The International Criminal Court and Africa: The Decision to Withdraw Or Cooperate

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Abstract
The International Criminal Court (ICC) was established by the Rome Statute (2002) and mandated to prosecute and judge the authors of the most serious international crimes, namely war crimes, genocide, crimes against humanity and the crime of aggression. African Union (AU) the Member States played a critical role in its creation and remain instrumental in its functioning. However, in recent times, AU Member States have levelled a great deal of criticism and threatened to withdraw from the ICC because they accused it of been bias and focussing on Africa despite the crimes under its jurisdiction being committed outside the African continent. One expected that Jean-Pierre Bemba’s release could help improve the relationship between ICC and African countries. However, the communiqué issued on 15 September 2018 by the government of the Democratic Republic of Congo (DRC) threatening withdrawal from the Rome Statute demonstrates that the relations between Africa and the ICC remain tense.

The purpose of this article is to analyse and uncover the reason why African countries who have over the years cooperated with ICC to prosecute individuals for crimes against humanity under its jurisdiction seems to have recently lost faith and trust in the ICC and not willing to cooperate with it anymore. By adopting the historical analysis and qualitative methodology, this article draws on some historical events that prove how African countries were willing to cooperate with the ICC in the past but however due to some recent development in the operations of the ICC, African countries have perhaps lost confidence in the ICC to fairly deal with cases under its purview. The article concludes that the unwillingness of African Countries to recently cooperate with the ICC is due to the fact that members of the AU are of the view that the ICC is too focused only on cases within the African continent and besides some African leaders also thinks that the ICC has allowed itself to be used as a tool by the big or powerful countries in the world to advance the interest of those powerful countries and this has prevented it from been impartial in the performance of its duties.

In this regard the article suggests that the ICC needs to restructure its operational activities in order to regain the trust and confidence of the AU because the withdrawal of the AU from the ICC will be detrimental to its establishment, and in the larger view, it will have a negative impact on the practice and application of international law as far as seeking international justices is concerned.

Keywords:  Africa; African Union; Al Bashir’s Case; Democratic Republic of Congo; International Criminal Court; International Crimes; Jean-Pierre Bemba’s Case; Malabo Protocol; Rome Statute.

1. Introduction
The creation of the ICC as a supranational and permanent court was the outcome of several attempts that started in the 19th century and continued after the Second World War (1940-1945). The Nuremberg and Tokyo Tribunals were established to punish individuals who were responsible for genocide, war crimes, and crimes against humanity.1

The end of the 20th century was marked by armed conflicts during which genocide, war crimes and crimes against humanity were perpetrated in a number of countries, particularly in Yugoslavia and in Rwanda. The international community could not remain indifferent, as it did after the First World War (1914-1918) when individuals who were responsible for international crimes went unpunished.2 In 1993, the United Nations (UN) Security Council (SC) adopted a resolution establishing the International Criminal Tribunal for Former Yugoslavia (ICTY) to prosecute individuals who were responsible for genocide and other international crimes committed during ethnic conflicts which led to the disintegration of Yugoslavia.3 In 1994, the Security Council established the International Criminal Tribunal for Rwanda (ICTR), which was modelled on the ICTY, to prosecute and judge individuals who were responsible for genocide in Rwanda.4

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2 See Nabyirungu mwene Songa, Droit pénal international, Kinshasa, Editions Droit et Société, 2013, 8-13 ; Mangu op cit (2015a) 183.  
3 UN Security Council Resolution 827 of 25 May 1993 establishing the ICTY to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1st January 1991.  
4 UN Security Council Resolution 955 of 8 November 1994 establishing the ICTR to prosecute persons responsible for genocide in Rwanda from 1st January to 31 December 1994.
African Union (AU) the Member States played a critical role in its creation and remain instrumental in its functioning. AU Member States have levelled a great deal of criticism and threatened to withdraw from the ICC because they accuse it of been bias for focussing on Africa despite the crimes under its jurisdiction being committed outside the African continent.

Yoweri Museveni, the Ugandan president, called the ICC a “bunch of useless people” while Paul Kagame, his Rwandan counterpart, argued that the court was never about “justice but politics disguised as international justice” and President Uhuru Kenyatta of Kenya considered it a “tool of global power politics and not the justice it was built to dispense.”

1.1 Africa’s Contribution to the Establishment and Functioning of the ICC

African countries have contributed immensely to the establishment and functioning of the ICC over the years.

One hundred and twenty three (123) countries are currently States Parties of the Rome Statute. Out of the 123, 33 are the African States, 19 are the Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

African countries were instrumental not only in the establishment of the ICC but also in its functioning as most preliminary investigations and the overwhelming majority of situations under investigation and cases decided or pending the ICC concern the African continent and African people.

1.1.1 How if a case qualifies for investigation by the ICC

The Office of the Prosecutor (“OTP”) of the ICC is responsible for determining whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by the Office or not. It conducts a preliminary examination of all communications and situations that come to its attention from individuals or groups, States, intergovernmental or non-governmental organisations; from State Parties or the UN Security Council; or based on a declaration lodged by a State accepting the exercise of jurisdiction by the Court pursuant.

The Rome Statute provides that in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.

Fourteen preliminary investigations have been conducted by the OTP. Four were closed with a decision not to proceed. Ten were completed with a decision to investigate and are among situations under investigations. Ten preliminary investigations are on-going and it concern countries like Afghanistan, Colombia, Gabon, Guinea, Iraq, United Kingdom, Nigeria, Palestine, The Philippines, Ukraine, and Venezuela. Out of this ten preliminary investigation that is currently on-going, three of them thus (Gabon, Guinea, and Nigeria) are been conducted in African countries which constitute the majority if one should take an average calculation of the entire cases under investigation.

Upon referrals by States Parties or by the UNSC, or on its own initiative and with the judges' authorisation, the OTP conducts investigations by gathering and examining evidence, questioning persons under investigation and questioning victims and witnesses, for the purpose of finding evidence of a suspect's innocence or guilt. The OTP must investigate incriminating and exonerating circumstances equally. The OTP requests cooperation and assistance from States and international organisations, and also sends investigators to areas where the alleged crimes occurred to gather evidence. Investigators must be careful not to create any risk to the victims and witnesses.

Eleven situations are under investigations and out of the eleven, ten are on the African continent. This places Africa at the heart of the activities of the ICC.

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The fact that the majority of preliminary investigations, situations under investigation and cases decided or pending the ICC concerned African could only impact negatively on the relationships between the ICC and the AU and between the ICC and the AU Member States.

2.1 Cases of willingness by African Countries to cooperate with the ICC

This section will draw on the some few cases where African countries were willing and wholeheartedly cooperative with the ICC to prosecute individuals that have been accused of committing crimes against humanity. The next section will then draw on current events that has compelled African countries not be willing anymore to cooperate with the ICC mainly because they perceive the ICC of been biased and selective with it focus mainly on African countries and at the end of this article some suggestion will be made so that the marriage that has existed between African countries and the ICC over the years will not be brought to an end. The Democratic Republic of Congo and the Jean-Pierre Bemba’s case will be the main cases that will be used to justify Africans past cooperation with the ICC.

2.1.1 The Democratic Republic of Congo and the ICC: “A Love Story”

In April 2004, the DRC was the first country to refer its own situation to the ICC. To date, with six (06) out of the twenty-six (26) cases, the DRC is the country which has presented ICC more cases than any other State. This is also the country which has the most cooperated with ICC in the prosecution of international crimes committed within its jurisdiction as the suspects issued with warrants for arrest had to be arrested, detained and transferred to ICC. The cases of Bemba⁸, Bemba and Others⁹, Katanga¹⁰, Ngudjolo¹¹, Lubanga¹², and Ntaganda¹³ bear testimony to this fact.

The Kabila’s Government was quite quick and more than willing to provide information to the Prosecutor, and in many cases, to arrest and detain the suspects before transferring them to The Hague. The actions of the ICC were not just welcomed but also applauded by the Government because the persons involved were seen as opponents or former allies who had ceased to cooperate and no longer supported President Kabila. The most interesting was the Bemba Case.

2.1.2 Bemba’s Arrest: An Instance willingness to cooperate with ICC

Jean-Pierre Bemba had been the leader of one of the main rebel movements, the Movement for the Liberation of Congo (MLC), which was mainly based in North-West. MLC was supported by Uganda and at some time administered third of the DRC.

In 2003, after the Inter-Congolese Dialogue which was held in Sun City, South Africa, the MLC participated in the Transitional Government of National Unity and its leader, Jean-Pierre Bemba, became one of the Kabila’s four Vice-Presidents. When elections were held in July 2006, Jean-Pierre Bemba was the main Kabila’s challenger. He came second during the first round and competed with Kabila in the run-off since no candidate obtained an absolute majority in the first run as required by the Constitution.

Following a referral by the CAR government of crimes committed on the territory of CAR (after 1 July 2002), on 21 December 2004 and investigation opened by the Prosecutor in May 2007, Pre-Trial Chamber III issued a warrant of arrest against Bemba on 23 May 2008 for international crimes (war crimes and crimes against humanity) committed by the troops he sent to assist CAR President Ange Patasse. A request for provisional arrest was addressed to the Kingdom of Belgium. On 24 May 2008, Mr. Bemba was arrested by the Belgian authorities. The Kabila government welcome the arrest of the Congolese political leader.

On 21 March 2016, Trial Chamber III ruled that, as a superior in command, Bemba was guilty beyond any reasonable doubt of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). On 21 June 2016, Mr. Bemba was sentenced to 18 years of imprisonment.¹⁴ Both the judgment and the sentence were subject to appeals.

On 8 June 2018, the Appeals Chamber found errors that have affected the decision of Trial Chamber III convicting Mr. Bemba. The Appeals Chamber concluded, by the majority, that Trial Chamber III had erroneously convicted Mr. Bemba for specific criminal acts that were outside the case of and that

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⁸ The Prosecutor v Jean-Pierre Bemba Gombo (ICC-01/04-01/07 & ICC-01/05-01/08).
⁹ The Prosecutor v Jean-Pierre Bemba Gombo and others (ICC-01/05-01/13).
¹⁰ The Prosecutor v Germain Katanga (ICC-01/04-01/07).
¹¹ The Prosecutor v Matthias Ngudjolo Chui (ICC-01/04-02/12).
¹² The Prosecutor v Thomas Lubanga Dyilo (ICC-01/04-01/06 OA 13).
¹³ The Prosecutor v Bosco Ntaganda (ICC-01/04-02/06).

http://www.ijmsbr.com
the proceedings in relation to these acts must be discontinued. The Appeals Chamber also found that Mr. Bemba could not be held criminally liable under article 28 of the ICC Rome Statute and should be acquitted thereof.\textsuperscript{15}

The point has been emphasized here is that the DRC Government welcomed the ruling of the ICC and demonstrated that it is willing to cooperate with the ICC at all times. Bemba was provisionally released pending the judgment on his appeal in the second case concerning his alleged offenses against the administration of justice. He could then return to the DRC and on 2 August 2018, he registered as a candidate for the presidential elections to be held on 23 December 2018. Bemba stated that he remained in the opposition and announced that he would stand for the presidency during the December 2008.

The Kabila government came to the conclusion that despite some concessions and acts of goodwill, they could not count on Bemba who could be playing the card to some foreign powers to unseat his regime. They also found his release from prison to have been orchestrated by the same powers to achieve this goal.

On 17 September 2018, the Appeal’s Chamber confirmed the judgment of the First Instance Chamber and Bemba was sentenced to one year of imprisonment and a fine of three hundred thousand Euros (EUR 300,000). However, the sentence of imprisonment was considered as served as Bemba already spent 10 years in prison.\textsuperscript{16} Bemba then appealed to ICC for clarification about its ruling which had been used to deny him the right to run for president. He expected that such a ruling by ICC could impact on the electoral process. He was of the view that the Electoral Commission and the Constitutional Court had erred by disqualifying him and sought to convince them to revise their decisions for him to run for the presidency.

A few days ahead of the date (19 September 2018) set by the Electoral Commission for the publication of the final list of the candidates for December 2018 presidential and parliamentary elections, the government which already suspected ICC of complicity with “some big powers” opposed to President Kabila in Bemba’s liberation, the government decided to anticipate.

In a communiqué issued on 17 September 2018 by Mr. Leonard She Okitundu Minister of Foreign Affairs and Regional Integration, announced that the DRC intends to withdraw from the Rome Statute alleging that certain governments exerted pressure on the judges.\textsuperscript{17}

Interestingly, ICC could only be manipulated by the big powers if it did not serve the interests of the DRC government and not when it helped President Kabila get rid of political foes like Bemba, Katanga, Ngudjolo and others who were prosecuted, arrested and even detained in The Hague for war crimes and crimes against humanity. It cannot be said that ICC surrendered to the DRC government when they did not uphold Bemba’s appeal and sentenced him. Anyway, Bemba’s lawyers could have advised him that ICC had no power to direct the highest judicial authority of a member state to act in one way or another and had the DRC government decided to withdraw from the Rome Statute under these circumstances, such a decision betraying the authoritarian nature of the regime would have suffered the same fate as the Gambian and the South African which ended up being revoked after regime change.

\textbf{2.1.3 The case of Laurent-Gbagbo}

Also, Laurent-Gbagbo who was no longer in office was arrested and taken to ICC for trial and this time again; the AU disagreed with that arrest as strongly registered its displeasure as it did in the case, Al Bashir. This arrest and transfer to ICC contributed to worsening the relationship between the ICC and the AU.

To date not a single case has been brought against pro-Ouattara forces for atrocities committed from 2002 to 2010, nor for the post electoral crisis period which saw one of the worst massacres of the conflict, with 1,000 people losing their lives in one day, committed by the Forces Nouvelles in Duékoué at the end of March 2011. Is the ICC not exasperating the crisis by repeating on an international level a one-sided justice system already deplorable at the national level, which currently has over 150 people from the former Gbagbo regime in prison or facing trial and no rebels? This seems to be a clear case that does not meet the criteria of serving the interest of justice," an ICC statutory criteria for considering the opening of an investigation. Human Rights Watch recently wrote: “Indeed the fact that the ICC is a court of last resort when governments are either unwilling or unable to pursue cases only underscores the imperative of ICC action against those on the Ouattara side, who are otherwise beyond the reach of justice. Concrete actions

\textsuperscript{15} Case information. At [https://www.icc-cpi.int/docpub/Pages/Judgement-BembaEng.pdf](https://www.icc-cpi.int/docpub/Pages/Judgement-BembaEng.pdf) (accessed on 31 August 2018).

\textsuperscript{16} Judgement No. ICC-01/05-01/13 I/S1 of 17 September 2018 at [https://www.icc-cpi.int/CourtRecords/CR2018_04355.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04355.PDF) (accessed on 31 August 2018).

\textsuperscript{17} See [https://scooprdc.net/2018/09/16/justice-internationale-la-rdc-menace-de-claquer-la-porte-de-la-cpi/](https://scooprdc.net/2018/09/16/justice-internationale-la-rdc-menace-de-claquer-la-porte-de-la-cpi/) (accessed on 31 August 2018).
against pro-Ouattara individuals where there is evidence of ICC crimes would go a long way toward rehabilitating the ICC’s credibility in Côte d’Ivoire as an impartial institution, and could thus also further impartial prosecutions at the national level.

When a case is referred for an investigation to the ICC, a situation report is prepared so as to identify those most responsible within a given situation. One thus wonders how the Prosecutor Moreno Ocampo could allow himself to take sides by making declarations pointing to the Laurent Gbagbo camp as culprits even before presenting a situation report on Ivory Coast. Ocampo was criticized at the time for undermining attempts to negotiate a resolution to the crisis. The Rome Statute says the Prosecutor can be disqualified if he participates in any matter in which his impartiality might reasonably be doubted on any ground. Its Article 42 (7) of the Statute.

Furthermore, the Prosecutor acted in a way that was prejudicial towards the rights of the accused by also wanting to interview Laurent Gbagbo while he was being held in arbitrary detention for eight torturous months with neither sunshine nor natural light in the remote village prison at Korhogo in Northern Ivory Coast. Gbagbo’s jail-keeper was Martin Fofié Kouakou, the rebel strongman in Korhogo, charged by the UN Security Council for war crimes and crimes against humanity since 2006: “he engaged in the recruitment of child soldiers, abductions, imposition of forced labor, sexual abuse of women, arbitrary arrests and extra-judicial killings, contrary to human rights conventions and to international humanitarian law; obstacle to the action of the IWG, UNOCI, French Forces and to the peace process as defined by resolution 1633 (2005)”. Why did the United Nations entrust a war criminal for the safekeeping of a prisoner? The UN and French authorities were aware of the imprisonment of up to 1,000 political prisoners from the former Gbagbo regime and its sympathizers in the aftermaths of Gbagbo’s arrest.

3.1 Cases of African Countries not willing to cooperate with the ICC

As already discussed above, African countries have over the years been cooperative with the ICC in helping it prosecute individuals that have been accused of crimes against humanity in its jurisdiction. However an analysis of some recent phenomenon proves that African countries are beginning to lose the trust and confidence that they have in the ICC because they think that the ICC is only targeting individuals from Africa alone and beside the ICC is allowing itself to be used as a tool by the powerful countries in the world to advance the interest of those powerful countries.

This section will thus draw of such of few cases where African leaders have registered their displeasure with the way the ICC operates which eventually has led to the AU’s threat to withdraw from the ICC if care is not taken.

3.1.1 The Al Bashir Case and Decision not to Cooperate with the ICC

Attending the AU summit in June 2015 South Africa, Al-Bashir came close to arrest following a ruling of the Pretoria High Court to enforce the Rome Statute which had been domesticated and was binding on South Africa in terms of its Constitution.

19 Laurent Gbagbo called on the International Criminal Court to open an investigation back in 2003, thus also formally recognizing the ICC jurisdiction over Ivory Coast, into the grave abuses committed by the Forces Nouvelles, yet till 2006 there was no concrete action on the part of the Court. By the time the Court had decided to visit Côte d’Ivoire in 2006 Gbagbo had lost faith in a part of the “international community. The French ambassador to the UN, Rochereau de la Sabalère, through a sentence introduced in resolution 1721 wanted to subordinate the Ivorian Constitution to UN Security Council resolutions. The resolution adopted on November 1 2006 excluded this phrase the French wanted, when Russia, China and the United States opposed this obvious infringement on sovereignty.
20 As early as the 21 of December 2010 the ICC Prosecutor Moreno Ocampo mentioned Blé Goudé, the Youth Minister of the Gbagbo government, as an ICC target and again on 8 of April 2011 he said “in December we put Gbagbo and others at notice”. He openly made these declarations before asking for an authorization to investigate in Côte d’Ivoire in June 2011.
21 On the dubious role of Prosecutor Moreno Ocampo in other international cases see Charles Onana, Al-Bashir & Darfour, La Contre-Enquête, Menaces sur le Soudan et révélations sur le Procureur Ocampo, Editions Duboisirs, 2010 and Julie Flint and Alex de Waal, Case Closed: A Prosecutor Without Borders.
22 Guy Labertit, Adieu, Abidjan, La Seine, Les Coulisse du conflit Ivorien, Autres Temps Edition, Paris, 2008. P. 31. See The Forces Nouvelles rebels again did not respect the deadline for disarmament, Gbagbo launched Operation Cesar/Dignity to try and reunify the country in 2004. The French responded by an intelligence operation which consisted in the killing of nine of its own soldiers in Bouaké, thus halting Gbagbo’s reunification plan. This event was followed by a brief Franco-Ivorian conflict in Abidjan, which saw 67 Ivorians die and 2,000 injured, as French forces fired on unarmed crowds protesting the French actions which had destroyed the entire Ivorian aviation.
23 Constitution of the Republic of South Africa, Section 231.
With the ratification and domestication of the Rome Statute, South Africa bound to enforce this arrest in order not to be accused of violating the Statue. Accordingly, as soon as they learned of President Al Bashir’s arrival on 14 June 2015 to participate in the AU Summit, Southern Africa Litigation Centre applied to South African High Court to ensure that South Africa comply with its obligations under the Rome Statute by arresting President Bashir and judge him or transfer him for judgment by the ICC.

On behalf of the respondents, Advocate Ellis opposed the application on the ground that the Government granted President Al Bashir immunity from arrest and this decision trumped over its duty under the Rome Statute to arrest the President on South African soil in terms of the two warrants of arrest issued by the ICC and its concomitant obligation under the Implementation Act. The proceedings were adjourned until Monday 15 June 2015. Meantime, Judge Fabricius issued an interim order that compelled the respondents to prevent President Bashir from leaving the country until a final order was made in the proceedings. On Monday 15 June 2015, the proceedings resumed, and before they were concluded, President Bashir already left the country with the collaboration of the South African Government.

The Court held that this was a clear violation of the order handed down by the judge Fabricius’s order of 5 June 2015. The respondents were compelled to take all reasonable steps to prepare to arrest president Bashir and detain him, pending a formal request for his surrender from ICC and failing to do so would be inconsistent with the Constitution and the Implementation of the Rome Statute of the ICC Act 27 of 2017. Despite this, the refusal of the South African Government to cooperate with ICC in the execution of the warrants for arrest of President Al Bashir was in line of the position of AU which stated on 12 October 2013 that no African Head of State or Government should be required to appear before any international court or tribunal during their term of office.

The relations between AU and ICC remained is now tense. Addressing the AU Assembly in January 2015 in his capacity as the Chair of the AU, Robert Mugabe, the then president of Zimbabwe called for non-cooperation with ICC or withdrawal from the Rome Statute. Nyabirungu rightly confirmed that Africa did not speak with one voice about the ICC. There was an “institutional” voice, and a “popular” voice on the ICC and these voices were contradictory.

3.1.2 The case of President Uhuru Kenyatta and his Vice-President

Another instance where the African leaders have demonstrated their unwillingness to cooperate with the ICC is the indictment of President Uhuru Kenyatta of Kenya and his Vice-President William Ruto before their election in Kenya. African leaders accused the ICC of being manipulated by the big powers and biased against Africa. The AU requested its member States to implement a policy of non-compliance and non-cooperation with the ICC and ultimately withdraw from the Rome Statute. Al Bashir, Kenyatta and Ruto could, therefore, travel safely to several other African countries that were States Parties to the Rome Statute without fearing arrest and surrender to the ICC.

The Kenyan leader has been charged with crimes against humanity for his alleged role in unleashing a wave of post-election violence during 2007-08. He denies the charges. Kenyatta handed over power to his deputy, William Ruto, before flying to The Hague in Holland. The international statute that established the ICC removed the principle that serving heads of state or governments should be granted immunity from prosecution under international law. The African Union, which represents countries across the continent, has accused the court of focusing its hearings excessively on African countries. Kenya has cooperated with the ICC while Sudan’s president, Omar Hassan al-Bashir, has defied rep.

24 On the DUBIOUS role of Prosecutor Moreno Ocampo in other international cases see Charles Onana, Al-Bashir & Darfour, La Contre-Enquête, Menaces sur le Soudan et révélations sur le Procureur Ocampo, Éditions Duboiris, 2010 and Julie Flint and Alex de Waal, Case Closed: A Prosecutor Without Borders.
25 Idem.
26 Idem.
27 Idem.
28 Mangu op cit (2015b) 183.
29 See Bakum op cit 9; Mangu op cit (2015a) 183.
30 Nyabirungu op cit 34–36.
31 Mangu op cit (2015a) 183.
32 Nicolas Schmidle, Bodies of Evidence, Kosovo’s leaders have been accused of grotesque war crimes, but can anyone prove it?, The New Yorker, 3 May 2013.
The ICC’s chief prosecutor, Fatou Bensouda, who has complained about witness intimidation and blamed Nairobi for withholding evidence, was present. Judge Kuniko Ozaki told Kenyatta he was attending “solely in your capacity as an accused individual,” adding: “You may speak only in your capacity as an accused and may not make statements either of a political nature or in your official capacity.” The case has been repeatedly delayed. At least seven prosecution witnesses have dropped out amid allegations of bribery and intimidation. Kenyatta, 52, faces five counts at the ICC over his alleged role in orchestrating the unrest that left 1,200 people dead and 600,000 displaced. The Kenyan leader has appeared at the ICC before, but not since he was elected president in March 2013. Ruto is already on trial at the ICC for his part in the violence. Kenyatta’s trial has yet to begin. eated summons to appear.

4.1 Current view of the African Union’s on the Operational Activities of ICC

The fact that the majority of preliminary investigations, situations under investigation and cases decided or pending the ICC concerned Africa, especially the DRC could only impact negatively on their relationships with the ICC. African cases have so far dominated the case law of the ICC which appeared to be an African Court. The Prosecutor remained indifferent to international crimes committed in other parts of the world. ICC had its pros and cons. Its advocates insisted that the ICC could help international combat crimes, which were rampant in Africa, while the opponents saw it as a real nuisance and considered it had failed to deliver on its mandate. Kimenyi did not hesitate to consider the ICC a “failed experiment.” Kambale echoed the view that the ICC was “either incapable or unwilling to respond adequately to the people’s search for justice.” The ICC was blamed for delivering a winners’ justice and focussing on the “big fish” following in the footsteps of ad hoc international tribunals such as ICTY and ICTR. Haque already found international criminal prosecution “too selective to satisfy the demands of international justice” as “Too many wrongdoers go unpunished; too many victims are forgotten or simply ignored.”

Within AU which was born almost the same year as ICC, enthusiasm at the beginning stages of the establishment of the ICC which led to the massive adoption and ratification of the Rome Statute by the majority of AU Member States has progressively been replaced by apathy and unwillingness to cooperate by African countries. AU Member States are less and less willing to cooperate in the prosecution of international crimes as they used to do during the first years of the ICC. The breakdown in the relationship which almost brought the marriage between the AU Member States and the ICC to the brink of collapse was the indictment of President Al Bashir of Sudan. African leaders found it to their utmost disappointment the Court could not limit itself to the opponents, but also prosecute them in the total immunity.

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In response to the warrant for arrest issued against some African past leaders or presidents, the AU which never reacted to other warrant for arrest for individuals under their jurisdiction proved that the AU remained a “club of African leaders supporting one another” to no longer cooperate with the ICC on the basis of the


35 See Kimenyi op cit 35; Mangu op cit (2015a) 182.

36 See Kambale op cit 23; Mangu op cit (2015a) 182.


39 Mangu op cit (2015a) 182.
Rome Statute\(^{40}\), and to a large extent one can argue that the AU now does not care if such actions are in violation of the Rome Statute.

The relationship between the ICC and the AU worsened when Al Bashir has issued a second warrant for arrest on 12 July 2012, this time for genocide. In line with the Rome Statute which requires States Parties to cooperate, ICC requested States Parties to arrest President Bashir and judge him in the event that he came under their jurisdictions or surrender him to the Court for trial but African countries this time around rejected and refused to honor the request.

In the light of this development, it is thus not surprising that AU members have made a proposal to establish an African Court of Human right as an alternative to the ICC. This attempt clearly shows that African countries have lost faith and trust in the competence of the ICC to fairly prosecute perpetrators of crimes against humanities or other crimes that fall under its mandate of operation.

### 4.2 The proposal to establish as African Court of Justice as an alternative to the ICC

On 27 June 2014, the AU adopted the (Malabo) Protocol\(^{41}\) on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR), which merged the African Court of Human and Peoples’ Rights provided by the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and Peoples’ Rights\(^{42}\) and the African Court of Justice of the AU.\(^{43}\)

To escape ICC and avoid African leaders being prosecuted before a “foreign”, “neo-colonial”, and “imperialist” ICC allegedly working under the instruction of “big powers” and against the “interests of Africa and its peoples”, the Protocol establishes three sections, namely a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section.\(^{44}\) The International Criminal Law Section is mandated to deal with 14 crimes, including genocide, war crimes, crimes against humanity and the crime of aggression which are the four crimes within the jurisdiction of the ICC. More Interestingly in the African context, unconstitutional change of government, corruption, and trafficking in persons are established as an international crime within the jurisdiction of the new Court.\(^{45}\)

The International Criminal Section of the African Court bears several resemblances with ICC. However, it does not make immunity irrelevant as the Malabo Protocol provides that “no charges will be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity or any senior state officials based on their functions, during his or her tenure of office.\(^{46}\)

As envisaged in the Malabo Protocol, ACJHR can play a positive role in a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law. However, whether the Court is an effective response and an alternative to the ICC were or whether AU leaders really committed to fighting impunity is an issue that needs to be addressed.

The response is hardly a positive one as can be seen the provision of immunity in the Malabo Protocol. It was also doubtful that a Court of only 16 judges could have the capacity to effectively and efficiently deliver on its mandate and that AU had the requisite resources to sustain an efficient ACJHR. The Protocol and the Statute annexed to it should enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) the Member States.\(^{47}\) Almost five years after its adoption on 27 June 2014, the Protocol has not been ratified by a single AU Member State\(^{48}\), raising doubts when or whether it will ever enter into force.

\(^{40}\) Rome Statute, Article 98.

\(^{41}\) Adopted on 1 July 2008, not in force.


\(^{43}\) AU Constitutive Act of 2000.

\(^{44}\) Protocol on Amendements, Annex, Article 6 & 9, 9 bis, 14.

\(^{45}\) Rome Statute, Article 14.

\(^{46}\) Rome Statute, Article 22.

\(^{47}\) Protocol, Article 11.


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Conclusion

Since the adoption of the Rome Statute in July 1998 and its entry into force in 2002, the relationship between the ICC and Africa has been a story of “marriage” with regular threats of divorce. While some countries, including powerful countries in the UN Security Council like the United States, China, and Russia never ratified the Rome Statute and refused to be bound by the Statute to allegedly protect their citizens who would have committed crimes within the jurisdiction of the ICC, African States massively adopted and ratified the Rome Statute. Their contribution was such that without their involvement and cooperation, the Rome Statute would not have come into force in 2002. Nor would the ICC have been established so quickly or had the success it has had so far since most of the situations under investigation and cases prosecuted have come from the African continent. It is only recently that preliminary investigations have been opened in other parts of the world but not a single one concerning North America or West Europe despite the fact that the crimes within the jurisdiction of the ICC have also been committed by citizens or officials from such countries.

On the other hand, apart from their rejection of the competence of the ICC and their refusal to ratify the Rome Statute or accept the jurisdiction of the ICC, a country like the USA has not hesitated to threaten the Court and its members with sanctions if the ICC ever dared to prosecute American citizens or those of a close ally like Israel.

Following this development and the assumption that the ICC is biased and selective in cases and has over the years only concentrated mostly in prosecuting African leaders, the AU and other African countries and ow not willing to cooperate with the ICC any more as it used to be in the parts, and some African countries have threatened to even withdraw from it. An attempt to withdraw from the ICC by African countries is the reason why the Malabo Protocol was proposed by African State as an alternative to the ICC and the main aim of the Protocol was establishing an African Court of Justice and Human Rights with an International Law Section as an alternative to the ICC signalled African leaders’ determination to even go beyond the ICC in combating international crimes, however it can be argued that the withdrawal of African countries for the ICC will be detrimental to the mandate and function of the ICC and as such it is suggested that the ICC restructure its operational activities to be fairer in order to regain its lost reputation in the eyes of African Countries.

Despite repeated calls for non-cooperation with ICC and withdrawal from the Rome Statute, only one AU Member State has withdrawn for its own reasons, and South Africa which intended withdrawing in the aftermath of the Al-Bashir case has reversed her decision.49

With regard to withdrawal, States are free to adopt, sign, ratify or domesticate a treaty. They are also free to withdraw. However, withdrawal should be made according to the treaty itself. African countries cannot be blamed for withdrawing from the Rome Statute, especially when some countries never signed or ratified it. The problem with the threats of withdrawal is that they emanate from governments that do not share the same view with the majority of their people and civil society organisations that still favour the ICC in order to combat crimes and impunity. This explains why the new Gambian government did not waste time to revoke the decision of the authoritarian government of Yaya Jammeh. South Africa also reversed its decision and should President Kabila’s government effectively withdraw, its decision would likely be reversed by the next government.

The Malabo Protocol has its own shortcoming because arguably, political interference cannot be excluded from the functioning of any high court or tribunal, whether national or international. If international courts or tribunals are influenced by the “big powers,” the same goes for domestic tribunals that even enjoy less independence and are subject to the executive. It is therefore hypocritical to accuse the ICC of being influenced when heads of state or governments tend themselves to deny independence to their domestic courts.

The threats of withdrawal proffered by the AU Member States is an implicit recognition of the failure of their domestic courts to independently, impartially and efficiently prosecute international crimes within the jurisdiction of the ICC but if the ICC does not embark on serious innovative measures and restructure its operations African countries will be left with no other option than not cooperate with it in prosecuting

49 In accordance with article 127 (1) of the Rome Statute, the Governments of South Africa, Burundi, and Gambia notified the Secretary-General of their decision to withdraw on 19 October 2016, 27 October 2016 and 10 November 2016 respectively. Burundi is the only country to have effectively withdrawn with effect from 27 October 2017 while the Gambia (C.N.62.2017.TREATIES-XVIII.10 of 16 February 2017) and South Africa (C.N.121.2017.TREATIES-XVIII.10 of 7 March 2017) notified the UN Secretary-General of the revocation of their notification of withdrawal.

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criminals and might eventually opted out of it which in the long run will not have a positive impact on the application of international law.⁵⁰

The competence of the ICC still remains on trial because no court is perfect. There is even more critical that has been levelled at domestic courts than at the ICC. Some Africans still consider the ICC better than domestic courts in combatting impunity. As Tessa Alleblas, Eamon Aloyo, Geoff Dancy and Yvonne Dutton pointed out, most and Kenyan and other Africans who have been victims of international crimes do not think that the ICC is biased against Africans.⁵¹

Kgomoewana is also the view that despite its shortcomings, the ICC is not anti-African but the perpetrators of malfeasance and atrocities against fellow-Africans.⁵²

⁵¹ Alleblas op cit.