

**The Ambiguity of Human Rights Norms and Institutions:
Antipreneurs and the International Criminal Court**

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In December 2014 the International Criminal Court (ICC) discontinued its case against Kenya's current President Uhuru Kenyatta for complicity in the waves of post-election violence which swept Kenya in 2007. Then, in April 2016, the ICC dropped all remaining charges against Kenyans, including those against Kenyatta's Vice-President William Ruto. Once a keen supporter of the ICC, Kenya had become an implacable foe and had 'giv[en] the world a rule book on how to beat the ICC' (Rashid Abdi, quoted in Pilling, 2016). But this was just the latest in a series of setbacks the ICC has suffered in Africa, with the ongoing controversy over the 2009 decision to issue an arrest warrant for Sudan's President Omar al-Bashir just the most serious. This article therefore examines the phenomenon and implications of African resistance to the norm which provides the primary rationale for the ICC's very existence, the anti-impunity norm.

The analysis proceeds from the premise that the anti-impunity norm, despite having been codified in an international treaty – the Rome Statute – should not be treated as 'the normative status quo'. Instead, we treat it as a *new* norm which is not yet firmly entrenched in practice, at least when it comes to whether powerful political figures who allegedly direct or incite the commission of mass atrocity crimes enjoy immunity from prosecution. We feel that the venerable tradition of sovereign immunity – reinforced by other related norms – remains the status quo norm, so we treat those actors who promote anti-impunity as 'norm entrepreneurs', or actors who 'set out to alter the prevailing normative order according to certain ideas or norms that they deem more suitable' (Wunderlich, 2013: 37; Finnemore and Sikkink, 1998). But because African resistance to the anti-impunity norm has increased recently we focus more on the norm entrepreneurs' opponents, the 'norm antipreneurs'. These actors 'defend the entrenched normative status quo against challengers' (Bloomfield, 2015: 12), although we do not imply that they all resist to the same degree and in the same way, or that actors never switch roles. Indeed, we are particularly interested in examining why African actors have been changing from entrepreneurs into antipreneurs.

Because we focus on *African* resistance we do not presume to offer a definitive or holistic assessment of the anti-impunity norm's current prospects of becoming the normative status quo. Instead, our findings are limited to just one piece of this wider empirical puzzle,

although in our opinion this is a particularly important piece given that all the active files in the ICC's brief concern African 'situations'¹ (Ralph and Gallagher, 2015: 562). We do, however, provide additional insights of a conceptual or theoretical nature which we feel will help other studies tackle the wider question.

The paper proceeds as follows. We first examine the roles typically available to actors in norm contestation contexts and explain how identifying these helps us choose between the appropriate norm dynamics models to understand the prevailing dynamics at play in such contexts at various times. We then define the normative status quo and the challenge posed to it in more detail before exploring the typical 'sites' of contestation. The following and longest section of the paper then empirically examines how, when and why African resistance to the anti-impunity norm stiffened, before the conclusion offers some thoughts about what this might mean for the anti-impunity norm now and in the future.

Agency and Norm Dynamics Models

Bloomfield has argued elsewhere that excessive scholarly focus on entrepreneurs has meant the phenomenon of resistance to efforts to change global norms has been neglected and insufficiently theorised. Scholars have mainly selected 'more noticeable' cases involving normative change, causing the norm dynamics research agenda to become unbalanced and biased (2015: 3-4). He argued that recognising antipreneurs as a distinct category of actor will facilitate collective efforts to rebalance the research agenda (23-24), and also illuminate both the possibility that antipreneurs might enjoy inherent advantages when practicing 'strategic' and 'tactical' resistance, and that actors can exercise agency by playing a variety of 'roles' in norm contestation contexts. This paper implicitly contributes to the collective rebalancing effort, but the second and third potential benefits are the most pertinent for our purposes.

Recognising that antipreneurs might enjoy inherent advantages in certain cases helps us better understand and explain outcomes. 'Strategic' resistance involves presenting justifications for resisting, and socio-psychological preferences for the status quo (Legro, 2000: 426-429; Mahoney, 2000) means advantages often accrue to antipreneurs when a status quo norm is deeply entrenched in practice. 'Tactical' resistance describes how actors resist, and when a status quo norm is highly institutionalised antipreneurs typically enjoy inherent 'blocking' and 'frustrating' advantages; they might, for example, cast a veto or use procedural rules to delay the application of a new norm in ostensibly relevant circumstances

¹ The use of the word 'situation' implies that the Prosecutor is authorised to carry out an investigation with relatively wide terms of reference; arrest warrants can later be issued for more specific 'crimes'.

(Tsebelis, 1995). These advantages therefore accrue to antipreneurs by virtue of the fact that it is the entrepreneurs who must generate and maintain momentum for change (Bloomfield, 13-17), although we should not assume antipreneurs' *always* enjoy 'unassailable' advantages. Instead, this is a context-dependent matter which must be assessed empirically (11-13, 17-20). And the relative power and influence of the contending actors obviously affects outcomes too so, conceptually speaking, we should consider the potential defensive advantages antipreneurs might enjoy as 'power-multipliers' (17). We argue below that African antipreneurs generally enjoy these advantages, especially because the anti-immunity norm is not deeply entrenched in practice and also because the ICC is a young institution with less-than-universal membership but, interestingly, the entrepreneurs enjoy the advantage of the norm having already being codified in the Rome Statute.

Regarding agency, Bloomfield presented a 'norm dynamics role-spectrum' to enable us to better understand why and how actors engage in norm contestation. This spectrum is book-ended by 'pure entrepreneurs' at one end – these actors seek radical normative change – while at the other end sit 'pure antipreneurs' who implacably resist. But other actors may have somewhat different intentions vis-à-vis the normative status quo. For example, 'competitor entrepreneurs' might seek different or less-radical normative change while 'creative resisters' may concede to some degree of normative change while still primarily defending the status quo (20-22). Indeed, most 'real world' actors probably fall into the intermediate zone. But collective actors are populated by and controlled by humans who can change their minds, meaning they might shift along the spectrum over time. This insight is particularly important given that the meta-narrative of this study is that a number of African actors have shifted towards the antipreneurial end of the spectrum recently.

Recognising these different forms of agency and the potential for actors to switch roles enables us to consider which pre-existing norm-dynamics models best describe the dynamics at play in this case, and how these dynamics changed over time. There are many potential models to choose from (Bloomfield, 2015: 3-10; Hoffman, 2010), but we focus on three models offered by Amitav Acharya. He first described in his 'norm localization' model how local actors responded to external pressure from 'the centre' – i.e. from Western states and the IGOs which they dominate – to accept new norms which sought to alter the normative status quo. He found that in the 1990s South East Asian actors essentially *adapted* the new common security norm to fit their pre-existing local normative frameworks (2004). Several years later he offered the 'norm subsidiarity' model to explain how local actors can invoke 'existing common global norms ... which are vital to preserving their autonomy ... like sovereignty, territorial integrity, independence and self-determination [etc.]'. He focused on South East Asia again and showed that these actors effectively resisted the imposition of the new and, to them, 'alien' constructive intervention and collective security norms (2011: 96-102). Finally, he combined the two earlier models

into a 'norm circulation' model which showed how local actors, after encountering pressure to accept new norms, might at first resist but later 'feedback/repatriate' an alternative, 'reworked' version of the 'new' norm back to the centre, or at least demand further negotiations and refinements. This article focused on Africa: he argued that some features of the Responsibility to Protect (R2P) norm were accepted by Africans and, indeed, had originated in Africa (i.e. 'responsible sovereignty': Deng, 1996), but African states also rejected some components and/or applications of R2P and wanted changes made to the norm (Acharya, 2013).

Acharya's three models describe fundamentally different interactive dynamics – adaptation to pressure, determined resistance, resistance followed by amendment demands – and we believe all three accurately describe Africa's engagement with the anti-impunity norm, albeit at different times. And we submit that identifying the various roles which the actors in norm contestation contexts are playing – and how these change over time – facilitates efforts to determine which model best describes the overall dynamics at play at a particular time, which in turn suggests what sort of outcome is likely (or, at least, what sort of hypotheses should be posed and tested in future, more comprehensive studies of the anti-impunity norm's progress). But we consider these matters in more detail later: for now we must examine the normative status quo and the challenge posed to it in more detail, and then consider where this contestation typically takes place.

The Normative Contest, and Where it Takes Place

To understand the dynamics around norm change and challenge we need to first understand exactly what the norms in question are. This section first lays out the status quo norm – the sovereign immunity norm which is being defended by the antipreneurs – and then the challenger norm, the anti-impunity norm which underpins the ICC, before the final sub-section considers where contestation typically takes place.

The status quo norm: sovereign immunity

The anti-impunity norm represents, in the simplest sense, a challenge to the norm of sovereignty. This latter norm establishes that states are immune to outside interference in their internal affairs and it is the basic constitutive norm of the international system; it defines the parameters of character and conduct of the primary actors in the international system, states. Although there is dispute about exactly when it became the key organizing principle of the international system, most histories point to the mid-16th to mid-17th centuries in Europe, after which it steadily spread globally (Philpott, 2001).

Sovereignty is said to be both internal – meaning no interference in domestic life of the state – and external, in that all states are all legally equal (Jackson, 1993). From a practical perspective, this latter aspect has always been myth to some extent because some states are more powerful and therefore able to assert their sovereignty more than others. Nevertheless, the most important element of sovereignty in the current context is that of non-intervention, which links the two aspects. This principle only came to be seen as fundamental in the 20th century, particularly with the creation of the United Nations. Article 2(4) of the UN Charter forbids the use of force against other member states, while Article 2(7) states that the UN may not ‘intervene in matters which are essentially within the domestic jurisdiction of the state,’ although the Security Council can take action to address threats to international peace and security (Mills, 1998: 10-13, 130).

Sovereignty is the primary norm which leaders of states rely on to argue that no external entity can tell them how to treat their people or, of particular relevance in this study, to resist demands that they or other senior officials be held to account for what they have done within their state. The principle of non-intervention applies to not only military intervention but also other types of political or, in this case, judicial intervention. A parallel principle of diplomatic immunity has evolved to ensure that diplomats can travel freely abroad to carry out their diplomatic duties by, for example, protecting diplomats from arrest. A similar logic supports head of state sovereign immunity: leaders need to be able to travel abroad freely in order to carry out state functions (Tunks, 2002: 651-5). Thus the sovereign immunity norm is a sub-norm, or a component of, the sovereignty norm; no matter what actions they may have undertaken at home – including ordering the most horrific of atrocities – state leaders and diplomats have been deemed to be immune to arrest and prosecution.

As noted earlier, despite the fact the anti-impunity norm has been enshrined in the Rome Statute the sovereign immunity norm nevertheless remains more heavily entrenched in state practice, and therefore in customary international law. Indeed, it was recently declared *jus cogens* by the International Court of Justice (ICJ) (although the court rejected an attempt to lay charges against the German state, not an individual German leader: *Germany v. Italy: Greece Intervening*). And while the sovereign immunity of leaders is not specifically enumerated in international legal instruments like diplomatic immunity is in Article 29 of the Vienna Convention on Diplomatic Relations, it is strongly implied in the supreme international legal instrument, the UN Charter (i.e. Article 2(7)). Finally, as recently as 2000 and 2001, both the ICJ and the US Supreme Court recognised the principle of the sovereign immunity of state leaders and other high-ranking officials (Tunks, 2002: 651).

It is also important to note, as Mills has pointed out, that international actors “‘argue” with each other over rival claims and interpretations as they define their identities and interests’, including by selectively appealing to norms which support their position (2012: 407; Risse, 2000). Mills’ subsequent analysis showed how African actors not only invoked the sovereign immunity norm to resist the ICC. Instead, and in a way in which Ludwig Wittgenstein (and Acharya) would recognise, they also appealed to other ‘related’ norms in the wider ‘web of meanings’ (1953: II.226) which constitutes the discursive terrain in which they operate. Specifically, they invoked anti-imperialism and Afrocentrism (or ‘African solidarity’ or ‘Pan-Africanism’), and especially the idea of ‘African solutions for African problems’. Finally, another norm privileging peace over anti-impunity and justice has also featured, although perhaps as more of a rhetorical device (Mills, 2012; Jalloh, Ajande and du Plessis, 2011: 37-43). These norms are in many ways secondary to or supportive of the core norm of sovereign immunity, but they are nevertheless related and constitute alternate ways of expressing sovereign rights; they serve as ‘hooks’ upon which anti-impunity claims hang their anti-impunity claims. Further, when seen in the context of the so-called African Renaissance – which focuses on Africans being responsible for their own destiny; democracy and human rights; and economic development with a more equal role for Africa internationally (Bischoff, 2003, 199) – we can see the roots of contradictions. While there is a focus on human rights, the African Renaissance is also frequently understood as being anti-imperial and anti-colonial (Mbeki, 1998), which would lead to a privileging of African solidarity over human rights.

The challenger norm: anti-impunity

In 2001 Daniel Philpott characterised the European integration process and the emerging practice of humanitarian intervention as the two primary ‘challenge[s] to] the sovereign state’s territorial authority’ (3). This latter challenge implies sovereignty should be reconceptualised to include protection of human rights, and that how a state treats its citizens should be a matter of international concern (Annan, 1999; Deng, 1996; Mills, 1998; Weiss, 1992). The modern manifestation of humanitarian intervention – the Responsibility to Protect (R2P) norm – has dominated discussions about this second challenge recently. But we are more interested in what Mills has called the ‘responsibility to prosecute’ (2013: 338; Ralph and Gallagher 2015) which has the anti-impunity norm at its core.

While there had been isolated attempts to hold individuals accountable for mass atrocities before World War II (Ratner et al., 2009: 6), the first modern war crimes trials happened in Nuremberg and Tokyo after the war (Schiff 2008: 24-25; Ratner et al, 2009: 6). Even though they did provide a precedent for holding senior leaders individually accountable for war crime, the sovereign immunity norm remained the normative status quo for decades thereafter. Yet in the 1990s the cracks in the impunity façade began to widen. The UN

Security Council created the International Criminal Tribunals for the Former Yugoslavia and Rwanda in 1993 and 1994 to prosecute individuals for mass atrocity crimes, and other special hybrid international courts have since been set up in Sierra Leone, Cambodia and Lebanon. Then, in 1998, former Chilean President General Augusto Pinochet was arrested in the UK under the principle of universal jurisdiction, namely, that some crimes are so horrible that they become international crimes and are prosecutable by any country on behalf of the international community. The British courts stripped Pinochet of immunity, although his extradition to Spain was eventually waived for health reasons (Roht-Arriaza, 2006). The principle of universal jurisdiction remains hotly contested; nevertheless, the Pinochet case signaled that a general norm against impunity was emerging, at least *vis-à-vis former* leaders.

The establishment of the ICC, also in 1998, marked the key development in the effort to entrench the anti-impunity norm. Of the 160 states gathered in Rome in 1998, 21 abstained and seven voted against, indicating overwhelming but not unanimous support – notably, several key great powers like the United States, China, Russia and India still remain aloof (Schabas 2011: 18-21) – which in part informs our decision to treat anti-impunity as an ‘emerging’ norm. Yet the fact that it is codified or legalized (Leonard and Roach, 2009) means, at minimum, it has gone beyond being ‘merely aspirational’. Importantly, the ICC does not exercise universal jurisdiction *per se*. Instead, the Rome Statute requires signatory states to prosecute citizens who commit mass atrocities, and if they fail to do so the ICC’s jurisdiction becomes activated (i.e. the principle of complementarity; Schabas 2011, 190-99). The United Nations Security Council (UNSC) can also refer a situation in a non-party to the ICC.

As with sovereignty, the anti-impunity norm is also ‘supported by’ other norms, like those underpinning international humanitarian law, the Protection of Civilians, R2P, etc. But we focus on the anti-impunity norm: at first glance it establishes that mass atrocities are of general international concern, and that individuals who commit or commission mass atrocities, regardless of position, should be prosecuted. But to understand exactly what it requires of actors requires recognising that norms are ‘standard[s] of appropriate behaviour for actors with a given identity’ (Finnemore and Sikkink: 3) which typically produce both *proscribing* effects – ‘ruling out’ certain actions – and *prescribing* effects which ‘enable’ or even ‘require’ certain actions (Giddens, 1984: Chapter 1). Other scholars have also noted that some norms are ‘permissive’ norms; they allow actors some degree of ‘freedom of choice’ regarding when and/or how to apply the norm (Sandholtz, 2016, 11).

The intended proscribing effect of the anti-impunity norm is obvious – it is meant to prevent individuals from committing mass atrocities – but it is equally obvious that not all individuals

become 'constituted' by this norm, at least not voluntarily or easily. Instead, they might need to be physically prevented by, for example, being incarcerated. But ideally, they should be *deterred*, which suggests offenders must be punished to create a demonstration effect. Thus a trial must be held: this is a prescribing effect of the anti-impunity norm, it requires *action*, both in setting up a trial venue and in delivering a defendant to that venue. The ICC obviously serves as the venue when national courts failed to act, but the defendant must still be arraigned, which implies that other actors must facilitate such. But when it comes to arresting *sitting* senior politicians accused of mass atrocities many African actors resist in various ways, implying that sovereign immunity continues to constitute them more strongly than anti-impunity; or that they were constituted more by African solidarity norms; or alternatively, perhaps African actors prefer to treat anti-impunity as a permissive norm.

Sites of contestation

Contestation between norm entrepreneurs and antipreneurs plays out in many sites, not least the 'court of public opinion' (i.e. the media). But we focus on the formal institutional sites in which actors interact according to rules, and which subsequently produce statements, policies, rulings and resolutions.

Contestation takes place within the ICC itself, although we stress that it is a complex set of institutions. The ICC is frequently conflated with the Prosecutor, who makes decisions on which cases to investigate and prosecute. But the Prosecutor is less a site of contestation than an actor; no doubt debate takes place within the prosecutor's office concerning whether to exercise the *proprio motu* power (i.e. to investigate and prosecute), but the Prosecutor essentially acts like a norm entrepreneur because his or her purpose is to apply the anti-impunity norm in relevant situations. The ICC also contains the Registry and pre-trial, trial, and appeals divisions and the latter three venues can become important sites of contestation. But the primary site within the ICC which interests us – because states contest against one another there – is the Assembly of State Parties (ASP). All the parties to the Rome Statute have a seat and therefore a vote, it meets annually, and seven-eighths of its membership must vote to amend the Rome Statute.

The UNSC is another important site of contestation. It is empowered to pass binding resolutions about matters of international peace and security, so its resolutions may contain provisions which reflect various related or overlapping normative urges (i.e. R2P, protection of civilians, humanitarian access, anti-impunity, etc.) making it difficult at times to disentangle these norms (Mills, 2015a). But in addition to its power to refer a situation in a non-party to the Prosecutor (Article 15), pursuant to Article 16 of the Rome Statute the UNSC can defer any investigation or prosecution – so, not just one it referred – for a renewable term of 12 months. The UNSC must be 'acting under Chapter VII' of the UN

Charter, which implies it must be attempting to remedy a threat to international peace and security when it exercises either of these powers.

The third important site for contestation – especially in the context of this study, and arguably more generally too – is the African Union (AU). 34 of its 54 members are parties to the Rome Statute, almost exactly the same proportion of members worldwide (63%). Although while we do show below that debate does take place within the AU about the statements which issue from its summits and the policies which it pursues – which implies it is a site of contestation – it is also an actor, especially vis-à-vis how it behaves in the two sites we just discussed. The AU does not sit in the ASP, so to influence this body's deliberations the AU must induce a member-state to raise a matter in the ASP and then lobby other African ASP members to support the initiative. The situation is similar vis-à-vis the UNSC. One or more African states may formally request that the General Assembly discuss a matter and subsequently refer it to the UNSC; the AU can informally lobby the Secretary-General to refer a matter; and it can directly but informally apply to the UNSC. Despite the relatively loose links between it and the other key sites of contestation the AU remains important because efforts to organise resistance and forge African solidarity take place and can be vested with legitimacy there.

Finally, contestation takes place within African states. Length limitations prevent us from comprehensively canvassing all the maneuverings between various domestic institutions which have taken place within African states regarding how to interact with the ICC, but we caution against assuming that African states are unitary actors (this is probably most evident with respect to Kenya and especially South Africa).

This concludes the discussion of the conceptual models which inform the study, the nature of the normative contest, and the sites where such take place. In the next two sections we consider how African actors' resistance to the ICC and the anti-impunity norm which underpins it has stiffened over time. The analysis proceeds chronologically in the main, and we treat the ICC Prosecutor's decision to request an arrest warrant for Sudanese President Omar al-Bashir in 2008 as an 'inflection point'; prior to this event African actors generally cooperated with the ICC, but after it they began to contest more vigorously.

'Before al-Bashir': Africa adapts to the anti-impunity norm, 2002-2008

There were, of course, states which always opposed the ICC and the anti-impunity norm at the core of the Rome Statute implacably. These pure antipreneurs are obviously non-parties to the ICC, and they are typically authoritarian countries which feel threatened by anti-

impunity and other human rights norms. Egypt and Eritrea are prominent in this regard, but Libya's Muammar Gaddafi – who eventually become the target of an ICC investigation via a 2011 UNSC referral – arguably took the lead. These states have tried to frame the issue within the AU with reference to all the three justifications for resistance we will canvass below – abuse by an unfair and unequal global political system, threats to peace, and African solidarity – and they have invoked status quo norms like sovereignty and its sub-norm, sovereign immunity, as well as the more local African solidarity norm against the anti-impunity challenger when doing so. But other states have staunchly supported the ICC. The most prominent is Botswana, with Zambia not also showing support South Africa and Kenya were also prominent entrepreneurs, but because they have shifted toward the antipreneur role more recently we will return to more detailed discussion of them later. More generally, about a dozen African states were influential player in the drafting process which led to the Rome Statute and, as Jalloh et al. put it, they 'generally advanced progressive positions' (2011: 14). As noted above, 34 African states eventually became parties and, notably, Senegal was the first state to ratify (in February 1999).

In the first few years after the Rome Statute came into force in 2002 African actors generally cooperated with the newly-operational ICC. For example, the first two cases the ICC dealt with were referred to the Prosecutor by Uganda in 2003 and the Democratic Republic of Congo in 2004. These attracted little comment in Africa. Notably, and pursuant to Article 12(3) of the Rome Statute, a non-party can grant limited jurisdiction to the ICC to investigate a single situation, and in 2003 Côte d'Ivoire (which had signed but not ratified the Rome Statute) formally granted ICC jurisdiction of this sort. Then, in 2004, the AU passed a resolution which urged its members to sign and/or ratify the Rome Statute (African Union, 2010b). Finally, in 2005 the UNSC referred the situation in Darfur, Sudan to the ICC and this event also attracted little controversy.

Several African states and the AU were, at this stage, therefore largely cooperating with ICC initiatives aimed at implementing what might be usefully thought of as a 'blanket' anti-impunity norm (i.e. with no exceptions for senior political figures). And non-members, while not overtly cooperating, also offered little criticism. Then two events took place which were more suggestive of 'adaptation to' rather than simple 'acceptance of' the anti-impunity norm. First, Interpol had issued an arrest warrant for former President of Liberia, Charles Taylor, in 2003. Nigeria refused to action it unless requested to by Liberia, but when the latter did issue such a request in 2006 Taylor was extradited to the Special Court for Sierra Leone (i.e. an ad hoc tribunal). Second, Senegalese courts had refused attempts to try the former President of Chad, Hissène Habré, in the early 2000s, citing jurisdictional limitations, and Senegal also refused to extradite him to Belgium (i.e. pursuant to claims of universal jurisdiction). But in 2006 the AU set up a 'Committee of Eminent African Jurists' to determine whether, and if so, how and where he should be tried. It found that he should be

tried, although the question of exactly where remained contentious; Senegal dragged its heels and was subsequently pressured by the AU, the Economic Community of the West African States, and several African states (especially Chad) to bring Habré to justice.

These examples suggest that the prescribing effect of the anti-impunity norm was shaping the behaviour of some African actors in the mid-2000s. These African actors were essentially operating as either pure entrepreneurs – they were cooperating fully with the ICC’s efforts to implement its preferred interpretation of the anti-impunity norm – or as competitor entrepreneurs, pursuing only slightly different normative change. Accordingly, the sorts of dynamics which prevailed in this era are reminiscent of Acharya’s localisation model: African actors were adapting to the anti-impunity norm, and they generally conformed with the way the ICC interpreted and sought to apply it.

‘After al-Bashir’: Africa resists the ‘blanket’ anti-impunity norm, 2008-2015

This section is broken into five sub-sections. The first four proceed chronologically and explain how contestation played out in the primary sites we identified earlier after ICC issued the arrest warrant for Sudan’s President Omar al-Bashir; in particular we focus on the AU’s role as both an actor in, and a site of, contestation. Then a final section considers contestation in three key states which have essentially shifted from the entrepreneur to the antipreneur end of the role spectrum we identified earlier.

Anti-Impunity and Universal Jurisdiction Entangled

Even before African resistance to the ICC began in response to al-Bashir arrest warrant another dynamic of contestation which provides the background for the fight over ICC investigations must be noted. On 1 July 2008, the AU Assembly passed a resolution which, while expressing general support for the principle of universal jurisdiction, also decried what it characterised as the ‘abuse of the Principle of Universal Jurisdiction... that could endanger international law, order, and security’ and stated that attempts to invoke universal jurisdiction against African leaders ‘is a clear violation of the sovereignty and territorial integrity of these states’ (African Union 2008a). The AU Peace and Security Council (PSC) followed with a very similar statement on 11 July (African Union 2008b).

Since the investigation of Bashir was occurring in the context of ICC jurisdiction acquired through the referral from the UNSC, there seemed to be a blurring of the two, which might be understood as disenchantment with the application of the anti-impunity norm more generally (although a number of African states have legislation authorising universal

jurisdiction prosecutions). Some of the antipathy to universal jurisdiction in Africa derives from unhappiness on the part of Rwanda that members of the Tutsi-dominated government have been pursued by Western countries for crimes committed during and after the Hutu-led genocide. More generally, Rwanda has had a contentious relationship with international criminal justice mechanisms since the 1994 genocide. While it called for the creation of the International Criminal Tribunal for Rwanda, it has been very critical of the way it operated (Peskin, 2008). In attempts to protect members of its government (and being very touchy generally about international criticism of its human rights record), Rwanda thus became the first outspoken African pure antipreneur against particular applications of the anti-impunity norm ('outspoken' because by not signing the Rome Statute about one-third of African states essentially resisted from the start) even though it has practiced anti-impunity domestically against perpetrators of the genocide (Mills, 2012: 419).

This episode illustrated the first justification for resistance – that the norm was being abused and endangered sovereignty. It was not a wholesale rejection of the anti-impunity norm, but rather the way it was implemented. Yet, the norm does, in one fundamental sense, challenge sovereignty so we regard this as an instance in which the normative status quo was invoked to undermine the challenger norm.

Immediate reactions to the al-Bashir arrest warrant

Just days after the AU Assembly and PSC declarations on universal jurisdiction, the ICC Prosecutor, Luis Moreno-Ocampo, asked the ICC Pre-Trial Chamber to issue an arrest warrant against Bashir for war crimes, crimes against humanity and genocide (International Criminal Court 2008). In response, the AU PSC called on the UN Security Council to use its powers to defer the ICC investigation and prosecution process against Bashir (African Union, 2008c). Its stated reason was that an ICC prosecution could undermine the peace process in Darfur. This represented the second strategic justification for resisting the anti-impunity norm – that it could endanger peace. The call for the Security Council to defer the investigation also represented the first tactical move to resist. The PSC also condemned perceived abuse of universal jurisdiction against African states, repeating its first justification for resistance and thus invoking a litany of grievances against two particular practices of the anti-impunity norm – the ICC and universal jurisdiction – which seemed to target Africa. At the same time, it did recognise the seriousness of the situation in Darfur and called for an investigation into how the AU might address the situation. We therefore characterise this as a shift, by the PSC, into a creative resister role; it was not opposing the anti-impunity norm implacably – it was conceding that 'something had to be done' vis-à-vis Darfur – but it was nevertheless primarily seeking to defend the normative status quo.

The AU Assembly continued with its calls for Security Council deferral, which were ignored (African Union 2009a). Such calls were reiterated by the PSC after the ICC issued an arrest for Bashir for crimes against humanity and war crimes on 4 March 2009 (African Union 2009b).² This was despite the fact that many African leaders found Bashir to be troublesome. The PSC also sought the assistance of the League of Arab States – which only had three states parties – to stop the Bashir investigation. Soon after three states parties – Senegal, Djibouti and Comoros – as well as Libya which had voted against the Rome Statute – called on African states to withdraw from the Rome Statute. This was rejected by a meeting of African ICC members, although most did support the deferral request (Sudan Tribune 2009). This was the first instance of a second tactical move – threat of withdrawal from the ICC – at it is significant because it signals that at least three African state-parties to the Rome Statute had, in effect, shifted towards assuming the pure antipreneur role.

Soon after, in July 2009, the AU Assembly would make a couple of decisions which would structure future African resistance and empower African antipreneurs. First, it called for an African court to be empowered to try mass atrocity crimes. We discuss this matter further below when the AU begins to take concrete steps towards stopping Africans being (allegedly) targeted by the West by moving the venue for prosecution to an African institution, but it should be seen as the third type of tactical move. Second, the AU Assembly called on African states parties not to cooperate with ICC arrest and surrender orders – a clear call to violate a core obligation under the Rome Statute (African Union, 2009c). This fourth tactical resistance move was particularly shocking given that a majority of African states were members of the ICC and could have blocked the resolution. Instead, they supported a resolution undermining a key element of the Rome Statute. Only Chad officially dissented at the time (African Union, 2009c), although other countries, including Botswana and South Africa – both reliable anti-impunity entrepreneurs – as well as Benin and Uganda indicated disagreement and a willingness to arrest Bashir (Mills, 2012: 425-426). The practical implications of this decision will be discussed below.

The African Union High Level Panel on Darfur (HLPD), set up by the AU PSC, then entered the fray. It argued that justice was a key element of addressing the conflict in Darfur and further noted that Sudan had an obligation to deal with the crimes committed in Darfur, and called for a removal of immunity for ‘State actors’, thus underlining the anti-impunity norm. At the same time, it called for the creation of hybrid courts with Sudanese and non-Sudanese African judges to try perpetrators, thus attempting to ‘Africanize’ international criminal justice. Yet, while the HLPD did not take an explicit position, it was clear that Bashir could not be tried by such a court (African Union 2009d). It is therefore difficult to

² An additional arrest warrant for the crime of genocide would be issued in 2010.

definitively determine what role it played, but we lean towards characterising it as a creative resistor. It declared support for the anti-impunity norm, and so for a shift away from the traditional normative status quo represented by sovereign immunity; but the impractical solutions it offered effectively undermined the ICC, which is supposed to be the vehicle for implementing the norm.

A number of African actors were therefore resisting the ICC and its preferred interpretation of the anti-impunity norm, meaning Acharya's localisation model no longer best described the overall dynamics; instead, the way African actors were invoking alternative norms which 'preserve local autonomy' mean the ICC-African interactive dynamic in this period fits his subsidiarity model better.

The AU calls for the Rome Statute's amendment

The site of contestation then moved from the AU and the UNSC to the Assembly of States Parties. This was important because the ASP served as a space where antipreneurs could more directly engage with the core institution at the centre of the contestation. However, as noted earlier, AU positions can only be brought before the ASP by dual AU/ICC members, and only they would be directly engaged in the discussions, limiting the scope of some core antipreneurs to engage. Before the ASP meeting in November 2009 26 African states parties and 15 non-states parties met in Addis Ababa. Four main decisions came out of the meeting which led to two proposals put forth for discussion at the ASP (African Union 2009e):

1. That the interests of peace be considered alongside the interests of justice in Prosecutorial guidelines for when to investigate – or not;
2. That the power of the Security Council to refer cases should remain;
3. That the UN General Assembly be empowered to defer ICC proceedings when the Security Council fails to make a decision in this regard;
4. That there should be a discussion regarding whether or not the leaders of non-states parties had their immunity removed by the Rome Statute.

Four points are relevant here. First, a norm of peace is framed as in opposition to justice. Second, that the role of Security Council was deemed as legitimate. This is particularly noteworthy given broader dissatisfaction with the Security Council on the part of African (and other developing) states, particularly its undemocratic and unrepresentative nature. Third, that some states were attempting to be creative in achieving their goal of deferral – and thus, some would say, undermining anti-impunity by attempting to change venues for contestation. The General Assembly, dominated by developing countries, would, it was

hoped, be a friendlier place for deferral discussions – although being much larger would also be much more unwieldy and unpredictable. Fourth, the issue of sovereign immunity continued to be important. But the particular argument made here was around states not voluntarily giving up that immunity but rather having it taken from them without their consent. It must also be seen in the context of perceived hypocritical attempts by the US to insulate itself from international criminal justice mechanisms (Mills and Lott, 2007) – even as it participated in a decision to remove such immunities from Bashir.

In the end, two proposals were officially put forth to the ASP – basically points 1 and 3 above. Bringing point 1 to the ASP was a way to reiterate and implement the second justification for resistance – the threat to peace – and it represented the fifth tactical move – an effort to change the normative environment in which the Prosecutor operates by bringing in guidelines which might undermine the challenger norm. Point 3 was a way to highlight the undemocratic nature of the global political system generally and the UN Security Council in particular, and in a sense highlighted the first justification for resistance – abuse of the new anti-impunity norm by the powerful to impinge on African states' sovereignty. We treat this attempt to change the venue for decision-making to an arena where the antipreneurs might have more support as the sixth tactical move.

There was, however, no consensus on these two proposals, with many African members opposed. South Africa agreed to formally put these proposals before the ICC on behalf of the AU, requesting that they be discussed at the forthcoming review conference in May 2010, although making it clear that it was up to each state to support the proposals or not (African Union 2009f). It appears that South Africa was not wholeheartedly in support of these proposals (although it did ultimately indicate support for the first), but may have agreed to take the lead in an attempt to head off more drastic measures, such as non-cooperation or, indeed, mass withdrawal. Yet, in doing so, it may have damaged its credibility a bit and contributed to perceptions of contradictions in its commitment to human rights (Borer and Mills, 2011). In the end, only four Africa states parties supported point 1, the proposal on prosecutorial guidelines – Burkina Faso, Namibia, Senegal, and South Africa – and only two supported giving the General Assembly the authority to defer ICC proceedings, and both the proposals failed to pass in the ASP (African Union, 2009f).

Even though the ASP provided the opportunity for more direct engagement on the issue by (a subset) of African impunity antipreneurs, this also highlighted the limitations on African antipreneurs when removed from the friendlier collective environment of the AU. AU Assembly and PSC statements can mask a much more complicated dynamic. Within the AU, peer pressure and bullying can be a significant resource for antipreneurs – particularly non-

States parties. But once the veneer of the AU is removed, and those non-states parties are taken out the equation, they lose power, as do antipreneur states parties.

This episode is also interesting in another way. During this period the AU was essentially playing a competitor entrepreneur role. It was not rejecting the anti-impunity norm outright but was instead seeking to change the scope and content of the norm to some extent; in other words, if all four points had been accepted in the ASP the way the anti-impunity norm was implemented would have changed, but not radically. We conclude these were not radical proposals mainly because point 4 proposed merely discussing making the leaders of non-parties to the Rome Statute immune, and it wasn't formally presented to the ASP in any event. One might conclude, therefore, that Acharya's norm circulation model captures the dynamics at play during this period; the AU's prior resistance (especially by refusing to cooperate with ICC arrest warrants) was being leveraged to force a further round of negotiations about the norm. But the effort failed, forcing the AU back towards more determined resistance.

Back to the AU

After the setback in the ASP the AU Assembly at first sent mixed signals: in February 2010, even while 'reiterating its commitment to fight impunity', it renewed its request to defer the Bashir prosecution and tried to muster a common African position (African Union 2010c). But in July, it shifted more decisively towards assuming the pure-antipreneur role after a separate arrest warrant was issued for Bashir on the charge of genocide and, accordingly, at the AU summit the call for non-cooperation was reiterated. Further, the AU rejected a proposal arising from the 2009 ASP to open an ICC-AU liaison office in Addis Ababa (African Union 2010d). The AU Commission Chairperson and high profile anti-ICC antipreneur Jean Ping claimed that the proposal for the liaison office was part of a plot against Africa (Sudan Tribune 2010a).

While this seventh tactical move to resist, and the redeployment of the second tactical move (i.e. non-cooperation) appeared to be a further hardening of Africa-wide opposition, in fact this particular decision – and the general discussion over how to respond to the Bashir arrest warrants – exposed significant cracks in the perceived unanimity of the African position – including dissent within the ranks over the justifications for resistance. South Africa, Ghana and Botswana represented the entrepreneurs, standing up for the ICC and the anti-impunity norm, while non-parties like Libya, Eritrea and Egypt and others used the AU to try to undermine the ICC (Sudan Tribune 2010b). Having said this, even parties to the Rome Statute were questioning ICC actions. In particular, the President of Malawi, Bingu wa Mutharika, who was also Chair of the AU, stated that heads of state should not be prosecuted by the ICC, thus contradicting a core element of the Rome Statute – that there is

no sovereign immunity of heads of state. He further stated that no African head of state could be tried outside of the continent, even as he said that he was 'not condoning impunity' (Sudan Tribune 2010a). This provided a bit of nuance to the debate. It represents not a complete repudiation of the anti-impunity norm, but draws on the African solidarity norm to modify and circumscribe it. It reasserts sovereignty, but an updated version of African sovereignty where African problems are addressed with African solutions. As with the HLPD report, it seems to recognise problems, but wants to reorient the venue for addressing the problem in a further refinement of the third tactical move noted above. Indeed, there was discussion of whether or not Bashir could be tried in Africa, although this discussion went nowhere, since it was decided that there was no existing mechanism available to try Bashir. The AU position on impunity lost further nuance in October 2013 when the AU decided that no sitting head of state should be subjected to prosecution by an international court (Kulich and Muchler, 2013).

Yet, the broader idea of an African court which could substitute for the ICC gained ground. This became the proposed African Court of Justice and Human Rights (ACJHR), which would be a merger of the African Court of Justice and the African Court on Human and People's Rights. There is no provision in the Rome Statute for allowing a regional court to substitute for the ICC. The principle of complementarity only applies to states. Yet, the ACJHR has been put forth as an alternative to the ICC in Africa, an implementation of the 'African solutions for African problems' mantra inherent in the African solidarity norm and a response to perceived targeting of Africa by the ICC. As such, it represents a third justification for resistance – African problems should be taken care of by Africans rather than outsiders. According to Abraham (2015: 7), the initial justification for the ACJHR responds to three concerns: 1) the perceived abuse of universal jurisdiction; 2) issues raised by the proposed trial of Hissène Habré; and 3) the African Charter on Democracy, Elections and Governance states that those who engage in 'unconstitutional change of government' should be tried by a 'competent court of the Union.'

In this sense, one might see the AU acting as a competitor entrepreneur. Taking the multiple statements emanating from the AU about supporting anti-impunity at face value, the AU could be seen as operating in the same normative environment, but approaching the issue slightly differently, wanting to ensure justice at a regional rather than global level, thus acting as a competitor entrepreneur, while also acting as an entrepreneur – particularly on the issue of unconstitutional changes of government, which are not under the ICC's jurisdiction. Yet, the details of the proposed court lead us to conclude that it is more accurate to conclude the AU had assumed the role of creative resister. Specifically, in July 2014 an AU summit voted to exclude sitting heads of state from the jurisdiction of the new court (International Justice Resource Center, 2014). In other words, AU heads of state, in giving themselves immunity, posed a direct challenge to a core precept of the anti-impunity

norm and the Rome Statute – that no one is immune to prosecution. Under pressure from the ICC, the AU proposed a variation of the norm which undermined the norm to a significant degree – and also created an incentive for leaders who might be prosecuted when they stepped down from power to stay in power indefinitely (a trend which has been accelerating in recent years (McEvoy, 2015; Corcoran, 2016)).

In January 2016, at another AU Assembly, a resolution was passed which called on the AU to prepare a roadmap for mass African withdrawal from the ICC ‘if necessary.’ Necessity would depend upon whether the ICC accepted AU demands for ‘reforms’ to the ICC, including most importantly recognising the immunity of heads of state (Fabricus, 2016). This particular demand is highly unlikely to be met because it would undermine a core aspect of the anti-impunity norm underpinning the ICC – that nobody is immune to prosecution. But this highlighted the ongoing tension with the status quo norm. It also further highlighted tensions with another pre-existing norm – African solidarity.

While the early history (and immediate pre-history) of the AU suggested that it would serve as an important entrepreneur supporting the anti-impunity norm in the form of the ICC, the reality has been significantly different. After the ICC issued the warrant for al-Bashir’s arrest in July 2008 the AU has primarily acted as either a creative resister or as a pure antipreneur and only in late 2009 did it play the competitor entrepreneur role by trying to leverage its earlier resistance to amend the anti-impunity norm in the ASP. After this bid failed the AU and many African states shifted ever-more firmly into roles on the antipreneurial end of the spectrum. Thus, apart for the brief period in which Acharya’s circulation model seemed relevant his subsidiary model – which describes local actors resisting normative pressure for the centre by appeals to local norms which protect their autonomy – describes the interactive dynamics between the ICC and African actors most accurately since id-2008.

South Africa, Kenya and Uganda

Although much of the public and behind the scenes contestation over the role of the ICC, particularly in the case of al-Bashir, occurred within the AU, contestation also took place within states as domestic actors sought to challenge – or support – the anti-impunity norm, or at least the ICC’s preferred mode of implementing it. This section focuses on South Africa and Kenya because they are such influential African states, and also on Uganda because it was the first state to refer a situation to the Prosecutor. But more importantly, all three states have in effect switched roles, from entrepreneur to antipreneur (with Kenya arguably travelling the furthest down this road)

As noted, South Africa was part of the group of countries which pushed hard for the creation of the ICC. This was a reflection of its *apartheid* past and its attempts to institutionalise its post-*apartheid* democratic domestic order. It has spoken out against attempts by the AU to undermine the ICC, including calls for non-cooperation. It stated on multiple occasions that it would arrest Bashir if he came to South Africa. Yet, it did publicly support the AU position of calling for questions of peace, in addition to those of justice, to be included in prosecutorial decisions, thus potentially further politicising the ICC and undermining the anti-impunity norm.

In 2009, Bashir was invited, but did not attend, President Jacob Zuma's inauguration. A government official stated that 'If he does [attend], that will create a situation, and we would be forced to arrest him, and we don't want that' (Gabel, 2009), thus demonstrating a reluctant commitment to live up to its obligations. As recently as July 2010 South Africa had declared that it would live up to its obligations and arrest and transfer Bashir to The Hague (Kwinika, 2010). Further, South Africa (along with the other two African members of the UN Security Council), had voted to refer Libya to the ICC in 2011, thus reinforcing the anti-impunity norm. Yet, its pure entrepreneurial credentials would be called into question at least a bit when, in March 2014, the deputy president of South Africa, Kgalema Motlanthe, that the proposed continental court was required "'to respond adequately to the yearnings of ordinary Africans for justice whilst being sensitive to the unique nature of the Africa context'" (Abraham, 2015) – a reiteration of the African solidarity norm deployed to undermine the global application of the anti-impunity and shift venues to Africa.

This might situate South Africa as a competitor entrepreneur – accepting the basic premise of anti-impunity but putting forth an alternate, local version of its implementation. But it appeared to move more firmly into the antipreneur role in June 2015. On 14 and 15 June, Bashir travelled to South Africa to attend an AU summit. Under the Rome Statute, South Africa is required to arrest Bashir and turn him over to the ICC. On 14 June the South Gauteng High Court ordered the government to prevent Bashir from leaving the country until a full hearing could be held to determine whether or not he should be sent to The Hague. The next day, during a brief recess, Bashir was allowed surreptitiously to depart South Africa on a plane. Before it was informed of Bashir's departure, the court ordered the government to arrest Bashir. The South Africa government argued that in this particular instance Bashir, who had previously been stopped from coming to South Africa twice before because he feared arrest – held a particular type of immunity because he was attending an AU summit (Mills, 2015b). This was a clear case of an attempt to privilege African solidarity over the anti-impunity norm – even though South Africa had previously expressed a reversed normative priority (although it had also privileged African solidarity over human rights before (Borer and Mills, 2011)). And was a clear victory for the fourth tactic of resistance – non-cooperation. The South African courts have not accepted this assertion. On

15 March 2016, the South African Supreme Court of Appeals ruled that the government had acted unlawfully and in violation of its international obligations which were enshrined in domestic law in 2002 (Coalition for the ICC, 2016). Prior to this, at the January 2016 AU summit, South African President Jacob Zuma stated that ‘Our strongly held view is that it is now impossible, under the circumstances, for South Africa to continue its participation in the Rome Statute. South Africa is seriously reviewing its participation in the Rome Statute and will announce its decision in due course’ (Fabricus, 2016). The African National Congress had stated in 2015 that the ICC was ‘no longer useful’ (News 24, 2015). At the time of writing, South Africa is under an obligation to report to the ICC why it did not arrest Bashir, although this has been suspended until domestic legal proceedings have been concluded. It is difficult to imagine South Africa actually withdrawing from the Rome Statute, but it certainly dramatically changed its role in the norm contestation dynamics.

Kenya is another prominent state which has moved firmly into the antipreneur camp. In late 2009 – around the time of the ASP – the ICC opened an investigation into post-election violence in 2007. Kenya itself had failed to prosecute anybody, and both the President and Prime Minister pledged to cooperate with the ICC (Gettleman, 2009). Cooperation with the ICC more generally evaporated the following year. In August 2010 Bashir traveled to Kenya to attend a ceremony celebrating the country’s new constitution at the invitation of the Kenyan President (the Kenyan Prime Minister criticised this, noting that it seemed to indicate a move back toward impunity) (Sudan Tribune 2010c) (although in November 2011 a Kenya court directed that Bashir be arrested if he traveled to Kenya again (Bashir Watch)). At the January 2011 AU summit, the AU Assembly supported Kenya (and Chad) in defying the ICC and allowing Bashir to visit unhindered. It also called on the UN Security Council to defer the ICC proceedings in Kenya – only 14 months after Kenyan leaders promised to cooperate (African Union, 2011). Since then, the ICC has brought cases against the sitting President and Vice-President, both of whom appeared in The Hague voluntarily. As a result of lack of evidence (brought on by lack of cooperation by the Kenyan state and witness tampering and intimidation (AFP 2016a)), the ICC terminated the case against the two ‘without prejudice’ – meaning that charges could be refiled (Fabricus, 2016; International Criminal Court, 2016). Here we see passive and active resistance to cooperating with the ICC and upholding the anti-impunity norm. This is not necessarily surprising given that the top leaders in the country were the targets of the investigation, but also illustrates the fragility of the anti-impunity norm and its institutional instantiation. Kenya, took further action, however, to undermine the ICC. The Kenyan parliament voted to withdraw from the ICC, although that has not had any effect. The Kenyan President, Uhuru Kenyatta, has been at the forefront of efforts to amend Article 27 of the Rome Statute to give sitting heads of state immunity. He also proposed the development of a roadmap to consider mass African withdrawal from the ICC in the AU the Article 27 amendment and other changes were not implemented (Fabricus, 2016). Although Kenya appears to be inhabiting a similar normative

space with South Africa, there are key differences. First, South Africa has traveled a lot further. As a prominent backer of the ICC from the beginning, and as a country of which a lot is expected in terms of human rights, its reversal appears more striking than Kenya's. Second, however, its actual position has been more nuanced. Its reasons for not arresting Bashir in June 2015 were narrower than Kenya's arguments. It did not argue for blanket immunity for heads of state. It stated that in this one instance, where Bashir was attending an AU summit, other diplomatic principles held sway. Many observers will say that this is a distinction without a difference, but it is still a more nuanced argument. Of course, President Zuma's statements regarding withdrawal do put South Africa in a similar position to Kenya in this regard. Overall, Kenya's actions demonstrate, as with South Africa, another instance of the tactic of non-cooperation, although in an even more substantial fashion.

A third country which has moved from norm entrepreneur to antipreneur is Uganda. In December 2003 President Museveni referred the situation in Uganda (specifically in Northern Uganda with regard to the Lord's Resistance Army (LRA)) to the ICC, and the case was taken up by the ICC the following month. While this might seem to be the action of a norm entrepreneur – it delivered the first case to the ICC Prosecutor – the reality was much more complicated. Museveni had material reasons for the referral – it helped him in the conflict with the LRA. Further, once Museveni perceived that the ICC was getting in the way of the peace process with the LRA, he asked for the ICC to stop its proceedings – essentially calling for impunity to support the peace process (Mills 2015). He thus seemed to be promoting an alternative norm to anti-impunity – peace – in a similar fashion to those who would later on promote peace over justice – at least temporarily – in Darfur. Museveni has also joined the antipreneur crowd, repeating the critique of the ICC 'as a tool that it out to punish Africa' at Uhuru Kenyatta's swearing in ceremony in 2013 (Momanyi, 2013)³ (even though Uganda had argued for watering down the July 2010 AU statement on non-cooperation (Sudan Tribune 2010a)). This conflicts with a government statement in 2009 revoking an invitation to Bashir to attend a meeting in Kampala: 'How does Uganda urge the DRC and others to apprehend Kony if they lay their hands on them but then let Bashir slip through its hands' (Bashir Watch). The hollowness of this statement was illustrated on 12 May 2016 when Bashir visited Uganda to attend Museveni's fifth Presidential inauguration and was allowed to leave again without being arrested. Museveni also denounced the ICC as a "bunch of useless people" (AFP 2016b).

Finally, it is notable that by the end of 2015 al-Bashir had traveled to the following ICC-member states without being arrested: Chad (2010, 2011, 2013 (twice), 2014), Djibouti

³ Although there are questions about whether he was acting as a true antipreneur or whether he was simply positioning himself as a leader in east Africa.

(2011), Malawi (2011), Nigeria (2013), Democratic Republic of the Congo (2014), South Africa (2015) and Uganda (2016). (Bashir Watch; AFP 2016b). Earlier we called the AU's decision to call for non-cooperation with the ICC in July 2009 the fourth instance of tactical resistance. Obviously these specific decisions to allow al-Bashir to travel with impunity are linked to it and, together, they probably constitute the single most effective act of resistance. They also demonstrate how antipreneurs can leverage the advantages they enjoy as defenders of the status quo by simply declining to take active steps consistent with the ICC's interpretation of what the anti-impunity norm requires.

Conclusion

This case supports the utility of recognising antipreneurs as a distinct category of actor which, in turn, enables us to consider a range of potential roles which actors can play. And identifying the roles the various actors played, and how/why these changed over time, enabled us to decide which of the three models Acharya has offered to explain outcomes in norm dynamics processes best describes what is happening in this case at various times.

In particular we found that after a short period of adaptation to – and indeed significant embracing of – the ICC's preferred interpretation of the anti-impunity norm, consistent with what we would expect to see in Acharya's localisation model, much changed – and quite rapidly – after the ICC issued an arrest warrant for Omar al-Bashir in July 2008. Thereafter African states and institutions engaged in escalating resistance to the norm, in favor of the status quo norm: sovereignty, and especially its sovereign immunity component. These actors put forth three justifications for this resistance – abuse of the norm in the context of an unequal global power distribution; threats to peace negotiations as a result of the application of the norm in ongoing conflict situations; and African solidarity. And African actors attempted to use seven different tactics in support of their resistance – calling on the UN Security Council to defer the proceedings in Darfur and Kenya; calling for mass African withdrawal from the ICC; attempts to create alternate African structures to substitute for the ICC; non-cooperation with ICC arrest and surrender orders (and other ICC activities); changing the guidelines for Prosecutorial decisions; calling on the UN General Assembly to be able to defer ICC prosecutions; and preventing the establishment of an ICC liaison office.

On the face of it, only two of these tactics were notably successful – non-cooperation and stopping the liaison office. The latter makes the work of the ICC a bit harder and sends a message of disapproval but, as noted above, the former represents the much more significant challenge, since it has entailed a number of African states directly contravening clear legal obligations they incurred by signing the Rome Statute. But African antipreneurs'

attempts at venue-shifting authority over Article 16 deferrals have not produced the desired results. Pleas to the Security Council have fallen on deaf ears, and the ASP members showed little interest in attempts to reform the ICC in the way the AU has called for. And while plans to create an African court to substitute for the ICC continue to develop, they have not yet come to fruition and will be of highly contested legality given that the principle of complementarity only applies to states; in other words, the ICC is not obligated, and indeed is probably required not to, cooperate with an African Court of Justice and Human Rights until the Rome Statute is amended. But looked at holistically all these tactics combine to create a strong defense of the normative status quo. We noted at the outset, *it is the norm entrepreneurs who must to generate and maintain momentum for normative change*. Thus, and put simply, blocking and frustrating moves, if they impede the forward progress of an emerging norm, on balance count as antipreneurial ‘wins’.

There are, however, more fine-grained conclusions to be drawn from this discussion. First, there is little evidence that African resistance to the anti-impunity norm, and in particular its institutionalisation in the ICC is about to wane. Indeed, quite the contrary; the trend has been towards greater resistance. Yet this resistance is not uniform or unproblematic. While the resisters seem to outweigh the entrepreneurs, many African ICC members have been more circumspect. While at times voting for antipreneurial resolutions in the AU, they have not been more outspoken – either in word or deed. The resisters do presently seem to have the upper hand but we should stress that most of the actors we have been describing as ‘shifting towards the antipreneur end of the spectrum’ seem to actually want to make the anti-impunity more of a permissive norm. In other words, they are not happy with it being a strong-prescriptive norm, but they don’t want to ‘roll-back’ the normative status-quo to the prohibitive strict-sovereign immunity position. Instead they simply want to have *more discretion* over when and how to apply it in *African* contexts.

Second, the broader global array of anti-impunity entrepreneurs shows little sign of wavering. There is little indication that non-African ICC member states will accede to African demands for reform. Nor is the UNSC likely to bow to demands to defer cases, or to accede to the General Assembly usurping its deferral power (for detailed discussion see Jalloh et al.: 29-37). Yet the UNSC’s intransigence – from Africa’s perspective – has contributed to a hardening of attitudes in Africa too, and this seems likely to continue. Some had speculated that the appointment of African Prosecutor might help the situation, but this has done little to change positions. Likewise, at this point, even if non-African situations move from the preliminary investigation stage to become active investigations with arrest warrants issued, the perceptions of bias, coupled with renewed African solidarity, will likely continue.

The wider implications of this are somewhat worrying for the anti-impunity norm. While African resistance will not necessarily kill the norm, it will stall progress in implementation and further expansion. Refusals to abide by legal obligations are worrying, but the response internationally as well as domestically (e.g. South African courts) indicates that there is still strong support. The ICC has been able to put a number of people on trial, and gain some convictions, but not being able to adequately – or at all – try those at the pinnacle of power does nevertheless represent a setback for the anti-impunity norm. Convictions of Charles Taylor and Hissène Habré notwithstanding, African antipreneurs have been able to carve out in practice a limited – and perhaps local – exemption for sitting heads of state.

Theoretically, the biggest challenge this situation poses is how to account for entrepreneurs who become antipreneurs. The work of Acharya and others highlights the dynamic nature of norm development and resistance. This case further illustrates that the primary actors involved in norm development and implementation – in this case states – are themselves dynamic actors and may play different and contradictory roles which makes the development of parsimonious models of norm development and implementation difficult, but reflects the messy dynamics of global politics – particularly in an era where politics is becoming more complicated as emerging powers – such as resurgent African states and institutions like the AU – are playing an increasingly important role in international relations. Thus, while the specific case of Africa and the anti-impunity norm does not necessarily indicate how the development of the norm will play out globally both theorists and diplomats would ignore these dynamics at their peril.

Finally, we believe that the conceptual framework we have offered can be usefully deployed in future studies. If scholars accept our finding that since 2008 Acharya's subsidiarity model best describes the general interactive dynamics the ICC and African actors they will be able to generate and then test appropriate hypotheses. Thus by paying attention to the roles the various African actors play and whether these are changing – and the responses by 'the centre' (especially the ASP and the UNSC) – it may be possible to determine if the ICC-Africa relationship is changing back towards the sort of patterns described in Acharya's localisation model, which would in turn indicate whether the norm was 'making progress' again, or whether its scope and content were changing substantially because a circulation model-like dynamic had taken hold.

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