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**A COURT IN CRISIS?  
THE ICC IN AFRICA, AND BEYOND**

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## INTRODUCTION

Confronted by challenges in mobilising state cooperation, gaining custody of accused, and affirming itself as an effective international judicial body, the International Criminal Court (ICC) has faced an uphill struggle in asserting its authority. When Burundi, Gambia and South Africa announced their intent to withdraw from the ICC ahead of the 15<sup>th</sup> Assembly of State Parties of the ICC in November 2016, the sense of crisis surrounding the Court was further heightened, despite recent achievements such as the trial of Ahmad al-Mahdi over the destruction of cultural sites in northern Mali, which resulted in a guilty plea, and the issuance of the ICC's first reparations order in the Germain Katanga case.

Backlashes against international courts are not uncommon, though withdrawals sit at the extreme end of the spectrum of measures that states can deploy to express discontent with an international judicial body. In fact, states' rejection of international court rulings, appending of reservations to international human rights treaties, and even withdrawals from international treaties and institutions form part and parcel of international relations, where state consent still underpins participation in international legal regimes. Several Latin American countries, for instance, have withdrawn or threatened to withdraw from the Inter-American Convention of Human Rights, thereby removing themselves from the jurisdiction of the Inter-American Court of Human Rights. However, three near simultaneous withdrawals from an international court are unprecedented and signaled that the ICC might be in serious trouble. Moreover, since the ICC is seen by many to represent certain core values on which international society is based, erosion of state support for the ICC is felt as posing a fundamental threat.

Initial concerns that the withdrawals would trigger a cascade of states leaving the ICC and lead in the long term to the Court becoming obsolete, now appear premature.<sup>1</sup> In February 2017, following Yahya Jammeh's removal from power, the new Gambian president, Adama Barrow, revoked Gambia's notice of withdrawal. The South African government also revoked its intent to withdraw in March 2017, after the Constitutional Court ruled the notice was unconstitutional because it had not received parliamentary approval. Moreover, the resolution on collective withdrawal from the ICC adopted at the January 2017 African Union (AU) Summit reflected the persistence of deep disagreements between AU member states about the desirability of such a move.<sup>2</sup>

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<sup>1</sup> Though the issue of ICC withdrawals has not entirely dissipated, as illustrated by Zambia's announcement that it would organise a public consultation about its ICC membership. 'Zambia launches public poll for ICC exit sparking concerns of African exodus', *International Business Times*, 27 March 2017.

<sup>2</sup> Allan Ngari, 'The AU's (Other) ICC Strategy', *ISS Today*, 14 February 2017 (<https://issafrica.org/iss-today/the-aus-other-icc-strategy>); Mark Kersten, 'Not All It's Cracked Up to Be – the African Union's "ICC Withdrawal Strategy"', *Justice in Conflict blog*, 6 February 2017 (<https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/>).

While opponents of the Court have been able to take centre stage in debates about the ICC's role in Africa, the Court also enjoys a degree of support among African states. Botswana, Burkina Faso, Cape Verde, Nigeria, Senegal, Tanzania and Tunisia have been steadfast in their support for the Court and countered the push at the AU for a mass withdrawal. The anti-ICC discourse propounded by some African states is also not necessarily reflective of wider public sentiments on the continent towards the ICC, nor should it overshadow the multidimensional nature of African civil society's attitude towards the Court.<sup>3</sup>

The fact that the ICC crisis has retreated from the brink should, however, not lead to complacency about the profound challenges still facing the Court. After setting out the background to the current tensions between the ICC and African countries, this paper discusses four areas of ongoing tension surrounding the ICC's work that could feed further backlashes against the Court if left unaddressed.

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<sup>3</sup> Tessa Alleblas et.al, 'Is the International Criminal Court Biased Against Africans? Kenyan Victims Don't Think So', *Washington Post Monkey Cage blog*, 6 March 2017 ([https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-dont-think-so/?utm\\_term=.ba19f3de0568](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-dont-think-so/?utm_term=.ba19f3de0568)); Marlies Glasius, 'What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations', *Human Rights Quarterly* 31:2, 2009; Phil Clark, 'All These Outsiders Shouted Louder Than Us: Civil Society Engagement with Transitional Justice in Uganda', *Security in Transition Working Paper*, London School of Economics, 2015 ([http://www.securityintransition.org/wp-content/uploads/2015/11/CS-and-TJ-working-paper\\_Uganda.pdf](http://www.securityintransition.org/wp-content/uploads/2015/11/CS-and-TJ-working-paper_Uganda.pdf)); Thomas Obel Hansen and Chandra Lekha Sriram, 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and their Enemies', *International Journal of Transitional Justice* 9:3, 2015.

## DRIVERS OF THE AFRICAN-LED BACKLASH

The decision by Burundi, South Africa, and Gambia to withdraw from the ICC follows on the heels of long-standing tensions between the Court, individual African states and the AU.<sup>4</sup> These first came to the fore following the Court's indictment of Sudanese President Omar al-Bashir in 2009, which saw the AU calling on the United Nations Security Council (UNSC) to defer the Sudan investigation and asking AU members not to cooperate with the Court for the execution of the arrest warrant against al-Bashir. Discontent with the Court further heightened with the indictments in 2011 of senior Kenyan officials over the 2007-2008 electoral violence in the country and the focusing of the Court's activities on Africa.

Although the current backlash can be traced back to the ICC's investigations and prosecutions in Sudan, Libya and Kenya, it is important to remember that the ICC has never enjoyed unanimous support among African states. Many African countries who participated in the 1998 Rome Conference were supporters of a strong and independent court (forming part of what was known as the 'like-minded group'), and Africa constitutes the largest regional grouping among ICC member states. But from the outset there has been a significant – albeit nonmajority – group of African countries that were opposed to or noncommittal towards the Court. While 34 African countries joined the Court, 16 states decided to remain outside its ambit (eight signed but did not ratify the Rome Statute, while eight are non-members). This contrasts with regional groupings such as Western Europe or Latin America and the Caribbean, where membership of the ICC is near universal. At present, opponents of the Court include both non-members of the ICC, such as Rwanda, Ethiopia and Sudan, and member states such as Kenya and Burundi.

An interplay of political and normative factors has driven the backlash against the ICC. Critiques levied by African states against the ICC centre on the Court's perceived bias, selectivity, politicisation, and disregard for African views on how best to promote peace and justice on the continent. Much of the discord stems from the fact that the Court's investigations have primarily, if not exclusively, focused on sub-Saharan Africa (nine of its ten current investigations are in African countries). Some downplay this bias by pointing out that many situations were self-referred to the Court by African countries (Democratic Republic of Congo or DRC, Uganda, Central African Republic or CAR, Mali) and that the scale of grave human rights violations and general weakness of domestic judiciaries in African countries warrants the ICC's

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<sup>4</sup> The particularistic motivations for these three withdrawals are, however, varied and, in some instances, also tied in closely with domestic political considerations. On Burundi, see for instance, Stef Vandeginste, 'The ICC Bruexit: Free at Last? Burundi on its way out of the Rome Statute', *IOB Analysis and Policy Brief 20*, Institute of Development and Policy Management, University of Antwerp, October 2016.

intervention.<sup>5</sup> However, the ICC's African focus has also been driven by political considerations and institutional self-interest: African situations were initially, though mistakenly, thought to constitute 'easy cases' that would present the nascent Court with an opportunity to demonstrate its relevance and effectiveness without risking major political upset among powerful countries.<sup>6</sup>

This perceived bias has been further fueled by the Office of the Prosecutor's (OTP) willingness to let preliminary investigations in countries like Colombia drag on, while acting swiftly on African situations, and its seemingly deliberate selectivity in choosing not to investigate a number of situations outside Africa despite strong evidence of gross human rights violations (e.g., Iraq and Palestine). This has led some to accuse the Court of (un)willingly acting to protect the interests of powerful states.<sup>7</sup> Further compounding this perception is that certain permanent states on the United Nations Security Council (UNSC), many of whom have not joined the ICC, have used its referral power to target certain African states while insulating their allies from similar ICC scrutiny. The backlash by African countries thus reflects a frustration with the ICC's inability to promote a more equal international order and concerns that it is evolving into yet another instrument through which powerful states seek to control weaker states.<sup>8</sup>

Criticism of the ICC's investigations also stems from what African states and the AU perceive as the UNSC and ICC's disregard for African views on how best to pursue peace and justice on the continent. The AU submitted requests for the deferral of the ICC's investigations in Sudan on the grounds that pursuing the arrest of President al-Bashir could pose a threat to the AU's peace mediation efforts, and, in Kenya, requested a further deferral on the grounds that ICC investigations could revive political tensions and that precedence should be given to domestic prosecutions instead. In both instances, however, the UNSC rejected the AU's request (in the case of Sudan, the request was not even tabled by the UNSC), with the OTP also adopting a narrow interpretation of its power, under Article 53 of the Rome Statute, to defer an investigation in 'the interests of justice'. While the validity of the grounds for deferral invoked by the AU is up for debate – especially in the Kenya case – the reluctance of

<sup>5</sup> Jean-Baptiste Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', *International Affairs* 92:6, 2016, p. 1328.

<sup>6</sup> As David Bosco points out, efforts to accommodate major powers, in particular the United States, have been a key strategy pursued by the ICC in an effort to contain efforts by these states to marginalise the Court. David Bosco, *Rough Justice. The International Criminal Court in a World of Politics* (Oxford: Oxford University Press, 2014).

<sup>7</sup> Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?', *Policy Brief 8*, Institute for Justice and Reconciliation, Cape Town, 2013; Benson Chinedu Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa', *African Journal of Legal Studies* 7:3 2014; John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?', *Journal of International Criminal Justice* 11:3, 2013.

<sup>8</sup> Murithi 2013, *op.cit*; William Schabas, 'The Banality of International Justice', *Journal of International Criminal Justice* 11:3, 2013.

the UNSC and ICC to engage the AU on this matter has created resentment over the latter's apparent sidelining in decisions affecting the continent.

Another important point of friction has been the ICC's rejection of immunities for sitting heads of state. The AU has countered that the pursuit of sitting heads of states may have profound destabilising effects in the countries concerned and the wider region. Many African states are also wary that calls for a rejection of heads of state immunities serve as a legal veneer for Western states' pursuit of regime change in some African countries. States have further questioned whether the Rome Statute's waiver of immunities overrides states' duties under international law to respect the diplomatic immunity of sitting heads of state, particularly in relations ICC state parties have with non-state parties (South Africa, for instance, invoked this argument to explain its decision to withdraw from the ICC).

It can be countered that the African backlash against the ICC has largely been politically motivated. The discourse in which the ICC is branded as a neocolonial institution targeting Africa has proved useful to certain political leaders seeking to protect themselves from ICC investigations. That self-protection has driven some of the ICC backlash is also clearly reflected in the introduction of an immunity clause for sitting heads of state or government, and other state officials during their tenure in office, in the Malabo Protocol of the proposed African Court of Justice and Human and Peoples' Rights (ACJHPR).<sup>9</sup> In such instances, critiques of the ICC do not reflect a genuine concern about imbalances in the implementation of international criminal justice, but rather a lack of political will to end impunity for grave human rights violations. The fact that the AU only expressed concern with the ICC when it started investigating political leaders, while seemingly having no issue with the ICC's earlier African-based investigations of rebel groups, suggests that a bias also exists on the part of African states. Furthermore, their critique of UNSC interference in the Court's operations may smack of insincerity, as some African states voted in favour of UNSC resolutions referring the situations in Libya and Sudan to the ICC, and the AU itself has been keen to use the UNSC's deferral power when it suited its political interests.<sup>10</sup>

Some also argue that African states themselves could do more to encourage the ICC to open investigations into non-African situations.<sup>11</sup> However, in reality, redressing this imbalance lies beyond the ability of African states alone. Considering their strong attachment to the principle of sovereignty – which many African states continue to see as key to protecting themselves from foreign intervention – and their geopolitically weaker position, African states are ill-positioned to take the initiative in refer-

<sup>9</sup> African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, Art. 46A bis.

<sup>10</sup> Vilmer 2016, *op.cit.*, p. 1330.

<sup>11</sup> David Scheffer, 'How to Move Beyond South Africa's Notice of Withdrawal from the ICC', *Just Security blog*, 24 October 2016 (<https://www.justsecurity.org/33778/move-south-africas-notice-withdrawal-icc/>).



ring powerful states to the ICC. Furthermore, even if African states made such a referral, it would still be dependent on the willingness of the Prosecutor to act on this information,<sup>12</sup> as illustrated by the unsuccessful referral made by the Comoros in 2013 over the actions of Israeli troops against a Comoros-registered vessel that tried to break the blockade of Gaza in 2010.

While one can acknowledge that political interests have driven some of the backlash against the ICC, it would be short-sighted to brush aside legitimate critiques of the Court's disappointing record in producing impartial and balanced justice. This is not to deny the important work that is being done by the ICC, or to question the commitment of ICC officials to the project of justice, but rather to recognise that the ICC is an imperfect institution that operates in highly complex and volatile social and political environments, and can produce unintended negative effects on the environments in which it operates. The ways in which the ICC sometimes entrenches inequality before the law, reinforces geopolitical imbalances, and imposes a normative order that does not align with all, should be taken seriously, and efforts made by the Court, its member states, and ICC proponents to minimise such impacts. In the remainder of the paper, I highlight four factors that are likely to be continuing sources of tension regarding the ICC, even in the absence of further state withdrawals, and which therefore warrant ongoing policy attention.

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<sup>12</sup> Tor Krever, 'Africa in the Dock: On ICC Bias', *Critical Legal Thinking* blog, 30 October 2016 (<http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/>).

## CHAFING NORMATIVE ORDERS

The backlash against the Court is not merely an issue of politics but also more broadly reflects tensions around the hierarchy of norms and values in the international system, as well as persistent frictions between statist and cosmopolitan views on the place of international criminal law in the world order. While much has been made of the universalistic aspirations of the ICC project, and many ICC advocates take it as a given that the values represented by the Rome Statute trump other values and norms, the conflict between the AU and ICC highlights the fact that no single normative order exists. Rather, there are a variety of normative orders within the international system that sometimes chafe and collide. Consequently, states make competing claims about which norms predominate and may challenge some of the norms and values propounded by the ICC.

The most evident example of this has been the challenge brought by African states concerning the scope of immunities for sitting heads of state. African states' opposition to the ICC also suggests disagreements with how the international criminal justice system as embodied by the ICC conceptualises responsibility and the nature of international crimes. For instance, the inclusion of terrorism, mercenarism, trafficking, the illicit exploitation of natural resources, and unconstitutional change of government within the criminal jurisdiction of the proposed ACJHPR indicates that African states favour a broader view of what constitutes international crimes. In their view, international criminal justice, as embodied by the ICC, does not adequately address security challenges that are of particular concern to African states and underpin many of the armed conflicts in Africa.<sup>13</sup>

While there is no immediate solution to resolving or arbitrating such norms or conflicts – beyond, for instance, asking for an advisory opinion from the International Court of Justice on the issue of immunities for sitting heads of state – future dialogue on the ICC needs to acknowledge the existence of these competing normative claims, and the validity of some of them, and engage in a genuine reflection on the possibility of adapting the current international criminal justice framework to accommodate these differing values and norms. The OTP's recent statement, that when assessing the gravity criteria guiding case selection, it intends to give particular consideration to 'Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources and the illegal dispossession of land' goes some way to integrating wider perspectives on

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<sup>13</sup> On the historical construction of the Rome Statute's focus on four 'core crimes', see Kamari Maxine Clarke, 'Is the International Criminal Court Targeting Africa Inappropriately?', *ICC Africa Forum*, March 2013 – January 2014 (<http://iccforum.com/africa#Clarke>).

criminality.<sup>14</sup> In addition, although there are some legitimate concerns about the feasibility of the ACJHPR as currently proposed under the Malabo Protocol, the process of regionalisation of international criminal justice should also be considered as a useful means by which to accommodate differing norms and values.

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<sup>14</sup> Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, p. 14; Alex Whiting, 'Finding Strength Within Constraints', *International Criminal Justice Today* blog, 23 November 2016 (<https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-constraints-and-strengths/>).

## RELATIONS WITH FENCE-SITTING STATES

State challenges to the legitimacy and authority of the ICC have been present since its creation and are likely to be a permanent fixture. Given that ICC investigations can have more far-reaching consequences than those of other international courts – to the extent that the ICC poses a personal threat to high-level and powerful civilian and military officials – it seems reasonable to expect that the likelihood of a backlash is also higher than at other international courts. It is also unlikely that the Court will manage to achieve universal membership in the near future (at present 124 countries are member states), thereby curtailing its jurisdictional scope and consequent ability to counter critiques that it pursues selective justice. As a result, the ICC will need to invest much time and resources in being accepted as an authoritative institution which, even if states do not fully agree with it, is nevertheless recognised as sufficiently legitimate and powerful that states perceive they have more to lose by abandoning the Court. This will require the Court to invest even more significantly than it already does in diplomatic efforts to manage these inevitable backlashes and limit their impact.<sup>15</sup>

In this context, the Court's management of relations with African 'fence-sitting states' will be particularly important as future withdrawal threats are likely to come from that corner. A substantial group of African countries have an ambivalent attitude towards the Court, being neither full supporters nor full opponents of the Court. This includes the CAR, Chad, the DRC, Gabon, Namibia, Uganda, the Republic of Congo, Zambia and until recently, South Africa. These states have expressed criticism (some more vocally than others) of the Court's operations and what they perceive as its bias against Africa, with some even supporting the call for a mass withdrawal from the Court. At the same time, they have cooperated with the ICC on certain issues (exchange of information and supporting investigations) but not on others (executing the arrest warrant of President Bashir). This ambivalent attitude is explained by two factors: domestic political interests and regional accommodation.

Firstly, many fence-sitting states support the ICC to the extent that it provides them with a measure of international legitimacy and can prove useful in prosecuting armed groups active on their territory. At the same time, elites in these countries remain nervous about the possibility that the ICC could investigate them in the future, making them likely to shift into the camp of Court opponents when they feel threatened. This puts the ICC in the unenviable position of having to balance its need for state cooperation with the necessity to avoid being tethered to the political interests of domestic elites in situation countries. Over the coming year, the ICC's

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<sup>15</sup> Scheffer 2016, op.cit.; Steven C. Roach, 'How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy', *Global Governance* 19:4, 2013.

relations with Ivory Coast (where the Court is expected to broaden its investigations after it initially only indicted individuals affiliated to ousted president Laurent Gbagbo) and the CAR (where the Court will look at crimes committed in 2012, and should in principle target both ex-Seleka and anti-Balaka forces) will therefore need to be watched closely.

A second driver of African states' ambiguity is the contradictory normative pressures they face at the international and regional level. Because the principle of African unity and solidarity remains a central component of diplomatic relations within the AU, acting in contravention of this principle can entail high political costs for states. Consequently, supporting African states that are targeted by the ICC and adhering to the anti-imperial discourse of Court opponents is a politically savvy strategy to follow. For some, it is a question of boosting their regional standing and leadership (Uganda, Chad and South Africa) while for others it is about ensuring key regional backing on other more important political and security dossiers (DRC, CAR).

Thus, what from the outside may look like a lack of resolve on the part of these states, in reality reflects their attempt to balance competing political and normative pressures. The risk that this balancing exercise ultimately tips to the ICC's disadvantage is starkly illustrated by the South African case. The latter furthermore offers a reminder that the legitimacy of the Court among states is ever-shifting and cannot be taken for granted, even when a state appears to have internalised the ICC's anti-impunity norm.<sup>16</sup> Building dialogues with fence-sitting states – for whom, at present, the priority still lies with reforming the Court rather than withdrawing from it – will thus be far more important for the ICC than an illusory attempt to get fervent court opponents on board.

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<sup>16</sup> Andrew J. Grant and Spencer Hamilton, 'Norm Dynamics and International Organisations: South Africa in the African Union and the International Criminal Court', *Commonwealth & Comparative Politics* 54:2, 2016.

## FRAUGHT UNSC–ICC RELATIONS

The adoption by powerful states of active measures to keep themselves out of the ICC's reach while (ab)using their position within the UNSC to align the Court's activities with their political interests has contributed significantly to perceptions that the ICC is biased and politicised. First, there has been a glaring inconsistency in the willingness of the UNSC to refer certain instances of mass human rights violations to the ICC (Sudan, Libya) but not others where similar grave atrocities have been committed (Syria, Israel). This practice has been driven by the political interests of the five permanent members of the UNSC. States have used the ICC threat to gain political leverage over what were then considered 'pariah states' and to delegitimise the leaders of these countries. At the same time, they have wielded their veto power to block referrals of 'friendly' countries: the United States has made it clear that it will oppose any attempt to bring Israel before the ICC, while Russia and China have blocked a referral of the Syrian situation to the ICC. There has furthermore been a lack of consistency in state support for ICC investigations once referrals have been made, as reflected by the unwillingness to allocate UN funding to the ICC to cover the costs of referred cases and by the UNSC's meek response to ICC findings of state non-cooperation (as happened in the case of Sudan).

Second, and maybe even more problematically, powerful states (particularly the United States) have pushed through measures and exemptions meant to insulate themselves from ICC scrutiny. For instance, the United States pressured states into signing bilateral immunity agreements that would prevent states from handing 'current or former Government officials, employees (including contractors), or military personnel or nationals of one Party' to the ICC, thereby protecting US nationals from the ICC. Close to 100 such agreements were concluded and states that refused to sign them faced the suspension of aid transfers and military assistance. The United States also forced through a UNSC resolution in July 2002 granting troops from non-state parties that contributed to UN peacekeeping missions a blanket immunity from prosecution by the ICC. Widespread opposition from other states led to the non-renewal of this resolution in 2004, but similar exemptions for UN peacekeeping troops from non-state parties were included in the UNSC resolutions referring the situations in Libya and Sudan to the ICC. These resolutions furthermore failed to impose a broad obligation for all states, including non-state parties, to cooperate with the Court, instead limiting this obligation to the countries that were being referred to the Court. In practice, different layers of accountability for non-state parties have thus been created: while powerful non-state parties have used their power to protect themselves from the ICC, they are mobilising their power within the UNSC to submit other, weaker non-state parties to the ICC.

Although severing the formal link between the ICC and UNSC might be considered desirable, it is currently unlikely to be politically feasible. Instead, efforts should go into devising measures that can, as much as possible, contain the potentially nefarious effects of the UNSC on the ICC. For starters, the ICC should reflect critically on the extent to which it is willing to accommodate realpolitik considerations as it did in the cases of Libya, Iraq, and Israel/Palestine. In theory, the ICC could even decide not to pursue investigations into a case referred to it by the UNSC.<sup>17</sup> While there is an understandable need for the Court to try to maintain cordial relations with powerful states, current experience shows that the ICC is paying a very high price for this, both in terms of its legitimacy and efficacy. A key role is also set aside here for ICC state parties, who should use their diplomatic influence to counter or limit attempts to politicise the ICC through the UNSC; they have an important role to fulfil as mediators between non-state parties sitting on the UNSC and the ICC.

To counter the negative effects of the UNSC's politics on the ICC's credibility, more emphasis should also be placed on strengthening the supportive role the UNSC can play in ICC investigations. This entails ensuring that UN peacekeeping missions are provided with strong and efficient mandates to fully cooperate with the ICC (the same goes for regional or sub-regional peace operations), including the arrest of indictees. It is also about ensuring that, beyond the formal mandate, the political and military leadership of UN peacekeeping missions effectively prioritise cooperation with and support for the ICC and the fight against impunity, which has not always been the case so far.

In addition, the UNSC (and the Assembly of State Parties or ASP) should play their designated roles in dealing with states that do not cooperate with the ICC. So far, states that have refused to cooperate with the Court have faced limited sanctions or sustained diplomatic pressure. This has signaled to countries that they have little to fear from acting against the Court or threatening to withdraw. Getting the ASP and UNSC to take a more assertive position against state non-cooperation could help bolster the Court's clout.

Finally, ICC state parties could also advocate for future UNSC referrals to be accompanied with appropriate provisions for the transfer of UN funding to the ICC, as provided for under the UN-ICC relationship agreement, or with states' voluntary contributions, as Canada did to support ICC investigations in Sudan. This might be challenging considering the budgetary constraints faced by many European countries today, which have seen some advocate for a 'zero growth policy' for the ICC's budget, and US President Donald Trump's announcement that it will signifi-

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<sup>17</sup> Adejoké Babington-Ashaye, 'Politicizing the International Criminal Court: Redefining the Role of the United Nations Security Council in the Age of Accountability', *Proceedings of the Annual Meeting of the American Society of International Law* 108, 2014, p. 303.

cantly slash its funding for international organisations, including the UN.<sup>18</sup> Excessively curtailing the Court's funding however, will affect its ability to fulfil its mandate, let alone expand its global reach, and to achieve its stated aim of guaranteeing a broad role for victims at the ICC. It may also lead to further decisions to limit ICC travel spending, which risks negatively impacting the quality of its investigations and the evidence collected, and consequently the viability of trial processes.<sup>19</sup>

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<sup>18</sup> Colum Lynch, 'Trump Administration Eyes \$1 Billion in Cuts to UN Peacekeeping', *Foreign Policy*, 23 March 2017.

<sup>19</sup> Dov Jacobs, 'The ICC Katanga Judgment: A Commentary (part 1): Investigation, Interpretation and the Crimes', *Spreading the Jam* blog, 10 March 2014 (<https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/>).



## ICC MONOPOLISATION OF THE JUSTICE FIELD

The current backlash against the ICC and accusations that it acts as an instrument of neo-colonialism is also fed by its growing monopolisation of justice discourses and practices. The ICC, and international criminal law more broadly, have become powerful frames around which justice issues are articulated; they are increasingly advocated as the dominant norm for dealing with armed conflicts and legacies of mass atrocities, particularly in Africa.<sup>20</sup> What has emerged is a powerful discourse portraying the ICC as sitting at the top of a 'justice pyramid' – that is, it is put forward as the most appropriate response to mass atrocities. While the existence of other, alternative justice responses is recognised, they are commonly presented as insufficient or secondary responses to the ICC. They are often also forced to fit within the standards set by international criminal justice. This growing hegemony of the ICC sits somewhat uncomfortably with the Rome Statute, which is built on a strong presumption that the ICC is not an inherently superior justice response.<sup>21</sup> Yet what has emerged is a growing tendency to (re)interpret the Rome Statute in a way that serves to introduce increasingly vertical relations between the ICC and other, more local justice responses. Three illustrations of this can be provided.

First, the ICC has interpreted the complementarity principle and attendant admissibility criteria in a way that nearly guarantees its ability to claim jurisdiction. It has simultaneously adopted a broad interpretation of the criteria that a case is only admissible before the ICC if a 'State is "unwilling or unable" genuinely to carry out the investigations and prosecution' (Article 17b), particularly when dealing with state self-referrals, and a narrow interpretation of criteria for applying the *non bis in idem* principle, basing it on notions of 'same conduct' and the need for national proceedings to mirror ICC proceedings. This has effectively amounted to shifting the ICC from a complementarity regime to one of 'quasi primacy'.<sup>22</sup>

Second, the emergence of the principle of burden-sharing offers a further illustration of efforts at reinterpreting the ICC's reach.<sup>23</sup> Under this principle, the ICC is put forward as having priority in dealing with the most serious crimes and the most responsible perpetrators, while other justice mechanisms should only deal with lesser crimes and perpetrators. While the Rome Statute nowhere states this idea of

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<sup>20</sup> Sarah M.H. Nouwen and Wouter G. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice* 13:1, 2015, p. 161; Obiera Chinedu Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as 'Transitional Justice' Mechanism in Africa: Some Critical Reflections', *International Journal of Transitional Justice* 9:1, 2015.

<sup>21</sup> Pdraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism', *Chinese Journal of International Law* 13:2, 2014, p. 277.

<sup>22</sup> Carsten Stahn, 'Admissibility Challenges Before the ICC: From Quasi-Primacy to Qualified Deference?' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015).

<sup>23</sup> McAuliffe 2014, *op.cit.*

burden-sharing, and the basis on which the ICC should have such an automatic primacy is never expressly stated,<sup>24</sup> it has become commonplace in discourses about the ICC and its relationship with other justice responses such as hybrid courts, domestic courts or truth and reconciliation commissions. The idea of burden-sharing illustrates how certain provisions of the Rome Statute which are solely meant to regulate the ICC's exercise of jurisdiction (such as the complementarity principle and Article 5 of the Rome Statute), are being increasingly interpreted as overarching organisational principles for the entire justice architecture, thereby subsuming other justice responses to the ICC frame.

A third and final illustration of the creeping hegemony of the ICC is the recent introduction of the principle of 'reverse complementarity' in the law establishing the Special Criminal Court for the Central African Republic (SCC), which gives the ICC primacy over the SCC and Central African courts.<sup>25</sup> While it is too early to tell whether this provision will have significant practical implications, it sets an important precedent in terms of altering one of the fundamental principles on which the ICC is built.<sup>26</sup>

The growing monopolisation of justice discourses by the ICC and international criminal justice has partly been driven by the Court's need to assert its institutional legitimacy, relevance and visibility. However, it is also underpinned by normative assumptions about the inherent greater effectiveness and legitimacy of international judicial processes, the moral superiority of the criminal response to mass atrocities, and the inherent benevolence of international criminal justice. This is intricately linked to the prevailing faith ICC proponents have in the transformative power of international criminal law.<sup>27</sup> While many view the ICC's growing dominance as an indisputably positive development, a critical eye should be cast over these normative assumptions and the narrowing of justice discourses and practices that results from this construction of a justice hierarchy. For instance, the ICC has not proven to be more effective than domestic courts at gaining custody of accused or at prosecuting heads of state and high-level officials, as a result of a combination of practical and political constraints. And like domestic courts, the ICC faces challenges in both collecting evidence and building cases, and accusations of politicisation and victor's justice. Furthermore, strong evidence is still lacking that the ICC achieves the

<sup>24</sup> While the Rome Statute limits the ICC's jurisdiction to 'the most serious crimes of concern to the international community as a whole' (Article 5), the notion that the ICC should only prosecute the most responsible perpetrators is not required by the Rome Statute. Rather the Rome Statute has been interpreted as such by the Pre-Trial Chamber and the Office of the Prosecutor.

<sup>25</sup> *Loi Organique No. 15.003 portant création, organisation et fonctionnement de la Cour pénale spéciale*, 3 June 2015, Art. 37.

<sup>26</sup> Valerie Arnould, 'The Uncertain Promise of Hybrid Justice in the Central African Republic', *Africa Policy Brief* 14, Egmont – Royal Institute for International Relations, September 2015; Patryck I. Labuda, 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?', *Journal of International Criminal Justice* 15:1, 2017, 192-194.

<sup>27</sup> David S. Koller, 'The Faith of the International Criminal Lawyer', *New York University Journal of International Law and Politics* 40, 2008.

commonly stated preventive, expressivist and peace-promoting goals,<sup>28</sup> or that it is able to advance not only the interests of global justice but also those of local justice.<sup>29</sup> As a form of justice that is seen by many as distant, selective, and slow, the ICC also struggles to build its credibility beyond its immediate constituency of human rights advocates.

More broadly, while deploying a criminal justice response to mass violence may appeal to our moral sense of fairness and justice, it is not always the most effective way of responding to and preventing further atrocities. The latter often require changing the underlying institutional conditions and cultures that authorise and legitimise the resort to mass human rights violations, as well as addressing broader structural violence and relations of distrust within societies and between the state and citizens, which requires in turn a broader set of policy interventions than mere criminalisation of these acts and the punishment of individual perpetrators.<sup>30</sup> International criminal justice also offers a restrictive frame through which to analyse and understand the nature of violence in today's armed conflicts and to apprehend the complex, overlapping and diversified nature of political and moral responsibility that characterises many conflict and repressive environments.<sup>31</sup> Moreover, by narrowly equating justice with legal accountability, it obfuscates the multidimensional character of the notion of justice, with the risk of displacing locally grounded justice conceptions and needs, which may comprise accountability but are not necessarily limited to it.<sup>32</sup> Criminal justice is thus rarely a sufficient means to provide justice in the wake of mass atrocities.

Accordingly, it is important to place the ICC within a more horizontal relationship with other justice responses, rather than advocate for the ICC to be the default response to mass atrocities. Care should also be taken to avoid framing justice debates around reductionist binaries such as justice vs. peace, anti-impunity vs. impunity, justice vs. reconciliation.<sup>33</sup> Portraying the ICC as the instrument of justice

<sup>28</sup> Tom Buitelaar, 'The ICC and the Prevention of Atrocities: Criminological Perspectives', *Human Rights Review* 17:3, 2016; Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007); Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects of Deterrence of Mass Atrocity', *International Journal of Transitional Justice* 7:3, 2013.

<sup>29</sup> Arnould Valerie, 'Rethinking what ICC success means at the Bemba Trial', *OpenGlobalRights*, 14 September 2016. Even if one adopts the view that the ICC's primary purpose is to be an instrument of 'juridified diplomacy' – that is, a diplomatic instrument aimed at promoting international peace and justice – rather than an instrument for local justice (see, for instance, David S. Koller, 'The Global as Local. The Limits and Possibilities of Integrating International and Transitional Justice' in Christian De Vos, Sara Kendall and Carsten Stahn, *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015)), evidence of the ICC's effectiveness in fulfilling the former role is currently lacking.

<sup>30</sup> Danielle Celermajer, 'Navigating the minefield of working with perpetrators', *OpenGlobalRights*, 30 March 2017.

<sup>31</sup> Significant tensions sometimes exist between the way in which legal responsibility is defined through criminal justice processes and the manner in which victims and societies at large perceive responsibility on the basis of political and moral considerations.

<sup>32</sup> Nouwen and Werner 2015, *op.cit.*

<sup>33</sup> Karen Engle, Zinaida Miller and D.M. Davis, *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), p. 1-12.

and anti-impunity and all other justice approaches as instruments of ‘non-justice’ and peace is highly questionable. Truth commissions, vetting, reparations, memorialisation, community-based justice responses, etc. are as much about providing justice for victims as is the ICC, though they might emphasise and address different dimensions of justice. The choice isn’t between the ICC and impunity; there exists a whole range of other justice instruments that are as legitimate and, in some circumstances more appropriate, than the ICC.

Stepping away from efforts to claim ICC primacy in responding to mass atrocities could also help curtail backlash against the Court. The displacement of local conceptions and approaches to justice that results from the ICC’s monopolisation of the justice field forms a fertile breeding ground for resentment towards the ICC, as it can lead states and local communities to (maybe unfairly) see the ICC as an instrument that silences them and stifles efforts to develop context- and cultural-sensitive justice responses. Countering this is not just an issue for the ICC though; often it is ICC proponents outside of the Court – among states, human rights advocates and the diffuse community of experts – who are most adamant in pushing the ICC forward as the sole legitimate response to mass atrocities. Instead, they would do well to display more humility about what the ICC can achieve and the extent to which it can satisfy the multiplicity of justice needs, and commit to equally supporting other approaches where these offer more appropriate or effective means of delivering justice for victims. In essence, the ICC needs to coexist alongside rather than above local conceptions of justice and alternative justice approaches.

## CONCLUSION

The ICC has been at the centre of heated contestations between proponents who advance the Court as a beacon of justice against the forces of impunity and violence, and those who accuse the Court of being a politicised, neo-colonial and biased institution. While both of these positions are overly simplistic and unfair representations of the Court, the confrontation seemed to reach its apogee with the announcements in October 2016 by Burundi, South Africa, and Gambia of their intent to withdraw from the Court. In a way, the Court has always been an ‘institution in crisis’. Since its inception, it has faced states’ attempts to marginalise its influence. However, the escalating tensions with the AU and the African withdrawals seemed to pose a more significant threat, not least because they signaled a definite break between the Court and African states, who were initially important ICC backers.

Now that this threat has waned, with South Africa and Gambia stepping back from their intentions to withdraw, it can be hoped that a more constructive environment may emerge for reflections about the Court’s future. It would, however, be a mistake to return to business as usual and be complacent about the significant challenges the ICC continues to face. Now is the time to engage in reflections about how to reform or rethink the Court’s role – and it is clear that many African states, even those who are not currently contemplating leaving the ICC, are placing reform of the Court high on their agenda and will likely continue to do so. Some of these reforms will be of a mostly legal and technical nature. This paper, however, proposes that there is also a need to reflect on more overarching issues relating to the normative order the ICC embodies, the politics surrounding the Court, and its place in the broader justice architecture. While these may seem like less immediately tangible challenges, addressing them may prove central to strengthening the Court’s credibility and effectiveness.

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