## Argumentation through law: an analysis of decisions of the African Union

Werner, WG

***published in***
Talking International Law
2021

***DOI (link to publisher)***
10.1093/oso/9780197588437.003.0010

***document version***
Publisher's PDF, also known as Version of record



***citation for published version (APA)***
Werner, WG. (2021). Argumentation through law: an analysis of decisions of the African Union. In I. Johnstone, & S. Ratner (Eds.), *Talking International Law* (pp. 203-218). Oxford University Press. https://doi.org/10.1093/oso/9780197588437.003.0010

# 10

# Argumentation through Law

## An Analysis of Decisions of the African Union

*Wouter Werner*



## I. Introduction

"It never gets boring," Teresa Reinold wrote some two years ago, referring to the (then) latest decision of the African Union (AU) on the International Criminal Court (ICC).[1] For over a decade, relations between the two organizations have been tense. The ICC has issued a series of judgments, mostly against African states that refused to arrest and hand over the then incumbent president of Sudan, Omar al-Bashir.[2] The AU, for its part, repeatedly accused the ICC of having an "African bias," of lack of respect for sovereign immunity, and for its detrimental influence on peace processes in countries such as Sudan or Kenya. Underlying these concerns is frustration that the ICC shows a lack of respect and willingness to seriously engage with the AU's critiques. On several occasions, these complaints were voiced through the adoption of formal legal documents. In a series of "Decisions," the AU has set out why it feels let down by the ICC (and the UN Security Council) and has expressed the need to respect the unity and dignity of the African continent.

Decisions by the AU are part of a larger practice of legal argumentation. In and outside the courtroom, African and other states, ICC officials, academics, and non-governmental organizations (NGOs) have exchanged legal arguments about topics such as the Court's jurisdiction, the immunities of heads of state, the formation of customary law, and the scope and impact of Security Council resolutions. There is no question that these are important legal issues, for the ICC, the AU, and international law generally. However, underlying these more technical questions of law lie highly

[1] Teresa Reinold, "African Union v International Criminal Court: Episode MLXIII (?)," *EJILTalk!*, Mar. 23, 2018, https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/.

[2] Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on The Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrests and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr, Dec.13, 2011; Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests; Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-ENG, Dec. 13, 2011; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, Apr. 9, 2014; Decision under Article 87(7) of the Rome Statute on the noncompliance by South Africa with the request by the Court for the arrest and *surrender of Omar Al-Bashir*, ICC-02/05-01/09-302, July 6, 2017; Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, May 6, 2019.

Wouter Werner, *Argumentation through Law* In: *Talking International Law*. Edited by: Ian Johnstone and Steven Ratner, Oxford University Press. © Wouter Werner 2021. DOI: 10.1093/oso/9780197588437.003.0010

political questions regarding recognition, equality, and respect. The AU does not just disagree with the ICC on the interpretation of law. As it has stated repeatedly, it feels it is not being taken seriously, not being heard, and not being recognized as an equal partner in the fight against impunity.[3]

What interests me is that these "feelings" are not only expressed in informal ways, for example, through press statements, but are also expressed in legal form, in formal Decisions taken by the supreme organ of the AU, the Assembly of Heads of State and Government. The Decisions do not contain elaborate arguments about the proper interpretation or application of law. In that sense, they are different from legal argumentation as understood traditionally. However, as I will argue in more detail, it does make sense to include them in a study on legal argumentation. First, they express what underlies the more doctrinal debates on the application of the ICC Statute, rules of customary law, or the powers of the Security Council. By choosing to use a formal legal instrument to communicate about issues, the AU gives the more technical debates their political bite. Second, the fact that the AU opted for "Decisions" has implications for the commitment of member states. AU Decisions, after all, constitute one of the sources of AU law, which member states are bound to respect. In that sense, it makes a big difference whether the Union expresses its concerns via formal Decisions or through informal statements. In this context, it is important to note that one of the recurring elements in AU Decisions has been the need to stick to a common position in relation to the ICC. This makes it possible to endow the concerns with the authority that comes with a common position expressed in legal form. There are good reasons for the AU to use legal decisions to appeal to emotions outside the courtroom. Through such appeals, the Union seeks to (re)claim membership, respect, and dignity while also fostering unity among African states.

Before I analyze the decisions of the AU in more detail, I will set out my theoretical framework, based on the institutional theory of law, legal expressivism, and Emile Durkheim's reflections on the role of criminal law in the formation of communities. I use this framework because it helps to illuminate one of the characteristic features of the Decisions of the AU: the expression of feelings of frustration, concern, and disappointment, together with a commitment to fight impunity. Taken together, these theoretical lenses support the claim that, although emotions play a role in various legal fields, they are of particular importance in the field of international criminal law. The first section lays the basis for the second, where I will focus in more detail on the content of the Decisions by the AU. I will conclude the chapter by returning to some of the questions posed by the editors of this volume.

[3] For some it may seem odd to ascribe feelings to an international organization, as if I am anthropomorphizing it. Of course, I am aware of the difference between humans and abstract entities such as organizations. Still, I think it makes sense to speak of "feelings" when it comes to international organizations such as the African Union. In the first place, the "feelings" that are central to this chapter are the formally expressed feelings, as set out in Decisions adopted by the African Union. Just like an organization "takes decisions" or "recommends," it is capable of formally expressing feelings and emotions. The question is not whether the organization "really" has these feelings, just like the question is not whether the organization "really" has taken a decision. Within the system of law, the feelings exist as institutional fact if they are created in accordance with the relevant power conferring rules. I will return to this point in Section II, where I discuss the institutional theory of law.

## II. Beyond Norms: Emotions and Communities in International Criminal Law

### A. Institutional Theory

My analysis of AU Decisions is inspired by three streams of literature. The first is the institutional theory of law, as developed from the late 1980s onward. The theory was introduced by Neil MacCormick and Ota Weinberger, who joined forces when they discovered they had been working on similar topics, although coming from two rather different intellectual traditions.[4] Both authors emphasized the need to analyze law in terms of "institutions" instead of rules of conduct and competence only. An institution, as MacCormick set out, combines three types of rules: (1) institutive rules, spelling out under what conditions a new institutional legal fact is created (e.g., the conditions that create the institutions of marriage, ownership, or an armed conflict under humanitarian law); (2) consequential rules, spelling out which other rules become applicable when a new institutional fact is created; and (3) terminative rules, spelling out under which conditions an institutional fact ceases to exist.[5] The idea that law consists of institutions and institutional facts was further developed by Dick Ruiter, who used it to distinguish two concepts: validity and binding force.[6] Often, the question whether something is "valid law" is confused with the narrower question whether there is a legally binding norm, rule, or principle. Of course, law does consist of norms, rules, and principles. However, there is no reason to assume a priori that law is *only* about that. As Ingo Venzke has argued in chapter 2 of this volume, one of the core functions of law is to enable certain forms of conduct. Rules of law make it possible to behave in ways "that would otherwise not be similarly available." I would add to this that power-conferring rules in law make it possible to express oneself in ways that would not be otherwise available. Just a cursory look at treaties, judgments, or resolutions illustrates this point.

Take, for example, the Security Council resolution on Yemen that was adopted on February 25, 2020 (SC Res. 2511). The resolution is created in accordance with the rules of competence set out in the UN Charter, a valid treaty under international law. However, only a small portion of the resolution consists of "binding decisions" or binding norms. Most of the text communicates the stance of the Security Council toward the situation in Yemen: the Council "reaffirms its commitment," expresses "alarm" about the presence of Al-Qaeda and Daesh, "emphasizes" the importance of humanitarian assistance, "affirms" that sexual violence can be an international crime—and so forth. This is done not only in the preamble to the resolution, as may be expected, but also in the operative part, following the explicit mention that it is "acting under Chapter VII of the Charter of the United Nations." Following the institutional theory developed by Ruiter, all these expressions possess validity under international law, even though they do not create binding obligations. Their validity is

[4] See especially Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: Reidel Publishing, 1986).

[5] *Id.*

[6] Dick Ruiter, *Institutional Legal Fact: Legal Powers and Their Effects* (Dordrecht: Springer, 1993).

derived, in a classical Kelsenian or Hartian way, from the power-conferring rules of the legal system. They are, in other words, legally valid expressions of concern, legally valid confirmations of existing obligations, legally valid hortatory acts pressuring or nudging states, and so forth. They exist as institutional legal facts, endowed with the authority of the legal system.

## B. Expressivism in International Criminal Law

The separation of bindingness and validity dovetails with a second theoretical strand I rely on, namely, theories of expressivism developed in the field of international criminal law. These theories focus on the different messages that are communicated through the language and procedures of international criminal law. These messages are connected to a wide variety of functions assumed by international courts and tribunals. A cursory look at some of the websites reveals an image that international courts and tribunals present to the world: they do not just issue arrest warrants and try individuals; they also engage in peace-building, recording history, changing the course of international law, truth-telling, and conciliation.[7] Although such lofty ambitions have been criticized,[8] they do appear time and again, especially in high-profile cases involving international criminal law.[9]

The expressive potential of international criminal law has not gone unnoticed by practitioners. An example inside the courtroom can be found in David Crane's opening statement in the case against Samuel Hinga Norman Moinina Fofana Allieu Kondewa, leader of the Kamajors militia that supported the Sierre Leone government in its fight against the Revolutionary United Front in the late 1990s. Crane begins by claiming to speak on behalf of "mankind," which has to reconstitute itself in the face of the atrocities committed in Sierra Leone: "On this solemn occasion, mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice." This can only be done if humanity can overcome impunity and strike back passionately against the transgressors. In Crane's words, mankind needs to put an "end to the life of that beast of impunity, which howls in frustration and shrinks from the bright and shining spectre of the law." In this way, humanity rediscovers itself through the boundaries set by the law. Deviance is translated into "crimes, the most grievous of acts that a person can be

[7] I checked the websites of the ICC, the International Criminal Tribunal for the Former Yugoslavia, and the Special Court for Sierra Leone: https://www.icc-cpi.int/about; https://www.icty.org/en/about; https://www.icc-cpi.int/about.

[8] See, e.g., Arendt's insistence that trials should only be about the guilt of the defendant: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin Classics, 2006).

[9] See, e.g., the discussion on the use of film and images in the Nuremberg trials in relation to the portrayal of the defendants in the press. For this argument, see Ulricke Weckel, "Watching the Accused Watch the Nazi Crimes: Observers' Reports on the Atrocity Film Screenings in the Belsen, Nuremberg and Eichmann Trials," *London Review of International Law* 6 (Mar. 2018): 45. For a more general analysis of the screening of "Nazi concentration camps," see Lawrence Douglas, "Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal," *Yale Law Journal* 105 (1995): 449; for a more general analysis of the "show part" of international criminal trials, see Martti Koskenniemi, "Between Impunity and Show Trials" *Max Planck Yearbook of United Nations Law* 6 (2002): 1.

charged with by mankind."[10] The example shows the close link between the (felt) need to express the basic values of international criminal law and the appeal to emotions. When it comes to questions how "we," humanity, or mankind, should respond to "them," transgressors of the basic values that hold the world together, it is practically impossible not to invoke emotions, not to include pathos. This brings me to the third theoretical influence on my analysis, the work of Durkheim.

## C. International Criminal Law and the Constitution of Communities

Crane's opening statement may be exceptional in its style and tone, but it does reflect a more general aspect of international criminal law. The statement repeatedly refers to concepts such as "mankind" or "humanity." In other words: it is the global community in whose name crimes are prosecuted and whose interests are at stake in fighting impunity. The invocation of a global community also appears regularly outside the courtroom. Take, for example, the 2018 speech delivered by the president of the ICC, Judge Chile Eboe-Osuji, to the General Assembly of the United Nations. The president recites the preamble of the Rome Statute, which speaks of "common bonds that unite all peoples," as well as the never-ending threat of "unimaginable atrocities that deeply shock the conscience of humanity." In order to fight these atrocities, the president states, it is necessary to promote a "rules-based order," where international crimes are "prosecuted and punished—'properly.' "[11]

The reference to the "crimes that shock the conscience of humanity" echoes Durkheim's emphasis on the "collective conscience" in domestic criminal law.[12] According to Durkheim, criminal law and punishment fulfill essential functions in the (re)constitution of a collectivity. Criminal law responses carve out the moral boundaries of a community, while enhancing social cohesion within the group through regulated yet "passionate" reactions to deviant behavior. Through its responses to criminal behavior, a collectivity (re)discovers its outer limits and identity; the moral boundaries that cannot be transgressed. Those who challenge these boundaries must be marked as transgressors in order to preserve the bonds that keep a group together. The identity of a group is secured through an emotional and forceful reaction against beliefs and acts "we do not, and cannot, permit to raise (their) head with impunity."[13] What is at stake in criminal law are not just the injuries suffered by the direct victim but also the integrity of the "collective conscience" that needs to be defended against its enemies.

[10] The Opening Statement of David M. Crane, The Prosecutor Special Court for Sierra Leone, June 3, 2004, In the International Criminal Trial for Crimes against Humanity, War Crimes and Other Serious Violations of International Humanitarian Law Against Samuel Hinga Norman Moinina Fofana Allieu Kondewa (Case No. SCSL-03-14-I), http://www.rscsl.org/Documents/Press/OTP/prosecutor-openingstatement060304.pdf.

[11] Speech of the ICC President to United Nations General Assembly, Oct. 29, 2018, https://www.icc-cpi.int/Pages/item.aspx?name=181029-pres-stat-un.

[12] Emile Durkheim, *The Division of Labor in Society* (New York: The Free Press, 1960, fourth print, translation by George Simpson). Originally published in 1893 as "La Division du Travail Social."

[13] *Id.* 97–98.

Durkheim's take on criminal law explains the often-repeated vocation of international criminal law to "end impunity" for crimes that shock the conscience of humanity.[14] This is not just a matter of redress for those who directly suffer from atrocities; it is also a matter of (re)constituting and (re)storing the common bonds that hold the global community of peoples together.[15] Those who transgress the boundaries of the global community commit crimes "against humanity" and deserve to be stigmatized and punished as such.[16] Because it fulfills a core function in the attempt to constitute a global community, international criminal law is a field where law and emotion often work in tandem.

The expressive power of international criminal law also means that a great deal is at stake for those who *contest* the way in which the boundaries of the common conscience are drawn. One may challenge, for example, the crimes that are used to delineate the contours of the moral core of humanity. As Kamari Clarke has shown, it was by no means obvious that only the three (now four) crimes covered by the Rome Statute would be those that shock the conscience of humanity. If other crimes were included, other acts would (also) have been singled out as requiring a passionate legal response.[17] The current debate on the "African bias" of the ICC, she contends, should be viewed through this lens: "It has to do with which crimes can be pursued, which agents can be held responsible, whether Africa's violence can be managed by African countries, and whether the crimes of the Rome Statute are sufficient to address the root causes of violence in Africa's political landscape."[18]

Much is also at stake for those against whom the ICC has issued arrest warrants. Contesting an arrest warrant by the ICC is often more than just trying to escape prosecution. It is also an attempt to fight the stigma of having acted beyond the scope of humanity, of transgressing the moral bonds that, to paraphrase the ICC Statute, hold a delicate international society together. Those fighting the stigma almost unavoidably seek to turn the tables. For those challenging the arrest warrants, it is the Court that endangers the delicate balance that holds societies together peacefully. The imposing of legal stigmata itself is presented as the core of the problem.

In the next section, I will analyze a set of responses to some of the ICC's most controversial arrest warrants, those against the then-incumbent president of Sudan as

[14] For an application of Durkheim's sociology to international criminal law, see Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (London: Routledge, 2017); Frédéric Mégret, "Practices of Stigmatization," *Law and Contemporary* Problems 3/4 (2003): 287; Immi Tallgren, "The Durkheimian Spell of International Criminal Law?," *Revue interdisciplinaire d'études juridiques* 71 (2013): 137.

[15] This is also visible in, for example, Hannah Arendt's epilogue to *Eichmann in Jerusalem*, where she sets out why Eichmann deserves to be put to death. Arendt's justification goes beyond the fate of his direct victims, referring in addition to the very idea of a global community of people as well as every "member of the human race": "Just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to share the world with you. This is the reason, and the only reason, you must hang." Arendt, *supra* note 8, at 279.

[16] In this context, it is interesting to recall the jurisprudence of the European Court of Human Rights, where torture is set apart from other forms of "degrading or inhumane treatment" because of the specific stigma attached to torture.

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

[18] ICC Forum, Invited Experts on Africa Question, https://iccforum.com/africa.

well as those against the persons believed to be responsible for the post-election violence in Kenya in 2007–2008. These arrest warrants exacerbated a lingering frustration about the way in which the ICC targeted African states, how they interfered with peace processes, and pressured states to act in contravention of rules on state immunity. One of the ways in which the AU responded to the ICC was through the adoption of formal legal instruments, Decisions. In this way, the AU used the power-conferring rules of its Constitutive Act to express a position that is valid for all its members. Speaking with a single pan-African voice, the Decisions allowed the Union to forcefully express its stance toward the ICC (and the UN Security Council) and to present it in a formal legal act. Like many other instruments in international law (think of the example of the Security Council discussed above), the Decisions of the AU include emotive appeals regarding basic values, identity, and respect.

## III. AU Decisions and Legal Expressivism

### A. Preliminary Remarks

To illustrate how emotions are communicated through law, but outside the courtroom, I have selected a series of Decisions by the AU on the ICC. I realize that the AU is not the only voice coming from Africa. States have disagreed on the desirability of withdrawing from the ICC,[19] different branches of government in African states may hold different opinions, and several African human rights NGOs have indicated their continued support for the Court. As I will set out in more detail below, the existence of various voices has been precisely one of the reasons for the AU to emphasize the need to "speak with one voice" and to guard the unity of the continent. And indeed, Decisions by the AU represent the formal voice of the Assembly, comprised of all member states of the Union, and thus come with legal authority.

My starting point is 2009, the year of the arrest warrant against al-Bashir. The arrest warrant grew out of Security Council Resolution 1593 (2005), which referred the situation of Sudan to the ICC. The Security Council, acting under Chapter VII of the UN Charter, had determined that the situation in Darfur constituted a threat to international peace and security and referred it to the ICC for investigation. The ICC investigation eventually led to several cases against Sudanese government officials, Janjaweed leaders, and leaders of the Resistance Front. By far the most controversial case concerned the then-incumbent president of Sudan, Omar al-Bashir.[20] He was the first sitting president indicted by the ICC and the first person charged by the ICC with the crime of genocide.

Legally speaking, the arrest warrant was controversial. Although Sudan was not a party to the ICC Statute, the statute allows for the referral of non-parties to the Court by the Security Council. Nevertheless, as head of state, al-Bashir would

[19] Assembly of the African Union, Decision on the International Criminal Court, 28th Ordinary Session, Doc.EX.CL/1006 (XXX) (Jan. 30–31, 2017). Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye, Opposition to Withdrawal by States," *Human Rights Watch*, Feb. 1, 2017, https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye.

[20] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Mar. 4, 2009.

normally be entitled to immunity from arrest should he travel to other states. The question was (and remains) whether this immunity was set aside by the combined effect of the Security Council referral and the arrest warrant of the ICC.[21] Politically, the arrest warrant spurred debates on the effects of ICC interventions on peace processes, the African bias of the ICC, and the reluctance of the Security Council to seriously engage with arguments brought up by African states.[22]

Like all beginnings, my starting point is somewhat arbitrary. The current dispute between the AU and the ICC has multiple roots, including the negotiations in Rome, colonialism, decolonization, lobbying by targeted heads of state, the Sudan referral by the Security Council, and the refusal by that same Council to take the concerns expressed by the AU seriously. Depending on where one starts, the story looks and evolves differently. At the same time, the choice for 2009 is not random. The arrest warrant against al-Bashir was a turning point in the relationship between the ICC and the AU and has given rise to a series of cases before the ICC.[23]

AU Decisions, by their very nature, are a form of legal communication. They are adopted by the Assembly, the "supreme organ of the Union" (Article 6), in accordance with the formal decision-making procedures set out in the Constitutive Act of the Union ("by consensus or, failing which, by a two-third majority of the Member States"; Article 7). However, that does not necessarily mean that all sections of AU Decisions contain legally binding elements. Just like Security Council resolutions, Decisions of the AU are filled with other elements, including the expression of emotions and claims about identity and membership. Such elements can only be taken seriously in legal analysis if the question of legal validity is separated from the question of binding force. The elements in the Decisions are legally valid, as they have been issued in accordance with the proper power-conferring rules under a valid treaty in international law. Yet their content is quite diverse and goes beyond normative prescriptions.

Especially in resolutions pertaining to the ICC, AU Decisions have been utilized to express the stance of the Union and to condemn the behavior of other institutions and states. They do revolve around what happens in the courtroom, including arrest warrants that are issued and states that are reprimanded for not arresting al-Bashir. Yet they do not contain in-depth doctrinal analyses, as the AU did, for example, in its submission in the case against Jordan.[24] Instead, they present a formally validated and consistent narrative that seeks to challenge the attempts by the ICC to impose stigmata in the name of the shocked conscience of humanity.

[21] See, *inter alia*, the case law mentioned *supra* note 2.

[22] See, *inter alia*, Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21 (2011): 941.

[23] *Supra* note 2.

[24] The African Union's Submission in the Hashemite Kingdom of Jordan's Appeal Against the Decision under Article 87(7) of the Rome Statute on the NonCompliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir, ICC-02/05-01/09-370.

## B. Decisions by the AU

I have analyzed eighteen Decisions adopted by the AU on the ICC between 2009 and 2020. The list of Decisions can be found in the annex to this chapter. In the following, I will set out how these Decisions express the anxieties of the AU on issues of membership, recognition, and dignity.

### 1. Joining the Fight against Impunity

My starting point is an element in all Decisions of the AU: the reiteration of the AU of its commitment to fight impunity. The reiteration appears in seventeen out of the eighteen Decisions, the only exception being Decision 586 (XXV) of June 14–15, 2015. This Decision, however, starts out by "taking note" of previous Decisions on the ICC and by "recalling" Decision 547, which does contain a reiteration of the commitment to the fight against impunity. In this context, the term "re-iteration" is interesting. The term indicates that, apparently, the commitment was already "iterated" (repeated) before and is now repeated again. Going back, however, there is no first "repetition" of the commitment, only "re-iterations." This gives the commitment the aura of being eternal, or at least it presents the AU's dedication to fight impunity as something that was always already there.

Given the expressive power of international criminal law, it is not surprising to find in all Decisions reiterations of the commitment to fight impunity. After all, when the ICC goes after individuals, it unavoidably sends out a message about larger communities as well. International crimes are almost invariably policy crimes, involving groups of people and often rooted in political programs.[25] Prosecuting individuals then involves delegitimizing broader political programs and structures as well. When the ICC determines that states have failed to arrest someone against whom it has issued an arrest warrant, it does more than identify the violation of a technical legal rule. It signals that a state is unable or unwilling to cooperate to fight impunity for the greater good of humanity as a whole. As the Appeals Chamber in a recent judgment regarding the Jordan referral decided, a failure to cooperate with the Court implies that a state refuses to live up to its obligations to the international community. After all, the Appeals Chamber argued, the duty to cooperate "reinforces the obligation *erga omnes* to prevent, investigate and punish crimes that shock the conscience of humanity ( . . . ) and it is this *erga omnes* character that makes the obligation of State Parties to cooperate with the Court so fundamental."[26]

This puts the constant reiterations of the commitment to fight impunity in the context of a struggle over recognition and membership. The reiteration signals that the AU is as dedicated as the Court to restore the shocked conscience of humanity. At the same time, the Union signals that the ICC does not hold a monopoly on the protection

[25] For an analysis of the tension between the collective nature of international crimes and the attempt to single out individuals under international criminal law, see, *inter alia*, Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity," Washington & Lee University School of Law Scholarly Commons, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1035&context=wlufac.

[26] Appeals Chamber, Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09OA2, May 6, 2019.

of humanity's conscience. The reiteration of the commitment to fight impunity is invariably accompanied by a reference to the Constitutive Act of the AU, and often more specifically to Article 4(h), which asserts a right to intervene in a member state in case of war crimes, genocide, and crimes against humanity. The duty to the conscience of humanity is thus related to the specific position of the AU and its commitment as set out in the Constitutive Act.

### 2. Reinforcing African Unity

The reference to the position and commitment of the AU adds two additional layers to the struggle between the AU and the ICC. In the first place, the Decisions present an altogether different image of the international community that is fighting crimes. The ICC invokes a global community transcending sovereign states and the rules that regulate their interactions—it is "humanity" or "mankind" whose interests are at stake, and it is up to the Court to draw the boundaries of that community. The AU, for its part, sees a world of sovereign states dedicated to fight impunity while respecting traditional rules of international law. In this world of sovereign states, there is room for regional approaches, such as that of the AU. This points to the second layer: the community of African states. By constantly referring to the Constitutive Act of the AU, the Decisions also seek to reinforce the unity of the member states of the AU. This point is reinforced by frequent references to the need to "speak with one voice"[27] or to comply with "the position" or the "Decisions" of the Assembly.[28]

The reference to African unity gets more bite when it is related to the issues of respect and dignity, as mentioned above. The actions of the Court, the Security Council, and the Prosecutor are related, not only to issues such as immunity or balancing prosecution and peace but also to the dignity and integrity of the continent that would be at stake. Thus, some Decisions "[u]nderscore that the AU and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent."[29] In this way, the AU links the struggle over the nature of the international community as a whole to the need to cling to the Union as a community of African states. Its Decisions, in other words, are Janus-faced. One part is looking outward, informing the world at large that the AU is as committed to fighting crimes as the ICC, albeit on different terms. The other part is looking inward, calling upon states to speak with one voice in order to prevent the ICC's image of "humanity" from undermining the dignity and unity of the continent.

### 3. Recognition

The idea of a community of African states that deserves to be taken seriously on the international plane recurs in several other ways across the Decisions. In eight Decisions,

[27] See, e.g., Doc.Assembly/AU/Dec.270 (XIV); Doc.Assembly/AU/Dec.269 (XV); Doc.Assembly/AU/Dec.334 (XVI).

[28] See, e.g., Doc.Assembly/AU/Dec.547 (XXIV); Doc.Assembly/AU/Dec.590 (XXVI); Doc.Assembly/AU/Dec.616 (XXVII).

[29] Doc.Assembly/AU/13 (XIII), July 1–3, 2009, para. 12; see also para. 9 of Doc.Assembly/AU/13 (XXI), May 26–27, 2013.

for example, the Assembly expresses dissatisfaction with the refusal of the Security Council to defer proceedings against al-Bashir or Kenyan officials, as provided in Article 16 of the ICC Statute. The reason for the AU's request for a deferral is spelled out in several Decisions: prosecution would hamper the peace process in Sudan and the political processes in Kenya, and may conflict with customary rules on head of state immunities. The language chosen to formulate the AU's position is telling. The Union "cautions," "notes with grave concern," "expresses concern," and "reiterates its requests to the Security Council." The AU here uses its formal decision-making powers to communicate to the Security Council what it seeks and why it does so.

However, there is more at stake than warning the Council about possible consequences of indictments. In a number of Decisions, the AU expresses its frustration, because it does not feel it is taken seriously or heard by the Security Council. The frustrations are rooted in the experiences of leaders and representatives of African states. Yet they also exist in legally valid form, as the officially sanctioned frustration of the AU. In this way, the frustrations are presented as the common experience of the member states, legally sanctioned and communicated to the outside world. In its Decision of January 30–31, 2017, for example, the AU "decides that the Open Ended Ministerial Committee discontinue any further engagement with the United Nations Security Council as no tangible result will come out of the exercise due to the *recalcitrant position* of some members of the UNSC" (emphasis added).[30] This helps explain the strong emotional language found across several Decisions when they talk about the Security Council. The AU is not just "disappointed" or "dissatisfied"; it is "deeply disappointed," it "deeply regrets" (four times), and even expresses "deep grief." The image that emerges is that of a Union whose members feel stigmatized by the ICC, insufficiently protected by rules on immunity, and not being taken seriously in the AU's attempts to address these issues at the United Nations.

### 4. The Prosecution

A last example concerns the position of the Prosecution within some of the AU Decisions. In five Decisions, the Assembly expresses unease and disagreement with arrest warrants, as they are believed to undermine peace, stability, and the rule of law. Thus in its Decision of January 30–31, 2015, the Assembly challenges "the wisdom of the continued prosecution against African Leaders."[31] These challenges spring from the Union's concern about the effects of prosecution on peace and political processes, as mentioned above. They also arise from concerns about international immunity law, as reconfirmed in several Decisions. The Decision of July 1–3, 2009, even stated that African state parties to the Rome Statute should prepare guidelines and a code of conduct for the exercise of the Prosecutor's discretionary powers.[32]

However, just as with decisions of the Security Council, the underlying issue is one of respect and recognition. The text of a few Decisions goes beyond expressing concerns by singling out specific persons and agents, in what I can only understand as handing out "counter-stigmata." Consider the language in the Decision of July

[30] Doc.EX.CL1006 (XXX), para. 3.
[31] Doc.Assembly/AU/18 (XXIV), para. 4.
[32] Doc.Assembly/AU/13 (XII), para. 11.

25–27, 2010: "Mr. Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements. . . ."[33] . . . Six years later, the AU "takes note with concern of the obstinacy of the ICC by the so-called 'Principals of the Court' comprising the Prosecutor, the Registrar and the President of the ICC, which continues to privilege the views of civil society over clearly held positions of African Member States . . . the disturbing dismissive disregard of the decisions of the 14th ASP by the Prosecution. . . ."[34] Where the ICC singles out specific individuals, and thereby the political structures they represent, the AU singles out the prosecutor in particular, and thereby the office and structures that she or he represents.

The reiteration of the AU's commitment to fight impunity in accordance with its Constitutive Act is thus more than a perfunctory signal. In a nutshell, it sets out how the Union sees itself as belonging to the moral community that is dedicated to fighting international crimes. In line with the arguments presented by Venzke and Hakimi in this volume, the authority of the law is used to present the African Union as a responsible member of the global community. All the while, the Decisions highlight the different approaches adopted by the African Union. The ICC does not hold a monopoly on how the international community is to be understood nor how the fight against impunity should be conducted. At the same time, the reiteration contains a call upon African states to speak with one voice (that is: the voice of the Assembly) in order to defend what the AU has called the "dignity . . . of the continent." In that sense, it is also the prelude to the more emotive aspects, such as its "concern" or "deep disappointment."

## 5. The ICC Responding

The calls for respect by the AU did not go unnoticed at the ICC. The Court held several meetings and retreats with representatives of the AU. It also dedicated a special issue of its online forum to the question "Is the International Criminal Court targeting Africa inappropriately?," where it invited experts to reflect on this question. The experts held different opinions, with some of them criticizing the setup or the functioning of the Court.[35] The ICC also responded more directly by means of its Presidency. On May 29, 2013, the Presidency published a press statement, which directly engages with the question of dignity and respect. The statement opens with a diplomatic gesture, "The International Criminal Court acknowledges and respects the AU's important role as the continent's main regional organization," while ending on a cooperative note: "[The ICC] remains fully committed to a constructive and cooperative relationship with the African Union."[36] The middle part of the press statement, however, does little to ease the concerns and anxieties of the AU. It mainly sets out that the ICC works independently within its mandate, is unable "to take political factors into account," and takes decisions "not based on regional or ethnic considerations." The AU is reassured that the ICC complements national jurisdictions and that it does so on the basis of fair,

[33] Doc.Assembly/AU/10 (XV), para. 9.
[34] Doc.EX.CL/952 (XXVIII), Jan. 30–31, 2016.
[35] See ICC Forum, Mar. 2013–Jan. 2014, https://iccforum.com/africa.
[36] Press Release: ICC underlines impartiality, reiterates commitment to cooperation with the African Union, May 29, 2013, ICC-CPI-20130529-PR908. For a similar message, see Press Statement: Oct. 2, 2013, ICC-CPI-20130529-PR908.

legal proceedings. The Presidency, moreover, explains that the ICC "is autonomous from the United Nations and does not participate in the Security Council's decision-making," while allowing states to challenge all Decisions in accordance with the rules set for the Court. While the Presidency thus starts by confirming respect for the AU, the rest of the statement reads more as an attempt to refute criticisms.

As may be gathered from the examples given above, the ICC has not responded to the Decisions by the AU by adopting decisions of its own. This reflects an institutional asymmetry between the AU and the ICC. In theory, the ICC Assembly of State Parties could also adopt a formal "Decision" contesting the critiques voiced by the AU. However, given the prominence of African states in the Assembly of State Parties, this is not a viable course of action. Where AU Decisions are taken by intergovernmental bodies composed of member states, the ICC organs that are engaged in the debate are individual Court officials, or groups of Court officials. It is not surprising, therefore, that ICC responses took quite a different form, such as press statements and blog posts. Of course, inside the courtroom the situation was different: in a series of judgments, the ICC expressed its views on what it means to be a member of an international community that seeks to fight impunity. It is exactly this imagery that the AU sought to question through a different legal form, the Decision.

## IV. Concluding Reflections

By way of conclusion, let me return to some of the questions posed by the editors of this volume. I will start with perhaps the most important question: What do we hope to learn? As it would be pretentious to claim that I know what the reader has learned or should learn from this chapter, let me rephrase this question: What did I learn from writing this piece? Most important, it took me to places that are often overlooked in the analysis of the relation between the ICC and the AU. Instead of focusing on the umpteenth round of debates on the obligation of states to arrest and hand over suspects to the ICC, I turned to a series of Decisions adopted by the Assembly of the AU. Formally speaking, these Decisions constitute valid law, being one of the sources of the legal order of the AU. They express the position of the Union, and thus are more than the sum of the views of fifty-five individual member states.

However, the Decisions hardly contain legal arguments in the traditional sense. Instead, they express the stance of the AU toward the ICC and the Security Council, including an expression of the state of mind of the Union on several issues (e.g., the Union is "concerned," "deeply disappointed," etc.). This does not mean they are less important. Nor does it mean they have no relevance for the more doctrinal debates on matters related to arrest warrants issued by the ICC. On the contrary, the Decisions I analyzed address questions that go to the heart of international criminal law, as they concern the constitution of the international society as well as the recognition and dignity of its members. The AU's choice to use the formal category of "Decisions" has much to do with the need to speak with one voice in the struggles with the ICC. Decisions address at least two audiences: internally, they point at the common position that states have formally agreed upon; externally, they function as signals that

they formally (re)present how the AU feels about matters of international criminal law. Again, these characteristics do not make them less legal—they just point to what gives the more technical aspects of international criminal law their political bite.

My chapter was based on a textual analysis, which makes it difficult to answer another question posed by the editors: Why does legal argumentation outside the courtroom occur? Still, I think it is safe to say that the use of legally valid Decisions reflects an intention on the part of the AU to strengthen unity among its members. The Decisions were not only addressed to outsiders such as the ICC or the Security Council. They also constituted attempts to rally AU members together against what the AU perceived as a lack of respect on the part of the ICC and the Security Council. Again, what was at stake were issues of membership and dignity; this time, however, the relevant community was the community of African states. The use of the legal form to express the position of the AU was thus far from arbitrary.

Last but not least is the question: Why is this an important issue? At the level of the AU-ICC disputes, attention to the emotions that are involved is crucial. If lawyers talk only of legal formalities such as the mandate of the ICC, its formal independence, and the like, they will do little to bring the two institutions together. In fact, they may very well intensify the problem, because the issues that the AU feels most strongly about are not addressed. At a more general level, it is important to make lawyers and researchers aware of the importance of emotions in legal argumentation. Decisions of the AU are by no means unique when it comes to expressing emotions: across the board, states and international organizations communicate how they feel about political issues in resolutions, decisions, or agreements. Ignoring these aspects would be practically unwise and academically untenable.

## Annex

## Analyzed Decisions and Declarations of the Assembly of the African Union Concerning the ICC

Twelfth Ordinary Session 1–3 February 2009, AU—Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan ICC

Thirteenth Ordinary Session 1–3 July 2009, AU—Doc. Assembly, AU13 (XIII)—Decision on the Meeting of African States Parties to the Rome Statute of the ICC

Fourteenth Ordinary Session 31 January–2 February 2010, AU—Doc. Assembly, AU8 (XIV)—Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the ICC

Fifteenth Ordinary Session 25–27 July 2010, AU—Doc. Assembly, AU10 (XV)—Decision on the Progress Report of the Commission on the Implementation of Decision Assembly /AU/Dec.270 (XIV)

Sixteenth Ordinary Session 30–31 January 2011, AU—Doc. EX.CL639 (XVIII)—Decision on the Implementation of the Decisions on the International Criminal Court (ICC)

Seventeenth Ordinary Session 30 June–1 July 2011, AU—Doc. EX.CL670 (XIX)—Decision on the Implementation of the Assembly Decisions on the International Criminal Court

Eighteenth Ordinary Session 29–30 January 2012, AU—Doc. EX.CL710 (XX)—Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the ICC

Nineteenth Ordinary Session 15–16 July 2012, AU—Doc. EX.CL731 (XXI)—Decision on the Implementation of the Decisions on the International Criminal Court (ICC)

Twenty-First Ordinary Session 26–27 May 2013, AU—Doc. Assembly, AU13 (XXI)—Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)

Extraordinary Session of the Assembly of the African Union 12 October 2013—Decision on Africa's Relationship With the International Criminal Court (ICC)

Twenty-Second Ordinary Session 30–31 January 2014 AU—Doc. Assembly, AU13 (XXII)—Decision on the Progress Report of the Commission on the Implementation of the Decisions on the ICC

Twenty-Fourth Ordinary Session 30–31 January 2015, AU—Doc. Assembly, AU18 (XXIV)—Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on The ICC

Twenty-Fifth Ordinary Session 14–15 June 2015, AU—Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court

Twenty-Sixth Ordinary Session 30–31 January 2016, AU—Doc. EX.CL952 (XXVIII)—Decision on the International Criminal Court

Twenty-Seventh Ordinary Session 17–18 July 2016, AU—Doc. EX.CL987 (XXIX)—Decision on the International Criminal Court

28th Ordinary Session of the Assembly of the Union, 30–31 January 2017, AU—Doc. EX.CL1006 (XXX)—Decision on the International Criminal Court

30th Ordinary Session of the Assembly, 28–29 January 2018, AU—Doc. EX.CL1068 (XXXII)—Decision on the International Criminal Court

32nd Ordinary Session of the Assembly, 10–11 February 2019, AU—Doc. EX.CL1138 (XXXIV)—Decision on the International Criminal Court