



Institute for Security Studies

# PAPER

## Universalising international criminal law

The ICC, Africa and the problem of political perceptions

### INTRODUCTION

The aim of this paper is to discuss the universal reach and aspirations of the world's first permanent International Criminal Court (ICC), why the ICC's reach thus far has been focused exclusively on the African continent, and how this geographic limitation has affected African perceptions of international criminal justice and is threatening to undermine – perhaps fatally, at least insofar as the African Union (AU) is concerned – the credibility of the ICC.

It has become fashionable to criticise the ICC for its exclusive focus on African cases. Developing nations, particularly from the South, now repeatedly complain about the skewed power relations reflected in the United Nations Security Council (UNSC). Those power relations – and the imbalance of power within the Council – have come sharply into focus in the case of the ICC and the UNSC's influence over the Court. After a decade of the ICC's work, the UNSC has found the common purpose of referring two African situations to the ICC (Sudan and Libya). However, it has repeatedly failed to do so in respect of equally deserving situations in relation to crimes committed by Israel and, most recently, in respect of the crimes occurring before our eyes in Syria.

With ten years of the ICC's work, the reality is that all the cases opened by the Court (that is, cases that have gone beyond the mere preliminary investigation of the Prosecutor and found their way to the Pre-trial Chamber of the ICC to be scrutinised by judges of the Court) are, with respect to crimes committed by Africans, in Africa.<sup>1</sup>

This reality creates a complex and urgent problem within the sphere of international criminal justice in Africa, a problem of perception. Central to this paper is what can be

called the 'politics of perception'. This is the use and abuse of the ICC's cases by leading African elites and the apparent failure by European and American elites and the ICC itself to recognise or appreciate the dangers of the Court's African imbroglio. Is it not time for all committed to the ICC to do more than acknowledge that the Court's over-commitment to African cases hampers the universal aspirations of international criminal justice and belies any talk of equality under international criminal law?

The situation – as confirmed by recent events at the 21st AU Summit at the end of May 2013, at which African leaders<sup>2</sup> both symbolically and expressly recorded their independence from the interference of the ICC's work in Africa, and thereafter the efforts by the AU in October 2013 to press the UNSC to defer, for at least a year, the trials of Kenya's president and deputy president in the ICC<sup>3</sup> – is as serious as it is urgent. Any hope of rescuing the international criminal justice project from the politics of perception requires a candid assessment of the situation, an open account of the political manipulation that infects the work of the Court, and an honest reflection of how the Court might navigate its way through the political fog that it has, with the help of the UNSC, drawn upon itself.

### HOW NON-AFRICAN CASES HAVE BEEN KEPT OUT OF THE ICC

It is necessary to identify the overriding factors that have kept the ICC's focus exclusively African. Before doing so, a contextual qualification needs to be made.

At a conference held in Nuremberg in early October 2012, the new (African) Prosecutor of the Court, Fatou Bensouda, correctly responded to African critics by

proclaiming in her words, 'that if you don't wish to be targeted by the ICC, then don't commit the crimes'. In this regard, it is worth stressing that there are credible explanations for the fact that all the Court's active situations are in Africa. These include that there is a preponderance of continental conflicts and that with 34 African states party to the ICC statute statistically the chances are high(er) that cases would come from those members. In that vein, Bensouda is right to highlight – as she has at that conference and elsewhere, and with the support of various academics, including the present author<sup>4</sup> – that there are good reasons why each of the African situations is currently before the Court. Not least is that the bulk of the cases being investigated reach the ICC through African governments' 'self-referring' the cases.

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## The international politics in the UNSC has infected the work of the ICC so that the Council has referred two African cases to the Court but has failed to refer any non-African cases

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Another footnote is important. It seems obvious that victims of the heinous crimes committed against them in the Democratic Republic of the Congo (DRC), Uganda, Cote d'Ivoire, Kenya, Sudan, Libya or any number of other African nations don't particularly care that the ICC's focus is on African situations only. As victims of crimes within the jurisdiction of the ICC, it is difficult to imagine that they would focus on the politics surrounding the manner of the assistance, if any, that they might receive from the ICC, or why they are receiving it. Probably in their minds they are only too satisfied that the ICC is attempting to deal with the perpetrators of these crimes.

It is thus important to separate the meritorious African claims by victims of these crimes for justice from the politically self-serving African criticisms of the ICC by powerful elites motivated by collective protectionism, some of whom are the very leaders responsible for the crimes in the first place. We must thus recognise the complicating reality that at the same time that the ICC is doing notable justice-advancing work in relation to African victims, it is also exposing itself to the justice-retarding machinations of those who have a personal interest in criticising the Court's African focus. This is precisely because geographically and graphically the ICC's work suggests that they may be next.

Nevertheless, it is because of the possibility of such abusive self-serving criticisms of the Court's work that the depth of the crisis must be recognised. Hence, no matter what justifications the Prosecutor of the ICC may provide, and no matter how the mantra that the bulk of the ICC's cases have arisen from self-referrals by African states is repeated, that does not explain away the burning issue of why other deserving cases (and there are other deserving cases) have escaped the Court's attention. At least two factors appear to be doing that evasive work as regards the Court's docket. Neither is edifying.

First, the international politics within the UNSC has infected the work of the ICC so that the Council has referred two African cases to the Court but has failed or refused thus far to refer any non-African cases. While that is not the fault of the ICC, it is a factor that should weigh with the Court as far as it goes about deciding which other cases deserve the Court's focus. In this regard, the second factor arises: it is the case selection by the Prosecutor of the ICC (which is also apparently influenced by international politics, as pointed out most recently by Professor John Dugard in a powerful critique published in the world's leading international criminal justice journal).<sup>5</sup> In deciding which cases, other than those that are referred to the Court by the UNSC, to pursue, either by way of the Prosecutor's *proprio motu* power or in response to a state referral, the Prosecutor's choices are a key ingredient in the Court's work. Both factors are considered in more detail below.

### *International politics at the UNSC resonating in the ICC*

One of the ways that cases reach the ICC is through the power of the UNSC to refer matters to the Court in terms of article 13(b) of the Rome Statute of the International Criminal Court of 1998 (Rome Statute). Article 13(b) provides that the ICC will have jurisdiction over a crime envisaged in article 5 of the Statute if '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.<sup>6</sup>

International relations and reality teach us that the members of the UNSC, being nations with their own views, internal politics and agendas, invariably exercise this power for reasons of self-interest. How this bias (if any) affects the outcome of UNSC decisions to refer matters to the ICC will depend on the facts of each case. Pointedly we now have unfolding and confirming evidence that the UNSC, through its members, has repeatedly found it unnecessary to refer non-African cases to the ICC.

A good (but tragic) example is that of Syria and specifically the crimes alleged to have been committed by

its leader, President Bashar al-Assad. Reports at the end of 2012 indicated that Assad's regime had sent Syria into a spiral of mass human rights' abuse.<sup>7</sup> 2013 has not heralded a change in Syria either, with increased news of abuses across the nation.<sup>8</sup> With estimates of the death toll in Syria climbing, and recent accusations that al-Assad's government was responsible for the alleged use of chemical weapons in the country, one must question the deadlock in the UNSC for two years now and why Russian and Chinese threats of a veto keep al-Assad safe for the time being. Most important is the fact that Russia and China have also helped to avoid a referral of al-Assad's crimes to the ICC.

The situation in Syria (and also the perception of the ICC as an anti-African entity) has certainly not been helped by the fact that the UNSC has thus far ignored requests for the matter to receive the attention of the ICC, or for the ICC to take any other meaningful action, for that matter. This is despite numerous complaints and requests, including by the UN High Commissioner for Human Rights (a former appeal judge of the ICC).

Not only is this a tragedy for the Syrian victims of war crimes and crimes against humanity, it is also a telling example of the problem highlighted in this paper and the reality of politics frustrating the justice ideals of the ICC. In response to the inaction of the UNSC in this regard, Switzerland sent a letter to the Council requesting that it refer the matter to the ICC. The letter, sent on 14 January 2013, was signed by 57 states. African states included Botswana, Libya, Seychelles, and Cote d'Ivoire. South Africa was unfortunately absent from the list of signatories. Importantly, however, the list reflects a global cross-section of countries, which includes such diverse partners as Japan and Costa Rica, the Republic of Korea, Australia, Samoa, and Andorra, and every member of the European Union save for Sweden.<sup>9</sup>

While providing an encouraging example of international sentiment, this letter also indicates, given that the UNSC has *still* not referred Syria to the ICC, that the UNSC's lack of motivation to help extend the reach of the ICC is sadly beyond question. The Council – and hence the ICC – has been held hostage to the protective and clubby interests of the veto-wielding nations of China and Russia.

The ICC's ability to advance equal and universal justice has been undermined in another obvious case by the US threat of using its veto in the UNSC to protect Israel. This is despite a variety of reports by independent bodies (including the UN) that confirm that Israel is responsible for serious violations of humanitarian law and despite the Arab League and the Human Rights Council of the UN recommending that the situation be investigated by the ICC. Violations identified in the reports include the deaths of at least 1 000 civilians through the targeted and

indiscriminate use of sophisticated modern weaponry to attack civilian and military targets in densely populated neighbourhoods, hospitals, mosques and schools.

As blinding as the white phosphorous used by Israel during Operation Cast Lead is the following: that although China, Russia and the US are not parties to the Court, their behind-the-scenes power is a cancer within the body of the ICC that ensures that the Court does not concern itself with cases that may cause offence to these powerful nations or their allies.

### *Avoiding the obvious: decisions of the Prosecutor*

The role of the Prosecutor of the ICC in the arrival of cases at the Court's door comes in three forms.

First, in terms of article 13(a) of the Rome Statute, the Prosecutor may pursue charges with respect to crimes within the jurisdiction of the ICC in situations where a state party, in terms of article 14, refers a matter to the Prosecutor for investigation. Second, in terms of article 15, the Prosecutor may also investigate a matter out of his or her own initiative (*proprio motu*), provided that the Pre-trial Chamber of the ICC authorises the continuance of such an investigation after being presented with the Prosecutor's motivation and supporting documents in this regard. Third, as discussed above, the UNSC may refer a matter to the Prosecutor in terms of article 13(b) of the Rome Statute, after which he or she may choose to investigate it and refer it to the Pre-trial Chamber of the ICC as set out in article 15. The UNSC has only referred African matters to the Prosecutor. This lends credence to the view that the ICC remains allergic to any deserving cases beyond the continent.

John Dugard has recently highlighted that apart from the selection of the 'situations' of Darfur and Libya by the UNSC, for consideration by the ICC, the 'situations' investigated by the ICC have been chosen by the Prosecutor. Dugard points out that while it is true that several of these situations have been 'self-referred' to the ICC by states parties (DRC, Uganda, Central African Republic, and Mali), we should not be naïve: because the Prosecutor is under no obligation to accede to a self-referral, such situations are as much selected by the Prosecutor for investigation as the situation in Kenya, which was chosen *proprio motu* by the Prosecutor.<sup>10</sup>

Of more importance for present purposes – but related to the issue of case selection – is the issue of *non*-selection. Most glaring is the decision of the Prosecutor not to open an investigation in respect of Israel's conduct in Operation Cast Lead.

On 27 December 2008, Israel launched an attack on Gaza. This attack, codenamed 'Operation Cast Lead', resulted in the deaths of 1 400 Palestinians, of whom at

least 850 were civilians (including 300 children and 110 women) and the wounding of over 5 000 Palestinians.<sup>11</sup>

On 21 January 2009, Palestine made a declaration in terms of article 12(3) of the Rome Statute in which it, for an 'indeterminate' period, recognised the jurisdiction of the ICC for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002. This declaration found its way to the office of Luis Moreno Ocampo, the Prosecutor of the ICC at the time.

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## The 2012 Resolution of the UN General Assembly removes the previous obstacle preventing the ICC Prosecutor from investigating the matter of Palestine, making it possible for the case to go ahead

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A problem was immediately identified: Palestine (at that time) was not universally recognised as a state for purposes of jurisdiction of the ICC under article 12(1) of the Rome Statute and could not make a declaration acceding to such a jurisdiction in terms of paragraph 3 of the same article. Therefore, the ICC did not have jurisdiction over crimes committed within Palestine and Palestine's declaration could also not technically constitute a referral by the state party under the Statute. Of course it could be argued that the interpretation of this issue and the relevant clauses of the Rome Statute were the prerogative of the Prosecutor and that he could still have made an argument for Palestine before the Pre-trial Chamber of the ICC. Nevertheless, the Prosecutor chose not to proceed with an investigation based on this technicality and made the following statement (after three years of sitting on the matter):

In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction of the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State' under article 12(3) which would be at

variance with that established for the purpose of article 12(1).

This decision of the Prosecutor (who shortly thereafter left office and was replaced by the current Prosecutor) was met with dismay. Why had it taken him three years to come to such a brief and thinly supported conclusion? If it was that perfunctorily obvious to him when he issued the statement in April 2012, then why not arrive at the same conclusion three years earlier? Why keep the Palestinians on tenterhooks and why had he encouraged a dense and prolonged debate on the topic by leading international lawyers who were invited to write scholarly pieces on the topic and to participate in a roundtable discussion held in the Office of the Prosecutor in October 2010? As Dugard points out, the only possible explanation for such a decision and its delay is that 'the Prosecutor lacks the strength to confront Israel, and thereby face the ire of the United States and many European states'.<sup>12</sup>

If there is any respite to be had from this charade, it comes from the fact that the Prosecutor qualified his statement by adding that the Office of the Prosecutor 'could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to the assessment of article 12'. This addendum opened the door for action to be taken and a letter was sent by Professors William Schabas and Dugard to the Assembly of States Parties (ASP) of the ICC. This letter, which was co-signed by 30 other senior international lawyers, requested the Bureau of the ASP 'in the interests of international criminal justice and the reputation of the International Criminal Court' to place the issue of Palestine's statehood before the ASP at its next session in the Hague in November 2009. Dugard reports that the matter was not put on the agenda of the Assembly,<sup>13</sup> for reasons best known to the President of the ASP, but which do not bode well for the idea of transparency within the work of the Court's organs.

Some positive movement then came on 29 December 2012, when the General Assembly of the UN decided to address the matter of Palestine's statehood of its own accord. The General Assembly drew up resolution 67/19, which granted Palestine 'non-member observer status in the United Nations'. This means that the previous obstacle preventing the Prosecutor of the ICC from investigating the matter of Palestine has effectively been removed. The Resolution of the General Assembly, while not compelling the Prosecutor of the ICC to investigate Operation Cast Lead, has made it possible for the case to go ahead. Despite this, the current Prosecutor of the Court has not reported any further investigation into the Palestine situation, although the Office of the Prosecutor has begun

investigating a situation in Mali.<sup>14</sup> This is despite the apparent fact that the situation in Palestine presents significantly more evidence with which to build a case.

The latest development regarding Palestine is that on 14 May 2013, the Prosecutor of the ICC received a referral by the Union of the Comoros in terms of articles 14 and 12(2)(a) of the Rome Statute in relation to the events of May 2010 on a Comorian ship that formed part of the Gaza Freedom Flotilla.<sup>15</sup> On the date in question, Israeli armed forces boarded and attacked the ships that comprised the Gaza Freedom Flotilla in the international waters of the Mediterranean Sea, killing nine of the activists of the Flotilla and injuring many more. The ships of the flotilla were then towed to Israel, where the surviving passengers were detained before being deported.

The Comoros claimed correctly that an attack on its ship constituted an attack on its territory (in that a ship commissioned by a state is considered the territory of that state for the purposes of the Rome Statute).<sup>16</sup> It thus became the first state to direct a referral against another state on its own behalf as the victim of the other state's actions.

The Prosecutor of the ICC has undertaken a preliminary investigation into the matter, but has not said anything further. This may be an opportunity for the ICC to displace some of the perceived bias towards taking African cases that it has generated, given the fate shared by all the other non-African referrals to the Prosecutor. However, it is unlikely that it will be the occasion to weaken this perception. That is because the usual *realpolitik* is likely to do its stifling work. As Bill Schabas points out, everyone knows that the Prosecutor is wary of dealing with the situation in Palestine because it risks upsetting the increasingly cordial relationship between the ICC and the US.<sup>17</sup> Accordingly, we can expect the Prosecutor's office to decide – and here she may well rely on past precedent in relation to the Office of the Prosecutor's (OTP's) refusal to investigate offences in Iraq by British soldiers – that the case does not meet the gravity threshold built into the Statute, since it involves only a handful of deaths. Alternatively she may find on the basis of complementarity that the Israeli courts are doing enough to investigate the offences themselves.

The problem is that this is likely to generate further difficulties for the Prosecutor in light of existing African perceptions of the Court's work. Assuming that the Court has valid reasons for declining to open an investigation under the Statute (and there may well be good ones), it will be perceived as further evidence of the Court's anti-African bias. The sad reality is that the Court has thus allowed itself to be driven into a corner where it can do little good. It is unlikely that this new referral (being linked again to Palestine and Israel's military operations) will find itself

anywhere other than on a shelf next to a dusty file with the words 'Operation Cast Lead' written on its spine.<sup>18</sup> The reasons for that shelving will go unheard. The only thing of importance – and here the Court and powerful non-parties like the US are to blame – will be the *fact* that another non-African case has been avoided by a Court that has otherwise busied itself exclusively with African cases.

Questions have thus rightfully been raised about the impartiality and independence of the Prosecutor of the ICC (and the ICC as a whole) and whether political considerations, such as the ICC's relationship with the US (which has a well-documented history with and interest in the Israel-Palestine conflict), have outweighed questions of law and objective considerations of justice.<sup>19</sup> The difficulty is that the Court's evasion of certain situations to avoid an American and European backlash has ironically yet ineluctably affected the health of the ICC. By avoiding pain from one quarter, the ICC has simply allowed for pain from another. And that pain – now inflicted by African leaders who in principle or out of self-interest are unwilling to be the scapegoats for the international criminal justice project – is as deleterious, possibly more so, for the overall chances of the ICC's continued wellbeing.

## THE PROBLEM OF PERCEPTION

Given the examples above of the UNSC and the Prosecutor of the ICC keeping the Court's focus directed at Africa, consideration must be given to the implications this may have for Africa's perception of the Court and, just as importantly, the implications of this perception. We are able to conclude surely that the ICC's continental focus has fuelled perceptions of selectivity and unfairness in the operation of international criminal justice. And the perception of the ICC as a witting or unwitting anti-African instrument yielding to the direction of, or failing independently to open deserving cases outside of Africa in application to, Western powers carries with it potentially grave consequences.

The AU's criticisms of the ICC have over the past few years grown in volume. There is now a well-established 'rhetoric of condemnation' (that the ICC is 'anti-African, and merely an agent of neo-colonialism or neo-imperialism')<sup>20</sup> as a defining feature of the relationship between the Court and the continental body.

A fear exists that the skewed nature of the international criminal justice project is so acute that the ICC may be at risk of being simply abandoned.<sup>21</sup> These concerns will hopefully prove to be overblown. Recall that none of the 34 African states parties have withdrawn from the treaty; that domestic legislation has been adopted and is being utilised on the continent; that half of the cases before the ICC from Africa were self-referrals, most recently from Mali;<sup>22</sup> and that African states, including non-states parties, receive

more than 50 per cent of the ICC's requests for cooperation, and over 70 per cent of these requests are met with a positive response.<sup>23</sup>

Nevertheless, the fact remains that there is a perception that the ICC is evidence of what Africans had suspected, even feared, all along – that the ICC would be used by the powerful in their own interests against the developing world. Notably, Archbishop Emeritus Desmond Tutu in early September 2012 declined to share a public platform with Tony Blair out of concern that some leaders evade justice for atrocities like the 2003 invasion of Iraq while their African peers are 'made to answer for their actions in The Hague'.<sup>24</sup> As a vocal supporter of the ICC, Tutu's comments are important because they highlight the depth of concerns in Africa about the perceived double standards that characterise international criminal justice. While it may be possible to dismiss such claims from despots intent on protecting themselves, it is not possible to do so when they come from the Archbishop.

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## The Kenyan situation has further cemented the AU's negative position towards the ICC and will provide cover to Kenya and other African states that are inclined to snub the Court

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Of course, the perceived double standards have provided the AU (driven by powerful interests within the Assembly) with a ready basis to attack the ICC. The AU's response to the ICC's investigation of Sudanese President Omar al-Bashir stands as a prime example of African resistance to the ICC in the face of anti-African sentiments within the Court. While the ICC warrant of arrest for al-Bashir was welcomed by human rights' organisations,<sup>25</sup> the AU called on the UNSC to defer the ICC's investigation into al-Bashir by invoking article 16 of the Rome Statute, which allows for a suspension of prosecution or investigation for a period of up to 12 months.<sup>26</sup> Then, on 3 July 2009, at an AU meeting in Sirte, Libya the AU took a resolution calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir.<sup>27</sup>

This AU decision placed African states parties to the Rome Statute in the 'unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other'.<sup>28</sup> To date, even though

al-Bashir is the subject of an arrest warrant by the ICC, there have been reports of several states parties failing to enforce the warrant after inviting al-Bashir to visit their territory – including Chad, Djibouti, Malawi and Kenya.

African concerns about an 'imperialist ICC' and the impact of competing legal obligations arising from the AU's resolution of non-cooperation with regard to al-Bashir are perhaps best illustrated by decisions taken by the Kenyan government and in relation to the Kenyan situation. Kenya, previously a model ICC state party,<sup>29</sup> has come to the fore as the battleground for the ongoing 'struggle for the soul of international law'.

The struggle is epitomised by two developments. The first, as indicated above, is the ongoing controversy over the ICC arrest warrant for al-Bashir and the AU's decision that its member states shall not cooperate in its execution. For Kenya, in particular, it is a decision that sits both legally and politically uncomfortably with that country's obligations under the Rome Statute and its domestic ICC implementing legislation. The Kenyan government's decision to invite al-Bashir to the launch of the country's new Constitution in August 2010 was another low watermark of this relationship. Many western capitals were vocal in their condemnation of Kenya's actions, which the country attempted to justify on numerous grounds, including regional stability and national interest. Further, Kenya pointed to its obligations as a member of the AU to comply with a decision by that body not to cooperate with the ICC in respect of al-Bashir. Nevertheless, the Kenyan government's action in hosting al-Bashir resulted in the first ever decision of the ICC on non-cooperation in its history, against Kenya. This is a remarkable step back for a country that remains one of only six of the 34 African ICC states parties to have adopted domestic legislation to implement (and expand) its obligations under the Rome Statute.<sup>30</sup>

The second, and now more ominous development, is the backlash from certain elements of Kenya's leadership against the ICC's investigation into the 2007-8 post-election violence in that country, which left over 1 000 people dead, caused around 400 000 to flee their homes, and brought Kenya to the brink of civil war.<sup>31</sup> The ignominy of being under investigation and the profile of the suspects named by the ICC Prosecutor, which now include President Uhuru Kenyatta and Vice-President William Ruto, have further damaged the relationship between the ICC and the AU.

Kenyan political acumen has helped turn this domestic discontent into a regional African position in opposition to the ICC's investigation. It has also fuelled a more general anti-ICC sentiment within Africa, further isolating those voices of support for the Court on the continent and in all likelihood adding urgency to the AU's project of expanding the jurisdiction of the African Court on Human and Peoples' Rights to cover the prosecution of international

crimes. In some quarters this has been interpreted as a snub to the ICC. For present purposes, it is alarming to note that at the end of May 2013 at the AU's 21st Summit in Addis Ababa, the Assembly of the AU adopted an Africa-wide position (Botswana being the lone dissenter) condemning the work of the ICC in relation to Kenya.

The Botswana dissent reiterates that although AU decisions on the ICC played a central role in Kenya's actions vis-à-vis the Court, this should not create the impression that all African states share a common (negative) position towards the ICC. At the practical (rather than political) level, many African states continue to cooperate with the ICC on various matters and requests for assistance, and several have publicly confirmed their support for the Court. Nevertheless, the Kenyan situation has further cemented the AU's position and will unfortunately provide cover to Kenya and other African states that might be inclined to snub the work of the Court. This is worrying, given that we already have clear examples of the AU's decision with regard to non-cooperation on the al-Bashir arrest warrant, which reflect realities on the ground. Consider, for example, that on 9 December 2010 the ICC Prosecutor reported to the UNSC:

[T]he Government of the Sudan is not cooperating with the Court and is conducting no national proceedings against those responsible for the crimes committed. Since 2005, Sudanese authorities have consistently promised to do justice, creating mechanisms such as Special Courts and Prosecutors, while consistently and deliberately protecting those who commit the crimes. President Al Bashir, in accordance with the Chamber's findings, issued the criminal orders to attack civilians and destroy their communities. President Al Bashir does not want to investigate those who are following his orders.<sup>32</sup>

The calls for non-cooperation with the ICC were again made at the AU's 21st summit in Addis Ababa. But much more worrying is that African leaders voted against the ICC in solidarity with two indicted international criminals in the form of Kenyatta and Ruto.<sup>33</sup> A key feature of the AU resolution at the summit was a decision by the AU Assembly to affirm that Kenya should be permitted to prosecute domestically the cases in which Kenyatta and Ruto are implicated, a decision which flowed from the Assembly's 'deep regret' at the ICC's conclusion (by independent judges of the Pre-Trial and Appeals chambers) that Kenya has been neither willing nor able to prosecute the senior officials involved. The AU decision was twinned with a declaration by the Assembly, which stressed 'the need for international justice to be conducted in a transparent and fair manner, in order to avoid any

perception of double standard, in conformity with the principles of international law'.

May 2013 was a busy month for Kenya. The Kenyan government furthermore requested, at an informal session of the UNSC in New York, that the ICC's cases against Kenyatta and Ruto be terminated in order for domestic Kenyan courts to mete out justice instead. Nine out of the 15 UNSC members opposed the request and the matter was effectively dismissed. Soon thereafter, the AU submitted a similar request to the ICC. This was as a result of the AU decision to support Kenya's request that the cases in question be referred back to Kenyan courts. The AU proposal includes a declaration claiming that:

[t]he Assembly supports and endorses the Eastern Africa region's request for a referral of the ICC investigations and prosecutions in relation to the 2007-08 post-election violence in Kenya, in line with the principle of complementarity, to allow for a national mechanism to investigate and prosecute the cases under a reformed judiciary provided for in the new constitutional dispensation, in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya.<sup>34</sup>

The ICC refused to entertain this request, holding that the resolution was no more than a political statement that held no bearing on the legal processes of the ICC. The Court explained that 'AU resolutions are political decisions. The ICC, as an independent judicial institution, does not take any political matter into consideration when deciding on cases related to serious and grave crimes allegedly committed within the territory of Kenya or any other country under investigation.'

Not satisfied with the ICC's snubbing of its request, the AU thereafter lodged a request in October 2013 with the UNSC to defer, for at least a year, the trials of Kenya's president and deputy president in the ICC.<sup>35</sup> The resolution, put forward by Rwanda, Togo and Morocco was rejected by the UNSC in November 2013, but not without garnering the support of seven of the 15 nations on the UNSC, two short of the required nine, with the US, France and Britain abstaining. As the BBC reported, 'for African nations this vote, which they knew would never pass, had larger meaning – it was also a protest at what they regard as an institutional bias from the International Criminal Court against Africa'.<sup>36</sup>

The AU has taken this stance before the ICC and the UNSC despite evidence that Kenya was unable to institute proceedings against Kenyatta and Ruto before.<sup>37</sup> Not surprisingly, the UNSC and the ICC have found it fit to keep these Kenyan cases within the ICC's jurisdiction and continue investigating the matters. However, it is clear that

such a response by the Court and the UNSC will have added poison to an already toxic relationship.

These developments are the latest instalments in a series of steps by the AU to register a broken relationship with the ICC. Whether out of a real concern by some to ensure equal justice under law, or motivated by others to shield themselves and other powerful African leaders from the Court's gaze, what is important is the result. That is, the product of these possibly mixed concerns and motives is a near uniform and homogenous position that reflects the AU's discontent with the Court.

### *Expanding the African Court's jurisdiction*

The discontent referred to is already manifesting in other ways. Most notable – and as a further example of the AU's efforts to claim 'independence' from the intervening ways of the ICC and its backers – are the attempts by the AU to push for an African substitute to the ICC within the existing African Court on Human and Peoples' Rights.

In response to a 2009 AU decision on the matter, the AU Commission began a process in February 2010 to amend the protocol on the Statute of the African Court of Justice and Human Rights to expand the Court's jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption.

By May 2012, African government legal experts and ministers of justice and attorneys general had considered and adopted the draft protocol (except article 28E, which relates to the crime of unconstitutional change of government and which presents definitional problems that require more attention). All that now remains is for the AU Assembly to adopt the draft protocol formally.

Given the continent's record of human rights' atrocities, some have argued that vesting the African Court with international criminal jurisdiction is a worthy development to end impunity.<sup>38</sup> In principle, that is indeed a laudable goal, but is it likely in practice, and at what cost?

The first issue that bedevils support for the proposal is the drafting process. On paper this process has taken three years, but in reality government legal experts had just over one year to consider the draft protocol properly. It is also unfortunate that civil society and external legal experts were given little opportunity to comment and that the draft protocol was never made available on the AU's website, or publicly posted for comment in other media.<sup>39</sup> The AU would have benefitted from a broader process of consultation considering that questions around jurisdiction, the definition of crimes, immunities, institutional design and the practicalities of administration and enforcement, not to mention the impact on domestic laws and obligations,

require careful examination. All these implications need to be considered.<sup>40</sup>

The AU Commission explains that the expansion of the African Court is motivated by reasons other than anti-ICC sentiment. Specifically, the process originates in the AU's requirement to deal with three issues: the misuse of the principle of universal jurisdiction; the challenges brought about by the process of Senegal prosecuting former President of Chad Hissen Habre; and the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance, which requires that the AU formulate a new international crime to deal with unconstitutional changes of government.<sup>41</sup>

It is, however, quaint to think that the recent tension between the AU and the ICC is not a prime influence behind the process, especially considering that the draft protocol is studiously silent on any relationship between the African Court, with its expanded criminal jurisdiction, and the ICC.

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## **For the ICC to do justice to the African victims of the cases that are rightly before it and to do justice to the victims of such crimes outside of Africa, a delicate balancing act is required**

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The second concern is with the African Court's ambitious jurisdictional reach. Legitimate questions can be asked not only about the Court's capacity to fulfil its newfound international criminal law (ICL) obligations but also about the effect that such stretching will have on the Court's ability to deal with its general (and existing) and human rights obligations. The subject matter of the Court's proposed ICL jurisdiction means the Court is expected to try the established international crimes and also a raft of other social ills that plague the continent.

A related difficulty involves money. To ensure that justice can be done to the Court's wide jurisdiction, a vast amount of money will be required to ensure proper staffing and capacity to run international criminal trials, not to mention perform the African Court's existing administrative tasks and to act as the continent's regional human rights' court. Indeed, the fiscal implications of vesting the Court with criminal jurisdiction raise serious questions about the effectiveness, independence and impartiality of such a court – and the motive for rushing the international criminal chamber into existence. By way of example, the ICC's



budget – currently for investigating just three crimes and not the range of offences the African Court is expected to tackle – is more than 14 times that of the African Court without a criminal component, and is just about double the entire budget of the AU.<sup>42</sup>

Finally, given that the African Court will be occupying the same legal universe as the ICC, it is necessary to consider the relationship (if any) between these two courts. This is no small matter. It must be recalled that 34 African states are now party to the ICC, with at least six of those states having adopted implementing legislation to give effect to their obligations to the ICC. It thus seems imperative that the relationship between the ICC and the African Court be addressed.<sup>43</sup> In the first place, which court will have primacy? Careful thought would also have to be given to the question of domestic legislation to enable a relationship with the expanded African Court (especially around the issues of mutual legal assistance and extradition).

Given these difficulties, it is surprising that the draft protocol nowhere mentions the ICC, let alone attempts to set a path for African states that must navigate the relationship between these two institutions. A useful comparison here is the careful thinking that has gone into the drafting of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which similarly would envisage a new system for the prosecution of such crimes as a complement to the ICC's Rome Statute.<sup>44</sup>

Given the many challenges with the creation of an international criminal chamber at the African Court, the question must be asked: what is the real motivation underpinning the draft protocol? All things considered, it seems clear that this is mainly an African response to an encroaching ICC. That is all the more so in light of reports that Kenya, *inter alia*, has been instrumental in driving the proposed expansion of the African Court's jurisdiction in a way that ties in with the ICC's jurisdiction.<sup>45</sup>

The AU's insistence on an international criminal chamber within the African Court, insofar as this may be a response to the ICC's anti-African approach, is a manifestation of the problem of perception that the ICC faces.

## CONCLUSION

If one considers that the true voice of Africa (or of any continent) is its people and not its leaders, this may bring into question the legitimacy of an 'African' perception of the ICC. While victims of human rights' abuses would accept the help of the Court with open arms, their leaders do not all share the same sentiment.

The concern is that, with a straight face, critics of the ICC's focus on Africa are able to decry the ICC's lack of universalism. And, if 'Africa's' negative perception of the ICC is short-sighted and has thus created a precarious

situation for the international criminal justice project, that has only been worsened by the ICC's narrow field of view.

By failing to universalise international criminal justice, the UNSC and the ICC have created a lose-lose situation where non-African countries suffer without the assistance of the Court, on the one hand, and African victims of international crimes suffer under leaders who have cynically been able to abuse the Court's work to escape justice or distract from its efforts, on the other. There is also the law of unintended consequences to confront, namely, that by the AU's attempts to rush an international criminal chamber into existence in the African Court (as part of an effort to liberate the continent from the influence of the ICC) the ICC will be party to the potential weakening of the African human rights' structures that are already precariously doing their work on the continent.

One cannot merely claim that the African cases before the Court are there because they deserve the Court's attention. They do. But while crimes in Syria, or Palestine, remain beyond the ICC's reach, it becomes impossible to claim that the international criminal justice project is truly universal in its justice aspirations, or free from the vicissitudes of international politics. Ultimately, it is a question of fairness and equality. So long as the UNSC and the ICC ensure that the Court busies itself exclusively with African situations, and ignores or evades dealing with other continents, the principle of equality before the law becomes little more than a platitude.

What this paper has shown is that the ICC's narrow application of international criminal law has given rise to a perception problem, the sum of which can no longer be ignored and which threatens to undermine the credibility of the Court.

Aside from the justice principles of equality and fairness, this exclusive focus on Africa also allows the perpetrators of human rights' abuses in Africa (who should be targeted by the Court) to draw deserving attention away from African crimes and the plight of African victims by insisting that the spotlight be kept trained on the skewed nature of international criminal justice and the hypocrisy of the ICC and UNSC.

For the ICC to do justice as it should to the African victims of the cases that are rightly before it *and* to do justice to the victims of such crimes outside of Africa, who equally deserve the Court's and the international community's attention, a delicate balancing act is required. It is thus in the interests of justice and the credibility of the ICC that the Court stretch its work beyond Africa. By doing so, the Court will deny the powerful African elites the diversion that they use to cover up their crimes. It will also – where the evidence shows a need for the Court's intervention – be a means by which to pay homage to the principle of equal justice under law.

## NOTES

- 1 Eighteen cases in eight 'situations' have been brought before the ICC, all of which stem from Africa. In this regard see [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (accessed 1 July 2013).
- 2 With the exception of Botswana.
- 3 See [http://www.nytimes.com/2013/10/23/world/deferral-sought-for-kenya-trials.html?\\_r=0](http://www.nytimes.com/2013/10/23/world/deferral-sought-for-kenya-trials.html?_r=0) (accessed on 19 November 2013).
- 4 See Max du Plessis, Confronting myths about the International Criminal Court, in Chile Eboe-Osuji (ed), *Protecting Humanity, Essays in International Law and Policy in Honour of Navanethem Pillay*, edited book in honour of Judge Navi Pillay, Netherlands: Brill Publishers, 2010. See also Max du Plessis, *The International Criminal Court and its work in Africa: confronting the myths*, Institute for Security Studies Occasional Paper, November 2008.
- 5 See John Dugard, *Palestine and the ICC: institutional failure or bias?* *Journal of International Criminal Justice*, 2013 (forthcoming).
- 6 Article 5 of the Rome Statute provides that the ICC has jurisdiction to try the crime of genocide, crimes against humanity, war crimes and the crime of aggression.
- 7 See Human Rights Watch's 2012 report on Syria, <http://www.hrw.org/world-report-2012/world-report-2012-syria> (accessed on 10 July 2013).
- 8 See Human Rights Watch's latest news on the ongoing situation in Syria, <http://www.hrw.org/middle-eastn-africa/syria> (accessed on 10 July 2013).
- 9 For more on Switzerland's letter to the UNSC, see <http://www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria> (accessed on 10 July 2013).
- 10 See John Dugard, *Palestine and the ICC: institutional failure or bias?*
- 11 For more information on the situation in Palestine, see Human Rights Watch Report, <http://www.hrw.org/world-report-2010/israel-occupied-palestinian-territories-opt> (accessed on 10 July 2013).
- 12 See John Dugard, *Palestine and the ICC: institutional failure or bias?*
- 13 *Ibid.*
- 14 See the statement of the Prosecutor of the ICC of 28/01/13, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/OTPstatement280113.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/OTPstatement280113.aspx) (accessed on 14 July 2013).
- 15 For the Comoros' full referral to the ICC, see <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf> (accessed on 10 July 2013).
- 16 Article 12 paragraph 2(a) of the Rome Statute of the International Criminal Court 1998.
- 17 See William Schabas' comment on this situation in 'Out of Africa – Israel is referred to the ICC', at, [http://humanrightsdoctorate.blogspot.com.au/2013/05/out-of-africa-israel-is-referred-to.html?utm\\_source=feedly](http://humanrightsdoctorate.blogspot.com.au/2013/05/out-of-africa-israel-is-referred-to.html?utm_source=feedly) (accessed on 10 July 2013).
- 18 *Ibid.*
- 19 For more detail on Operation Cast Lead and criticism of the Prosecutor of the ICC's decision, see John Dugard, *Palestine and the ICC: institutional failure or bias?*
- 20 Nicole Fritz, *Black-white debate does no justice to a nuanced case*, *Business Day*, 13 August 2008.
- 21 *Ibid.*
- 22 See Ottilia Maunganidze and Antoinette Louw, *Mali: implications of another African case as Mali self-refers to the ICC*, at <http://allafrica.com/stories/201207240748.html> (accessed 24 July 2012).
- 23 Fatou Bensouda, *Setting the record straight: the ICC's new Prosecutor responds to African concerns*, ISS Seminar, Pretoria, 10 October 2012, <http://www.issafrica.org/eventitem.php?EID=864> (accessed on 18 August 2013).
- 24 See "Why I had no choice but to spurn Tony Blair", *The Gaurdian*, at <http://www.guardian.co.uk/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq?newsfeed=true> (accessed on 15 July 2013).
- 25 See Human Rights Watch, *ICC: Bashir warrant is warning to abusive leaders*, 4 March 2009, <http://www.hrw.org/en/news/2009/03/04/icc-bashir-warrant-warning-abusive-leaders> (accessed on 14 July 2013); Human Rights Watch stated that the ICC warrant indicates that '[n]ot even presidents are guaranteed a free pass for horrific crimes'. Also see Amnesty International, *ICC issues arrest warrant for Sudanese President Al Bashir*, 4 March 2009, <http://www.amnesty.org/es/node/9632> (accessed on 14 July 2013).
- 26 Article 16 empowers the UNSC to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The UNSC would need to determine whether the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work.
- 27 *Ibid.*, 443.
- 28 Dire Tladi, *The African Union and the International Criminal Court: the battle for the soul of international law*, *SAYIL* 34 (2009), 57.
- 29 Kenya ratified the Rome Statute on 15 March 2005, becoming a State Party on 1 June 2005.
- 30 See Kenya's *International Crimes Act*, 2008, which came into operation on 1 January 2009. The others include South Africa and Uganda.
- 31 See Max du Plessis, *The International Criminal Court goes to Kenya (but keeps its head down on Gaza)*, *South African Journal of Criminal Justice* 2 (2010), 256.
- 32 ICC, *Statement to the United Nations Security Council on the situation in Darfur, the Sudan*, pursuant to UNSCR 1593 (2005), Office of the Prosecutor, 9 December 2010.
- 33 See decision on 28 May 2013 on international jurisdiction, justice and the International Criminal Court, AU Assembly Doc AU/13(XXI).

- 34 See Katrina Manson "African Union to vote on Kenyatta trial", Financial Times, 25 May 2013, at <http://www.ft.com/intl/cms/s/0/af9ac982-c556-11e2-af7a-00144feab7de.html#axzz2I5vZZJqJ> (accessed on 1 June 2013).
- 35 See [http://www.nytimes.com/2013/10/23/world/deferral-sought-for-kenya-trials.html?\\_r=0](http://www.nytimes.com/2013/10/23/world/deferral-sought-for-kenya-trials.html?_r=0) (accessed on 19 November 2013).
- 36 See Nick Bryant, "UN rejects Africa bid to halt Kenya leaders' ICC trials", available at <http://www.bbc.co.uk/news/world-africa-24961169> (accessed on 19 November 2013).
- 37 For criticism of the AU's decision see Simon Allison's comments, <http://www.dailymaverick.co.za/article/2013-05-28-analysis-in-protecting-kenyatta-and-ruto-the-au-betrays-us-all/#.UacwO0Cos-J> (accessed on 14 July 2013).
- 38 See Don Deya, Worth the wait: pushing for the African Court to exercise jurisdiction for international crimes, *International Criminal Justice, Openspace 2* (February 2012), <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 1 August 2013).
- 39 See Institute for Security Studies, African Court Roundtable Report, 24 April 2012.
- 40 See Max du Plessis, Implications of the AU decision to give the African Court jurisdiction over international crimes, ISS Paper 235, <http://www.iss.co.za/pgcontent.php?UID=31600> (accessed on 14 July 2013).
- 41 See Don Deya, Worth the wait.
- 42 See Max du Plessis, Implications of the AU decision, 9.
- 43 See Joint letter to the Justice Ministers and Attorneys General of the African states parties to the International Criminal Court regarding the proposed expansion of the jurisdiction of the African Court of Justice and Human Rights, 3 May 2012, <http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat> (accessed 14 July 2012).
- 44 See Leila Sadat, A comprehensive history of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, 9, <http://law.wustl.edu/harris/CAH/docs/CompHistoryFinal01-06-11.pdf> (accessed on 15 August 2013).
- 45 According to Peter Opiyo, 'Kenya has been using the AU as a platform to have the trials against four of its citizens postponed or referred to an African court. So far African leaders are trying to make sure that the African Court of Justice and Human Rights has the capacity to try international crimes, which hitherto have been the domain of International Criminal Court.' See Peter Opiyo, Why Kenya-AU plot against ICC may stall, 16 July 2012, <http://www.standardmedia.co.ke/?articleID=2000062030&pageNo=1> (accessed on 14 July 2013).

## ABOUT THE PAPER

This paper discusses the universal aspirations of the International Criminal Court (ICC), why the ICC's reach thus far has been focused exclusively on the African continent, and how this geographic limitation has affected African perceptions of international criminal justice. The paper argues that the ICC's narrow application of international criminal law has given rise to a perception problem, the sum of which can no longer be ignored and which threatens to undermine the credibility of the Court.

## ABOUT THE AUTHOR

Max du Plessis is a senior research associate at the International Crime in Africa Programme (ICAP) at the ISS. He is also an Associate Professor of Law at the University of KwaZulu-Natal, South Africa, and a member of the KwaZulu-Natal Bar with special expertise in international law, constitutional law and administrative law. Max has written widely in the fields of international criminal law and human rights. He is an associate tenant at Doughty Street Chambers, London.

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### ISS Pretoria

Block C, Brooklyn Court,  
361 Veale Street  
New Muckleneuk, Pretoria  
South Africa  
Tel: +27 12 346 9500  
Fax: +27 12 460 0998  
Email: [pretoria@issafrica.org](mailto:pretoria@issafrica.org)

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5th Floor, Get House Building  
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### ISS Nairobi

Braeside Gardens,  
off Muthangari Road  
Lavington, Nairobi, Kenya  
Tel: +254 20 266 7208  
Fax: +254 20 266 7198  
Email: [nairobi@issafrica.org](mailto:nairobi@issafrica.org)