

# Blog Post

## Skepticism about the ICC should come as no surprise

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On 21 October 2016, South Africa's Minister of Justice and Correctional Services, Michael Masutha announced the intention of the government to withdraw from the International Criminal Court (ICC).

South Africa's announcement to withdraw from the ICC was accompanied by similar announcements by Burundi and possibly Kenya to either leave or consider leaving the Assembly of State Parties, which comprises the members of the Rome Statute of the ICC. The Gambia also made clear it was intending to leave the ICC, which was all the more embarrassing as it is the country of nationality of the current ICC prosecutor.

### Longstanding discontent

For those who follow the workings of the ICC closely, such as Amsterdam-based Professor [Harmen van der Wilt](#), these developments were regarded with little surprise. It is not the first time African leaders have expressed their discontent about the ICC.

From the beginning the African Union (AU) expressed its explicit unwillingness to co-operate with the ICC in facilitating the arrest and extradition of Sudanese President Al-Bashir, who was the subject to an arrest warrant by the ICC [back in 2009](#). This position by the AU was reinforced during a meeting of African Heads of State, which took place in South Africa in 2015. Legal measures were taken by a South African NGO to try and compel the South African authorities to arrest Al-Bashir, who was attending the meeting. South Africa refused to do so and received much criticism. The South African High Court eventually ordered the government to carry out the arrest, which again, was refused and Al-Bashir was allowed to leave the country. Eventually, the Supreme Court of Appeal in South Africa ruled that the government had violated its legal obligations in failing to arrest Al-Bashir.

Various other condemnations of the ICC have followed, and South Africa's decision to withdraw has been enthusiastically welcomed by some commentators who for example argue that "justice cannot trump peace". However, the fact that South Africa, one of the ICC's leading member states (and founders) went beyond expressing its discontent to announce its intention to withdraw from the Court altogether caught many observers off-guard.

### Virtually exclusive attention to Africa

It cannot be denied that during its tenure, the ICC has paid virtually exclusive attention to situations concerning Africa.

Certainly, the Office of the Prosecutor has received information about other situations in the world. Accordingly, the Prosecutor has conducted so-called “preliminary examinations” in relation to many of these situations and even opened an investigation in relation to Georgia. These enquiries have ranged from alleged crimes committed by FARC rebels, militias and government forces in Colombia to alleged crimes committed by the Israeli government and military in the occupied Palestinian Territories of the West Bank, East Jerusalem and Gaza.

However, only Africans have been subject to full-scale investigations and prosecutions. All 32 persons indicted since the ICC was established in 2002 come from Africa.

Hence, it is understandable that African leaders criticize the ICC’s almost exclusive focus in prosecuting Africans and investigating in African situations. This is all the more understandable since powerful states, not least members of the Security Council, have essentially stood back and failed to take responsibility for their own alleged crimes (in Iraq, Afghanistan, Syria). Out of the five permanent members of the Security Council, only the United Kingdom and France are members of the ICC; the United States, Russia and China have all refused to ratify the Rome Statute.

### **It was African states that founded the ICC**

What makes the decision by South Africa to withdraw so painful is that the establishment of the ICC was very much due to the diplomatic efforts on the part of mainly African States.

South African diplomatic representatives in particular were actively involved in producing substantial sections of the Draft Statute of the ICC. They were the Court’s primary founders, and they were among the first states to ratify the ICC statute. Furthermore, it has been primarily African states who have referred matters to the ICC, based on the often-stated principle that responses to African conflicts be addressed by reference to the rule of law.

### **Is the ICC finished?**

The question on many people’s minds now is whether the ICC’s days are numbered.

But this would be too hasty a conclusion. While as a matter of international law, South Africa’s notification has already been lodged with the United Nations Secretary General, the government’s announcement that it wants to leave still needs to be confirmed by the country’s Parliament. The political situation in South Africa is very fluid at the moment and there is a lot of support within the judiciary and among South African and global civil society organisations for the ICC, as the Al-Bashir matter made very clear.

South Africa and others states’ declarations of intention to withdraw from the ICC are undeniably a huge reputational blow to the ICC. As a product of African diplomatic efforts, it is devastating that the very states who created the ICC are now turning against it.

However, the Assembly of States Parties includes many countries; 124 states to be precise, from all continents, and in particular Europe, South America, North America (barring the USA) and a number of countries in Asia as well.

Most importantly, the ICC has an opportunity to recover its credibility and to put much more visible effort into addressing other situations with the same level of energy, not least the much-publicised preliminary enquiry examination into the occupied Palestinian territories.

### **Performance of the ICC to date**

The ICC has undeniably established a reputation as a serious player in international relations and international law. In 2016 the ICC moved into permanent premises in The Hague.

The emergence of a permanent international criminal court has been accompanied by a sizeable global civil society movement supporting the work of the ICC. The ICC has also provided the incentive for a lot of scholarship.

However, the ICC has been criticized for many different reasons. Its work is slow and expensive. The Dutch government alone has spent many millions to support the ICC, including considerable donations to establish a permanent building in The Hague. But the ICC still has limited means of enforcing its authority.

Most significantly of all perhaps, the ICC has paid little more than lip service to supporting the national capacity to prosecute. This was one of the primary reasons for establishing the ICC, to be “a Court of last resort”. The first responsibility was meant to be shouldered by the member states themselves according to the so-called principle of complementarity. However, as [Sarah Nouwen has written](#), the ICC has not only put very little actual effort towards building national capacity to prosecute international crimes. While capacity-building is not, strictly-speaking the main part of its international mandate, the ICC has actively blocked efforts to do so by member states, including Uganda. The Court has also disregarded complaints that its work interferes with local transitional justice mechanisms.

The ICC, and the many NGOs and scholars who support this global project of international criminal justice also need to acknowledge their responsibility for the growing skepticism about the ICC. Most who support, and especially those who work for the ICC are lawyers. Lawyers tend not to get engaged in politics. They see their job as exclusively legal, based on principles of *objectivity, impartiality and neutrality*. They consequently have failed to grapple with the heady politics of the ICC’s work and most significantly they have been unable to shake the perception that the ICC is biased against Africa.

### **So can States prosecute crimes themselves?**

It must nevertheless be acknowledged that the capacity on the part of member states to prosecute international crimes is very limited. This is not to mention the political unwillingness to do so.

Uganda has in recent years begun to prosecute international crimes, although the process has been slow and cumbersome, and has been heavily dependent on international NGOs. The Netherlands and South Africa have also initiated investigations and prosecutions in relation to international crimes, establishing some important national jurisprudence. This adds to the sizeable international jurisprudence established early-on by the post-War Nuremberg and Tokyo Tribunals, and more recent jurisprudence established by the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and other international criminal justice institutions.

However, the biggest problem by far relates to the huge political sensitivities of pursuing international criminal justice cases, particularly concerning diplomatic officials, including Heads of State.

### **Political context is important**

Anyone who understands the political context of the ICC cannot be surprised by the growing skepticism of African states.

The political context of the African political community, not least the African Union is based on a number of core principles. These include: solidarity, sovereignty and peaceful co-existence; very different principles than those upon which international, and individualized criminal justice is based.

It is imperative that those who support the work of the ICC, who wish to see an end to impunity for international crimes, begin to take these politics seriously. Of the many concrete implications for those who wish to see the work of the ICC continue, two are especially worthy of mention.

First, one must openly acknowledge that states have interests in prosecutions going ahead (or not going ahead). Recognizing these interests can help advocates concerned with pursuing international (criminal) justice to anticipate obstacles and to recognize where support might lie, whether this be from within civil society organizations or – ideally – other states. This will reinforce any decision to prosecute in not only a legally-informed, but also a principled and transparent manner.

Second, other regions in the world must receive just as much attention as the African continent. Here, the ICC's current preliminary enquiries into the [situation in the occupied Palestinian territories](#) is worth a particular mention. According to South African professor Max du Plessis, the Palestine case comes at a ['vital juncture' in its history](#). Faced with abundant evidence from UN agencies as well as Palestinian, Israeli and international organisations, the Palestine case can be regarded as the litmus test of whether or not the Court can live up to its claim to be an International Criminal Court, rather than its unfortunate image as a Criminal Court for Africans.

Addressing the biased perception of the ICC cannot merely be done by mere reference to the normative character of the ICC, as [Harmen van der Wilt has argued](#). However convincing such an argument may be from a legal standpoint, such arguments will not lead to a serious reconsideration by African skeptics. As Van der Wilt puts it, “one should seriously ask whether Western investigating judges do not have the

responsibility to inquire what the local effects of their actions will be”. At the same time, it is hard not to escape the conclusion that African states are acting in “bad faith”.

To dispel its neo-colonial image, the ICC and its supporters would be well-advised to better understand and indeed openly acknowledge the political context in which the ICC operates. Moreover, treating country situations in a more consistent manner might rejuvenate the ICC’s legitimacy in the minds of African states now clamoring to withdraw and create a more robust basis for pursuing international criminal justice against individual violators.

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