I want to make something clear from the outset: what follows is not a defense of the International Criminal Court (ICC). Seriously. It may sound like one or be interpreted as one, but it is not one. What follows is an attempt to clarify what actually happened last week when states at the latest African Union (AU) summit adopted an “ICC Withdrawal Strategy”. In doing so, they set parts of the internet ablaze with a new round of reports of a mass exodus of states from the ICC and the Court’s pending demise. It’s not going to happen — at least not now. First, let’s tackle the actual resolution of the AU adopting the ICC Withdrawal Strategy. It is purposefully weak. Like, really, really weak. The non-binding resolution includes reservations from eight states. As Elise Keppler has pointed out, “Nigeria, Senegal, and Cape Verde ultimately entered formal reservations to the decision adopted by heads of state. Liberia entered a reservation to the paragraph that adopts the strategy, and Malawi, Tanzania, Tunisia, and Zambia requested more time to study it.” That’s a lot of reservations.

Further, the resolution’s operative paragraph declares that the Assembly of the AU “ADOPTS the ICC Withdrawal Strategy along with its Annexes and CALLS on member states
to consider implementing its recommendations”. There are few things weaker in the vernacular of international legalese than calling on states to consider something.

But what about the ICC Withdrawal Strategy that was adopted? Its title certainly sounds menacing. But in substance, it is anything but. For one, it doesn’t actually call on a mass withdrawal of states from the Court. Here’s what the Strategy lists under “objectives”:

- Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
- Institution of legal and administrative reforms of the ICC;
- Enhance the regionalization of international criminal law;
- Encourage the adoption of African Solutions for African problems;
- Preserve the dignity, sovereignty and integrity of Member States.

In reading the strategy, it is difficult not be left with the impression that African states remain engaged with the ICC. It certainly doesn’t sound like they’re collectively jumping ship. That’s because the Strategy reads like a largely reasonable list of possible reforms to the Rome Statute and the Court. Indeed, the arguments contained within the Strategy should be taken seriously and continue to be debated. There are at least a handful that should be acceptable to the Court and its champions, such as the long-standing request from Kenya to include “regional criminal jurisdictions” in the section of the Rome Statute’s pre-amble pertaining to the principle of complementarity. More attention also needs to be paid to the fact that the majority of the grievances and concerns expressed within the Strategy ultimately relate to the ICC’s relationship with the UN Security Council.

Perhaps the most unfortunate aspect of the Strategy is its misleading title. It is difficult, if not impossible, to read it and conclude that it proposes a roadmap for states to withdraw en masse from the Court. It really should be called “ICC Reform Proposals” or something similar. However, is clear that certain states prefer to muddy the waters and perhaps even want the media and observers to dramatize the possibility of a mass withdrawal. Advocates of the Court shouldn’t play into that game and, instead, ought to focus on encouraging African ICC member-states to advocate more accurate, and less inflammatory, titles for their documents and resolutions. That alone would help re-balance the narrative.

Finally, it is worth stressing that, irrespective of their interest in the ICC, some African states have expressed concern over the AU’s attempts to influence their membership in the Court.

https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/
Geoffrey Onyeama, Foreign Minister of Nigeria, which is under preliminary examination by the ICC, described his country’s views:

*Nigeria is not the only voice agitating against it; in fact, Senegal is speaking very strongly against it. Cape Verde and other countries are also against it. What AU did was to set up a committee to elaborate a strategy for collective withdrawal. After, Senegal took the floor, Nigeria took the floor, Cape Verde and some other countries made it clear that they were not going to subscribe to that decision. Each country freely and willingly acceded to the Treaty and not all of the members of the AU acceded; each country acceded individually, exercising its own sovereign right. So, if each country wants to withdraw, it has the right to do that individually. AU, which was not a party to the Rome Statute that established the court, should not be developing a strategy for a collective withdrawal for something that each country entered into individually. Those who feel they want to withdraw should do that individually.*

In assessments of the Africa-ICC relationship, an almost universal truth of international relations is often ignored: states don’t like being told what to do by supra- and international organizations. African states are no different. They respect the sovereign right of states to sign up to whatever treaties they want to and their sovereign right to withdraw from them. But it irks them to be told what to do — including on the ICC.

In the end, then, the AU adopted a resolution with *eight* reservations that recommended that its member-states *consider* withdrawing from the ICC by adopting a *non-binding* “ICC Withdrawal Strategy” that should probably just be called “ICC Reform Proposals”. The result was purposefully incendiary but weak.

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**About Mark Kersten**

Mark is a researcher, consultant and teacher based at the Munk School of Global Affairs in Toronto, Canada. His research focuses on the nexus of international criminal justice and conflict resolution. Specifically, Mark’s work examines the politics of the International Criminal Court and the effects of its interventions on peace, justice and conflict processes.

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