

# 'The Fog that it has Drawn upon Itself': Darfur and the future of the ICC

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## Abstract

This paper will explore widespread criticism of the International Criminal Court (ICC), through the lens of its long-running investigation in Darfur, Sudan. Analysis of the Prosecutor's reports on the Darfur investigation since 2005 reveals that the Court has often avoided engaging directly with its critics, and remains particularly reluctant to address accusations of internal structural bias. The ICC, in tandem with global media outlets, often characterises the Darfur conflict in simplistic terms, many of which originate in part from divisions that were introduced and sustained by colonial administrations. Although the ICC faces practical difficulties in enforcing its jurisdiction in Darfur, this paper argues that its problems of perception stem largely from the fact that it is the product of an international legal system whose normative home is the Global North. It is this systemic weakness that damages the ICC's global legitimacy and prevents the courts from functioning as an effective and progressive arbiter of international law. This paper seeks to suggest a way forwards for the ICC in the form of a reciprocal system of jurisdiction with an African International Criminal Court, such as the fledgling ACJHR. A partnership on equal footing, with a mutual basis for resource-sharing and legal expertise, may be the most promising avenue towards ending global impunity.

**Keywords:** International Criminal Court (ICC), Darfur crisis, Sudan's colonial past and post-colonial period, The prosecution of President Omar Al-Bashir, Structural bias in the International Criminal Court, African Union and UN Security Council.

## Introduction

Since its formation in 2002, the International Criminal Court (ICC, or 'the Court'), has declared itself to be 'participating in a global fight to end impunity', aiming 'to hold those responsible accountable for their crimes and to help prevent these crimes from happening again' (International Criminal Court, n.d.). As an international tribunal, the ICC was created to complement national governments in prosecuting individuals for crimes of [genocide](#), crimes of humanity, [war crimes](#) and the crime of aggression, where the relevant national government is 'unwilling or unable genuinely to carry out the investigation or prosecution' (Rome Statute of the International Criminal Court, Article 17.1(a); United Nations, 1998). Over the past 18 years, however, despite issuing arrest warrants for over 44 individuals, only 5 have undergone a full trial process. Most notably, the former President of Sudan, Omar al-Bashir, for whom the ICC issued an arrest warrant in 2009, was able to travel freely for several years subsequently; his eventual arrest in 2019 owed little to the Court's efforts. The Court's impotence in Darfur, Sudan, opened the door to wider criticism of the ICC, accompanied by accusations of 'neo-colonial' prejudice and racist attitudes towards Africa in particular (Allison, 2016). Many of these criticisms have at their core an accusation that the ICC is structurally biased. It cannot be denied that the African continent was historically an 'outsider' to international law, 'one of the originally subordinated continents in which international law was used as a means of ordering and organising the exploitation of the globe for the benefit of the North Atlantic communities' (Mutua, 2016:

49). Critics of the ICC argue that these long-standing structural inequalities are perpetuated today in the nature of the crimes that are subject to the jurisdiction of the Court, the mechanisms available for triggering investigations and a 'strong focus on individual culpability for crimes that are fundamentally collective' (Clarke, Knotterus and Volder, 2016: 12). Despite initial enthusiasm within Africa for the ICC and the fact that the mandate of the African Union (AU), remains consistent with that of the Rome Statute, support for the Court is now patchy among African states, and the relationship between the AU and ICC is strained. This paper will use the ongoing investigation in Darfur as a lens through which to explore the widespread criticism of the ICC's jurisdiction and to explore alternatives to the status quo in pursuit of more effective international justice.

Three questions will underpin my analysis: First, has the ICC demonstrated elements of prejudice that have compromised its judgements relating to Sudan? Second, how has the ICC responded to accusations of this prejudice? Third, can the ICC overcome such accusations and, if not, what possible alternatives would have greater potential to address inequalities in the international criminal justice system? In order to address these questions, the first section will briefly examine the trajectory of colonialism in Darfur over the past 70 years, exploring how the effects of the colonial period provide a vital context for the current conflict in Darfur, as well as contributing more broadly to the challenges that the ICC now faces in Africa. The second section will explore two legal issues that have contributed to the deterioration of the ICC's reputation, specifically the principle of complementarity as applied to the Darfur investigation, and the controversial issue of whether sitting heads of state should retain immunity when accused of international crimes. At the heart of this analysis will be the ICC's twice-yearly reports on the crisis to the UN Security Council, which summarise developments in Darfur from the ICC's perspective. These can be used to better understand the role that the ICC envisages for itself in Darfur, and to question whether its response reveals elements of structural bias. The final part of my analysis will consider whether it is possible for the ICC to reform from within, or whether its laudable aims of ending global impunity might be better served within a broader reorganisation of the international criminal justice system.

## The ICC in Darfur: Past and present

The Darfur crisis is the ICC's longest-running investigation, referred to the Court by the UNSC in March 2005 (United Nations Security Council, 2005). The prosecution of former President Omar al-Bashir was based on charges of numerous war crimes, [crimes against humanity](#) and genocide committed in Darfur since 2003; by 2015, the United Nations estimated the number of deaths during the genocide conflict to be between 100,000 and 400,000, with several million citizens displaced. However, despite the severity of the situation, the ICC failed to end impunity in Darfur over the past 17 years, and, despite a change of government in 2019, the conflict continues. In the global media, the Darfur conflict has been popularly characterised as a dispute between 'Arabs' and 'Africans', or between plucky 'rebels' and a corrupt 'enemy' government, masking a far more complex situation on the ground. Although it is beyond the scope of this paper to address the roots of the conflict fully, it is vital to briefly consider the historical background of the ICC's investigation. Willemsse argues that the First Prosecutor of the ICC took an 'historic and one-sided perspective of the conflict', which did not take into account political considerations borne out of British-Egyptian colonial rule (1898–1956), and its legacy (Willemsse, 2016: 326).

Under the colonial administration, inequalities were introduced, replicated and intensified, stemming in part from the unequal economic development: while the central region of Sudan benefitted from improved infrastructure, the rest of Sudan's territories 'have remained largely marginalized and neglected, including

Darfur' (United Nations Security Council, 2005). Mamdani argues that the colonial administration reinforced racial divisions by focusing on identity formation, reorganising populations around identities that suited the colonisers. Sometimes, 'this involved a benign acknowledgement of existing identities, but at other times, it involved a wholesale re-identification of peoples' (Mamdani, 2010: 145). These distinctions mattered in Darfur at an individual level, both economically and politically: particularly after the advent of indirect rule in the 1920s, tribes perceived as 'natives' were given greater political influence and land ownership rights than those who were perceived as 'outsiders'. As Mamdani argues, this 'retribalisation' 'purge[d] Darfuri society of the most dynamic part of its history', introducing artificial divisions that were then perpetuated by governments after Sudanese independence in 1956 (Mamdani, 2010; 168). Therefore, while the present conflict in Darfur has multi-faceted origins, the racialisation of identities and the discriminatory land system instituted under colonial rule played significant roles in the complex tensions of Sudan's post-colonial period. When, in 2003, the Sudan Liberation Movement and the Justice Equality Movement accused the sitting President Al-Bashir of segregating non-Arabs, and of creating ethnic segregation between the Arab and non-Arab community within the region, they were arguably protesting a policy that has its roots in Sudan's colonial past. The ICC, however, does not feel compelled to engage with the complex political history of the Darfur crisis; it declares quite simply that it cannot express an opinion on political matters without jeopardising the legitimacy of its jurisdiction. Such a stance is entirely understandable, yet it exculpates the Court from acknowledging that, in Darfur – and, more broadly, in Africa – its legitimacy is fundamentally undermined by its role as ideological inheritor of a colonial past. Arguably, it is partly the ICC's failure to acknowledge the complexities and historical trajectory of the conflict in Darfur that has led to its loss of legitimacy on the African continent. When combined with multiple failures to end impunity in Africa and elsewhere, this reticence has led to accusations that the Court is a 'Western, or imperialistic, initiative [...] some form of colonial throwback or the imposition of a developed world's form of justice on an unsuspecting and servile African people' (Du Plessis, 2008: 1). The ICC's response thus far to such accusation of anti-African bias and racism has so far been insufficient to placate its increasingly vocal enemies. This, argue DeFalco and Mégret, is because its principal line of defence has been to restate and reassert the purpose of the Court, rather than engaging directly with the specific content of the accusations against it (DeFalco and Mégret, 2019: 63). Generally, the ICC has attempted to overcome what it sees as a 'problem of perception' by using global media outlets as a tool to amplify its own purpose and values, unaware that it is this very approach that reveals and perpetuates its own structural bias (Du Plessis, 2013: 249). Indeed, the ICC arguably displays 'race-blindness': its refusal to 'see' race as a motivator of its activities may 'paradoxically and perversely contribute to reinforcing its status as a signifier of its activities' (DeFalco and Mégret, 2019: 78).

## The ICC in Darfur: The investigation

The first significant legal issue concerning the ICC's investigation in Darfur relates to the threshold for the [Principle of Complementarity](#) for the Court's involvement in the conflict. Under ordinary circumstances, as Sudan had not signed nor ratified the Rome Statute, it should not have been subject to the jurisdiction of the ICC, unless it was 'unwilling or unable genuinely to carry out the investigation or prosecution' (Rome Statute of the International Criminal Court, Article 17.1(a), 1998). Inevitably, this principle is subjective, particularly the term 'genuinely', over which the ICC, as the prosecuting body, retains full interpretative control. However, the ICC did not have to rely on Article 17 to proceed: instead, it was able to exercise unique jurisdiction in Darfur under Article 13(b), of the Rome Statute, following United Nations Security Council Resolutions (2005b). This resolution, under Chapter VII of the UN Charter, binds Sudan, as a

member of the United Nations, to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution' (United Nations Security Council Resolutions, 2005a). The special status of the referral under the UN Charter therefore provided the ICC with solid legal ground for its investigation in Darfur.

At the beginning of the Darfur investigation in 2005, the Court stated that it would provide a 'comprehensive response to the need for peace, justice and reconciliation' in Darfur through 'close partnership' with African countries (First report of the Prosecutor of the International Criminal Court, 2005). In June 2006, having received a statement expressing support and co-operation from the AU's Peace and Security Council in March, the ICC was hopeful that 'cooperation will now be forthcoming' and that it would be able to work effectively alongside the AU and the Sudanese criminal justice system to ensure justice was brought to the people of Sudan (International Criminal Court, The Office of the Prosecutor, 2006). However, this hoped-for co-operation did not last long. In June 2007, the Prosecutor identified two Sudanese individuals, Ahmad Harun and Ali Kushayb, as candidates for arrest, but the Government of Sudan (GoS), refused to grant the ICC's request to question them on the basis that the request was a violation of their rights under Sudanese law, and may also be 'construed as a waiver in respect of its right to challenge the issue of admissibility at a later date' (International Criminal Court, The Office of the Prosecutor, 2007a). The ICC stated in response that it could not be prevented from questioning or arresting the individuals on such grounds, and continued its investigation with reference to Article 55(2), of the Rome Statute. By December 2007, Sudan had instituted national proceedings against both men, but the Prosecutor declared that these proceedings did not satisfy the Court's legal standards. Sudan, for its part, declared that its courts were competent to carry out an investigation if required. In contrast, the ICC took into consideration criticisms of the Sudanese judicial system, specifically several statutory deficits, alongside evidence of failure to implement standards of fair trial. Most crucially, Sudanese laws 'provided for a wide range of immunities and a considerable influence of the executive during a criminal trial, both preventing effective prosecutions' (Pichon, 2008: 204).

Unsurprisingly, the ICC's explicit criticism of the competency of the Sudanese legal system led to a rapid deterioration in relations with the GoS. In June 2008, the GoS's ambassador added: 'If there are any accusations against our people, the Sudanese judiciary is more than capable of doing that [...] if we consider there have been crimes, we will put them on trial ourselves' (International Criminal Court, The Office of the Prosecutor, 2008). Naturally, statements from representatives of the GoS are largely self-interested, yet their language reveals a broader complaint – that the ICC's jurisdiction was 'foreign' and unjustly imposed. Therefore, while the ICC's reliance on Chapter VII of the UN Charter (United Nations, n.d.), to open its investigation in Darfur was entirely legal, the manner in which the Security Council referred some cases and not others 'revived concerns of African states about the political selectivity that is embedded in the Rome Statute through the Council's powerful role' (Clarke, Knotterus and Volder, 2016: 15). The Prosecutor's reports, however, displayed very little sensitivity to concerns relating to the principle of complementarity, declaring repeatedly that its decisions must be 'consistently and publicly presented as a non-negotiable, integral part of any comprehensive solution, a vital contribution to ending crimes and to achieving key political, security and humanitarian goals' (International Criminal Court, The Office of the Prosecutor, 2007). Therefore, while the ICC certainly had adequate legal basis to open its investigation in Darfur, its isolationist rhetorical strategy was arguably damaging to wider perceptions of the case, and formed the basis for later criticism of its legitimacy on the African continent.

In March 2009, under two years later, the situation worsened significantly upon the ICC's issue of an arrest warrant for the sitting President of Sudan, Omar al-Bashir, after which the AU's support for the ICC's investigation gradually dissipated. The arrest sparked controversy as to whether the Rome Statute could remove [head-of-state immunity](#) under international law. Several scholars have pointed to a contradiction between Article 27 and Article 98 of the Rome Statute regarding head-of-state immunity: while the former declares in no uncertain terms that, 'Official capacity as a Head of State or Government [...] shall in no case exempt a person from criminal responsibility', the latter appears to suggest that the Court must acquire a waiver before proceeding with an investigation in these circumstances (Rome Statute of the International Criminal Court, Article 27; United Nations, 1998). The legal inconsistencies identified here have remained at the core of much of the persistent ill-feeling between the ICC and the AU over the past decade, 'anticipating a situation of conflict between the provisions of the Rome Statute and existing international law norms' (Imoedemhe, 2015: 97).

Between 2008 and 2010, the AU requested on numerous occasions that the UN Security Council defer the proceedings initiated against President al-Bashir under Article 16 of the Rome Statute, but by January 2010, its request 'ha[d] not been acted upon' (Assembly of the African Union, 2010). In fact, the AU received no formal reply from the UNSC or the ICC on this matter. Shortly afterwards, in July 2010, the AU requested its members 'to balance, where applicable, their obligations to the AU with their obligations to the ICC' (Assembly of the African Union, 2010). Imoedemhe argues that this call for non-cooperation was a response to the Security Council's failure to respond: 'even among strong supporters of the ICC in Africa, the posture of the Security Council in failing to respond, either positively or negatively [...] was perceived as disrespectful' (Imoedemhe, 2015: 74). This powerful request led to significant tension between the Court and the AU, and the AU declared that 'the rest of the crimes committed in Darfur should be addressed by the Sudan domestically' (International Criminal Court, 2010). This, according to Bachmann and Nwibo, represents a 'watershed moment', when the ICC's 'fail[ed] to appreciate the effect that its interference in Africa's internal affairs was having on the peace building efforts in Sudan' (Bachmann and Nwibo, 2018: 457). The AU's perspective in the case of an ongoing conflict differs from that of the ICC and the UNSC, and its responses often express the opinion that the timing of the ICC's investigations is 'unsuitable in countries coming out of politically sensitive and highly complex conflict' and may prevent peace being achieved (Dersso, 2016: 65). Here, again, on this crucial issue of head-of-state immunity, the ICC has failed to respond effectively or respectfully to the complex priorities presented on multiple occasions by the AU. This repeated inflexibility has reinforced the broader perception that 'African states' views (as articulated within the AU framework), [are] not substantively engaged with and appropriately responded to' by the ICC (Dersso, 2016: 73).

Since 2010, rhetoric against the ICC has steadily grown within Africa, at points leading to a near-total breakdown in relations between the ICC and the AU. During this period, President al-Bashir was able to travel out of Sudan without arrest: first to Iran and China in June 2011, and then to Chad (party to the Rome Statute), in August 2011. Al-Bashir himself frequently attacked the ICC directly: in an interview with the *Guardian* in April 2011, declaring that 'the behaviour of the court was clearly the behaviour of a political activist', because 'obvious crimes like Palestine, Iraq and Afghanistan [...] have not found their way to the ICC' (Tisdall, 2011). Later, in 2014, declaring victory against the ICC, he appealed to African sovereignty, claiming that he had 'refused to hand over any Sudanese to the colonialist courts' (Abdelaziz, 2014). Among this display of rhetoric, the Assembly of State Parties of the ICC was convened in 2013 on the subject of the Court's relationship with Africa, and an amendment made to the Court's rules on presence at trial for those accused who fulfil extraordinary public duties at the highest level (Clarke, Knotterus and Volder, 2016: 2).



However, while the AU welcomed this amendment, it expressed 'deep disappointment' that the Security Council still had not responded to its deferral requests and requested that the Council act 'to avoid the sense of lack of consideration of a whole continent' (Assembly of the African Union, 2014). The response of both the ICC and the Security Council at this point was still non-committal, and the reports of the Prosecutor simply expressed repeated frustration at the UNSC's failure to implement its arrest warrants: 'whenever the Council, and the international community at large, have failed to integrate the peace and justice requirements, the Government of the Sudan has rejected cooperations' (International Criminal Court, The Office of the Prosecutor, 2012). In December 2014, the Court's Prosecutor finally announced that the Court was 'shelving the Darfur investigation for lack of support from the Security Council' (Abdelaziz, 2014). At the same time, the Prosecutor withdrew charges against the Kenyan Head Of State, Uhuru Kenyatta, due to lack of co-operation on the part of Kenya itself. The difficult operational relationship between the ICC and the UNSC may certainly be partly to blame for the failure of the investigation in Darfur. However, from a broader perspective, the mistake of both the ICC and the UNSC at this stage was to fail to recognise that at the heart of al-Bashir's insults was a growing unease – expressed explicitly by the AU over a period of several years – that the ICC was incapable of engaging respectfully with African concerns. Although undoubtedly a challenge, efforts to respond more directly to the perspective of the AU at this point may have delayed or prevented the premature failure of the ICC's investigation in Darfur in 2014.

The ICC's relationship with the African Union worsened in 2015 following South Africa's failure to arrest sitting President al-Bashir at the AU summit. A Host State Agreement, drawing both on customary international law and treaty law, was in place between South Africa and the African Union, under which al-Bashir possessed head-of-state immunity. The ICC immediately dismissed the Host Agreement, concluding that 'any possible immunity vis-à-vis the Court has been rendered inapplicable with the ratification of the Rome Statute' (Pre-Trial Chamber II, 2017). At this point, the legal positions and priorities of the ICC and AU became increasingly divergent, and, since 2015, the AU has continued to distance itself from the ICC, focusing primarily on 'African-led initiatives in the search for a lasting solution to the crisis in Sudan' (Peace and Security Council, 2019). In 2019, it requested that all partners should 'refrain from any action that could undermine African-led initiatives' (Peace and Security Council, 2019). The Court did not address this divergence of interests head-on; instead, it reverted to a focus on the Council's inaction, continuing to 'lament the Council's consistent failure' (International Criminal Court, The Office of the Prosecutor, 2017). In tandem, it sought to reinforce its identity as an independent and permanent judicial body, as distinct from the execution and enforcement pillar provided by State Parties and the UNSC (International Criminal Court, The Office of the Prosecutor, 2017). From 2017, the Prosecutor refers to the Security Council as the 'pillar of enforcement', absolving the ICC of further responsibility in the ICC investigation. In the face of a serious divergence between itself and the AU, however, this lack of direct engagement with its critics in the AU and elsewhere does not benefit the ICC. Seymour argues that 'instead of repeating the same staid defences of the Court's independence, the ICC might be more forthright about the political constraints under which it operates' (Seymour, 2016: 118).

## The way forwards

The foregoing analysis has revealed that, throughout the Darfur conflict, the ICC has shown a distinct reluctance to engage meaningfully with opposition, choosing instead to reframe its failures and, where possible, distance itself rhetorically from its critics. Tallgren argues that the ICC's rhetoric is part of the 'we-talk' of international legal discourse, which reinforces the 'defects and dissymmetry' present within the international legal community (Tallgren, 2015: 135). This 'we-talk' is particularly visible in the ICC's

communications with the Sudanese government, South Africa and the African Union, which reveal a tone of superiority, and an unwillingness to engage in productive dialogue. In its Strategic Plan of 2006, the Court acknowledges the need to ‘bridge the distance between the Court and these communities by establishing an effective system of two-way communication’ (International Criminal Court Assembly of States Parties, 2006). However, as Naldi and Magliveras argue, the ICC ‘has done very little to appease the AU, and has not been tactful vis-à-vis the AU’s fears and concerns’ (Naldi and Magliveras, cited in Jalloah and Bantekas, 2017: 113). It should be acknowledged that the ICC is not alone in Africa; there are still many states which express genuine support for its jurisdictions, and indeed ordinary Africans are often found to be more in favour of the ICC’s investigations than ruling parties. In addition, the Second Prosecutor, Fatou Bensouda, has made some attempt to engage in dialogue with AU and individual African states over her period in office, and the Court is currently examining allegations of US war crimes in Afghanistan and alleged Israeli atrocities in Palestine, although no investigations have been opened. In February 2022, the third Prosecutor, Karim Khan, in response to the expansion of the conflict in Ukraine, has decided to open an investigation there with respect to alleged war crimes and crimes against humanity committed between 2013 and 2014 (International Criminal Court, 2022).

Nevertheless, the overall rhetorical strategy of the Prosecutor’s office over the past ten years has not substantially changed, and it deliberately avoids engaging with charges of hypocrisy, bias against the weak, political interests and ‘institutionalised racism with neo-colonial resonances’ (Seymour, 2016: 120). Its reports on Darfur to date ‘reveal an institution which is held back primarily by its own refusal to self-examine’ (Rukooko and Silverman, 2019: 85). Yet, the ICC’s now widely-acknowledged ‘African problem’ is unlikely to be resolved without some self-reflection and recognition of the political issues at stake. DeFalco and Mégret argue that, because the ICC sees itself as an institution that exists to prosecute extreme racism, it views itself as ‘all the more innocent of racism because [it is] engaged in the prosecution of the worst and most pathological excesses of global racial politics’ (DeFalco and Mégret, 2019: 55). From the ICC’s own perspective, addressing criticisms that seem to emanate primarily from despotic individuals and governments – those whom it has already designated as ‘criminal’ – might run the risk of validating those criticisms. In an attempt to avoid this, as Schwöbel-Patel argues, the ICC has continued to market its jurisdiction to the ‘Western donor community’, painting a simplistic narrative ‘between the inhumane, non-white male perpetrator, the vulnerable, weak, and non-white victim, and the rational, assisting, mostly white, legal representative’ (Schwöbel-Patel, cited in May and Winchester, 2018: 16). In order to move forwards, therefore, the ICC must, like countless other organisations, acknowledge its historical roots, and the fact that it is itself the product of a system that relies heavily on a normative system of international justice whose principles inherently benefit parties in the Global North.

It may, however, be impossible for the ICC to achieve this level of self-reflection, partly because it is fundamentally unrealistic for it to become ‘political’ enough to engage fully with its critics in a meaningful way. Yet, as Menneke argues, ‘if *international* criminal law is not solely concerned with European practice, the analysis needs to include Africa as an actor, not merely a subject of universal jurisdiction’ (Menneke, cited in Jalloah and Bantekas, 2017: 11). The ICC may, in future, lessen its hold on the African contingent and allow African-led continental jurisdiction to develop along the rhetorical path of ‘African solutions to African problems’. In 2008, the AU adopted the Amendment Protocol, which proposes to endow the African Court of Justice and Human Rights (ACJHR), founded in 2004, with jurisdiction over international crimes. Although the Protocol has not yet been ratified, it does offer a positive vision for international justice in Africa, and ‘has expressive value as it articulates what African state leaders and consulted experts believe that the international criminal justice project should entail’ (Knotterus and Volder, 2016: 393). Crucially, the

Amendment Protocol offers a vastly different vision of international criminal justice to that offered by the ICC. Knotterus and Volder outline three main differences. First, in contrast to the ICC's limited mandate, the Protocol foresees prosecution of a wider range of crimes than the ICC, many of which are of 'an economic, political or resource-related nature', with the result that deeper structural problems are more likely to be addressed through jurisdiction (Knotterus and Volder, 2016: 388). Second, in contrast to the ICC's focus on individual criminal responsibility, the Protocol 'seeks a procurement of justice that includes those who are responsible for creating the conditions of conflict, and those who profit from the continuing instability of many African states' (Knotterus and Volder, 2016: 389–90). Notably, [corporate criminal liability](#) is foreseen – a concept rejected by the ICC during its formation. Last, the Protocol recommends the establishment of an independent Defence Office, guaranteeing 'equality of arms between the prosecution and the defence', which is arguably not present within the institutional structure of the ICC (Knotterus and Volder, 2016: 392). The Amendment Protocol does not address the issue of complementarity with the ICC, and therefore it is as yet unclear whether a fledgling ACJHR would operate productively alongside the ICC. Indeed, it may be some decades before such a court becomes operational, as the ACJHR is not as yet capable of exercising international jurisdiction with the limited resources it currently possesses (Udombana, 2013: 834). However, as the ICC currently runs the risk of becoming increasingly irrelevant beyond the Global North, the development of an international African court in the long term will 'ultimately strengthen rather than weaken the pursuit of international criminal justice' (Knotterus and Volder, 2016: 378)

## Conclusions

Overall, it has become evident that – both during its lengthy investigation in Darfur and more generally – the ICC, once an 'instrument extending African influence in international diplomacy', is now increasingly perceived as simply 'another instrument for western intervention on the continent' (Seymour, 2016: 112). As demonstrated above, the Court's conduct of the Darfur investigation since 2005 has revealed a reluctance to engage with criticism to the extent that its jurisdiction is now compromised, and the healthy progress of international law endangered. This is particularly evident in the ICC's heavy-handed approach to the principle of complementarity and, most crucially, in the tone of the Prosecutor's reports: in particular, the African Union and the individual African states are frequently treated with a level of condescension that would not be tolerated by Western states. As Abass notes, this attitude will gain the ICC no favours: 'The ICC prosecutor cannot afford to deal with ICC state parties as though s/he is a headmaster prevailing over a park of unruly pupils' (Abass, 2013: 933). Secondly, the ICC has failed to respond constructively to valid criticisms concerning its structural bias and racialised narrative, which arguably stems from the uncomfortable fact that international law is a product of a predominantly Western narrative. Scholars such as Mamdani have drawn attention to the superficiality of the West's approach to post-colonial regions, revealing attitudes that have persisted for centuries, in the case of Darfur. Attempting to tackle this thorny issue with a defensive rhetorical strategy has to date been unsuccessful because it avoids the uncomfortable but necessary task of self-reflection. Indeed, as Schwöbel-Patel notes, 'although [the ICC's] use of the rule of law as a branding tool may have enabled [its] initial flourishing [...] as a global justice project, it could also be its ultimate downfall' (Schwöbel-Patel, cited in May and Winchester, 2018: 17). The undeniable truth remains that, with a few exceptions, the vast majority of the ICC's investigations still focus on Africa, and the ICC therefore continues to be perceived as an institution that seeks to maintain (or, at best, does not challenge), political and economic structural inequalities across the African continent. Until this changes, the ICC's critics will continue to use this as grounds for opposition, and the ICC itself will remain lost in a fog of its own creation.



The ICC's path out of the fog into the sunlight is therefore not straightforward. Of course, criticism of the Court is by no means universal, and it must be recognised that there are multiple layers of perception both on and outside the African continent. In the long term, the Court should certainly aim to open and expand investigations outside the African continent where relevant crimes take place: this may be politically challenging, but could go some way to neutralising the criticisms of its opponents. The third Prosecutor, Karim Khan, has recently acted decisively in this direction, responding immediately to calls for an investigation into alleged war crimes and genocide in Ukraine, referred by 39 countries (Allegretti, 2022). This success, however, may be short-lived without additional self-examination on the part of the Court. The ICC must work towards recognising that its 'problem of perception' is at least partly the product of an international legal system developed and sustained in the Global North. It is highly unlikely that the ICC can preserve the support of those African countries, which were fundamental to its establishment without a significant adjustment of its priorities and principles. Specifically, the Court must engage more carefully with the principles of complementarity and immunity enshrined in customary international law, and prioritise a mutually respectful dialogue when engaging with institutions such as the African Union. In the medium to long term, the ICC must remain open to a reciprocal system of jurisdiction with an African International Criminal Court such as the ACJHR, when and if the Amendment Protocol is ratified. A partnership on equal footing, with a mutual basis for sharing resources and legal expertise, could, in the final analysis, achieve an end to global impunity.

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## Glossary

**Corporate criminal liability:** To hold a corporation vicariously liable for criminal acts done by its employees or agents.

**Crimes against humanity:** Acts that intentionally cause great suffering or serious injury to body or to mental or physical health committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

**Genocide:** Acts committed with the intent to destroy, in whole or in part, a national, ethnical radical or religious group.

**Head-of-state immunity:** The protection given to a head of state from being sued in the courts of other states.

**Principle of Complementarity:** Provides that a case is inadmissible before the International Criminal Court if it is currently under investigation by a state with jurisdiction over it.

**War crimes:** Atrocities or offences against persons or property, constituting violation so the laws or customs of war.

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