications attach to individual state parties that wish to withdraw. Second, and more importantly, the debate has not entertained how each individual country would go about withdrawing from the ICC. This path is neither uniform nor straightforward. Whether an individual state would be able to withdraw from the Court depends not only on international law but also on the legal mechanisms available to it domestically. While for some a treaty automatically becomes part of domestic law on ratification, in others it requires legislative action. In other words, and as the recent developments in Africa have demonstrated, each country will have to go through their domestic procedures for withdrawal from a treaty and will have to contend with domestic constituencies that might not necessarily be amenable to it.<sup>94</sup>

Although the AU had authorized the development of a collective ICC withdrawal strategy from the Rome Statute, a majority of African states attending the annual Assembly of State Parties (ASP) meeting in New York in November 2016 stated their intention to remain members of the ICC.<sup>95</sup> More recently and during a closed door session of the AU Summit in Addis Ababa in February 2017, Nigeria, Senegal, Ivory Coast, Mali, Burkina Faso, Tanzania, Tunisia, Cape Verde, Bot-

93 In the run up to the 15th Assembly of State Parties (ASP) to the Rome Statute held in November 2016 in The Hague, three African Countries namely Burundi, South Africa and Gambia announced their intention to withdraw their signatures from the Rome Statute. This was calculated to precipitate a mass walk out of African countries from the Court yet this did not occur, to date. See T. Verfuss, 'Sidiki Kaba: Why I Am Not Sighing with Relief over ICC Withdrawals Yet', *Journalists for Justice*, 26 November 2016. Available at: <[www.jfjustice.net/en/complementarity/sidiki-kaba-why-i-am-not-sighing-with-relief-over-icc-withdrawals-yet#sthash.GMmxND1h.dpuf](http://www.jfjustice.net/en/complementarity/sidiki-kaba-why-i-am-not-sighing-with-relief-over-icc-withdrawals-yet#sthash.GMmxND1h.dpuf)> (last accessed 12 April 2017). See also K. Makokha, 'African States Push for Heads of State Immunity at the ICC', *Journalists for Justice*, 26 November 2016. Available at: <[www.jfjustice.net/en/complementarity/african-states-push-for-heads-of-state-immunity-at-the-icc#sthash.g9Kp0pA9.dpuf](http://www.jfjustice.net/en/complementarity/african-states-push-for-heads-of-state-immunity-at-the-icc#sthash.g9Kp0pA9.dpuf)> (last accessed 12 April 2017).

94 For an analysis of what paths Kenya could take to withdraw from the ICC, see T. Obel Hansen, 'Referring Kenya to the ICC Assembly of States Parties, Part 2: Implications for Cooperation and Enforcement', *Justice in Conflict*, 4 October 2016. Available at: <<https://justiceinconflict.org/2016/10/04/referring-kenya-to-the-icc-assembly-of-states-parties-part-2-implications-for-cooperation-and-enforcement/>> (last accessed 12 April 2017). See also Cole, 2013, pp. 670-671 (noting the contributions of *ad hoc* tribunals to the establishment of the ICC).

95 T. Ackerman, 'Dwindling Momentum for Collective Withdrawal', *American NGO Coalition for International Criminal Court (AMICC)*, 6 February 2017.

swana and Chad all reiterated their resolve to remain members of the Court,<sup>96</sup> further diminishing the impetus for a collective withdrawal of AU members from ICC. In addition, developments in early 2017 saw the new administration in Banjul, through its Foreign Minister, notifying the UN Secretary General in January 2017 of its revocation of the notice by the earlier regime to withdraw from ICC. In a statement read on national television and radio, it noted in part, “As a new government that has committed itself to the promotion of human rights... we reaffirm The Gambia’s commitment to the principles enshrined in the Rome Statute of the International Criminal Court.”<sup>97</sup> In March 2017, South Africa wrote to the UN Secretary General to revoke its earlier decision to withdraw from the Court after a South African court ruling in February 2017 declared the proposed withdrawal null and void.<sup>98</sup> The court had found the procedure of withdrawal to be premature and irrational, noting that only the South African parliament could authorize such a move.<sup>99</sup> On the other hand, Kenya’s voice, the loudest calling for African states to withdraw from the ICC, has gone mute after the cases pending at the ICC involving Kenyan citizens were terminated. The rhetoric in Kenya has shifted to talk of “reforming” the ICC in a manner that would shield serving heads of state and other high-ranking officials from prosecution. Taken together, Burundi currently remains the only sub-Saharan African country mulling the idea of exiting the ICC.

#### 4 Part III: Lessons Africa Can Learn from the ICC

As highlighted in Parts I and II, the ICC will likely remain a permanent international court for holding individuals accountable for horrendous violations of international humanitarian law, whether or not African states take steps to exit the Court.<sup>100</sup> In this sense, the ICC has filled a critical gap in international criminal jurisprudence that only a handful of *ad hoc* tribunals were established to address prior to its establishment.<sup>101</sup> Africa, as a continent, and Africans have opportunities to learn from the ICC. Besides serving as “wakeup call” for the need to address genocide, war crimes and crimes against humanity, the ICC provides a model for how to establish and define jurisdiction of such courts. African states

96 A. Mutambo, ‘African Union Wants Member States to Pull Out of ICC’, *Daily Nation*, 2 February 2017.

97 Reuters, ‘Gambia’s President Adama Barrow Revokes Plan to Withdraw from ICC’, *The Standard*, February 15, 2007.

98 N. Onishi, ‘South Africa Reverses Withdrawal from International Criminal Court’, *New York Times*, 8 March 2017.

99 *Ibid.*

100 P. Kantai, ‘Who is Afraid of the ICC?’, *New Africa*, November 2016, p. 5 (noting that African opposition of the ICC is not total and that threatened walk out of some African countries would necessarily lead to mass exodus from the ICC).

101 See, e.g., the Nuremberg Tribunal (NT), The International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). See also J.M. Isanga, ‘The International Criminal Court Ten Years Later: Appraisal and Prospects’, *Cardozo Journal of International and Comparative Law*, Vol. 21, 2013, pp. 235-323, at 237-238.

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can use the ICC as an exemplar in establishing long overdue regional and national courts that would distinctly reflect African value systems. Should this occur and for those countries that choose to remain, the ICC could remain a viable and complementary court to local African courts, rather than a court of first instance. In addition, the sour taste of the ICC for some may galvanize the drive for entrenching local forms of justice and dispute resolution mechanisms that do not necessarily exist in Western-oriented judicial institutions. In Africa, as elsewhere, dispute mechanisms that adhere to local values and norms probably have a better chance of providing lasting solutions to otherwise intractable conflicts. It therefore behoves Africans, exercising their sovereignty, to move beyond the anti-ICC rhetoric and actualize their intentions by establishing courts that apply their own conceptions of justice. The Rwandan government's use of Gacaca courts to prosecute lower profile perpetrators of genocide according to local notions of justice is an apt example of how African polities may begin to address such problems. However, courts such as these will need to have elements of permanence and incorruptibility in order for them to work beyond the temporary and for posterity.

As such, Africans could select what has worked well and leave out what has not. For example, neither Uganda nor the ICC anticipated the LRA would walk out of peace talks when the Ugandan government referred the matter to the ICC in January 2004,<sup>102</sup> yet the fact that the OTP may have lobbied Uganda to self-refer the LRA case muddies the waters and demonstrate how the ICC, at least initially, may have shopped for work.<sup>103</sup> As a result, development, peace practitioners and critics of the ICC have warned that international prosecutions may undermine fragile local peace initiatives and prolong conflict. In addition, some have argued that the Court's brand of retributive punishment is fundamentally at odds with local values, for example, those enshrined culturally in traditional reconciliation ceremonies and legality in Uganda's Amnesty Act of 2000.<sup>104</sup>

Civil society, academics, law societies and other activists engaged in law reform, legal practice, human rights and governance in Africa must call the anxiety of some elites about the ICC for what it is – yet another effort by African elites to circumvent justice and neutralize opposition figures. As noted above, the problem that some African elites generally have with the ICC is that it rubbishes domestic laws that generally shield sitting heads of states and other elites from prosecution, thereby reinforcing their immunity and ability to commit economic and political crimes with impunity. The ICC remains one of the few threats to this impunity and thus is understandably unpopular in the halls of power across the continent, but continues to have the substantial backing of civil society, in general.<sup>105</sup> Raising awareness about the ICC at the local and regional levels can better inform the discourse on individual countries' efforts to withdraw from the Court,

102 Clark, 2011, pp. 521-545.

103 S.M. Nouwen & W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, Vol. 21, No. 4, pp. 941-965, at 947.

104 N. Grono & A. O'Brien, '2 Justice in Conflict? The ICC and Peace Processes', *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008.

105 Keppler, 2012, pp. 7-8. See also Lekalake & Buchanan-Clarke, 2015, p. 2.

but, more importantly, consider alternatives.<sup>106</sup> In fact, threats of withdrawal from the ICC could be used as leverage in demanding local or regional tribunals – ideally to condition withdrawal from the ICC on providing credible alternative judicial mechanisms. We admit the Herculean nature of this task given in many sub-Saharan countries civil society is relatively weak. Yet the danger in not challenging the anti-ICC narrative is that elites will do nothing to reform or establish viable justice systems if left on their own. The 2014 Malabo Protocol is a case in point.<sup>107</sup> The Protocol ostensibly expands the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to include war crimes. However, only four African states have signed the Protocol (Benin, Guinea Bissau, Kenya and Mauritania) and not one African state has ratified it to date, leading to an obvious crisis of legitimacy and empowerment.<sup>108</sup> Furthermore, the Protocol is flawed in that it provides sitting heads of state and other senior government officials with an automatic “get out of jail free card.”<sup>109</sup> That is, the Protocol specifically shields African leaders from indictment, thus arguably encouraging of impunity. Rather than actual withdrawal from the Court, most African governments seem to favour ignoring Court warrants, offering fig leaf alternatives such as the Malabo Protocol in the process. Either way, ordinary Africans will be left wanting for viable retributive justice options.

## 5 Part IV: Conclusion

The anti-ICC narrative currently popular in many African capitals and at the AU should be contextualized and critiqued. This is not because the ICC is beyond reproach or its actions not suspect. As Kantai and others have noted, the ICC has legitimacy but lacks teeth to enforce its warrants and depends on powerful states

106 See Internews, *The International Criminal Court and Post-Election Violence in Kenya*, May 2010 (pointing that in Kenya the discourse about sending the indicted suspects to the Hague was colored by media characterization “of the ICC as a distant, almost austere, authority with limited relevance to or understanding of Kenyan affairs.”)

107 First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Addis Ababa, African Union, 15 May 2014. Available at: <[www.au.int/en/sites/default/files/treaties/7804-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](http://www.au.int/en/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)> (last accessed 12 April 2017).

108 W. Menya, ‘Only Four Nations have Signed Pact for African Court’, *Daily Nation*, Nairobi, 11 April 2015. Available at: <[www.nation.co.ke/news/Only-four-nations-have-signed-pact-for-African-court/1056-2682996-9ep7dxz/index.html](http://www.nation.co.ke/news/Only-four-nations-have-signed-pact-for-African-court/1056-2682996-9ep7dxz/index.html)> (last accessed 12 April 2017).

109 K. Smith, ‘Why is South Africa Leaving the International Criminal Court?’ *Rising Powers in Global Governance*, 7 November 2016. Available at: <<http://risingpowersproject.com/why-is-south-africa-leaving-the-icc/>> (last accessed 12 April 2017).

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or states in general for the most part,<sup>110</sup> which risks eroding public confidence in the Court further undermining its ability to command compliance. In early 2017, the ICC Prosecutor indicated that the Court had limited its investigations in Cote d'Ivoire, in part, because it lacked resources.<sup>111</sup> The ICC also has not been good at public relations, which leaves it susceptible to being maligned by state-owned and state-directed anti-ICC propaganda disseminated to an unsuspecting public. This article has demonstrated that African countries played an instrumental role in the establishment of the Court, and that some are among its strongest proponents. In addition, most of the cases have been referred to the ICC by African governments. Although the ICC possesses weaknesses and flaws, including being politicized, it is a bit of a stretch to argue that it is neocolonial and beholden to Western powers bearing in mind Africa's primary role in its establishment. Such criticisms also ignore the fact that some Western countries such as the United States have refused to join or support it and actually lobbied against ratification of the Rome Statute. Despite these criticisms, the ICC can potentially contribute positively towards conflict resolution and peacebuilding in Africa, and elsewhere. It is therefore probably premature to call for an exit from the ICC when most African states and regions lack a mechanism for addressing serious violations of international humanitarian law. If anything, the negative experiences Africa has had with the ICC should motivate states to establish independent judiciaries equipped to prosecute perpetrators of atrocities and thereby make the ICC a court of last resort – as envisioned in the Rome Statute. Such courts could be attuned to African sensibilities and mete out justice in cases of genocide, war crimes and crimes against humanity in a manner consistent with local concepts of justice. Given the above, we view the anti-ICC crusade and efforts to engineer a mass exit of African countries from the Rome Statute as an elite conspiracy to escape being held accountable for human rights violations. That crusade is flawed and politically motivated and does not entertain serious alternatives to the ICC. Until such a time that African states establish independent, professional judiciaries, the ICC probably will remain a contested court of first instance and potentially the only hope for victims seeking justice for the worst crimes.

110 Kantai, 2016, p. 5. See also Marinakis, 2008, p. 157 (expressing pessimism on whether the ICC can survive “without an enforcement mechanism and without the U.S. utilizing its vast resources to apprehend suspects.”) See also generally Kenyans for peace with truth & justice, *All Bark No Bite? State Cooperation and International Criminal Court*, December 2014, pp. 1-27 (discussing collapse of the case against Kenyan President Kenyatta due to, in part, refusal of the government of Kenya to cooperate). Available at: <<https://www.africaportal.org/dspace/articles/all-bark-no-bite-state-cooperation-and-international-criminal-court>> (last accessed 12 April 2017).

111 ‘The International Criminal Court on Trial: A Conversation with Fatou Bensouda’, *Foreign Affairs*, January/February 2017, p. 50.