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RESEARCH ARTICLE

Understanding bricolage in norm development: South Africa, the International Criminal Court, and the contested politics of transitional justice

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Abstract

Within international relations the normative agency of African actors is often downplayed or derided. This article develops the concept of bricolage to offer a novel understanding of norm development and contestation in international relations, including the role African actors play in this. We contend that a norm's core hypothesis can be thought of as the nucleus of a norm. In the case of complex international norms, if this core hypothesis is sufficiently vague and malleable, the norm will continue to attract a range of actors who may claim to share a commitment to enacting the core hypothesis even if they simultaneously promote a variety of potentially conflicting and contradictory meanings-in-use of the norm when doing so. Each meaning-in-use, we argue, might be thought of as a product of bricolage: a process of combining and adapting both new and second-hand materials, knowledges, values, and practices by an actor to address a problem in hand. Through a detailed study of the contestation of transitional justice between South Africa and the International Criminal Court, we elucidate how bricolage can help to illuminate the normative agency of African actors in shaping transitional justice. Processes of bricolage add complexity and potentially confusion to a norm's development, but bricolage also offers the potential for a creative and dynamic means by which a range of actors can inject pluralism, dexterity, and vitality into debates about a norm's meaning and operationalisation.

Keywords: Bricolage; Norms; ICC; South Africa; Transitional Justice

Introduction

Transitional justice is concerned with facilitating or consolidating a new democratic order after mass violence and/or authoritarian rule and is founded on the 'basic idea' that 'societies need to be seen to confront and deal with unjust histories if they are to achieve a qualitative break between the past, present and future'.[1] Central to transitional justice are questions about how those responsible for human rights violations should be held to account and what role (if any) they should play in the new government and society. This, in turn, raises normative questions about what precisely constitutes 'justice' for victims of mass violence, and who should take responsibility for its definition and execution.

Two actors, the International Criminal Court (ICC) and the African National Congress (ANC) government of South Africa, are currently embroiled at the centre of this contentious politics. In this article we trace how the ICC's approach to promoting transitional justice has been contested, contributing to what is widely argued to be a legitimacy crisis experienced by the Court,

[1]Gabrielle Lynch, *Performances of Justice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018), p. 7.

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particularly in Africa.[2] This crisis is characterised by a lack of enforcement by states of ICC arrest warrants, its difficulties prosecuting high profile cases effectively, and the threat of some African states to leave the Court entirely, including South Africa, which had previously been one of its leading supporters.

Engaging with, and building upon theories of norm development and contestation in International Relations theory, we argue, enables us to understand the latest manifestation of these tensions. As constructivist scholars have noted a norm's 'meaning-in-use' is constantly subject to contestation and reshaping.[3] In this respect, as Mona Lena Krook and Jackie True have argued, 'norms that spread across the international system tend to be vague, enabling their content to be filled in many ways and thereby appropriated for a variety of different purposes' such that we should see 'norms as "processes", as works-in-progress, rather than as finished products'.[4] In this case, we contend that a 'core hypothesis'[5] of the transitional justice norm (TJN) can be identified: that perpetrators of mass violence must be held accountable for their crimes as part of a wider political project of enabling states to transition from periods of mass violence and/or authoritarianism to new political orders wherein human rights would be both safeguarded and advanced. What has enabled this norm to 'travel' successfully in the international system is its ambiguity and its ability to simultaneously accommodate a wide range of (often competing) meanings-in-use promoted by a wide range of actors all claiming to share a commitment to the norm's core hypothesis. As such, as Carla Winston notes, the TJN now entails a complex 'cluster' of the following contested elements: 'problems' that it seeks to address (grave human rights violations, civil conflict, authoritarianism, etc.); 'values' that help to identify the ends the actor wishes to pursue (for example, anti-impunity, reconciliation, peace, accountability, rule of law); and 'behaviours', in terms of the action taken to address the problem (for example, amnesty, truth commissions, trials, reparations).[6] We contend, therefore, that while a range of actors thus still find their own normative commitments compatible with the TJN's core hypothesis, the norm's competing meanings-in-use render the subsidiary questions regarding what actually constitutes justice and accountability unresolved, and at the centre of political struggles.

The main contribution we make in this article is to develop a fresh understanding of how norms can come to be filled with competing (and often contradictory) meanings-in-use while their core hypothesis can retain a degree of autonomy and integrity that prevents it from collapsing entirely. We contend that a norm's core hypothesis can be thought of as the nucleus of a norm, which attracts and draws together a range of actors who share a commitment to enacting this core hypothesis. This allows us to understand how, if this core hypothesis remains sufficiently vague, it will continue to 'travel' in the way Krook and True identify. This is because a variety of meanings-in-use attached to the norm orbit around the core hypothesis, each composed of unique combinations of the 'problems' they seek to address and the 'values' and 'behaviours' principled actors apply to remedy the problems. This enables us to understand a situation 'where variation and stability coexist, and where intersubjective meaning is at once generally set and specifically fluid':[7] in short, it moves us beyond an understanding of a norm having a singular accepted meaning that is taken or resisted by a bifurcated international society composed

[2]Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018).

[3]Antje Wiener, 'Enacting meaning-in-use: Qualitative research on norms and international relations', *Review of International Studies*, 35:1 (2009), pp. 175–93.

[4]Mona Lena Krook and Jackie True, 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality', *European Journal of International Relations*, 18:1 (2012), p. 104.

[5]Jason Ralph uses this idea of a 'core hypothesis' to a norm in his work. See Jason Ralph, 'What should be done? Pragmatic constructivist ethics and the responsibility to protect', *International Organization*, 72:1 (2018), pp. 173–203.

[6]Carla Winston, 'Norm structure, diffusion, and evolution: A conceptual approach', *European Journal of International Relations*, 24:3 (2018), p. 653.

[7]Ibid., p. 654.

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of norm-promoters and norm-resistors, and instead illuminates the way a range of actors can claim a principled commitment to a norm's core hypothesis while simultaneously promoting a range of values and behaviours that potentially contradict and conflict with those of other actors.

We develop the concept of *bricolage* to understand how this kind of complex norm with multiple meanings-in-use might develop. Emerging from anthropology, and in particular from the work of Claude Lévi-Strauss, *bricolage* refers to a process by which the agent (the bricoleur) sets about solving a problem or competing a task by 'making do' with the resources available to them in a given moment.[8] This potentially involves combining a range of both new and second-hand materials, knowledges, and practices that have been tweaked, refashioned, adapted, or transformed entirely and combined together such that they are collectively repurposed to tackle the problem in hand.[9] In short, a bricolage aims to become more than the sum of its parts through its 'patchwork of the new and second hand'.[10]

But how might bricolage be useful for understanding norm development in international relations? In terms of how a norm develops, we contend that this should be examined at particular moments of norm contestation, and through detailed empirical analysis of the epistemological development of each actor involved, in order to understand how they develop their meanings-in-use of a particular norm and why and how this contributes to contestation with other actors. Building on Winston's formulation, as a problem (or cluster of problems) present themselves to interested actors (for example, in this case human rights abuses, authoritarianism, war), each actor will then seek to identify the values/ends that they wish to achieve (for example, in this case peace, reconciliation, an end of impunity, etc.) and the behaviours to deploy to meet these ends. An actor might employ a bricolage approach to the particular problem by drawing upon a trove of the values and behaviours available to them which will be tweaked, refashioned, adapted, or transformed entirely and combined together such that they are collectively repurposed to tackle the problem in hand. In this case, depending on the problem(s) facing them, this might require some combination of criminal trials, amnesties, truth commissions, lustration, etc. to fulfil the core hypothesis of the TJN as each actor sees fit. This, we argue, helps to understand the development of diverse and potentially contradictory meanings-in-use of a norm by a variety of actors who all, nonetheless, claim to share the same commitment to the norm's core hypothesis.

Bricolage, we argue, adds new understandings to Amitav Acharya's ideas of 'norm localization' which: 'Instead of just assessing the existential fit between domestic and outside identity norms and institutions, and explaining strictly dichotomous outcomes of acceptance or rejection … describes a complex process and outcome …'.[11] It is this complex process that we draw attention to. However, bricolage, we argue, differs from Acharya's concern with the role 'local' actors play as 'norm-*takers* build[ing] congruence between transnational norms … and local beliefs and practices',[12] and also the related concept of norm 'vernacularization', in which local actors '*take* the ideas and practices of one group and present them in terms that another group will

[8]Claude Lévi-Strauss, *The Nature of Human Society: The Savage Mind* (London: Weidenfield and Nicolson, 1966), pp. 16–36.

[9]In some Business Studies scholarship 'bricolage' is a celebrated strategy of small and resourceful entrepreneurs. See Ted Baker and Reed E. Nelson, 'Constructing something from nothing: Resource construction through entrepreneurial bricolage', *Administrative Science Quarterly*, 50:3 (2005), pp. 329–66. This concept has also been used by geographers to discuss how development interventions might be more successful when they are culturally grounded. See Frances Cleaver, 'Reinventing institutions: Bricolage and the social embeddedness of natural resource management', *The European Journal of Development Research*, 14:2 (2002), pp. 11–30.

[10]Frances Cleaver and Jessica de Koning, 'Furthering critical institutionalism', *International Journal of the Commons*, 9:1 (2015).

[11]Amitav Acharya, 'How ideas spread: Whose norms matter? Norm localization and institutional change in Asian regionalism', *International Organization*, 58:2 (2004), p. 241, emphasis added.

[12]Ibid.

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accept'.[13] While helpful to understanding situations where actors might play a role in building congruence between local and global norms, these approaches nonetheless assume an asymmetrical relationship in which local actors 'take' externally derived norms and smooth off their rough edges to render them palatable and operationalisable.[14] Bricolage allows us to comprehend a more creative and potentially offensive strategy in which an array of actors traverse 'local' and 'global' sites of norm development to assemble complex, idiosyncratic combinations of values and behaviours to create new (or modified) meanings-in-use which, to return to Antje Wiener, might be identified as 'specific meanings that are influential at a specific time and place, yet will only be revealed through individual use'.[15] The meanings-in-use created through bricolage may thus offer 'transient artefacts'[16] in some cases. That is, they are always contingent and time bound 'solutions' to the idiosyncratic problems they confront. They may, like all forms of bricolage, be sometimes thought of as 'second-best solutions' making do in a meandering fashion with the compromised materials available to hand.[17] In the case of norms, this might provoke some actors to bemoan what they perceive to be the generation of an ever-increasing myriad of next-best behaviours that potentially obfuscate the norm's core hypothesis and/or allow some actors to subvert it.[18] Alternatively, bricolage could be recognised as providing a dynamic palette of values and behaviours to apply to heterogeneous problems. The latter follows a 'pragmatic constructvist' ethic which, according to Jason Ralph, guards 'useful norms' against over-zealous norm entrepreneurs who 'too readily take the meaning of a norm to be fixed and this uncritically authorizes self-appointed norm entrepreneurs to dismiss alterative prescriptions as shameful acts of noncompliance'.[19]

We develop this argument through a case study of the fallout between the ICC and the ANC government of South Africa. First, we trace the development of the ICC's retributive meaning-in-use of the TJN, which advocates that transitional justice should follow a retributive model of justice in which perpetrators are subject to prosecution and punitive sentencing according to an 'apolitical' application of international law. This follows a deterrent logic: that potential perpetrators of mass violence will be deterred from committing such acts if they can expect with a reasonable degree of certainty that their acts will be prosecuted and punished. Rather than employing a dynamic bricolage combining lots of diverse elements to each 'problem' it confronts, the ICC's meaning-in-use of the TJN is, despite the institutions pluralist origins, restricted by its own statute to focus on challenging the problem of impunity for human rights violators through the application of international criminal trials. A critical issue is that the Court attempts to ascribe the core hypothesis of the TJN with a fixed notion of what constitutes appropriate values and behaviours when it comes to tackling the impunity of human rights abusers: the pursuit of retributive criminal justice. Privileging this focus and approach above alternatives is argued to define the Court's mission and is inscribed into its statute, limiting its room for manoeuvre.

Other actors, however (particularly those emerging from periods of mass violence and authoritarianism), are confronted with complex constellations of 'problems' that they may have to deal

[13]Peggy Levitt and Sally Merry, 'Vernacularization on the ground: Local uses of global women's rights in Peru, China, India and the United States', *Global Networks*, 9:4 (2009), p. 446, emphasis added.

[14]This is where we differ from the application of bricolage by geographer Frances Cleaver who was studying local resource management in Zimbabwe and how local communities adapted to external development interventions. Cleaver's core concern was with the effectiveness of bureaucratic institutions and norms in a local cultural context. For Cleaver, bricolage was effectively a process of norm localisation in which 'the use and adaptation of pre-existing [local] customs and practices confer new arrangements with the legitimacy of "tradition"'. See Cleaver, 'Reinventing institutions', p. 14.

[15]Wiener, 'Enacting meaning-in-use', p. 180.

[16]A phrase used by engineer scholar G. F. Lanzara, 'Between transient constructs and persistent structures: Designing systems in action', *The Journal of Strategic Information Systems*, 8:4 (1999), pp. 331–49.

[17]Baker and Nelson, 'Constructing something from nothing', p. 334.

[18]Aidan Hehir's recent work details how norms subject to heavy contestation and/or co-optation can render the norm 'hollow'. See Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (Basingstoke: Palgrave Macmillan, 2019).

[19]Ralph, 'What should be done?', p. 175.

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with when enacting the TJN, which in turn might lead them to privilege a variety of alternative values and behaviours beyond the pursuit of retributive criminal justice alone. To develop this argument we take the case of South Africa. Drawing on analysis of an extensive range of internal party discussion documents, government pronouncements, press statements, policy documents and speeches, we trace the evolution of the normative approach to transitional justice of South Africa's dominant ruling party, the ANC, which emerged as the figurehead of the liberation struggle against apartheid and has subsequently been returned to power since the first elections in 1994 through successive landslide election victories. The ANC shifted from advocating Nuremberg-style prosecutions for perpetrators of apartheid in the late 1980s as negotiations with the apartheid regime began. Drawing on experiences from South America, the ANC began developing an alternative meaning-in-use of the TJN characterised by a commitment to a dynamic bricolage approach to transitional justice employing a palette of reparative, restorative, and retributive mechanisms of achieving accountability – however imperfect – as part of a wider effort to secure a lasting political settlement.

This bricolage approach has subsequently been deployed by the ANC in its approach to transitional justice beyond its borders. Understanding the dynamics of bricolage in norm development helps us to understand the current fallout between the ANC and the ICC: while the ANC views retributive criminal justice (and the ICC as an institution) as adding value to the deployment of transitional justice, it sees this as an auxiliary to a more flexible bricolage approach combining the experiences, values, and behaviours of a range of actors to meet the needs of each constellation of problems. At the heart of the ANC's bricolage approach is an attempt to reframe the TJN by embracing what it sees as a more pragmatic approach to norm entrepreneurship where we focus not on challenging the norm's 'core hypothesis but the tenacity of those who insisted [its] prescription was fixed, as well as those who held an unyielding commitment to ends that were, in practice, unrealistic'.[20]

More broadly, the concept of bricolage provides fresh understandings of complex African agency in norm entrepreneurship and reflects wider efforts to address the under-representation of African perspectives in International Relations scholarship.[21] As Rita Abrahamsen rightly argues, 'Contrary to common assumptions that the liberal world order was "made in the West" … it was produced in interaction with Pan-African ideology and actors.'[22] In this article we highlight the normative agency of African powers in designing, shaping, and contesting international liberal norms.

[20]Ralph, 'What should be done?', p. 176.

[21]For discussion, see Sophie Harman and William Brown, 'In from the margins? The changing place of Africa in international relations', *International Affairs*, 89:1 (2013), pp. 69–87; Elijah Nyaga Munyi, David Mwambari, and Aleksi Ylönen (eds), *Beyond History: African Agency in Development, Diplomacy and Conflict Resolution* (London: Rowman and Littlefield, 2020); Timothy M. Shaw, Fantu Cheru, and Scarlett Cornelissen, *Africa* and *International Relations in the 21st Century* (London: Palgrave Macmillan, 2012); Rita Abrahamsen, 'Africa and international relations: Assembling Africa, studying the world', *African Affairs*, 116:462 (2017), pp. 125–39; Emma Louise Anderson, 'African health diplomacy: Obscuring power and leveraging dependency through shadow diplomacy', *International Relations*, 32:2 (2018), pp. 194–217; Peace Medie, *Global Norms and Local Action: The Campaigns to End Violence against Women in Africa* (New York: Oxford University Press, 2019); Folashadé Soulé, '"Africa+1" summit diplomacy and the "new scramble" narrative: Recentreing African agency', *African Affairs*, advanced access (2020). This research agenda of understanding 'Normative Politics in Africa' has also been promoted recently by Portia Roelofs, Sa'eed Husaini, and Dan Paget in a series of conferences.

[22]Rita Abrahamsen, 'Internationalists, sovereigntists, nativists: Contending visions of world order in Pan-Africanism', *Review of International Studies*, 46:1 (2020), p. 56. See also Funmi Olonisakin and Moses Tofa, 'Appropriating African agency in international relations', in Munyi, Mwambari, and Ylönen (eds), *Beyond History* (2020), pp. 13–31, ch. 2. More broadly, this highlights the need for acknowledging and understanding the role of non-Western actors in developing and contesting liberal norms. See Cristina Stefan, 'On non-Western norm shapers: Brazil and the responsibility while protecting', *European Journal of International Security*, 2:1 (2017), pp. 88–110.

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The ICC's retributive meaning-in-use of the TJN: Cosmopolitanism and contestation

The retributive meaning-in-use of the TJN has been promoted and consolidated since the beginning of the latter part of the twentieth century including through the establishment of the Nuremberg and Far East Tribunals and then, more recently, the International Criminal Tribunals for the Former Yugoslavia and (ICTY) and Rwanda (ICTR), as well as numerous other international and hybrid tribunals, which are focused on prosecuting individuals for alleged crimes. It should also be recognised that national courts are increasingly taking on the role of prosecuting international crimes. This result of this process of promotion and consolidation is encapsulated in the ICTY's bold epistemological claim that it 'laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe'.[23] In support of this view, Geoffrey Robertson QC, a leading international lawyer, said that the first case before the ICTY was 'a deeply symbolic moment: the first sign of a seismic shift, from diplomacy to legality, in the conduct of world affairs'.[24] This development should be seen in the context of a gradual shift towards the juridification of international society.[25]

The evolving retributive meaning-in-use of the TJN was, however, most powerfully represented and consolidated by the creation of the ICC in 1998. Cherif Bassiouni, a leading architect of the Court, suggested that the ICC's existence could foreclose alternative interpretations of the TJN because it 'reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted'.[26] Similarly, Kofi Annan, the then UN Secretary General, explained that '[t]here are times we are told justice should be put aside …[b]ut we have come to understand that without justice there can be no lasting peace.'[27] While the ICC like its forebears, the ICTY and the ICTR, does aim to make a contribution to the peaceful resolution of conflicts and to postconflict reconciliation,[28] it does so only as an ancillary, consequential objective through evidence-led, impartial prosecutions, rather than *via* intentional, politically motivated and strategic interventions aiming at facilitating political settlements and securing lasting peace. As Akhavan has argued, reconciliation 'can only be the incidental outcome of international criminal justice, and not its purpose'.[29] Indeed, a defining mission of the Court, enshrined in Article 27 of the Rome Statute, is to challenge the impunity of any actor, whether they are sitting heads of state or other senior officials, even where this might override competing political demands emanating from ongoing peace processes.[30]

This position has been explicitly adopted in the Office of the Prosecutor's Policy Paper on the Interests of Justice[31] and has been reiterated by the Deputy Prosecutor: '[w]hile the ICC

[23]'About the ICTY', International Criminal Tribunal for the Former Yugoslavia, available at: {http://www.icty.org/en/about} accessed 30 April 2018.

[24]Geoffrey Robertson QC, *Crimes against Humanity. The Struggle for Global Justice* (London: Penguin, 2006), p. 373.

[25]Joel. P. Trachtman, *The Future of International Law: Global Government* (Cambridge: Cambridge University Press, 2013), p. 1.

[26]Cherif M. Bassiouni, 'Negotiating the Treaty of Rome on the establishment of the International Criminal Court', *Cornell International Law Journal*, 32:3 (1999), p. 467.

[27]Secretary-General Kofi Annan's Statement to the Inaugural Meeting of the Judges of the International Criminal Court, 11 March 2003, The Hague, cited in Victor Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', in Roland Pierik and Wouter Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2010), p. 211.

[28]ICC Website, 'About', available at: {https://www.icc-cpi.int/about} accessed 12 June 2018. 'Justice is a key prerequisite of lasting peace. International criminal justice can contribute to long-term peace, stability and equitable development in post-conflict societies.' 'About the ICTY' – '[t]he Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe', accessed 12 June 2018.

[29]Payam Akhavan, 'The rise, and fall, and rise, of international criminal justice', *Journal of International Criminal Justice*, 11:3 (2013), p. 532.

[30]Kurt Mills and Alan Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', *Review of International Studies*, 44:1 (2018), p. 102.

[31]Office of the Prosecutor at the International Criminal Court, 'Policy Paper on the Interests of Justice. September 2007', p. 4, available at: {https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf} accessed 9 September 2018.

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Prosecutor bears in mind the application of other components of transitional justice, such as truth commission or reparations programs, her mandate obviously relates to the first component, namely, criminal prosecutions.'[32] Importantly, it should be noted that under the Rome Statute's 'complementarity' provisions, which place the primary responsibility on States Parties for discharging the Court's mandate – the ICC being a mechanism of last resort – states must implement retributive justice and are not permitted to adopt an alternative interpretation of the TJN norm, which involves making use of, for example, truth, and reconciliation commissions or amnesties as a means of facilitating the peaceful settlement of a conflict as an alternative to criminal prosecutions. Most recently, the Court insisted that prosecutions take place in Colombia and it rejected the use of blanket amnesties that had been used previously as part of a demobilisation process. The Deputy Prosecutor argued that '[t]he ends of sustainable peace are intrinsically linked to justice being done and seen to be done.' The meaning-in-use of the TJN adopted by the ICC is thus underpinned by the philosophical view that there can be no peace without retributive justice. As Sarah Nouwen and Wouter Werner explain, the ICC frames its mission as consolidating 'the road to global justice' based upon what scholars have argued to be an implicit claim that its retributive meaning in-use of the TJN reflects a universally accepted standard of transitional justice.[33]

While the work of the ICC, as described here, is defined by the mandate that it is given by states, as codified in the Rome Statute, it is not a multilateral institution that is controlled in its operations by its member states. It is a court that acts independently of its members when exercising its prosecutorial and judicial functions, and it has a substantial degree of agency in its operations. For example, the Chief Prosecutor has a choice about where, when, and how to initiate and follow through investigations and prosecutions. The consequence of such agency is that decisions should be subject to scrutiny and, if necessary, criticism. However, the broader confines within which ICC institutional agency can be exercised, as established by states, should also be open to scrutiny and criticism at a normative level, particularly where states have had an opportunity to understand how the Rome Statute operates in practice. It follows that just because a state acceded to the Rome Statute, this does not mean that it cannot subsequently criticise how it rules operate in practice or how they are implemented.

It is also important to recognise how the Rome Statute was negotiated. A substantial and complex document was finally negotiated in just over one month in Rome with the consequence that it was a fast-moving process; as Phillipe Kirsch and Darryl Robinson noted, the 'project was daunting both in magnitude and complexity'.[34] Many states sent small, inexperienced, and under-briefed delegations to the negotiations and therefore, despite the efforts of NGOs, they were not always able to know what was happening in 'real time' or contribute effectively to the negotiations.[35] With many disagreements having been aired in respect of the content of the document, including the Court's jurisdiction, the power of the Prosecutor, and the role of the Security Council *vis-à-vis* the Court, agreement was reached and the statute adopted at the eleventh hour as a 'package-deal' meaning that not all states would have been entirely pleased with the outcome but took the view that it was better to have something than nothing. The consequence of

[32]James Stewart, Deputy Prosecutor of the International Criminal Court, Speech at the Conference on Transitional Justice in Colombia and the Role of the International Criminal Court entitled 'Transitional Justice in Colombia and the Role of the International Criminal Court', Bogota (13 May 2015), p. 5, available at: {https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf} accessed 9 September 2018.

[33]Sarah M. H. Nouwen and Wouter G. Werner, 'Monopolizing global justice: International criminal law as challenge to human diversity', *Journal of International Criminal Justice*, 13:1 (2015), pp. 162–3.

[34]Phillipe Kirsch and Darryl Robinson, 'Reaching agreement at the Rome Conference', in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford: Oxford University Press, 2002), p. 68.

[35]Fanny Benedetti, Karine Bonneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome*, 1994–1998 (Leiden: Martinus Nijhoff Publishers, 2014), pp. 95–6.

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this was that issues with the interpretation and operation of the Rome Statute were bound to rear their head in the future, particularly as the operation of rules in practice became clear.

In addition to these internal contestations over the Court's approach, the ICC's activities in Africa in particular have, as we will see below, generated tension with norm entrepreneurs in the Global South who have sought to broaden the palette of transitional justice mechanisms in order to consider 'questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation that had previously been treated as largely external to the transitional justice project'.[36] According to Mahmood Mamdani, this was informed by the pressing desire for Southern states undergoing complicated political transitions to 'Prioritize peace over punishment, and explore forms of justice – not criminal but political and social – that will make reconciliation durable.'[37]

We contend, therefore, that the ICC's current crisis in Africa should not be viewed – as the ICC and its supporters often claim – to simply reflect 'justice' being subverted through the *realpolitik* of African elites, but instead as part of broader normative struggle. This requires an understanding of African intellectual agency in global norm contestation and the manner in which African agents have sought to 'fill' the contents of transnational norms through a creative process of bricolage. We develop this argument below by tracing the normative evolution of South Africa's approach to promoting the TJN and how this has manifested in the threat of the country's ruling party to leave the Court.

Bricolage in the ANC's norm entrepreneurship

During the struggle against apartheid the core diplomatic challenge confronting the ANC in exile was to forge a broad international coalition of actors opposed to the apartheid regime galvanised by a shared, unequivocal condemnation of the gross violation of human rights constituted by apartheid itself. During the 1970s and 1980s the ANC sought to intensify this pressure by advocating radical proposals for international criminal trials to be held according to the 'Nuremberg Principles' where all actors who practiced, aided and/or abetted the crime of apartheid would be prosecuted according to international law. Although its overall foreign policy was incoherent at this stage,[38] the ANC nonetheless managed to lobby consistently on this issue at the UN, leading to the UN's International Convention on the Suppression and Punishment of the Crime of Apartheid, which advocated for a truly universal jurisdiction.[39] Once this was in force, the ANC called for the UN to compile 'a list of persons, from the highest echelons of the state machinery in South Africa to the murderers and torturers of the police force, who have been responsible for committing the crimes defined in the Convention'.[40]

As it became increasingly clear to the ANC's high command that it would be impossible to overthrow the apartheid regime militarily and as prospects for a negotiated political settlement grew, this shifted the ANC's calculations regarding what forms of justice for perpetrators of apartheid were desirable and attainable. Indeed, the scope for criminal prosecutions during a transition to democracy can vary, and in situations where the authoritarian regime has not – and perhaps never will – lose all power and control, there will always be a degree of codetermination of transitional justice between the 'old' and 'new' elites.[41]

[36]Ruti G. Teitel, 'Transitional justice genealogy', *Harvard Human Rights Journal*, 16 (2003), pp. 69–94.

[37]Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (London: Verso, 2009). p. 268.

[38]Matthew Graham, *The Crisis of South African Foreign Policy: Diplomacy, Leadership and the Role of the African National Congress* (London: I. B. Tauris, 2015), pp. 6–39.

[39]UN, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' (New York, 1976), available at: {https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf} accessed 7 July 2018.

[40]ANC, 'Statement from the Arusha Conference. Conference Proceedings', Johannesburg (4 December 1987), available at: {http://www.anc.org.za/content/statement-arusha-conference} accessed 14 July 2018.

[41]Luc Huyse, 'Justice after transition: On the choices successor elites make in dealing with the past', *Law & Social Inquiry*, 20:1 (1995), p. 76.

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The first signs of a shift in the ANC's stance on transitional justice emerged during the period of secret talks about negotiations in the late 1980s. It was recognised by both sides that (as yet unofficial) indemnities, and eventually amnesties, were a practical necessity for those participating in the talks, while calculated prisoner swaps between the two sides helped to augment trust.[42] As more formal talks progressed in the early 1990s, the move towards the acceptance of some form of amnesty provision became evident following meetings in early May 1990, between an ANC delegation and President De Klerk and his officials. The agreement reached at these meetings – the Groote Schuur Minute[43] – set forward a clear commitment to accelerate discussions 'to advise on norms and mechanisms for dealing with the release of political prisoners and the granting of immunity in respect of political offences to those inside and outside South Africa'.[44]

While the indemnities prescribed at this stage were temporary, secretive talks between ANC officials and representatives of the National Party regime continued to raise the issues of general amnesty provision that might be needed in future.[45] As formal negotiations gathered pace in the early 1990s, and the prospect of a majority government became increasingly likely, public deliberations about amnesty and transitional justice emerged within the ANC as its intellectuals began to debate the feasibility of both trials and the lustration of government officials. What began to emerge within the ANC was a consensus that retributive justice alone, in the form of criminal trials for the perpetrators of apartheid, was neither politically practical nor morally desirable. A particularly influential intervention was the proposal of 'sunset clauses' that would offer three areas of compromise. First, they proposed power sharing for a fixed number of years with what would later be referred to in ANC discussions as a 'Government of National Unity'.[46] This would serve to co-opt powerful components of the former regime willing to make compromises while marginalising right-wing nationalists who refused to embrace the new political order. Second, the ANC acknowledged the need to maintain a functioning state that could be utilised for the next phase of their 'National Democratic Revolution'. It would therefore be necessary to find accommodation for large sections of the civil service, including making offers of job security, because the risk of not doing so was clear: 'Precisely because racism gave [the white minority] a monopoly of skills and experience, their potential for destabilising a newly born democracy is enormous'.[47]

Third, to enable this accommodation of state elites and civil servants compromise was also required with regard to the prosecution of those responsible for the various crimes of apartheid. According to ANC senior figure Kadar Asmal, the ANC was confronted with striking a difficult 'balancing act', and that while criminal prosecutions could provide the kind of unfettered transition required by some who wanted 'a vivid line between the old illegitimacy and the new democracy', they would not satisfy 'the need to rehabilitate a bureaucracy that is needed to serve the new ideals [of a democratic government], and so cannot be dismissed or imprisoned'.[48] The ANC calculated from an early stage that while prosecutions might be desirable, the threat of prosecution might inhibit the negotiations process, and endanger a transition.[49]

[42]Willie Esterhuyse, *Secret Talks and the End of Apartheid* (Cape Town: NB Publishers, 2012), p. 145.

[43]ANC, The Groote Schuur Minute, Declaration, Cape Town, 4 May 1990.

[44]Ibid.

[45]Esterhuyse, *Secret Talks*, p. 289.

[46]ANC, 'Annexure to the Statement by State President FW De Klerk on the Timetable for Further Constitutional Reform', Johannesburg (26 November 1993), available at: {http://www.anc.org.za/content/background-paper-annexure-statement-state-president-fw-de} accessed 17 September 2018.

[47]Joe Slovo, 'Negotiations: What room for compromise?', *African Communist*, 130:3 (1992).

[48]Kadar Asmal, 'Truth, reconciliation and justice: The South African experience in perspective', *The Modern Law Review*, 63:1 (2000), p. 14.

[49]ANC Resolutions of the National Consultative Conference, Conference Resolutions, Johannesburg (1990), available at: {http://www.anc.org.za/content/resolutions-national-consultative-conference} accessed 17 September 2018.

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The agreements regarding the need for indemnity and amnesty provisions set forward in the Groote Schuur Minute paved the way for a gradual formalisation and expansion of amnesty provision in the Indemnity Acts (1990), Further Indemnity Act (1992), the 'National Unity and Reconciliation' clause of the 1993 Interim Constitution and, eventually, the Amnesty Act (1995). The inclusion of this amnesty provision was seen as a breakthrough by leading protagonists, such as Desmond Tutu, who remarked at the time that: 'Amnesty made our election possible … it was only when that was put in that the *boer* signed the negotiations, opening the door to elections.'[50] While the ANC thought that this compromise might forestall a 'counterrevolutionary' movement emerging, their leading intellectuals were nonetheless cognisant of the fact that this represented only a partial transition, leaving the new government with a civil service 'steeped in the precepts of apartheid'.[51]

However, it would be wrong to portray this as simply a triumph of the pragmatic promotion of peace at the expense of accountability and justice by a party itching to assume power and to subsequently put the past to bed. This ignores the normative agency of those within the ANC (and wider civil society) who embraced a form of bricolage in their design and application of the transitional justice norm. The ANC's internal discussion magazine, *Mayibuye*, in particular, featured a discussion of 'South Africa's transition in the global context' during the transition period, documenting the lessons the ANC could draw from the varied experiences of trials, amnesty provisions, and truth commissions in South America, as well as weighing up the practical and political consequences of embracing Nuremberg-style prosecutions of the apartheid regime.[52] These internal discussion documents reflected on a series of intensive conferences in Cape Town during February and July 1994 in which activists and politicians responsible for transitional justice in South America, as well as prominent intellectuals from the ANC and South African civil society debated what could be learned from the experiences of those countries.[53]

A shared understanding that developed during these exchanges was that South Africa could take inspiration – but not a rigid blueprint – from international experiments. During the Cape Town conferences it was agreed by leading delegates these countries emerging from mass violence and/or authoritarianism were confronted with a myriad of problems to deal with, and that challenging the impunity of those who had committed gross violations of human rights was part of a wider calculation involving experimental approaches and compromises. As ANC Minster of Justice Dullah Omar put it, 'I do not claim that we have all the answers or that we have the right answers. We need to find what former Chilean president Patricio Aylwin has called "the right equilibrium".'[54] Leading intellectuals argued that this 'equilibrium' in South Africa was to be found through selective prosecutions in some cases coupled with the formation of the Truth and Reconciliation Commission (TRC) and conditional amnesties. For the ANC, a more holistic notion of 'justice' was therefore required, which would blend prosecution (where desirable and possible) with truth commissions, which would be victim-centred and aimed at providing as much 'shared memory' about the past as possible, while also offering participants a potential platform for public penitence and forgiveness.[55] As Faustin Ntoubandi argues, 'South African

[50]Quoted in Faustin Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (Leiden: Martinus Nijhoff Publishers, 2007), p. 15.

[51]Harold Wolpe, 'The uneven transition from apartheid in South Africa', *Transformation*, 27 (1995), pp. 86–101.

[52]ANC (various authors), 'The SA transition in a world context', *Mayibuye*, 6/7 (1995/1996), available at: {http://www.anc.org.za/publication/Mayibuye} accessed 17 September 2018.

[53]The proceedings of the two conferences were published in Alex Boraine, Janet Levy, and Ronel Scheffer *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: IDASA, 1994) and the second in Alex Boraine, and Janet Levy (eds), *Healing of a Nation?* (Cape Town: Justice in Transition, 1995).

[54]Dullah Omar, 'Building a new future', in Boraine and Levy (eds), *Healing of a Nation?*, p. 8.

[55]This was a view advanced in the Cape Town conferences by leading civil society figures like Rev. Frank Chikane and ANC leaders like Albie Sachs and Dullah Omar. An excellent overview of the development of South Africa's transitional justice settlement is offered by Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Abingdon: Routledge, 2010).

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amnesty had a distinctive feature in that it was not based on oblivion or forgetfulness. Instead, it aimed to provide a "full disclosure" of past wrongs so as to allow all South Africans to remember, and not to forget, the crimes committed in the past.'[56] Indeed, as one leading ANC intellectual put it, the party realised that 'transitional justice was not a mere matter of criminal trials … it had to be part of a systematic process of acknowledging the illegitimacy of apartheid' and that 'impunity can be avoided and accountability achieved, by public disclosure of wrongdoing'.[57]

The ANC government's eventual approach to transitional justice,[58] which would eventually include a blend of a trials, conditional amnesties, 'sunset clauses', and truth commissions, thus reflected a form of bricolage: the reuse, repurposing, and remoulding of a range of resources and practices available 'to hand' to assemble a dynamic and idiosyncratic path towards a practically achievable and morally defensible transitional justice settlement. The bricolage approach taken in South Africa was therefore not simply a pragmatic compromise. It was deemed by its protagonists – with reference to the South American experiences – the best way to fulfil an ambitious project of political and moral reconstruction[59] and by ANC leaders as a way to inculcate a new 'human rights culture' underpinned by an active, 'vigilant citizenship' across all sections of society that could acknowledge the wrongs of the past and guard the new society against future abuses.[60] As we will discuss below, the details of the ANC's normative shift from its previously unequivocal promotion of retributive justice in the 1970s and 1980s towards this more flexible, bricolage approach helps us to understand the ANC's subsequent norm entrepreneurship in the international arena.

The ANC's 'export' of a transitional justice bricolage

The ANC's identity as a liberation movement strongly influences its foreign policy identity and the party claims that its foreign policy traces its lineage to anti-colonial struggles dating back centuries, and that its cornerstone is a form of 'Progressive Internationalism' driven by a demand for 'a world shaped not just by the aspiration and interests of the Western world, but one also shaped by African demands'.[61] It is in the area of conflict mediation and peacebuilding that South Africa has arguably been most influential in pressing forward an African agenda. This began immediately following South Africa's transition when African states and the international community looked to South Africa to take a leading role in peacebuilding on the continent – often with quite unrealistic expectations.[62] The ANC government was quickly invited to take on mediation roles across the continent by figures such as Julius Nyerere, who in 1994 urged Mandela and the ANC to commit to re-energising peacebuilding efforts in the Great Lakes region. Successive ANC governments were happy to embrace an extensive role in peacebuilding activities. ANC leaders demonstrated a proclivity to assume a vanguardist posture, contending that their own experience of assembling a complex bricolage of mechanisms to achieve their own transition offered a 'rich and complex model from which much can be learned, whatever its inevitable flaws'.[63] Indeed, even from the early 1990s during negotiations, this self confidence was already apparent in the

[56]Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law*, p. 61.

[57]Asmal, 'Truth, reconciliation and justice', p. 13.

[58]This approach, it should be noted, is not without its critics. See Mahmood Mamdani, 'Amnesty or impunity? A preliminary critique of the Report of the Truth and Reconciliation Commission of South Africa', *Diacritics*, 32:3/4 (2002), pp. 33–59; Sisonke Msimang, 'All is not forgiven: South Africa and the scars of apartheid', *Foreign Affairs*, 97 (2018), pp. 28–34; Matthew Evans, *Transformative Justice: Remedying Human Rights Violations Beyond Transition* (Abingdon: Routledge, 2018).

[59]For example, former president of Chile Patricio Aylwin, among others, made these arguments at the Cape Town conferences. See Boraine and Levy (eds), *Healing of a Nation?*.

[60]Febe Potgieter, 'The weight of the past', in Boraine and Levy (eds), *Healing of a Nation?*, p. 23.

[61]ANC, 'International Relations: Discussion document for 2012 ANC Congress' (Johannesburg, 2012), p. 3.

[62]Graham, *The Crisis of South African Foreign Policy*, p. 126.

[63]Asmal, 'Truth, reconciliation and justice', p. 23.

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way the ANC sought to intervene in the peace process in Northern Ireland, and expanded as ANC leaders sought to influence conflict mediation and transitional justice processes across the African continent, including Burundi, Zaire (DRC), Liberia, Angola, Nigeria, Libya, Zimbabwe, Swaziland, the Comoros, Kenya, Sudan, and Cot D'Ivoire. As Chris Landsberg notes in his detailed study of South African mediation efforts, at the core of the approach was the belief that calculations of what combinations of mechanisms and practices might be useful should be conducted on a 'case by case' approach, rather than imposing a singular, rigid formula.[64] South African mediators would initially seek to ferment conditions for talks between all important actors so that appropriate combinations of 'old' and 'new' mechanisms for achieving a way forward could be identified, often including power-sharing agreements and bespoke combinations and adaptations of different transitional justice mechanisms (for example, truth commissions, amnesties, and prosecutions).

The ANC government has faced considerable criticism, both domestically and internationally, where its application of this approach is argued to assume that some form of political settlement in the model of South Africa's is always possible.[65] Critics have also argued that the approach has, in some cases, unduly favoured powerful incumbents, failed to secure peace, and/or simply reflected the pursuit of South Africa's national interest at the expense of other objectives.[66] However, we should not ignore the normative content of the ANC's approach, which is enmeshed within the party's liberation movement identity, its understandings of its own transition, and its ambitions for reforming international politics.[67] While it was assuming this leading role in African mediation, South Africa was also investing considerable political capital into provoking wider normative shifts on the continent regarding state sovereignty and responsibility, including helping to build a wide array of institutional mechanisms in the AU that would place greater emphasis on African states taking responsibility for the promotion and protection of human rights.[68]

South Africa also made a significant contribution to the formation of the ICC. It was one of a limited number of states involved in the extensive preparatory negotiations that took place throughout the early 1990s and it played a prominent and active role during the Rome Conference in 1998. South Africa had one of the most cosmopolitan and hopeful visions of the Court, and supported the Court having an extensive jurisdiction and *proprio motu* powers for the prosecutor. It was also unfazed by the Court being able to exercise jurisdiction over non-States Parties, all of which were quite radical cosmopolitan ideas. In a show of its strong support for the Court, South Africa voted in favour of adopting the Rome Statute and signed it on the day it was opened for signature, ratifying it two years later. During this period South Africa embraced a form of bridge-building behaviour. This entailed lobbying for truth commissions to be included in Article 17 as part of an attempt to broaden the ICC's approach to transitional justice and to enhance the complementary role it could play in relation to African-led mediation efforts.[69] As Dire Tladi notes, 'While South Africa has not been shy, not only at AU events, but

[64]Chris Landsberg, *The Quiet Diplomacy of Liberation: International Politics and South Africa's Transition* (Johannesburg: Jacana Media, 2004).

[65]Gérard Prunier, 'Could the South African experience of conflict resolution help in bringing peace in Darfur?', in Kurt Shillinger (ed.), *Africa's Peacemaker? Lessons from South African Conflict Mediation* (Johannesburg: Jacana Media 2009), pp. 95–112.

[66]Lynch, *Performances of Justice*.

[67]Laurie Nathan, 'Interests, ideas and ideology: South Africa's policy on Darfur', *African Affairs*, 110:438 (2011), pp. 55–74.

[68]Kurt Shillinger, 'Learning from South African engagement in African crises', in Shillinger (ed.), *Africa's Peacemaker?*, pp. 17–24.

[69]Nkoana Mashabane, 'Opening Statement: Assembly of States Parties of the International Criminal Court', The Hague (18–26 November 2015), available at: {http://www.dirco.gov.za/docs/speeches/2015/mash1118.htm} accessed 17 September 2018.

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also so-called "ICC friendly" events, to question some practices of the Court, it has also sought to lower the anti-ICC sentiments at AU events.'[70]

It is therefore important to understand the long-standing tension that underpins South Africa's post-apartheid foreign policy under the ANC: On the one hand, South Africa sees value in shaping global liberal norms through its multilateral engagements such that they can be harnessed to promote African 'renaissance' in the form of democratic peace and prosperity. On the other hand, its deeply embedded (and growing)[71] scepticism regarding Western states' intentions towards Africa imbues its policymakers with a belief that international actors and institutions should play only an auxiliary role to African actors when confronting African problems. In terms of conflict mediation and transitional justice, this manifests in an expectation that international actors should defer to the ANC's judgement on what combinations of peacebuilding mechanisms might work in a particular situation. This tension is highlighted in its increasingly strained relationship with the ICC. ANC government officials have consistently maintained that its support for the ICC's establishment was an effort to buttress a wider transitional justice norm. As the Minister of Justice and Correctional Services remarked to Parliament, 'South Africa has never viewed the ICC in isolation, but as one element in a new system of international justice, law and governance. It must therefore be the last resort to protect human rights and to fight impunity',[72] or what scholars have called its 'backstop' function.[73] This, as we will expand below, highlights a core strand of the ANC's growing exasperation with the ICC: what it perceives to be the tendency of the Court to promote its agenda in Africa without due regard for African promotion of more flexible, bricolage approaches to promoting transitional justice as part of a wider element of peacebuilding.

What went wrong? South Africa's turbulent relationship with the ICC

While the ANC government has engaged critically with the ICC over a number of years, the turning point in its relationship occurred with its refusal to arrest Omar Al-Bashir, the president of Sudan, when he travelled to South Africa to attend an AU summit in June 2015. At that time Al-Bashir was subject to two ICC arrest warrants issued in 2009 and 2010 for war crimes, crimes against humanity and genocide, and as a State Party to the Rome Statute it was said that South Africa was obligated to arrest and surrender Al-Bashir to the ICC. After the incident, various legal proceedings took place concerning the government's failure to arrest Al-Bashir. The South African government was found to have acted unlawfully by the domestic courts,[74] and the ICC found that South Africa as a State Party to the Rome Statute had failed to discharge its

[70] Dire Tladi, 'The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law: A perspective from international law', *Journal of International Criminal Justice*, 13:5 (2015), p. 1030.

[71] This is evident in the 'anti-imperial' tone of recent foreign policy discussion documents and pronouncements, particularly following the NATO intervention in Libya, where the ANC has actively welcomed the gradual replacement of a unipolar world order under US leadership with the multi-polar future it sees with the rise of China and other emerging powers.

[72] Michael Masutha, 'South Africa's Withdrawal from the Rome Statute of the International Criminal Court', Statement to National Assembly (23 November 2016), available at: {https://www.parliament.gov.za/storage/app/media/Docs/hansard/cd41a47c-5b5b-4921-8cb4-b5a357477ab4.pdf} accessed 17 September 2018.

[73] Max du Plessis, 'South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity', *Institute for Security Studies Papers*, 172 (2008), p. 1.

[74] *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and others*, Case no.27740/2015, Judgement of the High Court of South Africa (Gauteng Division, Pretoria), 24 June 2015, available at: {http://www.saflii.org/za/cases/ZAGPPHC/2015/402.pdf} accessed 20 May 2019; *The Minister of Justice and Constitutional Development and others v. Southern African Litigation Centre and others*, Case no.867/15, Judgement of the Supreme Court of South Africa, 15 March 2016, available at: {http://www.saflii.org/za/cases/ZASCA/2016/17.pdf} accessed 20 May 2019.

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obligations of arrest and surrender required by the Statute.[75] The ANC government, however, maintained throughout these proceedings that it was under no obligation to arrest Al-Bashir in light of the immunity that attaches to his position as a sitting head of state and it also raised normative arguments about immunity.[76]

During the course of the ICC proceedings, the ANC government took the drastic and unexpected decision to withdraw South Africa from the Rome Statute.[77] Its response to the whole situation, including its decision to withdraw from the Court, was met with consternation. It was widely alleged that it had betrayed its long-standing commitment to a human rights-led foreign policy, and that taking steps to withdraw from the Rome Statute demonstrated that 'the South African government would like to take its place among Africa's old despots and not among its new democrats'.[78]

The existing academic commentary has also tended to suggest that the ANC government faced a binary choice between upholding its commitments to human rights or prioritising the realpolitik of its alliances on the continent. Franziska Boehme,[79] for example, frames the matter as a stark choice for the ANC government, which 'faced a loyalty conflict in which it had to choose between its commitment to the AU and its commitment to the ICC' and that the government's 'non-arrest decision prioritized the country's regional political reputation over its global reputation as a human rights supporter'. Others have noted how the incident allowed South Africa to 'score very critical points in its representation of African interests globally', which has bolstered its regional influence.[80] Indeed, such a view is supported by Kurt Mills and Alan Bloomfield, who contend that the incident reflected how South Africa had 'privileged African solidarity over human rights' and that, in this respect, South Africa had 'traversed almost the full range of the norm dynamics role-spectrum' by going from being an entrepreneur of the 'anti-impunity' norm to being at the 'tipping point' of taking an 'antipreneurial' stance in relation to this norm.[81]

These arguments are helpful for highlighting some of the dilemmas confronted by the ANC government but there are several reasons behind the ANC's decision, which are overlooked in such accounts. First, the ANC government was of the opinion that it was not obligated to arrest Al-Bashir because he had immunity by virtue of his position as a current head of state of a non-State Party and that 'it did not fail to comply with its obligations under the Rome Statute by not arresting and surrendering Omar Al-Bashi'.[82] This was argued extensively by the ANC government before South African national courts, including the Supreme Court, and before the ICC.[83] It was also a position shared by the AU.[84] The legitimacy of such a position cannot

[75]*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, available at: {https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF} accessed 20 May 2020.

[76]While the government had initially suggested that Al-Bashir had immunity by virtue of attending an international summit, it later clarified its position that his immunity derived from his position as a sitting head of state under customary international law.

[77]UN, 'Notification of South Africa of Withdrawal from the Rome Statute of the International Criminal Court', UN Doc. C.N.786.2016.TREATIES-XVIII.10 (Depository Notification) (19 October 2016), available at: {https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf} accessed 30 May 2019.

[78]Ray Hartley, 'Why Lindiwe Zulu's sarcastic hubris is wrong, wrong, wrong', *Timeslive*, available at: {https://www.timeslive.co.za/politics/2015-06-25-why-lindiwe-zulus-sarcastic-hubris-is-wrong-wrong-wrong/} accessed 17 September 2018.

[79]Franziska Boehme, '"We chose Africa": South Africa and the regional politics of cooperation with the International Criminal Court', *International Journal of Transitional Justice*, 11:1 (2017), p. 50.

[80]Christopher Isike and Olusola Ogunnubi, 'The discordant soft power tunes of South Africa's withdrawal from the ICC', *Politikon*, 44:1 (2017), p. 174.

[81]Mills and Bloomfield, 'African resistance to the International Criminal Court', p. 118.

[82]*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, Submission from the Government of the Republic of South Africa from the purposes of proceedings under Article 87(7) of the Rome Statute, 17 March 2017, available at: {https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF} accessed 20 May 2019, §52.

[83]Ibid.

[84]*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09 OA2, African Union's Submission in the Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on Non-Compliance

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be dismissed as simply a 'cover story' for the ANC, particularly in light of the complexity of the legal issues with which the courts had to grapple in considering the issue of immunity and because there were many highly reputed lawyers who supported the ANC's interpretation of the law.[85] The ANC was also critical of the fact that ICC Judges had long failed to articulate a consistent and coherent legal justification as to why Al-Bashir did not benefit from immunity which meant that the ICC position on immunity was lacking in authority,[86] criticism also made by commentators.[87] The ANC government was ultimately of the view – whether rightly or wrongly – that it was not possible for South Africa to remain a State Party when there were seemingly conflicting arrest and immunity obligations.

Second, the political context informing the ANC government's decision over Al-Bashir and the timing of its subsequent threat to withdraw from the Rome Statute was complex. As authors like Bohme referred to above are right to argue, the arrival of Al-Bashir in South Africa did provoke an immediate dilemma for the ANC government. On the one hand, choosing to arrest Al-Bashir risked straining its relationships with some African allies. It would have also aggravated a powerful nationalist-populist faction of the ruling party that was aligned to the then president Jacob Zuma, and also risked bolstering the appeal of sections of South Africa's leftist opposition.[88] On the other hand, opting not to arrest Al-Bashir would generate international criticism, undermining the ANC government's liberal identity, while also, less significantly (for the party), generating domestic opposition from the Democratic Alliance and civil society. The ANC government no doubt factored in these immediate concerns into its decision to let Al-Bashir leave the country. However, the wider geopolitical context cannot be ignored. The ANC had become increasingly critical of Western powers since the fallout from the NATO intervention in Libya in 2011, and its internal discussion documents from its 2012 congress onward reflect a heightened distrust of the 'imperial' powers of the West and a growing faith that South Africa would be able to become more assertive within a reconfigured, multipolar world order characterised by the rise of the BRICS.[89]

Third, these political considerations, while important, were not the only factors driving the ANC's decision-making on this issue. To portray this move as simply an immediate knee-jerk decision to favour African alliances or, alternatively, to frame this as a dramatic normative *volte-face* in which the ANC reversed its position on human rights promotion and combating impunity, ignores the nuance of long-standing norm contestation between the ANC and the ICC over how best to operationalise transitional justice. Instead, we contend that the ANC's bricolage approach to promoting the TJN cannot be so easily captured within framings of binary

by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir', 13 July 2018, available at: {https://www.icc-cpi.int/CourtRecords/CR2018_03735.PDF} accessed 20 May 2019.

[85]See, for example, *Minister of Justice and Constitutional Development v. Southern African Litigation Centre in the Constitutional Court of South Africa*, Case No. CCT 75/16, Written Submissions of the First Amici Curiae: John Dugard and Guénaël Mettraux, 13 October 2016, §31; Asad G. Kiyani, 'Al-Bashir and the ICC: The problem of Head of State immunity', *Chinese Journal of International Law*, 12:3 (2013), pp. 487–500; Paola Gaeta, 'Does President Al-Bashir enjoy immunity from arrest?', *Journal of International Criminal Justice*, 7:2 (2009), p. 323.

[86]UN, 'Notification of South Africa of Withdrawal', p. 3. See also, 'Submission from the Government of the Republic of South Africa', §75–80.

[87]William Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by the International Criminal Court, Pre Trial Chamber Concludes', PhD Studies in Human Rights, available at: {http://humanrightsdoctorate.blogspot.co.uk/2011/12/obama-medvedev-and-hu-jintao-may-be.html} accessed 23 July 2018; Dire Tladi, 'When the elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU/ICC dynamic', *African Journal of Legal Studies*, 7:3 (2014), p. 392.

[88]For a detailed examination of how these factions were shaping up at this time, see Alexander Beresford, *South Africa's Political Crisis: Unfinished Liberation and Fractured Class Struggles* (Basingstoke: Palgrave, 2016), pp. 25–46.

[89]ANC, 'International Relations'; ANC, 'International Relations: Discussion Document', Johannesburg (March 2017), available at: {https://www.politicsweb.co.za/documents/international-relations-anc-discussion-document-20} accessed 21 January 2019.

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oppositions and zero-sum trade-offs between normative commitments and realpolitik, human rights and autocrats, African solidarity and liberal cosmopolitanism, or impunity and anti-impunity. Instead, this contestation is characterised by the ANC's aversion to what it perceives to be the ICC's narrow and self-defeating operationalisation of the TJN in some situations, which it claims both hinders the political settlement of ongoing conflicts and inhibits South Africa playing a role in conflict resolution.

This contestation – and the subsequent breakdown of relations between South Africa and the ICC – must therefore be traced back to the initial arrest warrants against Al-Bashir in 2009. Our aim is not to take sides in this dispute, in terms of whether South Africa was 'right' to take the positions it has *vis-à-vis* Al-Bashir and the ICC. We are instead concerned here with highlighting how the bricolage approach to norm development favoured by the ANC came into conflict with the prerogatives of the ICC and therefore what the concept of bricolage might highlight for us, more broadly, in terms of how we understand the complex politics of norm contestation.

The contestation over the meaning-in-use of the TJN in Sudan

The ANC has regularly articulated the belief that South Africa's history places the ANC government in a unique position to act as a conflict mediator in Sudan because, as the then Deputy Foreign Minister Sue Van Der Merwe argued, 'The current conflict in Sudan has its roots in the very forces that kept South Africa as the last outpost of colonialism on the continent, namely, racism and the artificial separation of the African people within and across borders.'[90] South Africa has therefore assumed a leading role in conflict mediation and peacebuilding in Sudan (and subsequently South Sudan – where its leaders have recently mediated between factions to agree a Transitional Government of National Unity);[91] a role that it frames as central to wider efforts of promoting peace and stability across the continent, and that in this respect Sudan 'has the potential to occupy the front ranks in the African Renaissance'.[92]

The ANC's leadership, including former president Thabo Mbeki and current president Cyril Ramaphosa, have been at the forefront of this diplomacy, and South African officials have led a variety of diplomatic initiatives and high-level panels on behalf of the African Union,[93] including leading the talks that would eventually culminate with the signing of the Comprehensive Peace Agreement (CPA) in 2005. In addition to committing troops for peacekeeping, South Africa has also played an active role in efforts to build the capacity of the main parties involved in the conflict – evoking the 'lessons' that could be learned from the ANC with regards to developing party 'cadres' with the political intelligence and capacity to lead efforts to reconcile Sudanese society and to govern effectively in the national interest. As noted by the then foreign minister, this has been further promoted through South African-led training of Sudanese (and South Sudanese) civil servants, police, and ministers in all areas of government.[94]

The ANC government has engaged in 'quiet diplomacy' with the Al-Bashir government, opting to engage 'constructively' with the regime rather than joining Western powers in denouncing human rights violations, which they argue would risk alienating the government and blocking negotiations. This has included attempts to dilute interventions against the regime, including

[90]Susan Van De Merwe, 'Farewell Message', Pretoria (14 April 2005), available at: {http://www.dirco.gov.za/docs/speeches/2005/merw0414.htm} accessed 17 September 2018.

[91]Acting as AU Chairperson, Cyril Ramaphosa is said to have led the talks with both sides. {http://www.dirco.gov.za/docs/2020/au0220.htm} accessed 10 April 2020

[92]Jef Radebe, 'United Nations Security Council Debate on the Situation in the Sudan', New York (14 July 2011), available at: {http://www.dirco.gov.za/docs/speeches/2011/rade0714.html} accessed 17 September 2018.

[93]This includes the AU's Ministerial Committee on Post-Conflict Reconstruction in Sudan and the AU High Level Implementation Panel led by Thabo Mbeki.

[94]Nkoana Mashabane, 'The Conclusion of the Courtesy Call on President of Government of Southern Sudan, Salva Kirr Mayardit', Juba (17 September 2009), available at: {http://www.dirco.gov.za/docs/speeches/2009/mash0917.html} accessed 17 September 2018.

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sanctions,[95] and also public backing from South African presidents for Al-Bashir for what they controversially called his 'exceptional leadership' in relation to perceived progress made on the CPA and South Sudanese independence.[96] The deeply-rooted conflict entrenched in seemingly insurmountable identity politics cannot, the ANC's leadership have argued, be addressed by some form of 'quick fix' solution of attempting to force regime change through a 'judicial coup' arranged by the ICC.[97] South African mediators have instead argued that the threat of prosecuting of incumbent heads of state in such scenarios can be counterproductive because it ignores the need for elite accommodation for what they call 'long-lasting' peace. A commonly aired sentiment by ANC leaders is that the threat of punitive sentencing in Sudan would mean that 'belligerents have no incentive to settle disputes for fear that they will locked up the day after the resolution of the conflict' and that 'it was appreciation of this reality that informed the ANC to make necessary accommodations to the apartheid leaders' in the early 1990s.[98] Instead, the ANC's leading protagonists in the mediation of the conflict have consistently asserted that no side within the conflict – nor the African mediators – saw the prosecution of Al-Bashir as desirable in the short term. For example, Thabo Mbeki, who played a central role in the mediation, argues that:

> The challenge that arises is when someone says 'the issues of justice trumps the issue of peace'. If you talk to the South Sudanese, [for example], if you talk to the South Sudanese President Salva Kiir, and ask him 'Should President Bashir be transported to the Hague?' He will say 'No, because I need him for the peace that we are trying to make here.' But you know there will be someone saying from outside that 'no, justice is more important than the peace that you are after.' Now, you can imagine what would have happened in our case in South Africa if the International Criminal Court was there in 1994 and someone said 'arrest De Klerk and take him to the Hague.' We would have refused. We would have said no because what we need to do is end apartheid and we need President De Klerk here to lead this white population into the democratic settlement. We would never have agreed that justice must trump this, even though we were saying that apartheid is a crime against humanity.[99]

From the outset, therefore, South Africa argued for the AU to call for a deferral of the arrest warrant against Al-Bashir on 4 March 2009. South African policymakers argued that while they and the AU would support some form of ICC prosecutions for those responsible for the violence, they were concerned that if this was done too soon that it 'could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole'.[100] This substantive concern

[95]Nathan, 'Interests, ideas and ideology'.

[96]Indeed, Mbeki was awarded with Sudan's Highest Order, the Insignia of Honour, by Al-Bashir during a 2004 visit. See also DIRCO, 'South African Government's Response to the Recent Military Confrontation between the Republic of Sudan and South Sudan', Pretoria (30 March 2012), available at: {http://www.dirco.gov.za/docs/2012/suda0402.html} accessed 17 September 2018.

[97]ANC, 'National Executive Committee Statement', Johannesburg (29 September 2013). available at: {http://www.anc.org.za/content/nec-statement} accessed 17 September 2018.

[98]See, for example, Lidiwe Zulu, 'The Implications of the Attendance and Departure of President Omar Al-Bashir from the African Union Summit in South Africa', Speech to National Assembly, Cape Town (23 July 2015), available at: {http://www.politicsweb.co.za/politics/albashir-history-will-absolve-us--lindiwe-zulu} accessed 17 September 2018.

[99]Thabo Mbeki, 'Justice Cannot Trump Peace', interview with Al Jazeera (23 November 2013), available at: {https://www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-2013112210658783286.html?xif=} accessed 17 September 2018.

[100]DIRCO, 'Joint Communiqué issued at the Conclusion of the Working Visit of H.E. President Thabo Mbeki of the Republic of South Africa to the Republic of the Sudan' (16 September 2008), available at: {http://www.dirco.gov.za/docs/2008/suda0916.html} accessed 17 September 2018.

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about peacebuilding also contributed to South Africa's reluctance to arrest Al-Bashir, and the ANC government has held on to the line that heads of state must continue to be able to engage in international diplomacy, and that as such: 'We wish to give effect to the rule of customary international law which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur …'.[101]

However, it is also important to note that a more substantive dispute emerged over the scope for political deliberation within the ICC, specifically around Article 97 consultations regarding the arrest of Al-Bashir. This provision of the Rome Statute provides for consultations to take place between a State Party and the Court where the former identifies issues that may impede its ability to discharge obligations it owes to the latter under the Rome Statute, such as in respect of the arrest and surrender of suspects. ANC government officials attempted to use these consultations to raise concerns but were incensed when the Court merely repeated its expressed position that 'there is no ambiguity in the law and that the Republic of South Africa is under an obligation to arrest and surrender to the Court Omar Al-Bashir' and that 'there exists no impediment at the horizontal level' regarding his arrest and surrender'.[102] Expressing disappointment with the process, South Africa argued that it interpreted it to be a 'diplomatic and political process' that would take into account the kinds of 'hard diplomatic realities' facing countries like South Africa.[103] In its submission to the Court it stated that 'South Africa objects in the strongest possible terms to the manner in which its request for consultation in terms of Article 97 of the Statute was dealt with by the Court.'[104] The ANC government complained that what they thought would be a space for opening up a political conversation quickly 'morphed into a judicial process'[105] and stated that '[i]n not affording South Africa an opportunity to be represented in a proper forum and to be properly heard, South Africa's fundamental right to justice was violated.'[106]

Whether or not South Africa's expectations were naïve in this respect, this bore political consequences. The ANC government conveyed its exasperation in its subsequent rationale for leaving the Court, citing the latter's 'arrogant' disregard for African prescriptions for transitional justice, arguing in its notification of withdrawal from the Rome Statute that it 'is of the view that to continue to be a State Party to the Rome Statute will compromise its efforts to promote peace and security on the African Continent'.[107] The ANC situated this critique within a broader concern about how the lack of responsiveness to African concerns contrasted sharply to the way in which it believed the Court allowed itself to be leveraged to serve the interests of major powers like the US.[108]

In short, the ANC government's flexible bricolage approach to fulfilling the core hypothesis of the transitional justice norm privileges approaches that assemble combinations of transitional justice and peacebuilding mechanisms it deems appropriate to the given situation. This does not foreclose the possibility of including the ICC and its prerogative of promoting criminal prosecutions. However, where the ICC's pursuit of elite prosecutions is perceived by the ANC to

[101]Ibid.

[102]*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, Decision following the Prosecutor's request for an order further clarifying that the Republic of South African is under an obligation to immediately arrest and surrender Omar Al-Bashir, 13 June 2015, available at: {https://www.icc-cpi.int/CourtRecords/CR2015_06500.PDF} accessed 20 May 2019, pp. 4–5.

[103]DIRCO, 'South Africa's Submission to the International Criminal Court (ICC) Regarding the Matter of President Al-Bashir of Sudan', press release. Pretoria (5 October 2015), available at: {http://www.dirco.gov.za/docs/2015/suda1005.htm} accessed 17 September 2018).

[104]'Submission from the Government of the Republic of South Africa', p. 11.

[105]DIRCO, 'South Africa's Submission to the International Criminal Court'.

[106]'Submission from the Government of the Republic of South Africa', p. 16.

[107]UN, 'Notification of South Africa of Withdrawal', p. 3.

[108]ANC, 'Concourt Decision Halts DA Agenda to Defend Imperialism', Johannesburg (15 November 2016), available at: {https://www.politicsweb.co.za/opinion/concourt-decision-halts-da-agenda-to-defend-imperi} accessed 10 April 2020.

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override African peacebuilding initiatives this generates tensions, and when in the case of the Al-Bashir controversy it felt the ICC was closing down any space for political deliberation, this prompted the more dramatic threat to withdraw South Africa from the Rome Statute.

Conclusion

The first contribution this article has made is to highlight the importance of giving due care and attention to the actors, collectives, and institutions that play critical roles in filling, shaping, and contesting the content of international norms. This requires both an understanding of the norm entrepreneurs themselves – including their own idiosyncratic journeys towards arriving at normative standpoints – and a focus on the 'multiple forms and sources of agency, and different forms of power, resources, and capacities different actors and actants possess' to shape norms'.[109] In particular, we identify how actors may engage in norm development by employing a potentially creative and offensive strategy of bricolage. This includes a flexible consideration of the problems each actor must confront, and the identification of values and behaviours that can be used to address them, drawing on a resource bank of existing practices, behavioural rules, and knowledges available within a given historical context to the agents involved.

Second, as a product of this focus, we have developed a new approach to help us understand how complex norms like transitional justice have been continuously contested. What potentially gives these norms longevity is a broad core hypothesis that a range of actors can commit to without compromising their own epistemological commitments. As such, while the nucleus of a norm – its core hypothesis – might retain a degree of stability and recognisability, it can be surrounded by a range of alternative (and potentially competing) meanings-in-use. The bricolages of values and behaviours that make up some of these competing meanings-in-use might well only represent transient artefacts, fit for the purpose of addressing a particular problem or cluster of problems. Nonetheless, they form the basis for future experiments and modifications. They might reproduce and potentially amplify the contestation of the norm, but they also potentially introduce a pluralism and dynamic malleability to the norm's meanings-in-use that can sustain the continued engagement of a range of actors claiming to share a commitment to its core hypothesis.

Third, this understanding of norm development, we contend, allows us to understand the nuances of the contestation of transitional justice. While the structure of complex norms might create something of an unsatisfactory muddle to international agents like the ICC, we concur with the call for a 'pragmatic constructivist' approach by Ralph,[110] as well as the argument of Wesley Widmaier and Luke Glanville, that such ambiguity potentially broadens a toolkit of future intervention and 'may enhance flexibility in implementation, providing room to adjust to interpretive shifts and unexpected events and preventing adherence to formal rules from undermining the deeper values that underpin the norm'.[111] Attempts by the Court to insist that its retributive meaning-in-use of the TJN is synonymous and indissoluble from the norm's core hypothesis has done little to advance the Court's agenda and has generated a particularly vociferous backlash from some African actors.[112] Therefore, while South Africa's precise prescriptions for transitional justice and peacebuilding also bear significant flaws, what their method of bricolage in norm-filling might offer is a common ground upon which a range of actors can begin to debate the range of appropriate resources available to them, including what unique combinations of 'old' and 'new' materials can be used within a given context in the pursuit of transitional justice.

Recently, there has been greater recognition of a need to take alternative voices into account, particularly following South Africa's threat to withdraw from the Rome Statute. For example, at

[109]Abrahamsen, 'Africa and international relations', p. 134.

[110]Ralph, 'What should be done?'.

[111]Wesley W. Widmaier and Luke Glanville, 'The benefits of norm ambiguity: Constructing the responsibility to protect across Rwanda, Iraq and Libya', *Contemporary Politics*, 21:4 (2015), p. 369.

[112]For a detailed account, see Clark, *Distant Justice*.

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the annual Assembly of States Parties meeting in 2016, the representative of New Zealand explained that '[t]his session is chance for us to engage in an open, honest and respectful dialogue about how to ensure that the Court works effectively', and, moreover, the withdrawal of African States Parties 'underlines the critical importance of being much better at listening to, and engaging with, African states on issues of concern to them'.[113] Similar opinions were expressed by the United Kingdom, Australia, Norway, Canada, and Spain, among others.[114] More recently, the Appeals Chamber of the ICC has invited *amici curie* submissions from states, international organisations, and academics on the question of the implementation of Article 27 of the Rome Statute and its relationship with Article 98, in the context of Jordan's failure to arrest Al-Bashir, which represents the ICC's desire to engage.[115] As Charles Jalloh has noted, this is '[a] great strategic move on the part of the ICC appeals chamber. In effect, it is saying to the AU, we want to listen to you. Your immunity concerns matter to us.'[116] Additionally, Judge Song, the former President of the ICC, recently noted that the retributive justice on which the ICC is based will need to be expanded to include restorative and reparative justice.[117]

Meanwhile, there are signs of a willingness to reopen constructive dialogue between South Africa and the ICC. 2019 saw the election of Cyril Ramaphosa to the South African presidency, and he is widely believed to place greater value on the ICC than his predecessor, Jacob Zuma. Ramaphosa has ordered a review of South African foreign policy and opened new diplomatic channels to the Hague. At the 18th Assembly of States Parties meeting in the Hague in 2019, the South African representative expressed his country's support for the work of the Court and the prosecution of international crimes but reference was also made to how its continued membership risked 'undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere' and it was said 'we are still debating on the issue of withdrawal'.[118] At the same time, 2019 also witnessed a military coup in Sudan and its military leaders have expressed their desire to see former president Omar Al-Bashir tried by the ICC. While no panacea, his removal from office could remove a major point of contention between African states and the ICC, not least because opposition to his trial based on arguments about the political costs of trying a head of state are now redundant. These political developments, both within the ICC and in Africa, might offer an opportunity to arrest the ICC's crisis on the continent, while increased dialogue between key agents could breathe pluralism and vitality into broader debates about the future of transitional justice.

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[113]Statement of New Zealand delivered by Mr C. Reaich at the 15th Session of the Assembly State Parties to the Rome Statute of the International Criminal Court (17 November 2016), available at: {https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-NewZealand-ENG.pdf} accessed 13 September 2018.

[114]The statements are available at: {https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_15th_session.aspx} accessed 13 September 2018.

[115]*The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), 29 March 2018, available at: {https://www.icc-cpi.int/CourtRecords/CR2018_01892.PDF} accessed 30 May 2019.

[116]Charles Jalloh, Twitter (31 March 2018), available at: {https://twitter.com/CharlesJalloh/status/979870179495698434} accessed 13 September 2018.

[117]Diana Goff, Twitter (21 May 2018), available at: {https://twitter.com/dianajanaegoff/status/998570425142702080} accessed 22 May 2018.

[118]Statement of the Republic of South Africa by Mr J. Jeffery at the 18th Session of the Assembly State Parties to the Rome Statute of the International Criminal Court (2 December 2019), available at: {https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.SOU.2.12.pdf} accessed 15 January 2020.

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