

The ICC and the African Union: “Engaging African Youth in International Justice”

By Hisham AIDI

Summary

This policy brief outlines the debate surrounding the ICC’s focus on (sub-Saharan) Africa, describing how the Court has become the de facto court of transitional justice in Africa, and arguing that a realist theoretical framework can best explain its performance. The author follows a balance of power approach and a post-colonial perspective that help elucidate the ICC’s decisions as well as the maneuverings within the African Union around the tribunal.

On February 1, 2019, the International Criminal Court (ICC) released Laurent Gbagbo, the former president of Côte d’Ivoire, and the first head of state to stand trial at the ICC. The Ivorian leader, who had spent seven years in custody at the Hague, was freed in a shock acquittal on January 15, after judges decided that he was not responsible for the post-electoral violence that left 3000 people dead in Côte d’Ivoire in 2010, when Gbagbo had refused to concede defeat to his rival and now president Alassane Ouattara. The prosecution will appeal this verdict, but this latest acquittal has reignited debate around the ICC. Critics – especially in the US – observe, that after 17 years in existence, the ICC has only managed to convict three individuals (Congolese warlord Thomas

Lubanga in 2012, Malian militant Ahmad Al Mahdi in 2016, and Congolese vice-president Jean Pierre Bemba in 2018,) while its failures and reversals are more numerous: thus the failure to indict Gbagbo, the Court’s decision to overturn Bemba’s conviction (in June 2018,) the inability to try Omar al-Bashir in 2009 or Uhuru Kenyatta in 2014, the acquittal of Congolese colonel Cui Ngudjolo in 2008 have all raised doubts about the Court’s efficacy and independence. What are the effects of these failures? Do the acquittals constitute defeats?

This lecture will outline the debate surrounding the ICC’s focus on (sub-Saharan) Africa, describing how the Court has become the de facto court of transitional justice in

Africa, and arguing that a realist theoretical framework can best explain its performance. A balance of power approach can help elucidate the ICC's decisions as well as the maneuverings within the African Union around the tribunal. Concomitantly, a post-colonial perspective can explain how the Court fits into a long history of imbalanced Western attempts to bring justice to the post-colonial world. I will focus on the works of African scholars – Oumar Ba, Siba Grovogui, Mahmood Mamdani, Makau Mutua – who, through different theoretical lenses, have tried to understand the role of the Court in Africa. Finally, I will address the debate taking place within African civil society, highlighting the support that African youth and women's organizations have shown the Court, and how their support tallies with the opposition expressed at the African Union.

Rome Statute

The ICC is an intergovernmental treaty organization and international tribunal headquartered at The Hague. It was founded by the Rome Statute in July 1998; 138 states are signatories but only 123 are considered parties to the treaty. The United States, for instance, is a signatory, but not a party. The ICC came into force in July 2002 and is considered the “court of last resort,” trying four types of crimes: genocide, crimes against humanity, crimes of aggression and war crimes. In terms of structure, the ICC is made up of four parts: the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. The President is the most senior judge, selected by her peers in the Judicial Division, which hears cases before the Court. The Office of the Prosecutor investigates crimes and initiates proceedings in front of the Judicial Division. The Registrar in turn oversees all the units of the ICC, including the public defense office, the detention office and the headquarters.

The ICC was thus designed to complement the national judicial system, and intervenes when national courts are unable or unwilling to prosecute criminals. The Court has the jurisdiction to prosecute individuals for crimes against humanity, but only over the territory and citizens of its member states, and only when said member states are unable to prosecute international crimes domestically. Yet there is an important loophole: the UN Security Council can refer certain conflicts to the ICC, and this is how Libya and Sudan came into the Court's purview (even though neither state is a signatory.) The Office of the Prosecutor has launched 10 official investigations, and

with the exception of Georgia, all investigations are in Africa. There are preliminary examinations underway in Afghanistan, Colombia, Ukraine, Palestine and Myanmar. But currently 9 out of 10 situations being investigated are in Africa, and so far all 39 individuals indicted by the ICC have been African leaders – either rebel leaders or heads of state. This has sparked a debate over the ICC's lopsided interest in the continent, prompting even *The Washington Post* to ask if the ICC was “targeting black men?”¹

“The Court for Africa”

The ICC's focus on Africa has led African scholars and commentators to question the court's impartiality.² When the Court issued warrants for the arrest of al-Bashir in 2009 and 2010 during the Darfur conflict, Ugandan scholar Mahmood Mamdani would point to the Court's silence over conflicts in the Middle East, observing that, “the ICC is rapidly turning into a Western court to try African crimes against humanity;” and stressing that “more than the innocence or guilt of the president of Sudan, it is the relationship between law and politics including the politicization of the ICC, that poses a wider issue.”³ African heads of state would also question the Court's impartiality. Paul Kagame of Rwanda would dismiss the Court as a “fraudulent institution.”⁴ Public figures who supported the ICC would change positions after it began targeting sitting heads of state. Thus when the Court indicted the president of Kenya, the Ethiopian Prime Minister Hailemariam Desalegn (then chairing the African Union) would charge that the ICC had “degenerated [into] some kind of race-hunting.” Likewise, Yoweri Museveni of Uganda would claim that he had supported the Court until it turned into a tool for “oppressing Africa.” The leaders' discontent would culminate in calls at the African Union for states to withdraw from the Court. In 2009, the AU declared that it would not cooperate with the ICC citing the “publicity-seeking approach of the ICC Prosecutor.”⁵

1. Kate Cronin-Furman, “Is the International Criminal Court really targeting black men?” *The Washington Post* (June 17 2015)

2. Makau W. Mutua, “Africans and the ICC: Hypocrisy, Impunity and Perversion,” *Social Science Research Network* (October 2016)

3. Mahmood Mamdani *Saviors and Survivors: Darfur, Politics, and the War on Terror* (New York: Pantheon Books 2009 p.273)

4. Stephen A. Lamony, “Rwanda and the ICC: Playing Politics with Justice,” *African Arguments* (October 21 2013)

5. Cited in Errol Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (p.170 2010)

For Africa's leaders, the ICC's most egregious act was the issuing of warrants for the arrest of sitting heads of state (ie. al-Bashir of Sudan and Kenyatta of Kenya) which flagrantly violate the sovereignty of African states. Kenyatta did not mince words in this regard, saying the Court's "interventions go beyond interference in the internal affairs of a sovereign state. They constitute a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons." The African Union's position is that sitting heads of state should be immune from the court's prosecution while in office,⁶ but as various scholars have observed, the Rome Statute's Article 27 – signed by Kenya – allows for the prosecution of state officials.

As mentioned, the ICC is an organization that states willingly joined by ratifying the Rome Statute. As Senegalese scholar Oumar Ba has noted, African states were heavily present at the 1998 conference at the Italian capital where the statute was drafted. Of the 123 states who signed, 34 were African states– roughly two-thirds of the African continent (albeit only Tunisia from North Africa). And four of the African situations currently being investigated (Central African Republic, DRC, Mali, Uganda), are being examined because these member states invoked Article 14 of the Rome State that stipulates self-referral, and wrote to the ICC requesting investigation. Only two of the investigations underway (Sudan and Libya) were launched without the states' consent, but through a UN Security Council resolution.⁷

Realpolitik

A realist balance of power framework can be most useful in illuminating the state interests driving the ICC's inordinate focus on Africa, the UN Security Council's referrals, the African Union's call for withdrawal, and help us go beyond the headlines and rhetorical grandstanding. John Mearsheimer has compellingly argued that international institutions – whether it is the UN, the IMF or NATO – are dominated and instrumentalized by the leading states, such that at bottom, international institutions "have

no independent effect on state interests."⁸ The global balance of power situation today is less favorable to the international tribunal than when the Rome Statute was signed in 1998.⁹ The world's leading powers – US, China, Russia – are not parties to the tribunal, and will not let their allies be investigated by the Court through a Security Council referral. The "blockage" among the five permanent members has worsened since the Libya intervention (which infuriated Moscow) – and council referrals are increasingly impeded by a veto from one of the permanent five. Russia thus responded harshly when Prosecutor Fatou Bensouda decided to investigate the violence in Georgia and South Ossetia (2008) and the ongoing situation in Ukraine. Preliminary examination of violence committed by US servicemen in Afghanistan is already drawing the ire of American politicians.

The power politics shaping the ICC's work is often forgotten given the liberal rhetoric surrounding international justice. But the power disparities between the West and the post-colonial world, especially between sub-Saharan Africa and the West are critical to understanding the Court's record so far. Likewise, anti-ICC discourse from the US and the charge accusing the ICC of being an imperialist tool neglect the fact that the US and its African allies have at times enabled the Court's work. The arrest of Dominic Ongwen, a former commander of the Lord's Resistance Army in Uganda in 2015, is a case in point: he was captured in the Central African Republic by Seleka rebels, handed to US special forces who then turned him over to the Ugandan contingent of the African Union task force, who flew him to Bangui from whence he was sent to the Hague.¹⁰ This type of inter-state cooperation between American military forces and their local allies that helps the ICC is rarely discussed by the Court's critics.

Liberal discourse tends to explain the ICC's relationship to Africa in humanitarian terms or legal rationales, a consequence of African states' weak judicial systems. As Kofi Anan famously states: "Africa wants this court. African needs this court." Yet the liberal-humanitarian discourse ignores the contingent alignment of interests driving the ICC's focus on Africa.¹¹ The Court is focused on (sub-

6. "President Uhuru hits out at the West over ICC," *The Nation* (Nairobi, Kenya October 12 2013) In 2012, following Kenyatta's indictment, the AU would issue a statement expressing "concern on the politicization and misuse of indictments against African leaders by the ICC."

7. Oumar Ba, "International Justice and the Postcolonial Condition," *Africa Today* Vol. 63, No. 4 (Summer 2017), pp. 45-62

8. John J. Mearsheimer, "The False Promise of International Institutions," *International Security*, Vol. 19, No. 3 (Winter, 1994-1995), pp. 5-49.

9. Richard Dicker, "Why International Justice Still Faces Roadblocks?" *The Washington Post* (June 22 2017)

10. "Ugandan warlord's defence to open at ICC," *The Daily Monitor* (September 18 2018)

11. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014)

Saharan) Africa in part because that was the only way the nascent international tribunal could survive in face of strong opposition from the US.¹² The ICC was after all born at the beginning of the War on Terror when American hostility was resolute, prompting the ICC's Office of the Prosecutor to adopt a course of least resistance: "[the ICC] made clear that it would target supposedly meaningless African violence, in particular the non-political violence of African warlords, [but] not the violence of the US or its allies." To demonstrate that the US and its allies were going to be spared, the ICC's first investigations were not into the American invasions of Iraq and Afghanistan, but into the conflicts of DRC, Uganda, Darfur, and CAR. Central Africa in particular became a site for the 1990s humanitarian interventionism; as geo-political obstacles grew to the Court, the center of the continent would be depicted as a space ravaged by an apolitical violence and where obvious African victims needed Western saviors. As Cambridge scholar Adam Branch has written, Africa was also chosen because "The continent was politically marginal enough that intervention there wouldn't interfere with US interests. In addition, Africa was politically weak enough that those subject to intervention were considered unlikely to challenge the court."¹³

Thus, the ICC focuses on sub-Saharan Africa because the sub-Saharan region is "marginal" to American interests, and ICC verdicts will not provoke the American backlash that they would provoke in North Africa or the Middle East or Latin America. Moreover, sub-Saharan states have low capacity, need ICC assistance and cannot easily contest its decisions. (Relatedly, the reason the ICC has not been able to exercise jurisdiction over non-African atrocities is because Asian and Middle Eastern states have not joined the ICC and are protected from a Security Council referral by Great Power allies.) Because of the vast disparity in power between Africa and the Great Power, the ICC has sought the support of Western and African states by "tacitly" granting state leaders immunity from prosecution, with African leaders in turn portraying their enemies' violence as illegal, while cloaking their own violence in the language of law and order and counter-extremism. Siba Grovogui has explained this situation succinctly: international justice "has become an arena of political transactions where immunities are afforded to some, favors rendered for friends, while the rest are

targeted for punishment with prosecutorial zeal."¹⁴ Thus, for practical reasons the ICC has sided with Uganda – a regional hegemon, and with American forces in Libya and Uganda, and with French troops in Mali and Côte d'Ivoire – and with the stronger party in various African conflicts. Where the Court has not done this – as in Kenya – it has been humiliated. The risk of this realist strategy is, as Adam Branch observes, that ICC interventions in Africa can end up supporting the violence and impunity of the powerful, silencing democratic or pro-peace activists, and rendering transitions harder to achieve.

African Union

A balance of power approach also explains the rift that has opened up within the African Union around the ICC. In October 2016 – to widespread Western condemnation – South Africa formally announced its decision to withdraw from the Court, saying the Rome Statute was clashing with South African laws on diplomatic immunity.¹⁵ In January 2017, at the 28th African Union summit in Addis Ababa, a nonbinding resolution was adopted calling for withdrawal from the ICC. South Africa and Burundi formally initiated their countries' withdrawals. As various legal commentators have noted, not only is the "ICC Withdrawal Strategy" weak and nonbinding, but it would quickly prove controversial as few other states followed suit. The Roma Statute was signed by 34 of 55 African states, yet only two called for withdrawal (the third, Gambia, would reverse positions after Adama Barrow came to power in early 2017.)¹⁶ Formal reservations were entered against the resolution by Nigeria, Senegal and Cape Verde; while Malawi, Tanzania, Tunisia and Zambia requested more time to study it. As legal analyst Mark Kersten has observed, looking at the fine print, the AU's so-called "Withdrawal Strategy" is a deliberately weak, non-binding document that outlines five "objectives" regarding ICC reform - listed below verbatim:¹⁷

¹⁴. Siba Grovogui, "Intricate Entanglements: The ICC and the Pursuit of Peace, Reconciliation, and Justice in Libya, Guinea, and Mali," *Africa Development* 40 2015

¹⁵. In contrast, when Palestine joined the ICC, Israeli Foreign Minister Lieberman stated, "We will demand of our friends in Canada, in Australia [,] and in Germany simply to stop funding" the ICC; and the Canadian foreign minister said the Palestinians "had made a huge mistake." <https://justiceinconflict.org/2015/01/20/on-the-icc-in-palestine-canada-crosses-the-line/>

¹⁶. "Under New Leader, Gambia Cancels Withdrawal From International Criminal Court," NPR.org February 14 2017

¹⁷. Mark Kersten, "Not All it's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy," *JusticeinConflict.org* (February 6 2017)

¹². Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009)

¹³. Adam Branch, "Dominic Ongwen on Trial: The ICC's African Dilemmas," *International Journal of Transitional Justice* (March 2017)

- a. “Ensure that international justice is conducted in a fair and transparent manner devoid of any double standards.”
- b. “Institution of legal and administrative reform of the ICC.”
- c. “Enhance the regionalization of international criminal law.”
- d. “Encourage the adoption of African Solutions for African problems.”
- e. “Preserve the dignity, sovereignty and integrity of Member States.”¹⁸

This “Withdrawal” document is thus more about reform than withdrawal – calling for amendments to the Rome Statute, reform at the Security Council, broader representation at the ICC, and the strengthening of national criminal justice systems. To that end, the African Union’s Open-Ended Committee of Ministers of Foreign Affairs continues to engage with various stakeholders, especially the Assembly of States Parties to the Rome Statute, the ICC’s Office of the Prosecutor, the Security Council (the permanent five members, plus Russia and China.) In entering Nigeria’s reservation, the Nigerian foreign minister was candid, stating that “the ICC has [an] important role to play in holding leaders accountable,” and that “Nigeria is not the only voice agitating against [withdrawal], in fact Senegal is very strongly against it, Cape Verde and other countries are also against it.”¹⁹

If African states are in disagreement about the ICC and that split is reflected at the African Union, individual African states are divided domestically and that is mirrored in civil society.

African Youth and the ICC

In late June 2011, just before the African Union’s meeting where a plan of action on “Accelerating Youth Development and Employment” was adopted, a slew of youth organizations and women’s groups – the Ugandan-based African Youth Initiative Network, the Sierra Leonean-based National Youth Advocacy Network, the Africa Youth Coalition Against Hunger, the Liberian-based Forum for the Rights of Women (FOROW), the

Women’s Forum, and DRC-based Synergy of Women for the Victims of Sexual Violence (SFVS) – published an open letter challenging the emerging opposition to the ICC by African heads of state. The letter explained that the Court was investigating a disproportionate number of African conflicts because of “voluntary referrals” by African governments, stressing that the AU should “work proactively” to build state and societal support for the tribunal, and cease “seeking to limit the ICC’s ability to function effectively.” Thus six years before AU resolution on withdrawal, this civil society manifesto called upon African states to “work to avoid further calls by the AU for member states not to cooperate with the ICC or otherwise underscore the ICC’s ability to advance its mission and mandate.”²⁰ Likewise, following South Africa’s declaration of withdrawal in October 2016, the University of Johannesburg organized a symposium titled “Why International Justice Matters” inviting youth groups from across the continent to learn about the ICC; the keynote speaker was Ms Fatou Bensouda, the Court’s Chief Prosecutor. And in February 2017, South Africa’s High Court blocked the South African government’s attempt to pull out of the ICC, declaring the withdrawal notice “unconstitutional and invalid” because it had not passed through parliament.

The African Union is aware of the support that exists for the Court within civil society. According to the AU’s own reports, 65% of Africa’s population is between the ages of 18 and 35, making Africa the world’s youngest continent. And African youth have demonstrated their political clout in recent years: in Senegal’s “Y’en a marre” movement which protested Abdoulaye Wade’s attempts to extend his tenure in 2012; in South Africa’s “Fees Must Fall” campaign of 2016, which pushed the government to provide free education for impoverished youth; in the “Gambia Has Decided” movement which pressed for a peaceful transition to Adama Barrow’s rule after the elections of 2016; in Nigeria’s “Not Too Young To Run” campaign of 2018 which led to amendments in 1999 constitution, reducing the required age for presidential office from 40 to 30 years old. The AU is attentive to the influence and needs of African youth which is why the organization set 2017 as the year for “Harvesting the Demographic Dividend through Investments in

18. ICC Withdrawal Strategy Document Draft #2 ICC 12/O1/2017

19. “Nigeria Opposes Mass ICC Withdrawal,” *allafrica.com* (January 27 2017)

20. “Observations and Recommendations on the International Criminal Court and the African Union in Advance of the 17th African Union Summit,” (30 June-1 July) Posted on the website of the South African-based organization Lawyers for Human Rights: <http://www.lhr.org.za/news/2011/observations-and-recommendations-international-criminal-court-and-african-union-advance-17>

Youth.”²¹ In November 2016, the AU Commission also organized a Youth Consultation on the African Union’s Transitional Justice Policy. This gathering brought together youth from all five AU regions to give input into the Draft AU Transitional Justice Policy. The AUTJP draft document also called for efforts to strengthen regional and domestic protections, and especially for a plan to extend the African Court on Human and People’s Rights (AfCHPR) to include crimes of genocide, war crimes and crimes against humanity.²² It appears the debate within African civil society is percolating upwards and stirring institutional reform within the African Union, just as the AU’s youth policy is itself being shaped by rivalries between anti-ICC South Africa and pro-ICC Nigeria.

21. <https://au.int/sites/default/files/.../32665-doc-au-echo-magazine-2017-23june17-1.pdf>

22. “Continental Youth Consultation on the AU Transitional Justice Policy (AUTJP),” (November 2016): <https://au.int/en/newsevents/31584/continental-youth-consultation-au-transitional-justice-policy-autjp-nairobi-kenya>

Conclusion

The debate about the ICC in Africa has progressed; the animating question is no longer simply “why is the Court targeting Africans?” The discourse now is how to improve cooperation between African states and ICC, on the one hand, and the civil societies and the African Union on the other. There is a growing awareness that the Court is made up of different parts, and that criticism of the Court’s selection of cases is actually just about one unit -- The Office of the Prosecutor. The ICC has also learned from earlier mistakes. Of late, the Registrar has taken to bolstering its presence in countries where investigations are underway as a way of building local support, and the Prosecutor’s teams are increasingly relying on forensic evidence, preparing “trial ready” cases at an earlier date, to reduce risk of having insufficient evidence when investigations become more difficult. In summation: rhetoric and political grandstanding aside, African states remain invested in the ICC. The risks of signing on to the Court are clear: signatories are accepting that some point in the future their crimes may be investigated. But there are also benefits, including the outsourcing of internal conflicts (such as Nigeria’s struggle with Boko Haram) to an international institution, and developing a reputation as an African state respectful of human rights and international law, which could bring economic and political dividends.

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In 2002–2003, Aidi was a consultant for UNDP's Human Development Report. From 2000 to 2003, he was part of Harvard University's Encarta Africana project, and worked as a cultural reporter, covering youth culture and immigration in Harlem and the Bronx, for *Africana*, *The New African* and *ColorLines*. More recently, his work has appeared in *The Atlantic*, *Foreign Affairs*, *The New Yorker* and *Salon*. Since 2007, he has been a contributing editor of *Souls: A Critical Journal of Black Culture, Politics and Society*. Aidi is the author most recently of *Rebel Music: Race, Empire and the New Muslim Youth Culture* (Pantheon, 2014), a study of American cultural diplomacy.

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