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The ICC and Africa: Should the Latter Remain Engaged?

Makane Moïse Mbengue and Kirsten McClellan

Abstract The International Criminal Court (the 'ICC' or 'the Court' hereafter) and Africa have had a tumultuous relationship since the creation of the Court. Although there has never been unanimous support for the Court in Africa, African states were key to the development of the Court and engaged closely with it since its early years. Since 2005, however, there has been a growing discontent with the Court and deterioration in the relationship between the Court and the African Union. Despite this, a number of African states remain committed to the ICC. In 2017, the withdrawal notifications of South Africa and Gambia were retracted, whilst the 'mass withdrawal strategy' is in reality a list of proposed changes to the Court's mandate, as this piece will show. For the relationship between Africa and the ICC to continue to evolve, there needs to be more effective discourse between African states and the ICC. In the long term, it is necessary for African states to strengthen their national judiciaries; there is also an option of expanding the jurisdiction of the African Court of Justice and Human Rights to international crimes. However, the best way forward is to continue to engage with the ICC.

1 Introduction

Uniquely in international law, international criminal law concerns the liability of individuals rather than states. The creation of the International Criminal Court (ICC, the Court)—through the Rome Statute of the International Criminal Court in 2002\(^1\)—signified a new era in international criminal justice. The Court is the first

\(^1\)Rome Statute of the International Criminal Court. http://legal.un.org/icc/statute/romefra.htm. Accessed 12 January 2018.

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permanent international criminal tribunal with jurisdiction over war crimes, genocide, crimes against humanity and the crime of aggression.²

Under Article 13 of the Rome Statute of the International Criminal Court (Rome Statute), the jurisdiction of the ICC can be exercised in three ways: firstly, through a referral by a state party; secondly, through a referral by the United Nations Security Council (UNSC); and, thirdly, by opening an investigation by the Prosecutor proprio motu. Referrals by a state party or investigations proprio motu are only available where alleged offences are committed on the territory of a state party or by the national of a state party. Referrals by the UNSC, however, can include non-state parties. Importantly, the ICC was designed to interact complementarily with national courts to form a new system of international criminal justice. This is embodied in Article 17, which provides that the Court will only have jurisdiction where a state is ‘genuinely unable or unwilling’ to prosecute.

At the time of writing, there are 123 states parties to the Rome Statute, and Africa remains the largest regional bloc with 33 states parties.³

The ICC and Africa have had a tumultuous relationship since the creation of the Court. Although there has never been a unanimous support for the Court in Africa, African states were key in the development of the Court and have engaged with it since its early years. Since 2005, however, there has been a growing discontent with the Court and a deterioration in the relationship between the Court and the African Union (AU). Discontent has also begun to coalesce into a regional African movement with the primary criticisms leveled at the Court: neocolonialism, excessive focus on Africa and selective justice.

The catalyst for this coalescence was the issuance of an arrest warrant issued against sitting President Al Bashir of Sudan. Subsequent handling by the UNSC of AU deferral requests and concerns resulted in the 2009 AU statement of non-cooperation with the ICC.⁴ Tensions further increased following the Prosecutor’s proprio motu investigation of Kenya in 2011 and the indictments of President Kenyatta and Deputy President Ruto.⁵ The deterioration in the relationship between Africa and the Court culminated in the 2016 withdrawal notifications by three states—South Africa, Gambia and Burundi—and the 2017 AU resolution on ‘mass

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² International Criminal Court website. ‘About’. https://www.icc-cpi.int/about. Accessed 12 January 2018.
³ African states parties to the Rome Statute at the time of writing are: Benin, Botswana, Burkina Faso, Cabo Verde, Central African Republic, Chad, Comoros, Congo, Cote d’Ivoire, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tunisia, Uganda, United Republic of Tanzania, and Zambia. https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20Rome%20Statute.aspx.
⁴ Assembly of the African Union, Thirteenth Ordinary Session, 1–3 July 2009, ‘Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)’.
⁵ Arnould (2017); du Plessis (2013); Vilmer (2016), pp. 1319–1342.
withdrawal'. In January 2018, at the conclusion of the 30th session of the African Union Summit of Heads of State and Government, a decision was adopted to seek an advisory opinion from the International Court of Justice (ICJ) regarding the immunity of heads of state and government officials. The Decision—entitled ‘Decision on the International Criminal Court’—requests as follows:

The African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 (of the Rome Statute) and the obligations of States Parties under International Law.

The Decision expresses, inter alia, the following:

Deep concern with the decision of the Pre-Trial Chamber II of the ICC on the legal obligation of the Republic of South Africa to arrest and surrender President Al Bashir of The Sudan, which is at variance with customary international law and CALLS on Member States of the African Union, particularly those that are also State Parties to the ICC, to oppose this line of interpretation of their legal obligations under the Rome Statute;

The need for member states to strengthen national and continental judicial and legislative mechanisms to deal with impunity in order to ensure that justice is served in a fair manner...

It is hoped that the UN General Assembly will vote favourably to request such an advisory opinion from the ICJ and that the latter will clarify the legal issues that might help defuse the tension between the ICC and the AU.

Despite the spread of discontent, however, many African states have remained engaged with the ICC. For example, a number of African states did not support the AU’s non-cooperation statements, several African states in the UNSC supported the referrals of Sudan and Libya, self-referrals to the ICC by African states (Mali in 2012, CAR in 2014, Gabon in 2016) have continued, the ‘mass withdrawal strategy’ is in reality a submission of a list of proposed changes to the Court and the withdrawal notifications of South Africa and Gambia were themselves withdrawn in 2017. The AU Decision on the International Criminal Court also upheld the need for justice when international crimes are committed. However, it must be noted that the AU does not represent a united front of African States—there still exists some State support, and African civil society organisations remain committed to the ICC.

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6Assembly of the Union, Twenty eighth ordinary session, 30–31 January 2017, ‘Decision on the International Criminal Court Doc.EX.CL/1006(XXX)’; African Union, ‘Draft 2. Withdrawal Strategy Document’, 12 January 2017. https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. Accessed 7 August 2017.

7See also Coalition for the ICC website.

8The text of the decision was not yet public at the time of the writing of the present contribution but was on file with Makane M. Mbengue. Therefore there may be some minor language differences between the text that is quoted in the present contribution and the text that will be made public at a later stage.

9International Criminal Court website. ‘Situations’. https://www.icc-cpi.int/#. Accessed 14 August 2017.
In this context, this current development piece examines some of the recent developments in the relationship between the ICC and Africa. Section 2 examines the changing prosecutorial policy towards Africa, Sect. 3 discusses the State withdrawals and the AU’s collective withdrawal policy, Sect. 4 examines the recent developments in international criminal law as a result of cases arising from African situations and Sect. 5 considers the AU proposal for establishing an African continental criminal court. Some remarks are made at the end.

2 Prosecutorial Policy and the Perils of Selective Justice

As stated above, one of the primary criticisms leveled against the ICC has been that of selective justice in view of the prosecutorial policy of the Office of the Prosecutor (OTP). The OTP is an independent organ of the Court that is responsible for conducting investigations and prosecutions against individuals allegedly involved in genocide, crimes against humanity, war crimes and the crime of aggression.\(^\text{10}\) For an effective ICC, the Prosecutor must be considered above reproach and independent from politicisation.

Under Article 13 of the Rome Statute, the OTP is able to instigate investigations \textit{proprio motu}, which it has done in Kenya and more recently in Georgia. The OTP is also not obliged to pursue investigations in all state referrals, only those that meet its selection criteria. Equally, the OTP must make a decision on whether situations referred by the UNSC should be prosecuted.\(^\text{11}\) This independence and discretion is key to the effective functioning of any prosecutorial body; however, it is this discretion, or lack thereof, that has resulted in a perceived bias against African states.

The first situations before the ICC were self-referrals from African states. The investigation and prosecution of these cases worked to the OTP’s advantage as it allowed an opportunity to demonstrate the Court’s relevance and establish the OTP’s credentials whilst guaranteeing a degree of state support, which would not be as forthcoming in a non-self-referral situation.\(^\text{12}\) Until January 2016, however, all ICC investigations concerned African states, despite evidence of human rights violations in a range of other states, including Palestine, Colombia, Iraq, Syria and Afghanistan. In a view espoused by a number of academics and politicians,\(^\text{13}\) the only rationale

\(^{10}\)International Criminal Court website. ‘Office of the Prosecutor’. https://www.icc-cpi.int/about/otp. Accessed 12 January 2018.

\(^{11}\)Babington-Ashaye (2014), pp. 381–398.

\(^{12}\)Vilmer (2016) op. cit.

\(^{13}\)For example: The prominent Canadian academic William Schabas’ comments re Mr. Moreno-Ocampo in a Guardian interview: “he avoided situations where he would be likely to step on the toes of permanent members of the UN Security Council, from Afghanistan to Gaza to Iraq to Colombia”, in Smith (2012); Jean Ping, the former Chairperson of the African Union Commission: “ICC always targets Africans. Does it mean that you have nothing on Gaza? Does it mean that you have nothing in the Caucasus? Does it mean that you have nothing on the militants in Colombia? There is nothing on Iraq? We are raising this type of question because we don’t want a double standard”, in Kimani (2009).
for the failure to open investigations in these areas is that the decision was motivated by political considerations. This is particularly the case in relation to Palestine, where, despite a declaration of acceptance of jurisdiction in 2009, the Prosecutor took three years to issue a statement to the effect that Palestine is not a state and that as such Palestine was not able to request that the Prosecutor investigate a situation. African situations or alleged crimes, meanwhile, were acted on comparatively quickly, perhaps under the perception that they would be relatively easy cases to prove with minimal political backlash.

Accusations of selective justice were raised during the term of the first Prosecutor, Luis Moreno Ocampo of Argentina. Vocal criticism of the first Prosecutor was expressed by Jean Ping (then African Union Commission Chairman) at the African Union Summit in Ethiopia in 2011:

We Africans and the African Union are not against the International Criminal Court. That should be clear... we are against Ocampo who is rendering justice with double standards.

The appointment of Fatou Bensouda of Gambia as Prosecutor in 2012 has eased some of the concerns of selective justice. Beyond her impeccable legal reputation, the appointment of an African prosecutor signaled a political message to African states that their concerns regarding selective justice on the part of the Prosecutor had been heard. Since her appointment, Ms. Bensouda has taken steps that may in the long term assist in rehabilitating the reputation of the OTP and has undertaken an outreach campaign to change the negative attitudes towards the Court. She has also opened investigations in states outside Africa, with preliminary investigations having commenced in Palestine in 2015, in Iraq/UK, in Afghanistan and in Georgia in 2016.

In September 2016, a new OTP Policy Paper on Case Selection and Prioritisation was released. The Policy Paper reiterates the independence, objectivity and impartiality of the OTP. It also details the standards that the OTP will apply to prioritising cases. Although the Policy Paper does not directly address concerns regarding current investigations, such as the focus on Africa, the Policy Paper makes the workings of the OTP more transparent, which may help ease some of the AU’s criticisms.

One notable development in the new Policy Paper is that it provides that

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14 It is interesting to note that an investigation into the situation in Palestine may be forthcoming, as in 2012 Palestine was granted the status of a ‘non-member observer state’ at the UN, and in 2015 was accepted as a party to the Rome Statute.
15 Dugard (2013), pp. 563-570.
16 Arnould (2017) op. cit.
17 Richard Lough, ‘African Union accuses ICC prosecutor of bias’, Reuters, 29 January 2011, available at: http://www.reuters.com/article/africa-icc-idAFLDE70S09L20110129 (last accessed on 15 August 2017).
18 Olugbo (2014), pp. 351–379.
19 Labuda (2015), pp. 289–321.
20 International Criminal Court, Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’, 15 September 2016.
21 du Plessis and Maunganidze (2016).
the impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting 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 or the illegal dispossession of land.22

Further, the Policy Paper states that in relation to cases not selected for investigation or prosecution...the Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment. Finally, the Office recalls that it fully endorses the role that can be played by truth seeking mechanisms, reparations programs, institutional reform and traditional justice mechanisms as part of a broader comprehensive strategy.23

This expansion of considerations is comparable to the proposed expansion of the African Court on Human and People’s Rights under the 2014 Malabo Protocol (discussed in more detail later). As such, it is indicative of a responsiveness to African complaints regarding the biased focus of the Court on offences that concern the West and the exclusion of offences important to Africa.

These recent developments—the appointment of an African Prosecutor, the new Prosecutorial Policy Paper and opening investigations outside of Africa—will hopefully address the concern of selective justice expressed by many African states and result in continued engagement with the ICC.

3 The Threats of Withdrawals: From a Negative to a Positive Impact?

The perceived bias of the Court in general and its prosecutorial policy and record have resulted in many African states campaigning for a coordinated withdrawal *en masse* from the Rome Statute and the notice of intention to withdraw by a number of individual states.

Withdrawal from the Rome Statute is governed by Article 127, paragraph 1, which provides as follows:

A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification is withdrawn.

In October and November 2016, three African states parties, South Africa, Burundi and Gambia, notified the UN Secretary General of their intention to

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22 International Criminal Court, Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’, 15 September 2016; article 41.
23 International Criminal Court, Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’, 15 September 2016; article 9.
withdraw under Article 127(1) of the Rome Statute. These withdrawal notifications were supported by the AU in its ‘collective withdrawal strategy’ but triggered criticisms from a number of African states that have since reaffirmed their commitment to the Court.

Two of these countries—South Africa and Gambia—have since reconsidered their positions and retracted their notifications of withdrawal. As such, they remain states parties to the Rome Statute (Gambia retracted its withdrawal notification following a regime change, whilst South Africa did so following a decision of the South African Court, which found the withdrawal notice “unconstitutional and invalid” because it had not passed through parliament.

The withdrawal notifications of Gambia and Burundi appear to have been motivated by the perceived need to protect government officials from potential ICC investigations. In Gambia, then President Jammeh had seized power in a coup in 1994, and during the course of his presidency, the government frequently committed acts that, if proven, could come within the jurisdiction of the Court. Just prior to then President Jammeh losing the election in December 2016, Gambia submitted its intention to withdraw from the Rome Statute. In January 2017, power was transferred peacefully to President Barrow, who, in February 2017, notified the UN Secretary General of Gambia’s decision to rescind the withdrawal notification with immediate effect.

In relation to Burundi, allegations that state agents and groups launched widespread attacks against members of the civilian population who opposed the desire of President Pierre Nkurunzuza to run for a third term in office. This resulted in the OTP opening an investigation into the situation concerning the period 26 April 2015–26 October 2017. On 27 October 2017, the withdrawal of Burundi from the ICC came into effect. Unlike in Gambia, there has not been a regime change in Burundi, and as such it is perhaps unsurprising that Burundi proceeded with its withdrawal from the ICC. The effective withdrawal of Burundi from the ICC will not, however, affect the ability of the OTP to investigate and prosecute for offences allegedly committed before the withdrawal came into effect, i.e. 27 October 2017. Per Article 127(2) of the Rome Statute, the Court will continue to have jurisdiction over Burundian officials for this period and the state will remain obliged to cooperate with any ongoing investigations. The January 2018 AU Decision takes note of

The sovereign decision made by the Republic of Burundi to withdraw from the ICC effective October 27th, 2017, and condemns the decision by the ICC to open an investigation in

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24 African Union, ‘Draft 2. Withdrawal Strategy Document’. 12 January 2017. https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. Accessed 7 August 2017.
25 Lansky (2017).
26 Reuters. February 22, 2017. ‘South African Court blocks government’s ICC withdrawal bid’. https://www.reuters.com/article/us-safrica-icc/south-african-court-blocks-governments-icc-withdrawal-bid-idUSKBN1610RS. Accessed 12 January 2018.
27 Ssenyonjo (2017), pp. 1–57.
28 Ssenyonjo (2017) op. cit.
the situation prevailing in the Republic of Burundi as it is prejudicial to the dialogue process under the auspices of the East African Community, and ... constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country.

South Africa was the only state to provide detailed reasons for its intended withdrawal from the Rome Statute. These reasons included were the loss of credibility of the ICC due to its relationship with the UNSC and its focus on Africa, the ICC’s performance and budget, the UNSC’s refusal to consider Article 16 deferrals and conflicting international law obligations in respect of immunities.

The position of South Africa should be considered more closely as its relationship with the ICC is reflective of the continent’s relationship with the ICC. South Africa ratified the Rome Statute in 2000 and was the first African state to pass domestic legislation implementing the Statute. Further, South Africa refused to sign USA’s bilateral immunity agreement (BIA). These agreements sought to protect USA nationals from prosecution by the ICC by providing that states would not be permitted to hand over ‘current or former government officials, employees (including contractors), or military personnel or nationals’ to the ICC. In the case of a refusal to sign the agreement, the USA could, in accordance with its (then) new domestic legislation, suspend aid transfers and military assistance to the refusing State—in effect attempting to force compliance through economic sanctions. This was not an empty threat; in refusing to sign the BIA, South Africa did lose USA’s aid.

It was only after the 2009 ICC arrest warrant for President Al Bashir of Sudan that South Africa supported AU resolutions seeking the deferral of the investigation and the decision of non-cooperation. During the AU summit in 2013, South Africa voted against the Kenyan proposal for a mass withdrawal from the ICC. Initially, South Africa had tacitly avoided Al Bashir’s entering South Africa, but on 13 June 2015 he entered the country to attend the AU Summit. During this visit, the ICC requested that South Africa arrest Al Bashir pursuant to its obligations as a state party to the Statute. The South African High Court ordered the government to prevent Al Bashir from leaving the country, but he was able to leave South Africa prior to the arrest warrant being served. It was in this context that the South African President notified the ICC of the intention to withdraw. This withdrawal then had to be rescinded as it had been issued without undergoing parliamentary approval.

29 Akande (2016).
30 Ssenyonjo (2017) op. cit.
31 See ‘Agreement Concerning the surrender of persons to the International Criminal Court between the Government of the United States of America and the Government of the Republic of Senegal’ concluded 19 June 2003. http://guides.ll.georgetown.edu/c.php?g=363527&v=2456099. Accessed 15 August 2017.
32 American Service Members Protection Act 2002 (particularly Section 2007(a) which prohibited military assistance to governments of countries that are parties to the Rome Statute); Nooruddin and Lockwood Payton (2010), pp. 711–721; Jalloh (2009), pp. 445–499.
33 For more detailed discussion see: Woolaver (2016, 2017).
remains to be seen whether South Africa will re-submit a statement of intention to withdraw from the Statute if proper domestic procedure is adhered to.

In January 2017, the AU Summit issued a resolution titled ‘Collective Withdrawal Strategy’. The title is inflammatory and is a misnomer. In reality, the strategy lists AU grievances with the Court and contains a number of possible reforms, most of which relate to the relationship between the ICC and the UNSC. The resolution is also non-binding and merely calls on Member States to consider implementing its recommendations.

Furthermore, the AU does not represent a united front of African states. It is effective in bringing regional concerns to the attention of the international community but is incapable of representing the position of each of its member states individually. A number of states did not support the collective withdrawal strategy and eight issued reservations (Nigeria, Senegal, Cape Verde, Liberia, Malawi, Tanzania, Tunisia and Zambia). This lack of consensus is strongly indicative of the disagreements between African states as to the best way to proceed and their relationship with the ICC.

The retraction of the withdrawals of Gambia and South Africa and the reality of the ‘Mass Withdrawal Strategy’ as a list of reform recommendations indicate that the majority of African states remain supportive of the ICC. The ICC has also continued to enjoy the support of African NGOs and civil society even when their states have officially adopted an anti-ICC position. Equally, the efforts of the ICC to accommodate African concerns (for example in the recent developments in the OTP) indicate that the Court values the continued support of Africa and wishes to remain engaged with the continent. The relationship between the ICC and Africa is important for both sides: it has given African states access to a permanent international tribunal dealing with offences they themselves may not be able to prosecute, and African engagement gave the Court much-needed early support and has allowed the development and refinement of principles of international criminal law.

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34 Assembly of the Union, Twenty eighth ordinary session, 30–31 January 2017, ‘Decision on the International Criminal Court Doc.EX.CL/1006(XXX)’; African Union, ‘Draft 2. Withdrawal Strategy Document’, 12 January 2017. https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. Accessed 7 August 2017.

35 African Union, ‘Draft 2. Withdrawal Strategy Document’, 12 January 2017, para. 8, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. Accessed 7 August 2017.

36 Kersten (2017).

37 Ngari (2017).

38 ‘South Africa: Continent wide outcry at ICC withdrawal. Victims’ advocates urge reconsideration, support for Court’. Human Rights Watch. 22 October 2016. https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal. Accessed 5 August 2017.
4 Africa’s Contribution to the Development of International Criminal Law

Given the focus of ICC investigations, many Africans fear that the continent has been used as a testing ground for new concepts of international criminal law. As the ad hoc tribunals have shown, the early cases of any judicial body invariably involve some experimentation and settling of principles; however, this only increases their importance in the development of an effective system. Without first cases, there can be no development of the law. The early cases from Africa have allowed the Court to establish new rules of international criminal law and to clarify existing principles across a range of areas, including the application of the principle of complementarity, fair trial process, modes of liability and the scope of liability.

The application of Article 17 of the Rome Statute (complementarity) was addressed in Lubanga,\(^39\) where the Court and Prosecutor considered that there was no issue of admissibility as the situation had been a self-referral. Article 17 was further considered in Bemba Gombo,\(^40\) where it was argued that proceedings at a national level precluded the prosecution of individuals before the ICC. The Court determined that the dismissal of charges at a state level amounted to a decision not to prosecute, which would make the case inadmissible before the ICC. Similarly, in Katanga,\(^41\) it was argued that Katanga could not be prosecuted as he had already been investigated by the DRC and that the ICC could not exercise jurisdiction simply because it prefers to prosecute the case. The Appeals Chamber held:

> In the case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.\(^42\)

This may create difficulties if the state is attempting to address international crimes by non-prosecutorial means or by novel prosecutorial processes, which are proving slow to set up. The test is not that a member state is doing nothing at all; it is that the state is not investigating or prosecuting.

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\(^{39}\) ICC Pre Trial Chamber I, *Prosecutor v. Lubanga*, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-8-24, 24 February 2006.

\(^{40}\) ICC Appeals Chamber, *Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the Appeal Against Admissibility)*, 19 October 2010; *American Society of International Law, ‘International Law in Brief’, 2 November 2010*, http://asil.org/files/2010/fiLib/fiLib101101pdf.pdf.

\(^{41}\) ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009.

\(^{42}\) ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78.
Disclosure of information arose in Lubanga, where the OTP had promised confidentiality to informants and that the information they provided would never be disclosed outside of the OTP; as such, 207 potentially relevant documents were not disclosed to the defence. This policy was held by the Trial Chamber to have jeopardised Lubanga's right to a fair trial and issued a stay of proceedings. The trial was only able to continue once the OTP had renegotiated the agreements with its sources so that the material could be disclosed. The issue of disclosure arose again in Lubanga on account of the OTP's use of intermediaries to gather evidence. The defence alleged that some of the intermediaries had procured or attempted to procure false evidence. In response, the OTP maintained its refusal to disclose the identity of a particular intermediary, meaning that they could not give evidence. The Trial Chamber held that the Prosecutor's actions constituted an abuse of process and ordered a stay. Although overturning the stay, the Appeals Chamber held that the Prosecutor should have complied with the Trial Chamber's order and that such compliance was 'the fundamental criterion for any trial to be fair'.

The mode of liability was controversially charged in Katanga, when it was re-characterised by the Trial Chamber after the close of the evidence from co-perpetration (Article 25(3)(a)) to contribution to a crime committed by a group (Article 25(3)(d)). This re-characterisation resulted in a conviction and has raised questions as to whether it was consistent with the rights of the defendant given that this basis of liability was not addressed by either the prosecution or defence at trial.

The required evidentiary standard for the confirmation of charges has been addressed by the ICC in Lubanga, where it was held that the standard required was 'sufficient evidence' to 'establish substantial grounds'. This standard is higher than that required for an arrest warrant, but lower than that required for conviction, and was designed to protect defendants from 'wrongful' and 'wholly unfounded' charges.

The use of circumstantial evidence in ICC trials is an important issue that was also raised in Lubanga. The Trial Chamber held at paragraph 111 that 'when, based on the evidence there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt'.

43 ICC Trial Chamber I, Prosecutor v Thomas Lubanga Dyilo, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements, 13 June 2008, para. 73.
44 ICC Appeals Chamber, Prosecutor v Thomas Lubanga Dyilo, Appeal on the Disclosure of the Identity of Intermediary 143, 8 October 2010.
45 ICC Appeals Chamber, Prosecutor v Thomas Lubanga Dyilo, Appeal on the Disclosure of the Identity of Intermediary 143, 8 October 2010.
46 ICC Trial Chamber, The Prosecutor v Germain Katanga, 7 March 2014.
47 ICC Pre Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, 7 February 2007.
48 ICC Trial Chamber, Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012.
The scope of principal liability and individual criminal responsibility has also been developing at the ICC as a direct result of African cases. At present, there are two conflicting approaches regarding the interpretation of Article 25(3) of the Rome Statute, which concerns individual criminal responsibility. In *Lubanga*, the Court adopted a wide interpretation for the elements in which liability as a principal is grounded. This resulted in the expansion of the scope of criminal liability. Under this interpretation, three possible forms of common purpose arose: co-perpetration (where two or more people act together), indirect perpetration (where one person is acting through another agent) and indirect co-perpetration (where two or more people act together to bring about their criminal plan by using other persons as their agents). In the majority opinion, great reliance was also placed on ‘general principles of law’ derived from national legal systems, as opposed to plain reading of the Statute. In *Katanga*, the Court held that the distinction between perpetrators and accomplices is grounded in the autonomous or vicarious character of their contribution to the offence. In essence, this approach seeks to apportion culpability by determining which party was in the driving seat and which party was merely a passenger along for the ride. There have not yet been enough cases before the Court to determine which approach, *Lubanga* or *Katanga*, it will ultimately favour. It is a process—over time greater precedent—that will provide more certainty for those working in and appearing before the Court.

Beyond the further development of existing principles, a number of landmark ICC decisions have also arisen from situations in Africa. The September 2016 conviction of *Al Mahdi* for the war crime of intentionally directing attacks against religious and historic buildings in Mali was such a landmark decision. Arising out of a guilty plea, it was the first time that a conviction was recorded in an international criminal tribunal for the destruction of cultural sites and demonstrated the symbolic importance of protecting cultural heritage.

The first ICC reparation order was also issued in *Katanga* in March 2017. The requirement to pay reparations is hoped to assist in effecting reconciliation and represents a shift in the emphasis of criminal justice from being solely on the perpetrator(s) to focusing on the victims as well. The issuance of the first reparations order by the ICC demonstrates that it is not an empty principle but one that the Court is willing to apply.

During the early development of any legal system, somewhat experimental cases need to be heard by a court of law. In this regard, Africa and the cases it has raised

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49 ICC Trial Chamber, Situation in the Democratic Republic of the Congo, *Prosecutor v Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 976–1018.
50 *Prosecutor v. Germain Katanga*, ICC Pre-Trial Chamber Judgment, 2008.
51 Trial Chamber VIII, Situation in the Republic of Mali, *Case of The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016.
52 Aksenova (2013).
53 ICC Press Release, ‘Katanga case: ICC Trial Chamber II awards victims individual and collective reparations’. 24 March 2017. https://www.icc-cpi.int/legalAidConsultations?name=pr1288. Accessed 27 July 2017.
have been an essential catalyst for the development of international criminal law. The precedents set in such groundbreaking cases contributed to the effectiveness of the field and carved out international law’s powers to provide protection to those in need of the law and its mechanisms. The principles established and refined from these cases will impact not only the ICC but potentially the African Court of Justice and Human Rights with extended jurisdiction to core international crimes.

5 Tailoring an Alternative/or a Parallel Criminal Justice in Africa?

In 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol), which concerned the merger of the African Court of Justice (ACJ) and the African Court of Human and Peoples’ Rights (AfCHPR) to form the African Court of Justice and Human Rights (AFCJHR). This Protocol has not yet come into force as it has not received the required 15 ratifications.

In June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). Although adopted by the AU, the Protocol does not enjoy unanimous support and will not enter into force until it has been ratified by 15 states (at the time of writing, the Protocol has been signed by 10 AU member states but has not been ratified by any member state). The Protocol is intended to expand the jurisdiction of the African Court of Justice and Human Rights (AFCJHR), and the following are noteworthy:

- it proposes to include offences currently covered by the ICC (crimes against humanity, genocide, war crimes);
- it proposes to add offences of terrorism, mercenarism, trafficking, illicit exploitation of natural resources and the unconstitutional change of government, which are not found in the Rome Statute and are of great concern to African states as they underpin many of the continent’s conflicts; and
- it provides for immunity for heads of state. However, it does not follow that the implementation of such an immunity in a regional court would deter offenders;

54 African Union (2008) ‘Protocol on the Statute of the African Court of Justice and Human Rights’. https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf. Accessed 8 January 2018.

55 African Union (2014) ‘Protocol on amendments to the protocol on the Statute of the African Court of Justice and Human Rights’. June 2014. https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights. Accessed 2 August 2017.

56 African Union website. ‘Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ ‘Status list’. https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf. Accessed 12 January 2018.
indeed, it could potentially cause leaders to retain power at any cost. It must also be noted that the immunity provided by the African Court may not prevent the ICC from investigating and prosecuting the African Court’s members. For example, if the Malabo Protocol were to be implemented and the implementing states had been parties to the Rome Statute but had withdrawn their membership, they could still be investigated and prosecuted for offences committed during their ICC membership period under Article 127(2). Equally, for any states that were members of both the ICC and the African criminal court, Article 17 could potentially allow the ICC to investigate heads of state as an immunity in the regional court could be argued to make that court ‘unable’ to prosecute and as such leave open the option for the ICC to do so.

There are pros and cons to this proposed expansion of jurisdiction. On the one hand, it would enable African states to prosecute serious offences themselves without forced recourse to the ICC; it would allow greater consideration of African priorities, such as the exploitation of resources; it would involve the creation of additional organs of the Court, i.e. a Defence Office and a Victims Office; and it would allow alternative justice measures, such as truth commissions, to be included. On the other hand, the expansion of jurisdiction as proposed by the Malabo Protocol is not realistic as the proposed mandate is over-ambitious and economically unfeasible. African states do not have the ability to finance such expanded continental judicial activities, as well as their national judicial systems. The cost of the Court would need to be largely borne by the AU, which is itself underfunded and which, further, does not represent a unified position of all its member states.

There could also be a difficulty in staffing the Court. The Protocol states that there would be a total of 16 judges: five with experience in international law, five with experience in international human rights law and six with experience in international criminal law. As the Court would consist of three chambers (pre-trial, trial and appeals), either there would not be enough specialist judges or cases would be heard by judges without specialisation in the area. In order for each case to be heard by a judge with specialisation in the relevant area, more judges are required, which would in turn increase the financial demands of the Court.

Perhaps the greatest difficulty that any African continental court with criminal jurisdiction would face is the lack of political will. Without genuine commitment from all governments involved, no court can function effectively, particularly when that court professes to investigate and prosecute high-ranking officials. Unfortunately,

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57 du Plessis (2012).
58 For an interesting discussion see (2016) ‘Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court’. African Centre for Open Governance. http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf. Accessed 8 January 2018.
59 Gaeta and Labuda (2017).
60 (2016) ‘Seeking Justice or ShieldingSuspects? An analysis of the Malabo Protocol on the African Court’. African Centre for Open Governance. http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf. Accessed 8 January 2018.
the extent of real support can only be known when a state is being investigated, and one of the real difficulties of international courts is that cooperation cannot be forced. It is also an important consideration that by dealing with these offences at regional, as opposed to international, level, states would not be engaging fully in the international community, including ensuring that the ICC is a truly international court.

At present, it appears that the realistic option is to enable African states to strengthen their national (or regional) judicial systems over the long term, as well as engaging with the ICC. The January 2018 AU decision referred to earlier is an example of African states’ willingness to engage with international criminal justice. Equally, the ICC needs to improve on its perception problem so that it is seen as a legitimate forum for the investigation and prosecution of international crimes. This can only be done by broadening its focus from Africa and engaging in a dialogue with African states about their concerns.

6 Conclusion

The primary concerns raised by African states with respect to their relationship with the ICC include fears of neocolonialism, prosecutorial focus on Africa, the close relationship between the ICC and the UNSC, the issue of immunities for heads of state and the peace versus justice debate remaining, even though a number of African states remain committed to the ICC. As a result, and in spite of the sometimes strained relationship, African states have been central to the development of international criminal law. The early cases from Africa have allowed the Court to clarify such important principles as fair trial rights before the ICC, the protection of cultural sites and the use of reparations as a remedy under the ICC. The relationship between African states and the ICC was at its most tense in 2016 when three states (South Africa, Gambia and Burundi) notified the ICC of their intention to withdraw, followed by the 2017 AU resolution on ‘mass withdrawal’. However, a number of African states remain committed to the ICC, and in 2017 the withdrawal notifications of South Africa and Gambia were retracted. The February 2018 decision by the AU to seek an advisory opinion from the ICJ regarding the issue of immunities suggests that African states want to remain engaged with international courts and tribunals. In short, African states should strengthen their national judiciaries; the option of extending the jurisdiction of the African Court of Justice and Human Rights to international crimes may also be among the solutions. However, the best way forward is to continue to engage with the ICC.
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