

African States Failed Withdrawal from the Rome Statute of the International Criminal Court: From Withdrawal Notifications to Constructive Engagement

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Abstract

In 2016 three African states, namely South Africa, Burundi and The Gambia submitted written notifications of withdrawal from the Rome Statute of the International Criminal Court (Rome Statute) to the Secretary-General of the United Nations pursuant to Article 127 of the Rome Statute. Although the African Union (AU) welcomed and fully supported the three States' withdrawal notifications and considered them as 'pioneer implementers' of the AU's 'Withdrawal Strategy', The Gambia and South Africa withdrew their notifications of withdrawal before they became effective. This article examines three issues arising out of the said withdrawal notifications. It begins by examining the reasons as to why the three states submitted withdrawal notifications from the Rome Statute. It then considers the impact of the three states' withdrawal notifications. It concludes by identifying steps that might be taken to ensure constructive engagement between African States and the ICC.

Keywords

International Criminal Court (ICC) – withdrawal notification – Rome Statute – Security Council – Article 127 – African Union – South Africa – Burundi – The Gambia

* Internet sources in this article were last accessed on 18 August 2017.

1 Introduction

The interaction between the International Criminal Court (ICC) and African Union (AU) member states has evolved over the years from enthusiastic support in the early years of the ICC to growing discontent in recent years. This discontent with the ICC has been shown in different ways, including withdrawal notifications by some African states, threats by some African states to withdraw from the Rome Statute, non-cooperation with the Court's arrest warrants, and the creation of an African regional criminal court that in some sense would be a rival to the ICC. In 2016 the growing discontent with the perceived unequal application of the Rome Statute of the International Criminal Court (Rome Statute),¹ the founding treaty of the International Criminal Court (ICC), particularly among some African leaders, culminated in 3 state withdrawal notifications out of 124 state parties.² In October and November 2016, three African Union (AU) member state parties to the Rome Statute – The Republic of South Africa (South Africa),³ the Republic of Burundi (Burundi)⁴ and The Republic of The Gambia (The Gambia)⁵ – submitted their written notifications of withdrawal from the Rome Statute to the United Nations (UN) Secretary General.⁶ This was done in accordance with Article 127(1) of the Rome Statute, which provides that a state party to the Rome Statute may withdraw from the Statute 'by written notification addressed to the Secretary-General of the

1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

2 Assembly of States Parties, States Parties to the Rome Statute, <asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>. For recent literature on the ICC and Africa see generally K.M. Clarke et al., *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, Cambridge, 2016); E.A. Ankumah (ed.), *The International Criminal Court and Africa: One Decade On* (Intersentia, Cambridge, 2016); and J. Nyawo, *Selective Enforcement and International Criminal Law: The International Criminal Court and Africa* (Intersentia, Cambridge, 2017).

3 South Africa deposited its instrument of ratification to the Rome Statute on 27 November 2000.

4 Burundi deposited its instrument of ratification to the Rome Statute on 21 September 2004.

5 The Gambia deposited its instrument of ratification to the Rome Statute on 28 June 2002.

6 The official notifications of withdrawal were received by the UN secretary General on 19 October 2016 for South Africa, 27 October 2016 for Burundi, and 10 November 2016 for The Gambia. See the following Withdrawal Depository Notifications: C.N.786.2016.TREATIES-XVIII.10 (South Africa); C.N.805.2016.TREATIES-XVIII.10, (Burundi) and C.N.862.2016.TREATIES-XVIII.10 (The Gambia).

United Nations'.⁷ The notifications of withdrawals were welcomed and supported by the African Union (AU) as part of the AU's 'Withdrawal Strategy' from the Rome Statute.⁸ However, both The Gambia and South Africa withdrew their notifications of withdrawal before they became effective. At present, this signals their renewed commitment to the Rome Statute, from withdrawal notifications to constructive engagement. Unless Burundi also withdraws its notification of withdrawal at any time before it becomes effective, its withdrawal shall take effect one year after the date of receipt by the UN Secretary-General.⁹ This will make Burundi the first state party to the Rome Statute in the world to withdraw from the Rome Statute, 15 years since the Statute entered into force.

South Africa, one of the first signatories to the Rome Statute,¹⁰ ratified the Rome Statute on 27 November 2000 *after* first obtaining parliamentary approval.¹¹ In order to ensure the effective implementation of the Rome Statute in South Africa, in accordance with the South African Constitution, a domestic statute was enacted through the Implementation of the Rome Statute of the International Criminal Court 2002.¹² This made South Africa the first African state to domesticate the Rome Statute. On 19 October 2016, the government of South Africa Minister of International Relations and Cooperation, acting for the executive and without seeking or receiving *prior* approval of the

7 For a commentary on Art. 127 see Roger S. Clark, 'Article 127: Withdrawal', in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edn. (CH Beck, Munich, 2016) 2322–2324.

8 Decision on the International Criminal Court Doc. EX.CL/1006(XXX), Assembly/AU/Draft/Dec.1(XXVIII)Rev.2, (30–31 January 2017) para. 8; African Union (AU), Withdrawal Strategy Document (2017, on file with author).

9 Rome Statute, *supra* note 1, Art. 127(1). Unless Burundi's withdrawal notification is withdrawn, it shall take effect on 27 October 2017.

10 South Africa signed the Rome Statute on 17 July 1998 (the date it was first opened for signature).

11 Constitution of the Republic of South Africa 1996, Section 231(2), provides that an 'international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces'; *Glenister v. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6, para. 89 Ngcobo CJ.

12 Act 27 of 2002, adopted by Parliament in 2002, <www.gov.za/sites/www.gov.za/files/a27-02.pdf>; *Glenister, supra* note 11, para. 95; *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* (CCT 02/14), [2014] ZACC 30; Constitution of the Republic of South Africa 1996, Section 231(4): 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation...'

South African parliament or any public consultation,¹³ unilaterally submitted to the UN Secretary General a notification of South Africa's withdrawal from the Rome Statute.¹⁴ This was followed by a Parliamentary Bill to repeal the Implementation of the Rome Statute in South Africa.¹⁵

Although South Africa's withdrawal notification was revoked on 7 March 2017 in order to adhere to a High Court judgment,¹⁶ President Jacob Zuma stated that the current government position is that the decision to withdraw from the Rome Statute was 'a principle matter' and the principle 'still stands'.¹⁷ For this reason it is still useful to understand reasons leading to South Africa's notification of withdrawal, which came after three significant recent developments. First, in June 2015, the High Court of South Africa, Gauteng Division, Pretoria, ordered the South African government to prohibit the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir (Al Bashir), who is subject to two ICC arrest warrants,¹⁸ from leaving South Africa, which the South African government ignored.¹⁹ The Supreme Court of Appeal of South Africa found that South Africa's failure to take steps to arrest and detain, for surrender to the ICC, Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th AU Assembly, was inconsistent with South Africa's obligations under

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- 13 Constitution of the Republic of South Africa 1996, Section 231(2), *supra* note 11. By implication even withdrawal notification from an international agreement like the Rome Statute must follow the procedure in Section 231(2) – it must be submitted 'after it has been approved by resolution in both the National Assembly and the National Council of Provinces'.
- 14 See UN, South Africa: Withdrawal, C.N.786.2016.TREATIES-XVIII.10.
- 15 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, 2016, <www.parliament.gov.za/live/commonrepository/Processed/20161111/616356_1.pdf>.
- 16 See *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, Case No. 83145/2016, (High Court of South Africa, 22 February 2017), <saflii.org/za/cases/ZAGPPHC/2017/53.pdf>, declaring the notice of withdrawal, without prior parliamentary approval, 'unconstitutional and invalid'.
- 17 J. Zuma, 'The ANC must and will emerge from this policy conference stronger', *Daily Maverick*, 30 June 2017, <www.dailymaverick.co.za/article/2017-06-30-op-ed-the-anc-must-and-will-emerge-from-this-policy-conference-stronger/#.WWUdVOhnhIV>.
- 18 See Pre-Trial Chamber I, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-1, 4 March 2009 (warrant for seven counts of war crimes and crimes against humanity); Pre-Trial Chamber I, 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-95, 12 July (warrant for three counts of genocide).
- 19 *Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others*, Case No. 27740/2015, 2015 (9) BCLR 1108 (GP) (24 June 2015), <saflii.org/za/cases/ZAGPPHC/2015/402.html>.

the Rome Statute.²⁰ The ICC Pre-Trial Chamber II had earlier made it clear that ICC State parties including South Africa are under an obligation to arrest and surrender Al Bashir to the ICC.²¹ Thus South Africa failed to comply with the Court's request for the arrest and surrender of Al Bashir, thereby preventing the Court from exercising its functions and powers under the Rome Statute. Second, the AU (which has more than a third of member states as non-parties to the Rome Statute),²² had made several decisions calling upon African States not to cooperate with the ICC²³ and urged its member states to consider 'collective withdrawal from the ICC'.²⁴ Third, South Africa's withdrawal notification came after the withdrawal process initiated by Burundi²⁵ and later supported by The Gambia.²⁶

20 *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016). The Supreme Court of Appeal's decision in this case is final since on 18 November 2016, the Constitutional Court of South Africa issued a direction noting South Africa's withdrawal of its appeal to the Constitutional Court, *The Minister of Justice and Constitutional Development and Others v. The Southern African Litigation Centre and Others*, CCT 75/16.

21 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09-242, 13 June 2015; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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, 9 April 2014, paras. 28 to 31; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 6 July 2017, para. 123.

22 34 out of 54 AU member states (62 per cent) were parties to the Rome Statute in December 2016, making African states the largest block of state parties to the Rome Statute.

23 See e.g. the following AU decisions on the ICC: Assembly/AU/Dec.245(XIII), 3 July 2009, para. 10; Assembly/AU/Dec.296(XV), 27 July 2010, para. 5; Assembly/AU/Dec.397(XVIII), 30 January 2012, paras. 6 and 8.

24 See Decision on the International Criminal Court – Doc. EX.CL/952(XXVIII), AU Assembly/AU/Dec.590 (XXVI) 30–31 January 2016, para. 10(iv).

25 See Government of Burundi, Press Release of the Meeting of Council of Ministers of Thursday, 6 October 2016, <www.burundi.gov.bi/spip.php?article1534>. On 12 October 2016, the Burundian Parliament voted in favour of Burundi's withdrawal from the Rome Statute and on 18 October 2016, President Pierre Nkurunziza of Burundi signed off the bill for Burundi's withdrawal from the ICC, after the ICC Prosecutor Fatou Bensouda opened a preliminary examination in April 2016 into possible crimes against humanity allegedly committed in Burundi since April 2015. See also UN Depository Notification, *Burundi: Withdrawal*, C.N.805.2016.TREATIES-XVIII.10, 27 October 2016.

26 See UN Depository Notification, *Gambia: Withdrawal*, C.N.862.2016.TREATIES-XVIII.10, 11 November 2016.

This article examines key issues in connection with the three withdrawal state notifications. Section 2 examines reasons for withdrawal notifications. It considers why did the three states submit notifications of withdrawal from the Rome? Section 3 analyses the likely consequences of the 3 withdrawal notifications from the Rome Statute. Section 4 makes concluding observations. It comments on whether Burundi, following the example of South Africa and The Gambia, should consider withdrawing its withdrawal notification and outlines measures that might be taken to avoid, or at least minimise, further withdrawal notifications in the future and to avoid impunity of perpetrators of international crimes in any state after withdrawal from the Rome Statute.

2 Reasons for Withdrawal Notifications from the Rome Statute

Article 127 of the Rome Statute, which applies to withdrawals from the Statute, does not require states to provide any reason for withdrawing. It follows, therefore, that a state party to the Rome Statute may submit a withdrawal notification from the Statute at any time, in accordance with Article 127, without giving any reason, 'good' or 'bad'.²⁷ While withdrawal notifications of Burundi and The Gambia did not state any specific reason(s) for withdrawing, it is possible to infer some reasons from the prevailing circumstances in both states before withdrawal notifications were submitted. South Africa decided to give reasons for its withdrawal notification.²⁸ An analysis of the reasons advanced by South Africa is helpful in understanding why it took this step and what needs to be done to avoid further possible withdrawal notifications in the future by any other state sharing the same views as South Africa. In what follows, an analysis is made of the reasons that principally motivated the three withdrawal notifications.

2.1 *Avoiding Accountability before the ICC for Possible International Crimes*

Both withdrawal notifications of Burundi and The Gambia were intended to ensure that state officials including sitting heads of state – President Pierre Nkurunziza of Burundi since 2005 and President Yahya Jammeh of The Gambia from 1994 to 19 January 2017 – escape possible criminal investigations and

²⁷ Clark, *supra* note 7, 2322.

²⁸ See *Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court*, C.N.786.2016.TREATIES-XVIII.10 (19 October 2016), <treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

prosecutions before the ICC. Burundi experienced violence before and after legislative and presidential elections since April 2015 including a failed *coup de tat* in May 2015. The government responded by carrying out several operations leading to gross violations of human rights possibly amounting to crimes against humanity of 'killing, other inhumane acts, imprisonment, torture, rape and other sexual violence, as well as cases of enforced disappearances and acts of persecution'.²⁹ Thus, on 25 April 2016, the ICC Prosecutor opened a preliminary examination of the situation in Burundi since April 2015. On 20 September 2016, the UN Independent Investigation on Burundi found that 'gross human rights violations have taken place and are taking place, committed primarily by State agents and those linked to them'.³⁰ The Commission added that these violations were widespread, 'systematic and patterned and impunity [was] pervasive'.³¹ The Commission expressed the view that some of the violations could amount to crimes against humanity and that 'independent international processes determine accountability for possible international crimes'.³² Following these findings, the UN Human Rights Council decided, on 30 September 2016, to create for a period of one year a commission of inquiry into human rights abuses in Burundi since April 2015 that would identify alleged perpetrators of human rights violations in Burundi with a view to ensuring full accountability.³³

Burundi's head of state and other state officials did not want the Prosecutor to proceed with the preliminary examination because they would be possibly identified among the alleged perpetrators. At the time 'more than 430 persons had reportedly been killed, at least 3,400 people arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries'.³⁴ The preliminary examination focussed on acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances

29 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016, <www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>, paras. 36, 39–52.

30 Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council resolution S-24/1, UN Doc. A/HRC/33/37, 20 September 2016, 1.

31 *Ibid.*

32 *Ibid.*, paras. 123–4.

33 Human Rights Council, *Human Rights Situation in Burundi*, UN Doc. A/HRC/33/L.31, 27 September 2016. See also African Commission Resolution on the Human Rights Situation in the Republic of Burundi, ACHPR/Res.357(LIX) 2016, 4 November 2016.

34 ICC, *Preliminary Examination: Burundi*, <www.icc-cpi.int/burundi>.

that have been allegedly committed since April 2015 in Burundi.³⁵ It should be noted that a full investigation can still be carried out since withdrawal has no impact on withdrawing state obligations (to cooperate with the Court in connection with criminal investigations and proceedings) under the Rome Statute prior to the date on which the withdrawal becomes effective.³⁶ However, it would be very difficult for the Prosecutor to obtain Burundi's cooperation with the investigations.

For The Gambia President Jammeh was concerned that the situation in The Gambia could potentially be subjected to a preliminary investigation by the ICC. Jammeh took power in a coup in 1994 but lost an election on 1 December 2016.³⁷ This happened shortly after submission of The Gambia's notification of withdrawal from the Rome Statute. Jammeh's government 'frequently committed serious human rights violations including arbitrary detention, enforced disappearance, and torture against those who expressed opposition to the government' especially in the aftermath of the 30 December 2014 attempted coup.³⁸ These could amount to crimes against humanity. The Gambia under President Jammeh consistently demonstrated its lack of commitment to accountability before judicial and quasi-judicial bodies. For example, it refused to implement three legally binding decisions by the Court of Justice of the Economic Community of West African States (ECOWAS Court) regarding the torture,³⁹ murder⁴⁰

35 *Ibid.*

36 Rome Statute, *supra* note 1, Art. 127(2); Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969, entered into force 27 January 1980, (1980) 1155 UNTS 331, Art. 70(1)(b).

37 The Gambian Independent Electoral Commission (IEC) declared that Barrow obtained 222,708 votes (43.3 percent) while Jammeh obtained 208,487 (39.6 percent). See IEC, *The Total of Final Results*, 5 December 2016, <iec.gm/the-total-of-final-election-results/>.

38 Human Rights Watch, *World Report 2016: Gambia*, <www.hrw.org/world-report/2016/country-chapters/gambia>; European Parliament Resolution of 12 May 2016 on The Gambia (2016/2693(RSP)).

39 See *Musa Saidykhan v. Republic of The Gambia*, Suit No. ECW/CCJ/APP/11/07, Judgment No. ECW/CCJ/JUD/08/10 (6 December 2010) concerning the award of damages in the sum of USD 200,000 for arrest, detention and torture of journalist Musa Saidykhan for 22 days without any lawful excuse and without trial.

40 See *Deyda Hydara Jr. and Others v. The Gambia*, Case No. ECW/CCJ/APP/30/11, (10 June 2014), the ECOWAS Court awarded damages of US \$50,000 for the prejudice suffered as a result of the government's failure to conduct effective and impartial investigations into the assassination of Deyda Hydara (former publisher and editor of the Banjul-based newspaper *The Point*, and former president of the Gambian Press Union) leading to culture of impunity in the Gambia.

and enforced disappearance of journalists,⁴¹ and it has on several occasions failed to cooperate with the resolutions of the African Commission on Human and Peoples' Rights, which is based in Banjul, The Gambia.⁴² It is important to note that The Gambia's withdrawal notification was a clear manifestation of its unwillingness to be subjected to a possible ICC investigation. It was an executive decision under President Jammeh made without prior parliamentary approval or any public consultation. As a result, the notification could be withdrawn by an executive act at any time before it becomes effective.

In December 2016 President Jammeh lost a Presidential election to Adama Barrow.⁴³ Afterwards Jammeh was forced to carry out 'a peaceful and orderly transition process, and to transfer power to President-elect Adama Barrow' in January 2017 in accordance with the Gambian Constitution.⁴⁴ Barrow expressed commitment to the rule of law and accountability observing that 'there is no need for us [The Gambia] to leave the ICC'.⁴⁵ Subsequently, in February 2017 The Gambia under Barrow notified the UN Secretary General of

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- 41 See *Chief Ebrimah Manneh v. The Republic of The Gambia*, Suit No. ECW/CCJ/APP/04/07, Judgment No. ECW/CCJ/JUD/03/08, (5 June 2008). The ECOWAS Court ordered The Gambia to immediately release journalist Manneh and pay damages in the sum of USD. 100 000 to Manneh or, in his absence, to his family.
- 42 See e.g., African Commission, *Resolution on the Human Rights Situation in the Republic of The Gambia*, Doc. ACHPR/Res.134 (XXXXIII) 2008 adopted at the Commission's 44th Ordinary Session, Abuja, Nigeria, 10 to 24 November 2008; *Resolution on the Deteriorating Human Rights Situation in The Gambia*, adopted at the Commission's 7th extraordinary session, Dakar, Senegal, 11 October 2009, <www.achpr.org/sessions/7th-eo/resolutions/145/>.
- 43 UN News Centre, 'Gambia: UN Calls on Outgoing President to Respect Election Results and to Carry Out a Peaceful Transition', 10 December 2016, <www.un.org/apps/news/story.asp?NewsID=55776#.WE2k2j5vjIU>.
- 44 See UN Security Council, Presidential Statement: Gambian Leaders Must Respect Vote Result, S/PRST/2016/19, <www.un.org/press/en/2016/sc12650.doc.htm>; UN Security Council Resolution 2337, S/RES/2337 (19 January 2017) para. 7; Joint Declaration by the Economic Community of West African States, the African Union and the United Nations on the Political Situation of the Islamic Republic of The Gambia on 21 January 2017, <www.peaceau.org/uploads/ecowas-au-un-joint-communique.pdf>.
- 45 K. Cham, 'The Gambia's New President to "Reverse ICC Withdrawal"' *The East African*, 6 December 2016, <www.theeastafrican.co.ke/news/The-Gambia-new-president-to-reverse-ICC-withdrawal/2558-3476690-pufyxjz/index.html>. See also L. Mogeni, 'Gambia May Not Join Other African States in ICC Withdrawal' *The Wire*, 9 December 2016, <<http://thewire.in/85747/gambia-icc-africa/>>; P. Saine and L. Jahateh, 'Gambia Announces Plans to Stay in International Criminal Court', *Reuters*, 13 February 2017, <uk.reuters.com/article/uk-gambia-justice-icc-idUKKBN15S2HD>.

'its decision to rescind' the notification of withdrawal 'with immediate effect'.⁴⁶ It also confirmed that 'The Gambia still considers itself as a state party and will continue to honour its obligations under the Rome Statute'.⁴⁷ The rescission of The Gambia's notification of withdrawal was historic – the first time a state has taken such a step. It offered some hope that the new Gambian government might help pave the way to accountability in the future. The rescission of the withdrawal notification means that it is still possible for the ICC to carry out a preliminary examination of the situation in The Gambia.

2.2 *Alleged Loss of Credibility by the ICC*

The South African government claimed that the ICC as a judicial body has lost its credibility primarily because of the Court's relationship with the UN Security Council as a UN political organ. South Africa further stated that the ICC has lost credibility due to 'the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others [commission of international crimes outside Africa]'.⁴⁸ This view was restated by The Gambia's information minister, Sheriff Baba Bojang, who claimed that The Gambia's withdrawal notification was 'warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans'.⁴⁹ Has the ICC lost its credibility due to its relationship with the UN Security Council to justify withdrawal by (some African) state parties? Has it been selective on investigating and prosecuting crimes committed only by Africans in African states while ignoring similar or worse crimes committed outside Africa?

2.2.1 The UN Security Council Exclusive Referral of Situations in Africa to the ICC

The UN Security Council, a political body, acting on behalf of all UN member states to maintain international peace and security under Chapter VII of the UN Charter,⁵⁰ has power to give the ICC jurisdiction by referring a 'situation' to the ICC Prosecutor in which one or more crimes within the ICC jurisdiction

46 UN, Gambia: Withdrawal of Notification of Withdrawal, C.N.62.2017.TREATIES-XVIII.10 (16 February 2017).

47 *Ibid.*

48 Declaratory Statement, *supra* note 28. Both the US and Russia signed but never ratified the Rome Statute and later 'unsigned' the Statute.

49 J. Bavier, 'Gambia Announces Withdrawal from International Criminal Court' 26 October 2016, <uk.reuters.com/article/uk-gambia-icc-idUKKCN12P333>.

50 Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI, Arts. 24(1), 39, 41, 48 and 103.

appear to have been committed.⁵¹ The Security Council can trigger proceedings over the crime of aggression.⁵² The referral practice of the Council has been characterised by double standards, lack of consistence and coherence as well as inaction or lack of effective support after referral. The ICC as an independent permanent international organisation is entirely autonomous from, but has an important relationship with, the UN.⁵³ Since the ICC does not participate in the Security Council's decision-making, it is not responsible for the Council's practice.

However, its credibility as a judicial body has certainly been affected by the Council's practice. The Council has to date referred two situations to the Prosecutor, exclusively in Africa – Darfur (Sudan)⁵⁴ and Libya,⁵⁵ which does not reflect the aspiration to the universal vocation of the Court. In both situations, the Council required that Sudan and Libya 'cooperate fully' and 'provide any necessary assistance to the Court'.⁵⁶ Nevertheless, notwithstanding Article 115 of the Rome Statute,⁵⁷ the Council did not provide financial support for expenses associated with the investigations and prosecutions.⁵⁸ Similarly, it did not provide political support to the ICC or take any other follow-up actions to ensure that ICC arrest warrants are executed by both state parties and non-state parties,⁵⁹ leaving the Prosecutor unable to prosecute cases from

51 Rome Statute, *supra* note 1, Art. 13(b).

52 *Ibid.*, Art. 15ter.

53 *Ibid.*, Art. 2; Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, 4 October 2004.

54 SC Resolution 1593, UN Doc. S/RES/1593 (31 March 2005).

55 SC Resolution 1970, UN Doc. S/RES/1970 (26 February 2011). Although the situation in Libya may be seen as concerning mainly 'Arabs', Libya is geographically located in Africa and a member of the African Union. Cases arising out of the Libyan referral (Saif Al-Islam Gaddafi, Abdullah Al-Senussi and Mahmoud Mustafa Busayf Al-Werfalli) deal with Africans.

56 SC Resolution 1593, *supra* note 54, para. 2; SC Resolution 1970, *supra* note 55, para. 5.

57 Rome Statute, *supra* note 1, Art. 115 provides that in addition to assessed contributions made by States Parties, the expenses of the Court shall be provided by the: 'Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council'.

58 SC Resolution 1593, *supra* note 54, para. 7; SC Resolution 1970, *supra* note 55, para. 8; Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 9 November 2016, para. 30 noting: 'the Council has so far failed to provide any meaningful support, financial or otherwise, to the Office [of the Prosecutor's] work in Libya'.

59 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, ICC-02/05-01/09, 29 April

Sudan⁶⁰ and to obtain custody of Saif Al-Islam Gaddafi from Libya.⁶¹ In fact, five suspects who are members of the Government of the Republic of Sudan or its aligned militias remain at large in Sudan, many years after arrest warrants were issued against them.⁶² Two warrants for the arrest of Omar Al-Bashir subsequently issued by Pre-Trial Chamber I (the first on 4 March 2009 for a number of war crimes and crimes against humanity⁶³ and the second on 12 July 2010 for the crime of genocide)⁶⁴ have not been executed. Instead Al Bashir has been able to travel across several international borders without arrest and surrender to the Court, thereby openly undermining Resolution 1593 and the credibility of the Council as well as the Court.

It is well known that Africa is seriously underrepresented on the UN Security Council, which is steered primarily by great powers who are permanent members namely China, France, Russia, the United Kingdom (UK) and the United States (US). According to the South African government: 'Questions on the credibility of the ICC will persist so long as three of the five permanent members of the Security Council [China, Russia and the US] are not State Parties to the Statute.'⁶⁵ This is primarily due to their status as non-state parties and veto power. South Africa's view suggests that the Security Council, which is still stuck in the post Second World War hegemony, has referred African situations to the ICC but ignored similar or worse situations elsewhere eg Afghanistan, Iraq, North Korea, Palestine, Sri Lanka, Syrian Arab Republic (Syria), Ukraine, and the US with respect to methods used in interrogations and detention since 9/11.

2014, para. 12 Pre-Trial Chamber II observed that the Security Council by means of a resolution adopted under Chapter VII of the UN Charter, may 'create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter'.

60 See Twenty-Fourth Report of The Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005), 13 December 2016, para. 36 observing: 'the Council, as an important pillar of enforcement, has not taken the follow-up steps necessary to ensure that accountability is realised in practice'. See also Ms. Bensouda in UN Security Council, *Reports of the Secretary-General on the Sudan and South Sudan*, UN Doc. S/PV.7337 (12 December 2014), 2.

61 Twelfth Report of the Prosecutor, *supra* note 57, paras. 3–9.

62 These suspects are Messrs Omar Hassan Ahmad Al Bashir, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Abdel Raheem Muhammad Hussein, and Abdallah Banda Abakaer Nourain.

63 Pre-Trial Chamber I, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-1.

64 Pre-Trial Chamber I, 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-95.

65 See Declaratory Statement, *supra* note 28.

Situations involving interests of some major political and economic states which are permanent members of the UN Security Council or their allies would never be referred to the ICC. For example, the situation in Afghanistan did not attract a UN Security Council referral despite the existence of 'a reasonable basis to believe' that crimes were committed in 2003–2004 (continuing in some cases until 2014) within the Court's jurisdiction, in particular 'war crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency'.⁶⁶ The US would use its veto power against such a referral investigating crimes committed by US military officials.

In May 2014, Russia and China vetoed a draft UN Security Council resolution calling for the referral of the situation in Syria since 15 February 2011 to the ICC Prosecutor – ignoring support for the referral by 65 other states and all other 13 members of the Security Council including African states non-permanent members (Chad and Rwanda).⁶⁷ This was intended to shield the regime of President Bashar al-Assad, to which Russia had tied itself over decades, from ICC investigations and potential prosecutions. Thus while the Security Council can theoretically refer any situation to the ICC, in practice only a certain group of states can be referred to the ICC due to 'prevailing geo-strategic and international political reasons' among the permanent UN Security Council members.⁶⁸

Consequently, this has created a perception that it is only African sitting heads of state (starting with Al Bashir of Sudan in 2009, Gaddafi of Libya in 2011, Kenyatta and Ruto of Kenya in 2012) that commit international crimes and need intervention from the ICC. This has provided a basis for some African leaders to criticise or perceive the ICC as 'a biased instrument of post-colonial

66 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016, <www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>, para. 198(c).

67 UN Security Council, Draft Resolution (proposed by France), UN Doc. S/2014/348 (22 May 2014); UN Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, SC/11407 (22 May 2014), <www.un.org/press/en/2014/sc11407.doc.htm>.

68 International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Joseph Kanyabashi*, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-7, 18 June 1997, para. 36 noting: 'The fact that the Security Council, for previously prevailing geo-strategic and international political reasons, was unable in the past to take adequate measures to bring to justice the perpetrators of crimes against international humanitarian law is not an acceptable argument against introducing measures to punish serious violations of international humanitarian law when this becomes an option under international law'.

hegemony⁶⁹ which is ‘intended for developing and weak countries and was a tool to exercise cultural superiority’⁷⁰ and thus a ‘vessel for oppressing Africa again’.⁷¹ While there is some merit in criticising the practice of the Security Council, two observations should be noted.

First, it must be acknowledged that none of the African non-permanent Security Council members voted against the UN Security Council referrals in Darfur and Libya: Gabon, Nigeria and South Africa voted in favour of the Libyan referral,⁷² while Benin and Tanzania voted in favour of the Darfur referral.⁷³ Thus African states non-permanent Security Council members including South Africa have contributed to the practice of Security Council referrals of African situations to the ICC. The five permanent members would be unable to refer a situation without the concurrent vote of other non-permanent members, since a Chapter VII decision requires a majority. Besides, there is no doubt that attacks on the civilian population in Darfur were war crimes and crimes against humanity.⁷⁴ It is in this context that the AU Commission of Inquiry on South Sudan recommended that ‘those with the greatest responsibility for the atrocities at the highest level should be brought to account’.⁷⁵ Since Sudan was

69 F. Makana, ‘Ugandan President Yoweri Museveni Lashes out at ICC, Wants Africa to Pull Out’ *Standard*, 13 December 2014, <www.standardmedia.co.ke/article/2000144601/ugandan-president-yoweri-museveni-lashes-out-at-icc-wants-africa-to-pull-out>.

70 See Security Council, ‘Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court’, 5158th Meeting, SC/8351 (31 March 2005), statement by the representative of the Sudan, Elfatih Mohamed Ahmed Erwa, <www.un.org/press/en/2005/sc8351.doc.htm>.

71 D. Miriri, ‘Uganda’s Museveni Calls on African nations to quit the ICC’, *Reuters*, 12 December 2014, <www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212>. President Museveni described the ICC as a ‘vessel for oppressing Africa again’.

72 See Security Council, 6491st Meeting, SC/10187/REV.1, 26 February 2011, <www.un.org/press/en/2011/sc10187.doc.htm>. SC Resolution 1970, was adopted unanimously. South African representative, Baso Sangqu, stated that ‘the measures it [SC Resolution 1970] contained could contribute to the long-term objective of bringing peace and stability to the nation’.

73 See Security Council, 5158th Meeting, SC/8351, 31 March 2005, <www.un.org/press/en/2005/sc8351.doc.htm>. SC Resolution 1593 (2005) was adopted by a vote of 11 in favour, none against with 4 abstentions (Algeria, Brazil, China, United States).

74 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 November 2005, <www.un.org/news/dh/sudan/com_inq_darfur.pdf>.

75 Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2014, <www.peaceau.org/uploads/auciss.final.report.pdf>, para. 1142.

unable or unwilling to do so, the Security Council referral of the situation in Darfur to the ICC is understandable.

Second, any investigation and proceedings that may arise from any situation referred by the UN Security Council to the ICC is not determined by the Security Council but governed by the Rome Statute and the ICC Rules of Procedure and Evidence.⁷⁶ Decisions are made by the ICC independent judges through a judicial process and are 'not influenced by the Security Council or any other external body'.⁷⁷ No evidence exists to show any lack of independence on the part of ICC judges in the performance of their judicial functions.⁷⁸

Nonetheless, the current practice of the UN Security Council referral of African situations while ignoring non-African situations reflects wider political dynamics at the Security Council. Pressure by some UN Security Council permanent members undermines efforts at accountability and impedes the Council from carrying out its referral duties to the ICC Prosecutor in an impartial and effective manner. It also undermines attempts to adopt resolutions that would have helped to hold parties accountable. For instance, in the past five years, Russia has vetoed seven Security Council texts on the Syrian conflict, while China has cast a negative vote six times on the issue.⁷⁹ The UN Security Council remains a political body that is subject to veto wielding and has been inconsistent in referring situations to the ICC. In this context, the UN Secretary General noted:

[T]here remain serious challenges in pursuing accountability. Some situations which, by any objective analysis, would have warranted some form of action by the Security Council, have faced serious obstacles or languished entirely. This has eroded the Council's credibility. There is a need to address this problem, and to bring some consistency to the effort.⁸⁰

76 See Rome Statute, *supra* note 1; ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, part II.A, <www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>.

77 See Statement by the ICC Presidency, 'ICC Underlines Impartiality, Reiterates Commitment to Cooperation with the African Union', ICC-CPI-20130529-PR908, 29 May 2013, <www.icc-cpi.int/Pages/item.aspx?name=pr908&ln=en>.

78 Independence of ICC judges is secured through Articles 40, 36, 46, 47 and 49 of the Rome Statute.

79 See UN News Centre, Russia, China block Security Council Action on Use of Chemical Weapons in Syria, 28 February 2017, <www.un.org/apps/news/story.asp?NewsID=56260#.WLCmjvmlTIU>.

80 Secretary-General, Honouring Geneva Conventions, Secretary-General Says Debate 'No Longer between Peace and Justice but between Peace and What Kind of Justice',

It is essential for the Council to correct its failings by taking concrete action to refer all deserving situations to the ICC. This requires developing a transparent and consistent policy setting out objective criteria for deciding whether or not to refer a situation to the ICC without of any perception of double standards. This will provide an opportunity for the ICC to extend its global reach.

2.2.2 Security Council Exemption of the US Nationals from the ICC Jurisdiction

In 2002 the US passed the American Service-members Protection Act, which prohibits cooperation with the ICC.⁸¹ Based on the insistence of the US, the two Security Council referrals in Darfur and Libya limited the personal scope of ICC jurisdiction by excluding certain categories of individuals from non-state parties to the Rome Statute. In the Darfur referral, for example, the Council decided that:

nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.⁸²

The above paragraph, which discriminates on the basis of nationality, was intended to protect US nationals from the ICC jurisdiction and it was included in the SC resolution as a condition for the US not to veto the resolution.⁸³ A similar paragraph was included in the SC resolution referring the Situation in Libya to the ICC Prosecutor,⁸⁴ and in the draft resolution for the Syria

SG/SM/12494, L/T/4417, HR/5002 (26 September 2009), <www.un.org/press/en/2009/sgsm12494.doc.htm>.

81 American Service-members' Protection Act of 2002, <legcounsel.house.gov/Comps/aspao2.pdf>, Sec 2004.

82 SC Resolution 1593, UN Doc. S/RES/1593 (31 March 2005), para. 6.

83 UN SC, 5158th Meeting 31 March 2005, United States, UN Doc. S/PV.5158, at 4, <www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5158>: US ambassador, Mrs. Patterson, explained that: 'This resolution provides clear protections for United States persons. No United States person supporting the operations in the Sudan will be subject to investigation or prosecution because of this resolution'.

84 SC Resolution 1970, UN Doc. S/RES/1970 (26 February 2011), para. 6.

referral.⁸⁵ Such discriminatory referrals were criticised by states upon adoption.⁸⁶ The Office of the Prosecutor (OTP) stated that it has not accepted the effects of the above discriminatory paragraph and it has stated before the UN Security Council that it has competence over NATO troops in Libya. Nonetheless, these referrals were acted upon by the Court without determining whether the UN Security Council resolutions of situations in Darfur and Libya were compatible with Article 13(b) of the Rome Statute and the principle of non-discrimination. The Security Council is not empowered to impose discriminatory exemptions to the exercise of the jurisdiction of the ICC. It follows that discriminatory exemptions granting immunity to nationals of non-state parties who commit crimes in a situation referred to the Court do not bind the ICC. Nonetheless by acting upon the UN Security Council referrals in Sudan and Libya, without any judicial determination of the effect of the purported exemption clauses on the exercise of the Court's jurisdiction, the ICC appears to have, at least in practice, implicitly accepted the exemption paragraphs.⁸⁷ Although the OTP stated that it has not accepted the effects.

A 'situation' under Article 13(b) must be referred to the Prosecutor without any prohibited discriminatory limitation. Under Article 21(3) of the Rome Statute the application and interpretation of law by the Court 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, ... age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.⁸⁸ This applies to 'all of its [the Court's] constituent organs',⁸⁹ namely the Presidency, the Chambers, the Office of the Prosecutor

85 UN Doc. S/2014/348, (22 May 2014) para. 7. Argentina objected to this paragraph. See The Situation in the Middle East (Syria), UN Doc. S/PV.7180, 22 May 2014, record of debates on draft resolution S/201/348, at 11.

86 See e.g. statements made by representatives of Argentina, Brazil and Philippines, Records of Debates on Draft Resolution S/2005/218, UN Doc. S/PV.518 (31 March 2005), at 6–8, 11; Brazil, 'Peace and Security in Africa', UN Doc. S/PV.6491 (26 February 2011), Record of Debates on Draft Resolution S/2011/95, at 7.

87 But see *contra* R. Rastan, 'Jurisdiction', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015) 141–178, at 158–163.

88 Rome Statute, Art. 21(3). See also ICTY Judgment, *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 605, 611, <www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

89 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute), ICC-01/04-01/07 (9 June 2011), para. 77.

and the Registry.⁹⁰ Only then can the Prosecutor, in exercising prosecutorial discretion in selecting situations and cases under the Rome Statute,⁹¹ and the Court, observe the 'interests of justice' including the principle of equality before the law and non-discrimination, which flows from principles of independence, impartiality and objectivity.⁹²

Discriminatory Security Council referrals leading to investigations and prosecutions which exclude individuals (who may have committed crimes within the ICC's jurisdiction) on the basis of nationality have indeed undermined the credibility of the ICC by subsuming 'the independence of the ICC into the political and diplomatic vagaries of the Security Council'.⁹³ As noted above, this is particularly the case given that three permanent members of the UN Security Council namely Russia, China, and the US are not parties to the Rome Statute and thus are outside the ICC's jurisdiction. It should be recalled that when the Rome Statute was adopted in 1998, 120 states voted for the establishment of the ICC with 21 abstentions and 7 against (including the US, Israel and China).⁹⁴

Both the US⁹⁵ and Russia⁹⁶ signed the Rome Statute in 2000 but later 'unsigned' the Statute by making their 'intention clear not to become a party to

90 Rome Statute, *supra* note 1, Art. 34.

91 *Ibid.*, Art. 53(1)(a)-(c). In determining whether there is a 'reasonable basis' to proceed with an investigation into a situation the Prosecutor considers: (i) jurisdiction (temporal, either territorial or personal, and material); (ii) admissibility (complementarity and gravity); and (iii) the interests of justice.

92 See Rome Statute, *supra* note 1, Arts. 21(3), 42(1 and 7) and 54(1)(a); OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>, para. 16: 'The Office shall conduct its case selection and prioritisation on the basis of the overarching principles of independence, impartiality and objectivity'.

93 UN SC, 5158th Meeting 31 March 2005, Philippines, UN Doc. S/PV.5158, 6, <www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5158>.

94 See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Italy 15 June–17 July 1998, UN Doc. A/CONF.183/SR.9, 9th Plenary Meeting, paras. 28, 33 and 40; M. Cherif Bassiouni and W.A. Schabas (eds.), *The Legislative History of the International Criminal Court*, 2nd edn. (Brill/Martinus Nijhoff, Leiden, 2016) 101.

95 The US signed the Rome Statute on 31 December 2000 but 'unsigned' the Statute on 6 May 2002 by making clear to the UN Secretary-General its intention 'not to become a party'.

96 See Bylaw No. 361-rp, 'On the Russian Federation's intention not to become a party to the Rome Statute of the International Criminal Court' (16 November 2016), <publication.pravo.gov.ru/Document/View/000120161160018>. Russia signed the Rome Statute on 13

the treaty', in 2002 and 2016 respectively.⁹⁷ Russia's withdrawal was made shortly after the ICC Prosecutor examined crimes allegedly committed in the context of Russia's military actions in Georgia, Crimea and Ukraine and called the Crimea situation an international armed conflict and occupation.⁹⁸ Both the US and Russia intended to cancel their legal obligation to refrain from defeating the object and purpose of the Rome Statute ie not to create conditions for or facilitate in any way the commission of genocide, crimes against humanity, war crimes and aggression.⁹⁹ Accordingly, they made it clear that they do not intend to ratify the Statute in the future or of cooperating with the ICC in a meaningful way. This was part of the strategy to shield American and Russian nationals from potential ICC prosecutions in the future.

Thus while powerful permanent UN Security Council members non-parties to the Rome Statute are highly influential in deciding which 'situation' should be referred to the ICC Prosecutor to determine whether a particular situation should give rise to a criminal investigation, they have been able to avoid ICC investigations and prosecutions. De facto, they enjoy immunity from ICC investigations and prosecutions arising from the prospect of a UN Security Council referral. They have used their veto privilege to block referral of situations involving their allies to the ICC Prosecutor. This has been the case in states that are not parties to the Rome Statute—and have not accepted the jurisdiction of the Court on an ad hoc basis—but allies of some UN Security Council permanent members. For example, despite existence of evidence showing that crimes within the jurisdiction of the ICC appear to have been committed in Syria a referral to the ICC was blocked.¹⁰⁰ In the words of the Russian Federation delegate:

September 2000 but 'unsigned' it on 30 November 2016 by informing the UN Secretary-General of Russia's intention 'not to become a party to the Rome Statute'.

97 Rome Statute of the International Criminal Court, 17 July 1998, <treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf>.

98 See The Office of the Prosecutor, *Report on Preliminary Activities 2016*, (14 November 2016) 33–42.

99 Vienna Convention on the Law of Treaties, *supra* note 36, Art. 18(a).

100 See reports of the Independent International Commission of Inquiry on the Syrian Arab Republic, <www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>; UN Security Council, Draft Resolution (proposed by France), UN Doc. S/2014/348 (22 May 2014); UN Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, SC/11407 (22 May 2014), <www.un.org/press/en/2014/sc11407.doc.htm>.

The United States frequently indicates the ICC option for others, but is reluctant to accede to the Rome Statute itself. In today's draft resolution,¹⁰¹ the United States insisted on an exemption for itself and its citizens. Great Britain is a party to the ICC, but for some reason is unenthusiastic about the exploration in the Court of crimes committed by British nationals during the Iraq war. If the United States and the United Kingdom were to together refer the Iraqi dossier to the ICC, the world would see that they are truly against impunity.¹⁰²

The criticism above reveals that Russia is aware that some states in particular the US support ICC investigations for crimes committed by others but not for their nationals or their allies. Therefore Russia also vetoed a proposed UN Security Council resolution to refer the situation in Syria to the ICC despite the existence of 'a reasonable basis to believe' that war crimes and crimes against humanity were committed in Syria¹⁰³ including 'indiscriminate and disproportionate attacks on civilian-inhabited areas, particularly through pounding aerial bombardments', unlawful killings, enforced disappearance, hostage-taking, torture, and sexual violence.¹⁰⁴ It should be noted that the Independent International Commission of Inquiry on the Syrian Arab Republic recommended that the Security Council takes appropriate action 'by referring the situation [in Syria] to justice, possibly to the International Criminal Court or an ad hoc tribunal, bearing in mind that, in the context of the Syrian Arab Republic, only the Security Council is competent to refer the situation'.¹⁰⁵ However, no action was taken by the Security Council mainly because of Russian and Chinese resistance.

The UN General Assembly sidestepped the Security Council by deciding in Resolution 71/248 to establish 'the International, Impartial and Independent

101 UN Security Council, Draft Resolution (proposed by France), UN Doc. S/2014/348 (22 May 2014).

102 UN Security Council, 7180th Meeting, 22 May 2014, S/PV.5158, Mr. Churkin (Russian Federation), 13 <www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7180>. It should be noted that the UK cooperated with the ICC's Iraq preliminary inquiry, and has carried out investigations and some court martials.

103 See e.g. Resolution adopted by the Human Rights Council on 21 October 2016: *The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Situation in Aleppo*, UN Doc. A/HRC/RES/S-25/1 (25 October 2016). The Resolution strongly condemned 'all attacks against civilians and civilian infrastructure'.

104 See *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/33/55 (11 August 2016).

105 *Ibid.*, para. 147(c).

Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (the IIM or the Mechanism).¹⁰⁶ This is a significant historic step since it marked the first time the Assembly has established such a Mechanism. The Mechanism is a fact-finding body that will rely solely on the voluntary cooperation of states, NGOs and individuals to 'collect, consolidate, preserve and analyse' evidence of crimes for future prosecutions.¹⁰⁷ It will not prosecute anyone but 'prepare files in order to facilitate and expedite fair and independent criminal proceedings' in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.¹⁰⁸

Unlike the Security Council, the General Assembly lacks the authority to refer the situation in Syria to the ICC or to establish an ad hoc international criminal tribunal for Syria with the legal authority to charge individual perpetrators or to require state cooperation. Furthermore, it cannot mandate states to cooperate with the ICC, though it can recommend that the Security Council take such actions in the future to ensure that perpetrators of international crimes in Syria are held accountable.¹⁰⁹ It is worth noting that the General Assembly has been involved in prior accountability efforts since 1946 to promote cooperation by states to investigate and punish international crimes.¹¹⁰ Thus, establishing such a Mechanism builds upon earlier practice of the General

106 See UN General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/71/L.48, 19 December 2016, <www.un.org/ga/search/view_doc.asp?symbol=A/71/L.48>, para. 4. The vote was 105 to 15, with 52 abstentions. The US voted in favour of the measure.

107 *Ibid.*, para. 4.

108 *Ibid.*

109 The General Assembly has limited powers under the UN Charter Arts. 10, 11, 13, and 22. See B. Simma, et al., *The Charter of the United Nations: A Commentary*, 2nd edn. (Oxford University Press, Oxford, 2002) 427–28; L.M. Goodrich, et al., *Charter of the United Nations*, 3rd edn. (Columbia University Press, New York, 1969) 191; A Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' 15(2) *Journal of International Criminal Justice* (2017) 231; C. Wenaweser and J. Cockayne, 'Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', 15(2) *Journal of International Criminal Justice* (2017) 211.

110 See e.g. the following GA resolutions: Resolution 3 (13 February 1946); Resolution 95 (11 December 1946); Resolution 3074 (3 December 1973); Resolution 52/135 (12 December 1997); Resolution 57/228(B) (22 May 2003); Resolution 60/147 (16 December 2005); Resolution 63/19 (16 December 2008).

Assembly with respect to investigative bodies such as Commissions of Inquiry or Expert Panels with a view to assisting future accountability efforts.

However, Russia (and Syria) have opposed this Mechanism on the basis that it was granted powers 'prosecutorial in nature', which the General Assembly does not itself possess. Thus, Russia claimed that 'the General Assembly acted *ultra vires* – going beyond its powers' as set out in the UN Charter.¹¹¹ This is incorrect because the powers of the Mechanism do not include the prosecution of anyone and cannot, therefore, be considered as being 'prosecutorial in nature'. Accordingly, the opposition to the Mechanism is political rather than strictly legal. The Mechanism is an important step in the promotion of the principle of accountability for international crimes. This is because it provides a way to 'collect, consolidate, preserve and analyse' evidence of crimes to criminal law standards (identifying perpetrators for possible future prosecution) where there exists political resistance preventing any international tribunal from investigating and prosecuting crimes committed in Syria.¹¹² This increases the prospects of future accountability and justice for Syria since the Mechanism is aimed at assisting any recognised exercise of criminal jurisdiction, whether by Syria, any other state, or competent international or regional court/tribunal. It also presents an important precedent for future situations faced with a political impasse within the Security Council.

2.2.3 Has the ICC Unfairly Focused on Africa?

Credibility of a judicial institution, like the ICC, depends in part on its independence and its performance. While it is true that the ICC's first active investigations, arrest warrants and prosecutions were exclusively in Africa,¹¹³ including the most recent arrest warrant issued in the context of the Libyan situation on 15 August 2017 for *Mahmoud Mustafa Busayf Al-Werfalli*, a commander in the

111 Note Verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc. A/71/793, 14 February 2017; General Assembly, 66th Plenary Meeting, 21 December 2017, Official Records, A/71/PV.66, at 21–23.

112 See Report of the Secretary General: Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/71/755, 19 January 2017.

113 The Office of the ICC Prosecutor has carried out investigations in Uganda (since 2004), the Democratic Republic of the Congo (DRC, since 2004), Darfur in Sudan (since 2005), the Central African Republic (CAR, since 2007), Kenya (since 2010), Libya (since 2011), Côte d'Ivoire (since 2011), Mali (since 2013), and another situation in CAR (since 2014). See ICC, *Situations under Investigation*, <www.icc-cpi.int/pages/situations.aspx>.

so-called Libyan National Army, three observations must be noted. First, five African situations – Central African Republic (CAR), Côte d'Ivoire, Democratic Republic of the Congo (DRC), Mali, and Uganda – were 'self-referrals' brought voluntarily to the ICC by concerned African states so that the Court can investigate and prosecute domestic leaders/commanders of rebel groups in Africa. Both the Union of the Comoros (Comoros) and Gabon have also referred situations on their territories to the ICC. While a state party to the Rome Statute may refer to the ICC Prosecutor for investigation 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed' (in any other ICC state party),¹¹⁴ with the exception of the Comoros¹¹⁵ no African state has ever referred or attempted to refer any situation outside Africa to the ICC for investigation. States have only made so-called 'self-referrals' because they contemplated the territory of the referring state generally targeting armed rebel groups. The 'self-referral' of African situations to the ICC by African states cannot be blamed on the ICC. African ICC member states that have complained of Africa-bias could have taken appropriate measures to remedy this claim by referring other (non-African) situations to the Court.

Second, the ICC Prosecutor's exercise of *proprio motu* powers in Kenya was based on information provided by Kofi Annan, the Chairman of the African Union (AU) Panel of Eminent African Personalities¹¹⁶ following the report of an Independent Commission of Inquiry (also known as Waki Commission, after its President, Justice Philip Waki).¹¹⁷ In any case, when the ICC found at the trial stage that the evidence against Kenyatta and Ruto was insufficient, charges were respectively withdrawn or vacated.¹¹⁸ Notably, the exercise of *proprio*

114 Rome Statute, *supra* note 1, Arts. 13(b) and 14.

115 The Comoros referral concerns an investigation of the situation on certain registered vessels (over crimes allegedly committed on board), registered respectively in the Comoros (the *Mavi Marmara*), Cambodia (the *Rachel Corrie*) and Greece (the *Eleftheri Mesogios/Sofia*). See ICC, Preliminary Examination: Registered Vessels of Comoros, Greece and Cambodia, <www.icc-cpi.int/comoros>.

116 ICC, 'ICC Prosecutor Receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya' (9 July 2009) Press Release No. ICC-OTP-20090709-PR436.

117 See *Report of the Commission of Inquiry into Post-election Violence (2008)* 18, 472–475; M. Ssenyonjo, 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials', 1(1) *State Practice & International Law Journal* (2014) 17.

118 See *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, 13 March 2015; and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11, 5 April 2016.

motu powers in Cote d'Ivoire was upon voluntary acceptance of the Court's jurisdiction under Article 12(3) of the Rome Statute by the government.¹¹⁹ In both situations in Kenya and Cote d'Ivoire, the Pre-Trial Chambers of the Court independently concurred with the Office of the Prosecutor and authorised the commencement of the investigations.¹²⁰ However in some situations (such as Uganda and Cote d'Ivoire) the Prosecutor has not been seen to be impartial due to failure to investigate both sides simultaneously. Nevertheless in all African situations before the ICC, the ICC has acted to hold accountable some perpetrators of international crimes for the benefit of African victims of alleged crimes that African states were unable or unwilling to investigate and prosecute. This contributes to lasting peace, security and stability in Africa. All ICC judicial decisions from the authorisation of investigations to the confirmation or non-confirmation of charges and decisions on guilt or innocence are and have been 'taken independently on the basis of the law and the available evidence and are not based on regional or ethnic considerations'.¹²¹

Third, while in the past the Prosecutor has tended to neglect situations outside Africa, the Prosecutor has since made good progress by investigating situations outside Africa as reflected in an investigation opened in Georgia in January 2016.¹²² In addition, although in the past the Prosecutor decided not to proceed in certain politically complex non-African situations, such as with Iraq,¹²³ Korea, Palestine and Venezuela, on the basis that the legal criteria under Article 53 was not met, there has been a change in approach. At the time

119 See ICC, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11, <www.icc-cpi.int/cdi>. Côte d'Ivoire was not a state party to the Rome Statute at the time but accepted the jurisdiction of the ICC on 18 April 2003; and on both 14 December 2010 and 3 May 2011, the Presidency of Côte d'Ivoire reconfirmed Côte d'Ivoire's acceptance of this jurisdiction. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute.

120 See Rome Statute, *supra* note 1, Art. 15; Pre-Trial Chamber II, *Situation in the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09, 31 March 2010; Pre-Trial Chamber III, *Situation in the Republic of Cote D'ivoire: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, ICC-02/11, 3 October 2011.

121 See Statement by the ICC Presidency, *supra* note 77.

122 Pre-Trial Chamber 1, *Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation*, No. ICC-01/15, 27 January 2016.

123 See 'ICC: A Cautious Beginning with Mixed Signals from the Prosecutor', *Wikileaks*, 15 July 2003 <wikileaks.org/plusd/cables/03THEHAGUE1806_a.html>. The first ICC Prosecutor, Luis Moreno-Ocampo, is reported to have privately stated that 'he wishes to dispose of Iraq issues (i.e., not investigate them)'.

of writing, the Prosecutor's was carrying out preliminary examinations in non-African situations including Afghanistan, Colombia, Iraq (UK military intervention in Iraq), (Israel's policies in occupied) Palestine, Registered vessels of Greece and Cambodia, and Ukraine.¹²⁴ Such recent developments involving preliminary examinations that involve foreign military activities of powerful States of the global North, to the extent that they are addressed seriously, indicate that the Prosecutor is willing to investigate non-African situations. In this context, the Prosecutor's announcement to reach a final determination with respect to the situation in Afghanistan and the Comoros referral is to be welcomed.¹²⁵

Nevertheless due to lack of a prosecutorial policy commitment to a defined maximum length/ time limit for the duration of preliminary examinations, many preliminary examinations in more politically contentious situations and some of the world's most daunting crises (such as Colombia, Afghanistan, Iraq and the first preliminary examination in Palestine) are mired in delays for obscure reasons. For example, the preliminary examination in Colombia has taken more than 12 years, and still ongoing at the time of writing. This creates the appearance of lack of impartiality, transparency and a perception that the ICC is unlikely to effectively investigate and prosecute since evidence vanishes over time as witnesses become difficult to obtain, memories fade, and data gets lost.

Besides the current composition of the ICC resembles an 'old colonial court', run mainly by Europeans.¹²⁶ About 70 percent of the Court's personnel in 2017 were European, while only 16 percent were African.¹²⁷ This was the case despite the fact that as a percentage of global population, Africa was the Court's largest continent. Some African Heads of States have thus claimed that the ICC has been put in place mainly for poor (African) countries. For this reason, President Kagame of Rwanda stated in 2008 that 'Rwanda cannot be part of that colonialism, slavery and imperialism'.¹²⁸

124 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016, <www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>. The term 'preliminary examinations' appears in Article 15(6) of the Rome Statute, and indirectly in Article 42.

125 *Ibid.*

126 W.A. Schabas, *An Introduction to the International Criminal Court*, 5th edn. (Cambridge University Press, 2017) 44. For the current composition of the Court, see ICC at <www.icc-cpi.int/about/Pages/in-the-courtroom.aspx>.

127 *Ibid.*

128 See 'Rwandan President Says ICC Targeting African Countries', *Sudan Tribune*, 1 August 2008, <www.sudantribune.com/spip.php?article28103>.

2.2.4 The ICC's Performance and Budget in the Last 15 Years

Another element advanced to demonstrate the ICC's lack of credibility is based on the assessment of the ICC's performance during the last 15 years. While the Prosecutor initially projected that the Court would complete its first trial in 2015,¹²⁹ more than five years later it had not finished any single case. The Court delivered its first judgment after a decade in existence on 14 March 2012 convicting Congolese militia leader Thomas Lubanga Dyilo of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.¹³⁰ Since the first ICC Prosecutor's mandate began in mid-2003 up to the end of 2016, the Prosecutor had only been able to prosecute African non-state actors leading to 9 convictions by the Court in the following cases (Lubanga,¹³¹ Katanga,¹³² Bemba et al¹³³ and Al Mahdi)¹³⁴ and 1 acquittal¹³⁵ at a cost of over one billion US dollars, making the ICC one of the

129 ICC Assembly of States Parties, 'Draft Programme Budget for 2005', ASP/3/2, (26 July 2004) para. 159, <asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP3-2_budget_English.pdf>.

130 *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06, 14 March 2012. He was sentenced to a total of 14 years of imprisonment on 10 July 2012, and this was confirmed by Appeals Chamber on 1 December 2014.

131 *Ibid.*

132 *The Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07, 7 March 2014. He was found guilty, on 7 March 2014, as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. He was sentenced to a total of 12 years' imprisonment.

133 *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016. Trial Chamber III found Mr Jean-Pierre Bemba Gombo guilty under Article 28(a) of the Rome Statute, as a person effectively acting as a military commander, of the crimes of crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging). He was sentenced to 18 years of imprisonment on 21 June 2016.

134 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, 27 September 2016, Reparations Order, ICC-01/12-01/15-236, 17 August 2017. Al Mahdi was found guilty of the crime of intentionally directing attacks against protected objects, alleged to have been committed between 30 June 2012 and 11 July 2012 in Timbuktu, Mali, against 10 sites of a religious and historic character. He was sentenced to 9 years on his own guilty plea, the first time a defendant at the ICC has done so.

135 *The Prosecutor v. Mathieu Ngujolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", ICC-01/04-02/12 A (7 April 2015). On 18 December 2012, Trial Chamber II acquitted Mathieu Ngujolo Chui of the charges of war crimes and crimes against humanity and

most expensive courts in the world.¹³⁶ At the time of writing, there were three ongoing cases at the trial stage involving former warlords from the DRC¹³⁷ and Uganda,¹³⁸ as well as the ex-President of Cote d'Ivoire.¹³⁹ With the exception of *Al Mahdi* trial that was completed within less than 1 year (because the accused pleaded guilty),¹⁴⁰ the trials of *Lubanga* and *Katanga* took over 5 years between the confirmation of charges and the convictions.¹⁴¹ The first two convictions of Lubanga and Katanga resulted in low custodial sentences of 14 and 12 years, respectively. This reflects the fact that they were not the most serious crimes worthy higher custodial sentences imposed by international criminal tribunals.¹⁴²

Over the years, the Court's budget, to be met by levies upon State Parties, has increased from approximately €30 million (in 2002)¹⁴³ to over €144 million (in 2017), as shown below. With staff of over 800 staff members,¹⁴⁴ the Court's approved annual budget in 2016 was €136,585,100 and several contributions were outstanding.¹⁴⁵ As of 15 September 2016 the total outstanding contributions,

ordered his immediate release. The Prosecution appealed the verdict on 20 December 2012. On 27 February 2015, the verdict was upheld by the Appeals Chamber.

136 €1,479,301, 700 has been spent on the ICC between 2002–2016 to secure four convictions only (eight if Article 70 convictions are added). See Statement by the Russian Foreign Ministry on signing the Decree 'On the intention not to become a party to the Rome Statute of the International Criminal Court', (17 November 2016), <www.rusemb.org.uk/fnapr/5869>; D Davenport, 'International Criminal Court: 12 Years, \$1 Billion, 2 Convictions' (12 March 2014), <www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#274232456440>. As at the time of writing, the Court had 34 judges and over 700 staff.

137 *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.

138 *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15.

139 *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15.

140 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 134.

141 *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 130; and *The Prosecutor v. Germain Katanga*, *supra* note 132.

142 Rome Statute, *supra* note 1, Art. 77(1) the ICC may impose one of the following penalties on a person convicted of a crime: '(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.

143 See Official Records of Assembly of States Parties to the Rome Statute of the International Criminal Court: First session, New York, 3–10 September 2002, ASP/1/3, pp. 253–326.

144 ICC, *Facts and Figures*, <www.icc-cpi.int/about>.

145 Assembly of State Parties, *Report of the Committee on Budget and Finance on the work of its twenty-seventh session*, ICC-ASP/15/15 (28 October 2016), <asp_docs/ASP15/ICC-ASP-15-15-ENG.pdf>, paras. 16(a)–21.

including the regular budget, the Contingency Fund and interest on the host State loan, stood at €34,163,902.¹⁴⁶ The growing number of preliminary examinations, investigations and prosecutions would require more resources. The Court's 2017 programme budget was approved at €144,587,300.¹⁴⁷ Despite such a huge budget, the ICC has been able to convict only non-state actors.

The main case against a serving head of state arising out of the UN Security Council referral (Al Bashir of Sudan) stalled primarily due to the Council's failure to put pressure on Sudan to cooperate fully with the Court or to surrender Al Bashir to the Court, thus undermining the ICC's investigations.¹⁴⁸ In addition, the UN Security Council has not taken any measures against ICC State Parties (Malawi, Chad, DRC, Djibouti, and Uganda) that have failed to comply with their obligations to cooperate with the Court. This has arisen in six instances referred to the Council following the adoption of Resolution 1593 (2005) in relation to State failures to arrest and surrender Al-Bashir.¹⁴⁹ Thus referrals of non-compliance by the Court to the Council have had no consequence as

146 *Ibid.*, para. 22.

147 See Resolution of the Assembly of States Parties on the proposed programme budget for 2017, the Working Capital Fund for 2017, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2017 and the Contingency Fund, ICC-ASP/15/Res.1, at 1.

148 See UN Security Council, *Reports of the Secretary-General on the Sudan and South Sudan*, UN Doc. S/PV.7337 (12 December 2014) 2.

149 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, '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 Arrest and Surrender of Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-139-Corr, 13 December 2011; Pre-Trial Chamber I, '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-tENG, 13 December 2011; Pre-Trial Chamber II, 'Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir', ICC-02/05-01/09-151, 26 March 2013; Pre-Trial Chamber II, '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, 9 April 2014; Pre-Trial Chamber II, 'Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute', ICC-02/05-01/09-266, 11 July 2016; Pre-Trial Chamber II, 'Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute', ICC-02/05-01/09-267, 11 July 2016.

a mechanism for the Court to obtain cooperation. Some Permanent Security Council members (Russia and China) appear to be non-supportive of the arrest and surrender of Al Bashir to the ICC. For instance, Russia has insisted that ‘the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party the Rome Statute can be repealed, and presuming the contrary is unacceptable.’¹⁵⁰ By ignoring or failing to act in response to such Court decisions concerning non-compliance and non-cooperation, the Council has effectively relinquished and undermined its responsibility in such matters arising from the Rome Statute, as negotiated and adopted, and pursuant to SC resolution 1593 (2005).¹⁵¹

All the five suspects¹⁵² against whom ICC arrest warrants were issued in the situation in Darfur remain at large in Sudan nearly a decade later after the first warrant was issued primarily due to the Security Council’s lack of robust, swift and concrete action after the referral to induce Sudan and other States to execute the arrest warrants.¹⁵³ This has emboldened Al Bashir to travel to both ICC state and non-state parties as well as emboldening states to continue to invite and host him.¹⁵⁴ As noted by the ICC Pre-Trial Chamber II: ‘In the absence of follow-up actions on the part of the Security Council, any referral to the Court under Chapter VII of the United Nations Charter would become futile and incapable of achieving its ultimate goal of putting an end to impunity.’¹⁵⁵

150 See UN Security Council, Seventy-second year 7963rd meeting Thursday, 8 June 2017, 3 p.m. New York, S/PV.7963, speech by the representative of Russian Federation, Mr. Zagaynov, 12, <www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7963>.

151 *Ibid.*, Ms. Bensouda, 4.

152 The suspects are Omar Hassan Ahmad Al Bashir, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Abdel Raheem Muhammad Hussein and Abdallah Banda Abakaer Nourain.

153 See Twenty-fourth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), 13 December 2016, <www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur_Eng.pdf>.

154 *Ibid.*, paras. 9–22.

155 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 11 July 2016, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, para. 16. See also Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09, 11 July 2016, para. 17.

Cases arising out of the exercise of the Prosecutor's *proprio motu* powers in Kenya have been met by fierce resistance in the form of non-cooperation and witness interference (leading to the withdrawal or vacation of charges against senior State officials – *Uhuru Muigai Kenyatta* and *William Samoei Ruto* of Kenya).¹⁵⁶ Nevertheless, it must be acknowledged that during its first 16 years the ICC has established itself as a functioning institution with investigations, arrests, trials, convictions, acquittals and appeals. As at the time of writing in January 2017, the Court had three trials running, one of which was expected to be completed in 2018 and the other two in 2019 but there were no cases at the pre-trial stage.¹⁵⁷

An increase in the number of situations and cases before the ICC means that there will be an increase in the Court's workload/activities (eg outreach and public information, investigations, legal aid for victims and accused, trial preparation, funds for victims) and long-term spending pattern of the ICC over the years.¹⁵⁸ Unlike other international criminal tribunals created in recent decades with limited temporal and geographical jurisdiction,¹⁵⁹ the ICC is a permanent court whose membership has been growing over the years. This requires increased prioritisation in the exercise of prosecutorial discretion and improvement in the quality and efficiency of the Court's core activities including preliminary examinations, investigations, analysis, trials and appeals.¹⁶⁰

2.2.5 UN Security Council's Failure to Defer Investigation or Prosecution
Another reason advanced by South Africa for its withdrawal notification from the Rome Statute is that: 'The Security Council has also not played its part in

156 See *The Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 118; and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, *supra* note 118.

157 See *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.

158 S. Ford, 'How Much Money Does the ICC Need?' in Stahn, *supra* note 87, 84–104.

159 Such tribunals include: the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia; International Criminal Tribunal for Rwanda; the Extraordinary Chamber in the Courts of Cambodia; and the Special Court for Sierra Leone. See S. Ford, 'How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts', 55 *Saint Louis University Law Journal* (2011) 953.

160 See Office of The Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>; The Report of the Court on the Basic Size of the Office of the Prosecutor, ICC-ASP/14/21 (17 September 2015).

terms of Article 16 of the Rome Statute where the involvement of the ICC will pose a threat to peace and security on the African continent.¹⁶¹ Although South Africa did not provide further details, its claim is based on the failure of the UN Security Council to defer situations in Darfur and Kenya with specific reference to cases arising from those situations concerning some prosecution of African heads of state. In 2008 when the ICC Prosecutor announced that he was seeking an arrest warrant against President Al Bashir of Sudan, the AU called upon the Security Council to apply Article 16 of the Rome Statute and ‘defer the process [proceedings] initiated by the ICC’ for a period of 12 months.¹⁶²

A similar request was made in 2013 to defer the investigation and prosecution against Kenya’s President Uhuru Muigai Kenyatta and Deputy President William Samoei Ruto.¹⁶³ However, the Security Council did not adopt any resolution on the basis of Article 16 to defer investigations/ prosecutions in both Darfur and Kenya.¹⁶⁴ Article 16 of the Rome Statute provides for the deferral of investigation or prosecution by the UN Security Council when political and

161 Declaratory Statement, *supra* note 28.

162 See, e.g., African Union Peace and Security Council Decision, PSC/MIN/Comm (CXLII), 21 July 2008 paras. 3, 5, 9, 11(i); African Union Peace and Security Council Decision, PSC/PR/Comm (CLXXV), 5 March 2009, paras. 4–6; African Union Decision on the Application by the ICC Prosecutor for the Indictment of the President of the Republic of the Sudan, Dec.221(XII), 3 February 2009, paras. 2–3; African Union Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc.Assembly/AU/13(xiii), Assembly/AU/Dec.245(XIII) Rev.1, 1–3 July 2009, para. 9; Decision on the Implementation of the Decisions on the International Criminal Court, Doc. EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI), 30–31 January 2011, para. 3.

163 See, e.g., Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) – Doc.Assembly/AU/18(XXIV), Assembly/AU/Dec.547(XXIV), 30–31 January 2015, paras. 3 and 17(d); Decision on the International Criminal Court Doc. EX.CL/952(XXVIII), Assembly/AU/Dec.590(XXVI), 30–31 January 2016, para. 2(ii); Decision on the Implementation of the Decisions on the International Criminal Court (ICC) – Doc. EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI), 30–31 January 2011, para. 6; Decision on the Implementation of the Decisions on the International Criminal Court (ICC) – Doc. EX.CL/731(XXI), Assembly/AU/Dec.419 (xix), 15–16 July 2012, para. 4; Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013) para. 10(i), (ii), (xi); UNSC Draft Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda and Togo) Voting in Favour, 8 (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and United States) Abstaining, SC/11176 (15 November 2013), <www.un.org/press/en/2013/sc11176.doc.htm>.

164 See UN Doc. S/RES/1828 (2008); UN Doc. S/PV.7060, p. 2.

conflict resolution imperatives (the maintenance of international peace and security) would make it necessary to delay international criminal justice (ICC investigation or prosecution). Article 16 reads:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Under Chapter VII of the UN Charter the Security Council is empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to make recommendations, or decide what measures shall be taken to 'maintain or restore international peace and security'.¹⁶⁵ The *travaux préparatoires* of Article 16 indicates that the relationship between the Court and the Security Council was very contentious.¹⁶⁶ The content of the current Article 16 of the Rome Statute was introduced by Singapore¹⁶⁷ as a means of ensuring that 'politically motivated actions [referrals] by States Parties or by the Prosecutor that might contradict Security Council aims could be suspended or terminated indefinitely by the Security Council acting under its Chapter VII authority'.¹⁶⁸ It was thus intended to be used on 'a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other'.¹⁶⁹ It was not intended to defer situations referred by the Security Council and the cases that arise from it since the Council has established that international criminal prosecutions contribute to the 'restoration and maintenance of peace'.¹⁷⁰ Despite its adoption, many states considered that it was

165 UN Charter, *supra* note 50, Art. 39.

166 Clark, *supra* note 7, 770–780.

167 See Proposal by Singapore on article 23, Non-Paper/WG.3/No. 16, (8 August 1997).

168 D. Scheffer, 'Three Realities About African Situation at the International Criminal Court', *ICC Forum* (November 2016), <iccforum.com/withdrawal>.

169 See UN Security Council, 4568th Meeting, 10 July 2002, statement by Permanent Representative of New Zealand, Mr. MacKay, UN Doc. S/PV.4568, p. 5, <www.un.org/Docs/pv4568e.pdf>.

170 See, e.g., UN Security Council Resolution 808 (1993), S/RES/808, 22 February 1993, preamble para. 9; UN Security Council Resolution 827 (1993), S/RES/827, 25 May 1993, preamble, para. 6; and UN Security Council Resolution 955 (1994), S/RES/955, 8 November 1994, preamble para. 7.

an unacceptable encroachment upon judicial independence. As yet, the Court has not yet interpreted the scope of Article 16 but the Security Council has used it in two resolutions to protect officials or personnel of the Security Council members and their close allies.¹⁷¹ This suggests that Article 16 was 'conceived as an additional tool for the big [Western] Powers to protect themselves and protect their own [allies]' from the ICC.¹⁷² For this reason, the ICC is perceived by some African leaders as 'no longer a Court for all but only to deal [primarily] with Africans in the most rigid way'.¹⁷³

Following the failure of the UN Security Council to defer the investigations or prosecutions in African situations in particular those relating to heads of states in Darfur/Sudan and Kenya, as requested by the AU, South Africa, acting on behalf of AU State Parties to the Rome Statute, proposed, in accordance with Article 121(1) of the Rome Statute, an amendment to Article 16 in order to allow the UN General Assembly to exercise deferral powers when the Security Council fails to act.¹⁷⁴ South Africa's proposal provided for the addition of the following paragraphs to the current Article 16:

- 2) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.
- 3) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.¹⁷⁵

171 See SC Resolution 1422 (12 July 2002), UN Doc. S/RES/1422 (2002); SC Resolution 1487 (12 June 2003) UN Doc. S/RES/1487 (12 June 2003); Amnesty International, 'The Unlawful Attempt by the Security Council to give US Citizens permanent Impunity from International Justice', AI Index IOR 40/006/2003 (May 2003).

172 UN Doc. S/PV.7060, p. 11.

173 See 'Statement by Hon. Frederick Ruhindi, Deputy Attorney General/Minister of State for Justice and Constitutional Affairs of the Republic of Uganda on behalf of the African Union, 21 November 2013', <asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AU-Uganda-ENG.pdf>.

174 Report of the Working Group on the Review Conference, ICC-ASP/8/20, Annex II, para. 59.

175 UN Depository Notification C.N.851.2009.TREATIES-10 of 30 November 2009 (South Africa: Proposal of Amendment).

The above proposal was not adopted since it raised several questions with regard to the relationship between the UN Security Council and the UN General Assembly as well as the relationship between the ICC and the UN.¹⁷⁶

2.2.6 Conflicting International Law Obligations

Another reason advanced for South Africa's withdrawal notification from the ICC is that the Rome Statute has been interpreted in a manner that has led to 'conflicting international law obligations'.¹⁷⁷ In particular, South Africa's Minister of Justice stated that the Rome Statute compel ICC state parties including South Africa to 'arrest persons who may enjoy diplomatic immunity under customary international law who are wanted by the court'.¹⁷⁸ In effect the claim here is that compliance with the Rome Statute would lead to a breach of obligations to other states. The alleged obligations relate to whether or not a head of state non-party to the Rome Statute (in particular, President Al Bashir of Sudan subject to two ICC arrest warrants for crimes against humanity and genocide) enjoys immunities *ratione personae* from arrest and surrender to the ICC.¹⁷⁹

On 4 March 2009, ICC Pre-Trial Chamber I (composed of Judge Akua Kueyehia, Presiding Judge, Judge Anita Usacka, and Judge Sylvia Steiner) stated that 'the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case'.¹⁸⁰ This determination was based on four considerations namely the goal of ending impunity for the perpetrators of the most serious crimes as stated in the Rome Statute's preamble; Article 27 of the Statute; the law applicable was the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence; and the effect of the Security Council.¹⁸¹ The Chamber stated that:

...by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution

176 Report of the Working Group on Amendments, ICC-ASP/13/31, para. 9 and ICC-ASP/14/34, para. 17.

177 See South Africa's 'Declaratory statement', *supra* note 28, 2.

178 See South African Government News Agency, 'SA Formally Withdrawing from ICC' 21 October 2016, <www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc>.

179 See Pre-Trial Chamber I, *supra* note 18.

180 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3 (4 March 2009), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 41.

181 *Ibid.*, paras. 42–45.

arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.¹⁸²

The Chamber decided that the Registry ‘prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir’ to the ICC. Accordingly the Registry requested all ICC state parties to arrest and surrender Al Bashir.¹⁸³ This was done without considering whether such a request would, under Article 98 of the Rome Statute, be inconsistent with the requested state’s obligations under (customary) international law with respect to the head of state immunity of Al Bashir.

Following the failure of some ICC state parties to arrest President Al Bashir on numerous international visits to African ICC States parties (including Malawi, Chad, Democratic Republic of the Congo (DRC), Kenya, Uganda, Djibouti and South Africa), the ICC Pre-Trial Chamber interpreted the Rome Statute as imposing an obligation on state parties to arrest Al Bashir because of two reasons.

First, the Chamber rejected the argument presented by Malawi, with respect to states not parties to the Rome Statute, that ‘international law affords immunity to Heads of States in respect of proceedings before international courts’.¹⁸⁴ It claimed that ‘customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes’.¹⁸⁵ Although this position was restated in a decision concerning the Republic of Chad,¹⁸⁶ the Chamber did not

¹⁸² *Ibid.*, para. 45.

¹⁸³ See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-7, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, (11 March 2009); ICC-02/05-01/09-96, Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, (21 July 2010).

¹⁸⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (12 December 2011), 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 Arrest and Surrender of Omar Hassan Ahmad Al Bashir (*Malawi Decision*), para. 18.

¹⁸⁵ *Ibid.*, para. 43.

¹⁸⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (13 December 2011), 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, para. 13.

provide satisfactory evidence to support this view.¹⁸⁷ It is correct to state that the ‘immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War 1’.¹⁸⁸ This was the case with the practice of the Nuremberg Tribunals, the Tokyo Tribunals, the ICTY, the ICTR, the Special Court for Sierra Leone and the Lebanon Tribunals. However, there is no evidence to show that this practice is generally ‘accepted as law’ (*opinio juris*) in order to transform it into a rule of customary international law,¹⁸⁹ and none was presented by the ICC in the Malawi and Chad decisions.¹⁹⁰ Accordingly, it was not proved that customary international law requires or rejects immunity before international courts and tribunals.

Second, the Chamber held that by virtue of the language used in paragraph 2 of Security Council (SC) Resolution 1593(2005),¹⁹¹ ‘the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State’.¹⁹² Thus South Africa was under ‘the duty under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court’ during Al Bashir’s presence in South Africa.¹⁹³

According to South Africa arresting senior state officials such as African heads of state or ministers who are subject to ICC arrest warrants makes it impossible to participate in the peaceful resolution of conflicts.¹⁹⁴ Yet negotiation of peace agreements (to end armed conflicts, which so often unleashes serious crimes) may require the participation of African heads of state or senior ministers who

187 See Malawi Decision, *supra* note 184, paras. 22–43.

188 *Ibid.*, para. 38.

189 See the Report of the International Law Commission on the Work of its Sixty-Sixth Session ((5 May–6 June and 7 July–8 August 2014), General Assembly Official Records Sixty-ninth Session Supplement No. 10 (A/69/10), Chap 10, paras. 169–171.

190 See D. Tladi, ‘The ICC Decisions in Chad and Malawi: on Cooperation, Immunities, and Article 98’, 11(1) *Journal of International Criminal Justice* (2013) 199.

191 UN SC Resolution 1593(2005) para. 2. The SC *decided* that the ‘Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’.

192 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (9 April 2014), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, para. 29.

193 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, (13 June 2015), Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, para. 10.

194 See South Africa’s ‘Instrument of Withdrawal’, 19 October 2016 (on file with author).

are subject of ICC arrest warrants. Accordingly, South Africa claimed that to 'continue to be a State Party to the Rome Statute will compromise its efforts to promote peace and security on the African Continent'.¹⁹⁵

The claim here is that the interpretation given to Articles 27 and 98 of the Rome statute compel South Africa (in particular in situations referred to the Court by the Security Council) to arrest persons in South Africa. This includes arresting serving heads of states of foreign states subject to ICC warrants who may enjoy diplomatic immunity under customary international law, and 'to surrender those persons to the International Criminal Court, even under circumstances where the Republic of South Africa is actively involved in promoting peace, stability and dialogue in those countries'.¹⁹⁶ According to South Africa, 'arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary international law obligations' on diplomatic immunity or head of state immunity.¹⁹⁷ In South Africa's view, this immunity is necessary in order to 'effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur'.¹⁹⁸

It should be noted that according to Article 25 of the UN Charter the UN members 'agree to accept and carry out the decisions of the Security Council' in accordance with the Charter.¹⁹⁹ Therefore, 'when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision'.²⁰⁰ This includes decisions concerning referrals to the ICC including Council decisions that ICC state parties 'cooperate fully' with the Court. In the event of a conflict between the obligations of the UN members under the UN Charter and their obligations under any other international agreement including the Rome Statute, their obligations under the UN Charter 'shall prevail'.²⁰¹ In effect UN member states, including

195 Declaratory Statement, *supra* note 28.

196 Memorandum on the Objects of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, 2016, <www.parliament.gov.za/live/commonrepository/Processed/20161111/616356_1.pdf>, para. 1.2.

197 Declaratory Statement, *supra* note 28.

198 Memorandum, *supra* note 195, para. 1.3.

199 UN Charter, *supra* note 50, Art. 25.

200 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion, 21 June 1971, (1971) ICJ Reports 16, para. 116, <www.icj-cij.org/docket/files/53/5595.pdf>.

201 UN Charter, *supra* note 50, Art. 103.

non-state parties to the Rome Statute, are by virtue of Articles 25 and 103 of the UN Charter obliged to comply with the decisions of the UN Security Council arising from resolutions of the UN Security Council Chapter VII referral of situations to the ICC.

Does the Rome Statute require ICC state parties to act in a violation of customary international law of immunity to a serving head of state (from arrest and surrender)? Immunity provisions under Articles 27 and 98, interpreted in accordance with the object and purpose of the Rome Statute, do not lead to violation of customary international law. Article 27 aims at eliminating impunity by providing that immunity is not a bar to the Court's jurisdiction:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The removal of immunity under Article 27 applies to officials of state parties to the Rome Statute and not to non-state parties to the Rome Statute. This is because a 'treaty in force is binding upon the parties to it' and such a treaty 'does not create either rights or obligations for a third state'.²⁰² Therefore, Article 98(1) protects state sovereignty by recognising customary international law rules concerning state or diplomatic immunities reflected in an exemption from arrest and surrender of a person or property of a non-state party to the Rome Statute. It provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

²⁰² Vienna Convention on the Law of Treaties, *supra* note 36, Arts. 26 and 34.

Clearly, Article 98(1) limits the avenues for surrendering individuals or property of a 'third state'²⁰³ to the ICC that are entitled to immunity principally under customary international law.²⁰⁴

Some African ICC states parties (Malawi,²⁰⁵ Chad,²⁰⁶ DRC²⁰⁷ and South Africa)²⁰⁸ and Arab League ICC states parties (Jordan,²⁰⁹ widely regarded as a friend of the ICC and the first Arab state to ratify the Rome Statute) refused to arrest and surrender President Omar Al Bashir of Sudan during his presence in respective states partly on the basis that complying with the ICC requests would require violation of head of state immunities under customary international law. In its decisions on Malawi and Chad, the ICC Pre-Trial Chamber (composed of Judge Sanji Mmasenono Monageng, Presiding Judge, Judge Sylvia Steiner, and Judge Cuno Tarfusser), in December 2011, accepted that there is 'an inherent tension between Articles 27(2) and 98(1) of the [Rome] Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State'.²¹⁰ The Chamber went on to observe that Article 98(1)

203 *Ibid.*, Arts. 2(1)(h), 34–8. The term 'third state' means 'a State not a party to the treaty'. In the context of cooperation treaties it is used to refer to a state that is a third party to the cooperation request. Under Article 98 of the Rome Statute a 'third state' could refer to any other state that still has immunities.

204 For a commentary on Article 98 see W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 2nd edn. (Oxford University Press, Oxford, 2016) 1342–1353, at p. 1346.

205 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 Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, Pre-Trial Chamber I, 12 December 2011.

206 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, Pre-Trial Chamber I, 13 December 2011.

207 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, Pre-Trial Chamber I, 9 April 2014.

208 Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, 13 June 2015.

209 Decision on the request of the Hashemite Kingdom of Jordan for an extension of the time limit to provide any further submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, ICC-02/05-01/09, 2 June 2017, para. 5, <www.icc-cpi.int/CourtRecords/CR2017_03692.PDF>.

210 *Malawi* Decision, *supra* note 184, para. 37.

was not applicable because customary international law ‘creates an exception to Heads of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes’.²¹¹ The Court stated that the unavailability of immunities with respect to prosecution ‘applies to cooperation’²¹² and that to interpret Article 98(1) as allowing the requested states to refuse to arrest and surrender heads of state ‘would disable the Court and the international criminal justice’.²¹³

Despite the above observations, the Court did not give an interpretation of Article 98(1). It, therefore, did not address the ‘tension’ between Articles 27(2) and 98(1) but based its decision on Article 27, while ignoring completely the need to interpret Article 98(1) as if it was not part of the Rome Statute. If immunity under customary international law does not exist when the ICC seeks arrest of a person entitled to immunity (eg a head of a non-state party to the Rome Statute) for the commission of international crimes, then Article 98 is effectively redundant. In 2014 the Pre-Trial Chamber (with two new judges who did not participate in Malawi and Chad decisions)²¹⁴ attempted to address the scope of Article 98(1) by noting that:

it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. Such personal immunities are ensured under international law for the purpose of the effective performance of the functions of sitting Heads of States. This view has also been supported by the International Court of Justice (the “ICJ”).²¹⁵ An exception to the personal immunities of Heads of States is explicitly provided in article 27(2) of the Statute for prosecution before an international criminal jurisdiction. According to this provision, the existence of personal immunities under international

211 *Ibid.*, paras. 42–43.

212 *Ibid.*, para. 44.

213 *Ibid.*, para. 41.

214 The Chamber was composed of Judge Ekaterina Trendafilova, Presiding Judge, Judge Hans-Peter Kaul and Judge Cuno Tarfusser (who participated in the decisions concerning Malawi and Chad).

215 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, (2002) ICJ Reports 3, paras. 53–59, <www.icj-cij.org/docket/files/121/8126.pdf>.

law which generally attach to the official capacity of the person “shall not bar the Court from exercising its jurisdiction over such a person”.²¹⁶

The Chamber correctly noted that Article 27(2) should ‘in principle, be confined to those State Parties who have accepted it’.²¹⁷ Therefore, the Chamber accepted that ‘when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute’.²¹⁸ Accordingly, in a case dealing with a head of state not party to the Rome Statute, who is wanted by the ICC, and where there is no relevant Security Council referral or binding treaty removing immunity, immunity ought to continue to be given effect to in the light of the position under customary international law.

However, according to the Chamber, the Security Council ‘implicitly waived’ the immunities granted to Omar Al Bashir under international law and attached to his position as a head of state by virtue of sc Resolution 1593 (2005) for the purpose of the proceedings before the Court.²¹⁹ It follows that under customary international law, a head of state does not possess immunity in cases where that immunity has been waived or removed either implicitly or explicitly by the Security Council or treaty such as the Genocide Convention²²⁰

216 DRC Decision, *supra* note 206, para. 25.

217 *Ibid.*, para. 26.

218 *Ibid.*, para. 27.

219 *Ibid.*, para. 29; and South Africa decision, *supra* note 208, paras. 6–7 (Judge Cuno Tarfusser, Presiding Judge). The Chamber relied on sc Resolution 1593 (2005) para. 2 which: ‘Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully’. See also D. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir Immunities’, 7(2) *Journal of International Criminal Justice* (2009) 333–352; D. Akande, ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’, 10(2) *Journal of International Criminal Justice* (2012) 299–324.

220 See Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force 12 January 1951, Art. IV provides: ‘Persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’. On genocide see generally P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, Oxford, 2009); W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2009); C. Tams,

to which a state is a party. Moreover, under Article VI of the Genocide Convention, 'persons charged with genocide' shall be tried, inter alia, by an 'international penal tribunal' as may have jurisdiction. An 'international penal tribunal' covers all international criminal tribunals/courts created after the adoption of the Genocide Convention, competent to try perpetrators of genocide, such as the ICC.²²¹ Furthermore, Article VI also obliges States Parties to the Genocide Convention which shall have accepted the jurisdiction of the ICC to cooperate with it, 'which implies that they will arrest persons accused of genocide who are in their territory' and 'hand them over for trial by the competent international tribunal'.²²² Since Al Bashir was given 'official notification' in July 2010 by the competent authority of an allegation that he has committed the crime of genocide,²²³ he can be considered a 'person[] charged with genocide' for the purposes of Article VI of the Genocide Convention.

In the end if persons are found guilty of 'committing genocide', under Article IV of the Genocide Convention they 'shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'. Therefore, personal immunities cannot attach to 'constitutionally responsible rulers', including sitting Heads of State, when charged with the crime of genocide. Such immunities are removed for the purposes of arrest, surrender and prosecution before an 'international penal tribunal'.

For this reason, all State Parties to the Genocide Convention including both Sudan and South Africa, as parties to the Genocide Convention since 11 January 2004 and 10 March 1999 respectively, have implicitly waived the immunities enjoyed by their State officials, including sitting Heads of State, for the purpose of prosecutions for the crime of genocide. As Judge Marc Perrin de Brichambaut observed:

the full participation of Sudan and South Africa in the Genocide Convention has the effect of lifting the immunity of Omar Al-Bashir, allowing

L. Berster and B. Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Nomos, Munich, 2014).

221 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Merits), Judgment of 26 February 2007, para. 445.

222 *Ibid.*, para. 443.

223 Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94, p. 28; Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95.

and in fact compelling Contracting Parties to the Convention to arrest him when he is present on their territory. It follows that South Africa would not have acted inconsistently with its “obligations under international law with respect to the [...] immunity of a person [...] of a third State” within the meaning of article 98(1) of the Statute, had it arrested and surrendered Omar Al Bashir to the Court. However, it failed to do so and it is, therefore, in non-compliance with its obligations under the Statute to execute the Court’s request to arrest and surrender Omar Al-Bashir.²²⁴

Consequently, the Security Council referral has the effect of making the Rome Statute (including Article 27 which removes personal immunities) applicable to non-state parties and removes immunity in that situation. It is essential for the Security Council, when it makes a Chapter VII referral with regards to a situation concerning a non-party to the Rome Statute, to explicitly waive immunities. As noted by the International Law Commission (ILC) ‘when applied to a serving Head of State [...] a waiver of immunity should be explicitly stated’.²²⁵ In addition, the Security Council should impose clear obligations of cooperation in the respective resolution in accordance with the provisions of the Rome Statute on that non-party and ICC state parties.²²⁶ Since the UN security Council imposed an obligation on Sudan, that Sudan ‘shall cooperate fully’, presumably that imposes all the cooperation obligations in part 9 of the Rome Statute. In this regard, the non-state party has an international law obligation to cooperate with the Court arising under the UN Charter. As noted above, this obligation prevails over any other treaty obligation. Therefore, in such a case there is no violation of customary international law immunity (from arrest in states cooperating with the ICC) and thus no conflicting international law obligations arise. State parties to the Rome Statute remain obliged to cooperate with the Court as parties to the Rome Statute, rather than on the basis of the UN Charter.

224 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302-Anx 06-07-2017 1/60 RH PT, 6 July 2017, para. 106, <www.icc-cpi.int/RelatedRecords/CR2017_04403.PDF>.

225 See ILC, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/646, para. 55.

226 But SC Resolution 1593 (2005) para. 2 omitted reference to the Rome Statute. It merely obliged Sudan to ‘cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’ (emphasis added).

3 Impact of the (Failed) Withdrawal Notifications

The general effect of withdrawal is that, subject to Article 127(2), a withdrawing state will no longer be a party to and bound by the Rome Statute once withdrawal becomes effective.²²⁷ As a matter of law, withdrawal has no impact on a withdrawing state obligations (to cooperate with the Court in connection with criminal investigations and proceedings), including any financial obligations which may have accrued, under the Rome Statute prior to the date on which the withdrawal becomes effective.²²⁸ It follows that breaches of the Rome Statute committed prior to withdrawal on a state's territory (such as South Africa's failure to arrest and surrender Al Bashir) or by a withdrawing state's national would still fall within the Court's jurisdiction notwithstanding the fact that investigations had not yet been concluded and prosecutions had not yet been conducted before the withdrawal.²²⁹ In this regard the Prosecutor should conclude whether there is a reasonable basis to proceed with an investigation and if so submit to the Pre-Trial Chamber a request for authorisation of an investigation in Burundi formally in good time before 27 October 2017, the effective date of withdrawal. In accordance with Articles 15 and 53 of the Rome Statute, the Pre-Trial Chamber should consider whether to authorise the opening of an investigation in Burundi before the date of withdrawal becomes effective.

Similarly, withdrawal does not affect a state's other obligations under international treaties or customary international law since it is settled law that 'the withdrawal of a party from a treaty 'shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'.²³⁰ This means that the obligations of South Africa, Burundi and The Gambia as state parties to the Genocide Convention are not affected by withdrawing from the Rome Statute. Withdrawing states still have an 'implicit obligation' to cooperate with a competent 'international penal tribunal' as may have jurisdiction over genocide such as the ICC when it is acting by virtue of a Security Council referral, including an obligation to arrest persons charged with genocide and surrender them to the ICC for trial.²³¹

227 See *supra* note 9.

228 Rome Statute, *supra* note 1, Art. 127(2); Vienna Convention on the Law of Treaties, *supra* note 36, Art. 70(1)(b).

229 Clark, *supra* note 7, 2324.

230 Vienna Convention on the Law of Treaties, *supra* note 36, Art. 43.

231 Genocide Convention, *supra* note 220, Art. VI; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and*

Withdrawal from the ICC intended to avoid accountability may be costly to poorer developing states in terms of its impact on a state's (perceived or real) commitment to international criminal justice. It may lead to retaliatory measures (such as cutbacks in the EU technical and financial assistance or international assistance/development aid).²³² Thus, the withdrawal notifications of three African states have prompted strong statements of support for the Court from a greater number of African states. State officials of several African ICC state parties – including Botswana, Burkina Faso, Cape Verde, Côte d'Ivoire, DRC, Ghana, Ivory Coast, Lesotho, Malawi, Mali, Nigeria, Senegal, Sierra Leone, Tanzania, Tunisia, and Zambia – have reaffirmed their continuous commitment to support and cooperate with the ICC.²³³ In Zambia submissions received from a national consultative process held in 2017 showed that 91.43 per cent of the petitioners were against the idea of Zambia withdrawing from the Rome Statute.²³⁴

African state parties to the Rome Statute are thus widely divided on the AU's so-called 'ICC Withdrawal Strategy', which does not really focus on withdrawal but mainly contains constructive non-legally binding ICC reform proposals.²³⁵ For example, in January 2017 Nigeria, Senegal, and Cape Verde formally entered reservations to the AU decision adopted by heads of state which fully supported 'the sovereign decisions taken by Burundi, South Africa and The Gambia as

Montenegro), Judgment of 26 February 2007, (2007) ICJ Reports 43, <www.icj-cij.org/docket/files/91/13685.pdf>, paras. 439–447.

232 See *The European Union and the International Criminal Court* (February 2008), <www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf>, 16.

233 S.R. Lansky, *Africans Speak Out Against ICC Withdrawal: Governments Signal Continued Support for Court*, 2 November 2016, <www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal>; E. Keppeler, 'African Members Reaffirm Support at International Criminal Court Meeting: Countries Commit to Working Within the ICC System', 17 November 2016, <www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting>.

234 Chila Namaiko, 'Zambia: "We Stay in ICC"', *Times of Zambia*, 1 July 2017, <www.times.co.zm/?p=96321>.

235 Decision on the International Criminal Court Doc. EX.CL/1006(XXX), *supra* note 8, para. 8 'calls on member states to consider implementing its recommendations'. See also AU, *Withdrawal Strategy Document*, *supra* note 8. The Strategy presents a list of proposed reforms to the Rome Statute and the Court including amendments to the Rome Statute; reform of the UN Security Council; ratification of the Malabo Protocol; increasing African representation in the ICC; strengthening national criminal justice mechanisms; and more engagement with relevant organs – Assembly of State Parties, Office of the Prosecutor and the UN Security Council.

pioneer implementers of the [AU's ICC] Withdrawal Strategy'.²³⁶ Liberia entered a reservation to the paragraph that 'adopts the ICC Withdrawal Strategy' while Malawi, Tanzania, Tunisia and Zambia 'requested more time to study the Withdrawal Strategy'.²³⁷ Other non-African states including Canada, Switzerland, Slovenia, and Czech Republic have affirmed strong support for the ICC's mission following South Africa's withdrawal notification.²³⁸ The result of withdrawals could be a court membership that is slightly smaller in number but more committed to cooperation with the ICC.

However, it must be noted that withdrawals represent a loss to the court and to the victims it serves by limiting the Court's ability to investigate and prosecute any future international crimes after the withdrawal notices come into effect. This is because withdrawing states will no longer be bound by the Rome Statute including the obligation to 'cooperate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance'.²³⁹ Withdrawals would strip victims of one of the most important judicial institutions with a potential to investigate and prosecute international crimes and potentially allow such crimes to be committed by state officials with impunity in the future.

African victims continue to rely on the ICC to investigate crimes committed by senior state officials. For example, on 9 December 2016 some Members of Parliament in Uganda called for an ICC investigation into the deaths of over 100 people that allegedly occurred when the Ugandan state security agencies (army and police) raided the region's cultural kingdom, '*Obusinga bwa Rwenzururu*' king's palace in Rwenzori sub-region – Kasese in Western Uganda on 27 November 2016 and clashed with the Kingdom's royal guards.²⁴⁰ Situations for withdrawing states could then only be brought before the Court if the a relevant state decides to accept ICC jurisdiction on an *ad hoc* basis (which is unlikely in situations where government officials are likely to be investigated) or the UN Security Council makes a referral.

236 Decision on the International Criminal Court Doc. EX.CL/1006(XXX), *supra* note 8, para. 6.

237 *Ibid.*, para. 8.

238 R. Dicker, 'Defend the Integrity of the Rome Statute and a Court Worth Having' *Human Rights and International Criminal Law*, <iccforum.com/withdrawal#Dicker>.

239 *Minister of Justice v. SALC*, *supra* note 19, para. 61.

240 E. Biryabarema, 'Ugandan MPs Petition ICC to Probe Kasese "Genocide"', *The East African*, 5 January 2016, <www.theeastafrican.co.ke/news/Uganda-MPs-petition-ICC-to-probe-Kasese-genocide/2558-3507338-vicokiz/index.html>; Human Rights Watch, Uganda: 'Investigate Killings in Rwenzori Region: Cycles of Violence, Reprisals Need Justice', 28 November 2016, <www.hrw.org/news/2016/11/28/uganda-investigate-killings-rwenzori-region>.

Furthermore, withdrawal notifications of South Africa, Burundi and the Gambia have set a precedent for other African and other states opposed to the ICC to consider withdrawing, or threaten to withdraw from the Court's jurisdiction in the future.²⁴¹ It also creates some doubt among other states considering a possibility of signing and ratifying the Rome Statute not to do so in the near future. Burundi's withdrawal notification specifically provides a way for ICC state parties being (or about to be) investigated by the ICC to resist accountability for genocide, war crimes, crimes against humanity and aggression by initiating a process of withdrawing from the Rome Statute. This is likely to be the case if there are no sustained diplomatic, political or financial costs to withdrawing from the Rome Statute. This is particularly the case whenever state officials are opposed to being investigated for possible international crimes. This is confirmed by President Rodrigo Duterte of the Philippines (the President of one of the only states in Southeast Asia that has ratified the Rome Statute as of August 2018) consideration of withdrawing from the Rome statute. The withdrawal is intended to avoid investigations relating to at least 7,000 reported extra-judicial killings of alleged drug dealers and users in the Philippines since President Rodrigo Duterte took office in June 2016.²⁴²

Withdrawal is also likely to be an option following a state party's failure to cooperate with the Court in the execution of arrest warrants. For instance following Uganda's non-compliance with the request for arrest and surrender of Al-Bashir to the ICC while he was present on Uganda's territory,²⁴³ President Museveni publicly referred to the ICC as 'a bunch of useless people'²⁴⁴ and a

241 Decision on the International Criminal Court Doc. EX.CL/1006(XXX), *supra* note 8, para. 8.

242 ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda Concerning the Situation in the Republic of the Philippines, 13 October 2016, <www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php>; K. Forster, 'Philippines May Withdraw from the International Criminal Court, says President Rodrigo' *Independent*, 17 November 2016, <www.independent.co.uk/news/world/philippines-president-rodrigo-duterte-says-they-may-withdraw-from-the-international-criminal-court-a7422076.html>; N.J. Morales and S. van den Berg, 'Philippines' Duterte says may follow Russia's withdrawal from "useless" ICC', *Reuters*, 17 November 2016, <www.reuters.com/article/us-philippines-duterte-icc-idUSKBN13CoGS>; Human Rights Watch, 'Philippines: Duterte Threatens Human Rights Community – Call for Police to Shoot Activists "Reprehensible"', 17 August 2017, <www.hrw.org/news/2017/08/17/philippines-duterte-threatens-human-rights-community>.

243 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09 (11 July 2016).

244 See 'ICC a Bunch of Useless People – Museveni', *New Vision*, 12 May 2016, <www.newvision.co.ug/new_vision/news/1424384/icc-bunch-useless-people-museveni>.

'very useless' institution.²⁴⁵ This has been followed by an open consideration of the possibility of withdrawing from the Rome Statute.²⁴⁶ However, this rhetoric is limited to the ICC's investigations and prosecutions of serving African leaders. It does not extend investigating and prosecuting non-state actors. It is in this context that there is apparent good cooperation provided by Uganda in the ongoing ICC trial in the *Ongwen* case.²⁴⁷

A few other African ICC state parties in particular Namibia²⁴⁸ and Kenya²⁴⁹ have considered the option to withdraw from the Rome Statute due to the ICC's alleged bias against African leaders.²⁵⁰ President Uhuru Kenyatta has observed that the ICC 'has become a tool of global power politics and not the justice it was built to dispense'.²⁵¹ Although there is no evidence to support this view, Russia has supported African states withdrawal notifications by noting that 'the Court [ICC] failed to meet the expectations to become a truly independent, authoritative international tribunal'.²⁵² However, as noted in Section 2.2, the ICC remains an independent judicial institution though its credibility is

245 See 'Museveni Praises South Africa's Decision to Leave ICC as he Arrives in Zambia for Uhuru Celebrations', *Lusaka Times*, 23 October 2016, <www.lusakatimes.com/2016/10/23/museveni-praises-south-africas-decision-leave-icc-arrives-zambia-uhuru-celebrations/>; E. Buchanan, 'Ugandan President Museveni praises African nations for withdrawing from "useless" ICC', *International Business Times*, 26 October 2016, <www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328>.

246 See Agencies, 'Uganda's Withdrawal from ICC will Depend on AU Decision', *Daily Monitor*, 17 November 2016, <www.monitor.co.ug/News/National/Uganda-ICC-will-depend-AU-decision/688334-3455476-3cofhaz/index.html>.

247 See *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15; ICC, 'ICC President meets with President of Uganda', ICC-CPI-20170302-PR1279 (2 March 2017), <www.icc-cpi.int/Pages/item.aspx?name=PR1279>.

248 S. Immanuel, 'Cabinet affirms ICC withdrawal', 24 November 2015, *The Namibian*, <www.namibian.com.na/index.php?page=archive-read&id=144660>; C. Milhench, 'Namibia Will Stay in ICC – if United States Joins, Says President', *Reuters*, 1 December 2016, <www.reuters.com/article/us-namibia-economy-president-idUSKBN13Q5Lo>.

249 See 'Kenya Votes to Leave the ICC Days before Deputy President's Hague Trial' *The Guardian* (5 September 2013), <www.theguardian.com/world/2013/sep/05/kenya-icc-international-criminal-court>.

250 See 'Kenyatta Considers Kenya's ICC Withdrawal, Warns against Foreign Interference', *Africa Times*, 12 December 2016, <africatimes.com/2016/12/12/kenyatta-considers-kenyas-icc-withdrawal-warns-against-foreign-interference/>.

251 *Ibid.*

252 See The Ministry of Foreign Affairs of the Russian Federation, 'Statement by the Russian Foreign Ministry', 16 November 2016, <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJEo2Bw/content/id/2523566>.

undermined by the practice of the Security Council. While it is difficult to claim that there is a single case at the ICC that should not have been examined or investigated by the Prosecutor, there are many situations that should have been referred to the ICC but they have not been referred.

In addition, South Africa's withdrawal notification led to developments in diplomatic mechanisms. The first step was taken at the meeting of the ICC Assembly of States Parties (ASP) in 2016. At South Africa's request, the ASP Bureau established an open-ended working group to develop consultation mechanisms on the implementation of Article 97 of the Rome Statute.²⁵³ These are intended to be used when a Member State is subject to an ICC obligation to arrest and surrender to the ICC a serving State official who the State considers to be protected by immunities under international law.²⁵⁴ If effectively developed, such mechanisms could be used to clarify the procedure to be followed by the Chamber pursuant to Article 98(1) or (2) as to whether a conflict of obligation indeed exists and whether the Court should indeed not proceed with its request. This has the potential to prevent future perceived or real conflict of obligations like those advanced by South Africa following Al Bashir's visit to South Africa.

Furthermore, following South Africa's withdrawal notification, without prior parliamentary approval, the High Court of South Africa declared the notification 'unconstitutional and invalid' and ordered the responsible government officials²⁵⁵ to 'revoke the notice of withdrawal'.²⁵⁶ To comply with the above judgment, the Government of South Africa revoked with immediate effect its notification of withdrawal on 7 March 2017, signalling possibly that South Africa does not intend at present to proceed with its withdrawal without compliance with the relevant domestic law.²⁵⁷ As such, a new notification is required, after obtaining prior parliamentary approval, to restart the 12-month withdrawal period provided for under Article 127(1) of the Rome Statute. In the absence of a new notification of withdrawal by the Government of South Africa, the High Court judgment will, at the very least, delay the timeline for

253 Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court, ICC-ASP/15/35, 24 November 2016.

254 See Section 2.4 above.

255 The Minister of International Relations and Cooperation, the Minister of Justice and Correctional Services and the President of the Republic of South Africa.

256 *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, Case No. 83145/2016, (High Court of South Africa, 22 February 2017).

257 United Nations, South Africa: Withdrawal of Notification of Withdrawal, C.N.121.2017.treaties-XVIII.10, 7 March 2017.

withdrawal. This provides an opportunity to renew South Africa's commitment to the principles and values upheld by the Rome Statute.

Importantly, the non-cooperation proceedings against South Africa at the ICC afford an opening for judicial clarification of the immunity provisions of the Rome Statute, Articles 27 and 98.²⁵⁸ These Articles have thus far been interpreted in an unsatisfactory and inconsistent manner.²⁵⁹ If the ICC can more convincingly address the issue of immunities through consistent and satisfactory judicial means, taking into account the concerns of South Africa and other member States, this could address concerns raised by South Africa and render withdrawal unnecessary or unjustifiable. This would prevent other states with similar concerns raised by South Africa from considering future withdrawals and instead focus on cooperation and meaningful engagement with the ICC.

Finally, successful withdrawals are likely to be followed by the repeal of domestic legislation (eg the South African Implementation of the Rome Statute of the International Criminal Court 2002), which gives domestic effect to the Rome Statute.²⁶⁰ The repeal of ICC domestic implementing legislation constitutes a form of parliamentary approval for withdrawal from the Rome Statute. This is because after withdrawing from the Rome Statute, concerned states will no longer be under a legal obligation to give effect to the domestication of the provisions of the Rome Statute into national law to ensure that such law became compatible with the Statute. Should this take place, without adopting new legislation for domestic investigation and prosecution of international crimes, an important legal basis for the domestic prosecution of international crimes would be seriously weakened. It will be more difficult to get the full cooperation from withdrawing states in new situations and cases after withdrawals have taken effect.

258 *Al Bashir* case: ICC Pre-Trial Chamber II Schedules a Hearing on South Africa's Cooperation on 7 April 2017, ICC-CPI-20161208-PR1264, 8 December 2016, <www.icc-cpi.int/Pages/item.aspx?name=PR1264>. These proceedings will consider 'whether South Africa failed to comply with its obligations under the [Rome] Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on its territory'.

259 C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in M. Bergsmo and L. Yan (eds.), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, Beijing, 2012) 223–265.

260 See Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, B23-2016, <www.gov.za/sites/www.gov.za/files/b23-2016_implementation_of_rome_statute_act_repeal_161103.pdf>.

4 Conclusion

While signing and ratifying the Rome Statute is a voluntary and a sovereign decision of every state, state withdrawals from the Rome Statute undermine the global movement towards greater accountability to put an end to impunity for the perpetrators of the most serious crimes (genocide, crimes against humanity, war crimes and aggression) and a ruled-based international order. Withdrawals from the Rome Statute limit the Court's jurisdictional reach and its ability to provide justice to the victims of such crimes and contribute to the prevention of future atrocities. Withdrawing from the Rome Statute without a credible alternative mechanism (national or regional judicial systems) in place to investigate and prosecute international crimes without any distinction based on official capacity shields state officials who commit crimes from accountability. It also undermines the AU's 'condemnation and rejection of impunity' in respect of grave crimes, in particular genocide, war crimes, and crimes against humanity.²⁶¹ A number of measures may be taken to prevent further future justifications of withdrawals by African states from the Rome Statute.

First, the ICC mainly through the Assembly of States Parties must engage in a meaningful and constructive dialogue with the reasons – 'good' or 'bad' – advanced by withdrawing states, such as those advanced by South Africa, to justify withdrawal. Concerns of states must be respectfully and effectively considered by the Assembly. To enhance the credibility of the ICC and complementarity with the state parties, the ICC Prosecutor, President of the Court and President of the Assembly of State Parties should conduct extensive awareness campaigns as well as intensify engagement and dialogue with all ICC State Parties and relevant stakeholders, including African States, civil society and academia. While more outreach would require more resources, it is helpful to counteract media, political and diplomatic (mis)information campaigns used by states to undermine the ICC. Such campaigns should be done in cooperation with state parties, UN bodies, regional organisations and relevant domestic actors (such as the judiciary, prosecutors, lawyers, victims, and civil society) on the ICC's work at the national, sub-regional, regional and international levels.

Second, the Prosecutor must demonstrate that crimes within the jurisdiction of the Court are investigated objectively wherever such crimes are committed. In particular, the Prosecutor must ensure that all crimes within the jurisdiction of the Court committed in appropriate non-African situations are pursued beyond preliminary investigations. These include crimes against humanity and

²⁶¹ Constitutive Act of the African Union, 11 July 2000, 4(o) and 4(h).

war crimes committed by parties to the conflict – the Georgian armed forces, the South Ossetian forces, and the Russian armed forces – in the context of an international armed conflict in and around South Ossetia, Georgia between 1 July and 10 October 2008;²⁶² war crimes committed by members of the US armed forces and the US Central Intelligence Agency in Afghanistan;²⁶³ and crimes against humanity of torture, deportation, persecution, and other inhuman acts committed against asylum seekers including women and children by Australian government officials and their private contractors.²⁶⁴

Third, it is proposed that instead of withdrawing from the Rome Statute, concerned African states could invoke Article 98(2) of the Rome Statute which provides that:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

There are different views about the above provision. One view is that the above article was intended to protect the status of forces agreements in existence prior to signature of the Rome Statute.²⁶⁵ On this basis it is argued that Article 98(2) ‘only refers to existing agreements’ which means ‘agreements concluded by a State party before the latter’s signature of the Statute’.²⁶⁶ Accordingly it is argued that a state intentionally negotiating an Article 98(2) designed to purposefully avoid its obligations to arrest and surrender a person sought by the Court would be violating the basic principle not to defeat the object and purpose of a treaty.²⁶⁷ Another view is that Article 98(2) allows agreements

262 See Pre-Trial Chamber 1, *Situation in Georgia: Decision on the Prosecutor’s Request for Authorization of an Investigation*, No. ICC-01/15, 27 January 2016.

263 *Report on Preliminary Examination Activities 2016*, *supra* note 66, para. 211.

264 See *The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention of Refugees and Asylum Seekers* (February 2017), <www.scribd.com/document/339213633/Communication-made-to-International-Criminal-Court-requesting-investigation-of-Australia-and-corporate-contractors>.

265 See C. Kreß and K. Prost, ‘Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender’, in Triffterer and Ambos (eds.), *supra* note 7, 2117–2146, at 2142–2146.

266 *Ibid.*, at 2146.

267 *Ibid.*; Vienna Convention on the Law of Treaties, *supra* note 36, Art. 18.

negotiated and ratified subsequently.²⁶⁸ Under the above provision, African states can negotiate a multilateral treaty among themselves to prohibit the arrest and surrender of any national of a non-party state including head of state or senior state official to the ICC provided any such individual is 'indispensable' to the pursuit of a peace settlement for an ongoing conflict in Africa.²⁶⁹ Once such a treaty enters into force, the Court is obliged to first obtain the consent of the 'sending State' for the surrender of a person wanted by the ICC.

Fourth, since the ICC is not a substitute for national justice systems but it is rather 'complementary' to them,²⁷⁰ it is imperative that states develop effective national (or regional) criminal justice systems to genuinely investigate and prosecute international crimes. African states that are unable to carry out prompt, impartial, thorough and transparent investigations and/or prosecutions of crimes within the jurisdiction of the ICC must enhance their domestic institutional (investigative and judicial) capacity. This should include seeking assistance from the ICC Prosecutor's office, conducting legal reform by enacting and enforcing ICC national implementing legislation integrating provisions of the Rome Statute in domestic law including crimes within the Court's jurisdiction and granting authority to national prosecuting authority to refer situations to the ICC, cooperation with the Court and enforcement/ execution of sentences, enhancing national capacity-building by training investigators, prosecutors and judges and infrastructure investment in the court system.

Fifth, the Rome Statute does not indicate whether a notification of withdrawal can itself be withdrawn at any time before the withdrawal becomes effective. In principle, it will be in the interest of victims of international crimes for Burundi to follow the example of The Gambia and South Africa to withdraw its withdrawal notifications and for other ICC state parties to refrain from withdrawing from the Rome Statute in the future. African States played a key role in the establishment of the ICC, as well as in its development and the evolution of international criminal justice more generally. This role would be enhanced if African States remain parties to the Rome Statute. The criminal jurisdiction of the yet-to-be-established African Court of Justice on Human and Peoples' Rights does not affect the jurisdiction of the ICC particularly over serving state

268 D. Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', 3(2) *Journal of International Criminal Justice* (2005) 333, at p. 336.

269 D. Scheffer, 'More Options for Africa under the Rome Statute', *Just Security*, 19 November 2016, <www.justsecurity.org/34669/options-africa-rome-statute-international-criminal-court-scheffer/#more-34669>.

270 Rome Statute, *supra* note 1, Preamble para. 10, Arts. 1 and 17.

officials who may enjoy immunity under Article 46 *bis*.²⁷¹ Besides, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (and the Statute annexed to it), which provide for international criminal jurisdiction of the African Court, has not yet entered into force as the required number of ratifications for its entry into force has not yet been achieved.²⁷²

Finally, notifications of withdrawal from treaties must be consistent with relevant domestic law.²⁷³ As confirmed by the South African High Court, South Africa's notification of withdrawal, without prior parliamentary approval, was unconstitutional, invalid and had to be revoked.²⁷⁴ Therefore, should the executive still wish to withdraw, it must wait for parliament to successfully repeal the ICC domestic implementing legislation before submitting a valid notification of withdrawal to restart the 12-month withdrawal period under Article 127(1) of the Rome Statute. This period could be used by South Africa to reconsider the wisdom or desirability of withdrawing from the Rome Statute and to engage in constructive diplomatic dialogue and judicial mechanisms to address issues raised in Section 2 above.

271 See generally Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014, <au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>; Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court', 22 January 2016, Index number: AFR 01/3063/2016, <www.amnesty.org/en/documents/afro1/3063/2016/en/>; Gerhard Werle and Moritz Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser Press/Springer, The Hague, 2017).

272 The Protocol on Amendments (and Statute annexed to it) require ratification by 15 member states for entry into force. However, only nine states – Benin, Chad, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone and Sao Tome & Principe – had signed it as of 15 June 2017.

273 See *R (Miller) v. The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

274 *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, Case No. 83145/2016, *supra* note 16.