Existential Threats to the International Criminal Court: Making Sense of the Convergence of Disparate Geo-political Interests and Ideological Positions

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Abstract

The establishment of the International Criminal Court (ICC) in 1998 was welcomed by many as a progressive step towards ending the impunity of those who commit international crimes. However, there appears to be serious legitimacy and existential threats to the ICC. Those at the forefront of the attack on the ICC, such as the United States of America (United States) and the African Union, have fundamentally different geo-political interests and pursue largely different ideological positions. The reasons advanced by these disparate enemies of the ICC are different but are largely informed by the different fears they have for the Court. This article aims to expose the various interests behind the efforts to delegitimise and destroy the ICC. The article also seeks to demonstrate the different strategies used by the ICC's nemeses in their attacks on the Court. To achieve this, the article provides an overview of the relationship of various United States administrations with the ICC. I trace the United States' initial support for the ICC and, thereafter, try to set out why it suddenly morphed into one of the Court's foremost nemeses. I also outline the various strategies that the United States has employed in its attack on the ICC. I then discuss the AU's troubled relationship with the ICC, starting with the AU's overwhelming endorsement of the ICC project, to the current situation where there is a general view within the body that the Court is anti-African. I attempt to unpack the reasons for this troubled relationship between the AU and ICC. I also outline the strategies the AU (and some of its Member States) employs in its attack on the ICC. I conclude by positing that it is crucial for those who may want to save the ICC from collapse to understand the different fears of its nemeses and the different strategies they have been employing to destroy it. It is only through such an understanding that formidable counter strategies may be employed to mitigate the legitimacy and existential threats to the ICC.

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Introduction*

The establishment of the International Criminal Court (ICC) in 1998 was viewed by many across the globe as a progressive step towards ending the impunity of those who commit gross violations of human rights (Cryer et al. 2014, 172; Cassese et al. 2013, 20). Twenty-five years later, there appears to be serious legitimacy and existential threats to the ICC. What is interesting is that those at the forefront of the attack on the Court have fundamentally different geo-political interests and pursue largely different ideological positions. Among the ICC's foremost nemeses are the United States and the AU. While there may be convergence on the desired outcomes—delegitimisation and collapse of the ICC—, these disparate enemies of the ICC advance different reasons that are largely informed by the different fears they have for the Court.

The United States has been one of the most influential superpowers in international politics since the end of the Cold War (Ikenberry 2005, 133). It is also one of the biggest financial contributors to the United Nations (Sendruk 2019). The United States has also played a pivotal role in the creation of various international tribunals to foster accountability for gross human rights violations (Rhea 2009, 19). In addition to aiding the formation of these tribunals, the United States supported the ICC in its early stages (Amann and Sellers 2002, 382−384). The AU, on the other hand, is the main political organisation on the African continent. It provided the most support for the ICC at the negotiation, signing, and ratification stages of the Rome Statute of the International Criminal Court (the Rome Statute).[1]

The Rome Statute establishes the ICC as a permanent institution, with the power to investigate and prosecute persons accused of committing "the most serious crimes of international concern" (Article 1 of the Rome Statute). The ICC is not intended to replace domestic courts, but rather to serve as a complementary justice mechanism to national criminal jurisdictions when they are unwilling or unable to prosecute those who have committed international crimes (Article 1 of the Rome Statute; Schabas 2020, 182). The ICC became operational on 1 July 2002 after 60 countries ratified the Rome Statute (Gerhad and Jessberger 2014, 21). The ICC has jurisdiction over genocide, crimes

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1 As of 4 May 2022, 123 countries have signed and ratified the Rome Statute. See https://asp.icc-cpi.int/states-parties.

against humanity, war crimes, and the crime of aggression (article 5 of the Rome Statute). The ICC has since its operationalisation, more than two decades ago, convicted ten people for, among other things, destruction of cultural property, crimes against humanity, genocide, and sexual violence.[2]

The jurisdiction of the ICC is basically three-pronged. First, the Prosecutor of the ICC can initiate an investigation based on a referral from any State Party to the ICC (Article 12 of the Rome Statute). Second, the Prosecutor may do so based on a referral from the United Nations Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations (Article 13 of the Rome Statute). Third, the Prosecutor can also initiate investigations *proprio motu* (of their own volition) based on information received from organisations or reliable sources about crimes within the jurisdiction of the ICC (Article 13 of the Rome Statute).

Article 86 of the Rome Statute provides that "State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". This provision highlights that the effectiveness of the ICC is largely dependent on the support of State Parties because it has no coercive mechanism of its own, for example, a police force to apprehend suspects (Hans-Peter 2007, 578; Cryer 2014, 517). Therefore, without the support of State Parties, the ICC will always find it difficult to deliver justice to victims of unimaginable atrocities in states which fall under its jurisdiction.

The international community hailed the coming into force of the Rome Statute in 2002 as a progressive step towards ending the impunity of those who commit atrocities. However, today the ICC is facing enormous challenges such as the refusal by some State Parties to apprehend suspects and surrender them to the Court. For example, despite a warrant for the arrest of the then president of Sudan, Omar Al Bashir, which had been issued by the ICC on 8 May 2011, he attended the inauguration of President Ismael Omar Guelleh of Djibouti; he was not arrested (Perez 2016). Also, Chad and Malawi did not arrest him when he visited those countries in the same year (Nkhatha 2011, 150; *The Prosecutor v Omar Hassan Ahmad Al Bashir*). In 2014, President Al Bashir also attended the Common Market for Eastern and Southern Africa Summit that took place in Kinshasa, Democratic Republic of the Congo on 26 and 27 February 2014 and was likewise not arrested (Boschiero 2015, 625). Also, South Africa did not arrest him when

2 See for example, *The Prosecutor v Ahmad Al Faqi Al Mahdi Judgment and Sentence* ICC-01/12-01/15; Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment ICC, see SP Tunamsifu. 2019. "Twelve Years of Judicial Cooperation Between the Demographic Republic of Congo and the International Criminal Court: Have Expectations Been Met?" *African Human Rights Law Journal* 125:114. https://www.icc-cpi.int/about/the-court#:~:text=ICC%20judges%20have%20also%20issued,10%20convictions%20and%204%20acquittals.

he attended the 25th AU Summit in 2015.[3] In fact, as a matter of policy, the AU has urged its members not to cooperate with the ICC (Chigara and Nkwanko 2015, 243).

However, as alluded to above, the AU and its Member States are not alone in their refusal to cooperate with the ICC and in their hostility towards it. The United States has also been at the forefront of attacks on the credibility of the ICC. In 2019, the United States revoked the ICC Prosecutor's entry visa because of her office's pursuit of the Afghan War Crimes case (Simons and Specia 2019).

It must be noted that all the above-mentioned countries that have refused to cooperate with the ICC, with the exception of the United States, voluntarily ratified the Rome Statute. Consequently, under international law, by signing, and let alone ratifying the Rome Statute, they undertook to honour all the obligations arising from the same in good faith (*Nuclear Tests Case (Australia v France)* (Merits)).

The purpose of this article is to investigate the reasons for the hostility of the United States and the AU towards the ICC. The article also seeks to identify the various stratagems deployed by the ICC's nemeses to discredit it. In the following section, the attitude of the United States under its various administrations is discussed with the aim of ascertaining the general United States' relationship with the ICC and the reasons for that association. The article also outlines the various political strategies and legal instruments that the United States has used in its onslaught against the ICC.

In the third section, I discuss and critique the relationship between the AU (and a select of Member States of the AU) and the ICC. As in the case of the United States, I seek to establish the reasons for the AU's newfound hostility towards the ICC and the strategies it has been using to discredit it. In the fourth section, I discuss the role of the United Nations, specifically the UNSC, in so far as referrals and deferrals to the ICC are concerned. I analyse the extent to which this non-Party State intervention procedure could be aiding the spirit of hostility towards the ICC on the part of State Parties to the Rome Statute. In the fifth section, I make recommendations, followed by the sixth section, which is the concluding part.

The United States and the ICC

As has already been mentioned above, the relationship between the United States and the ICC has evolved from one of support to one of utter hostility. This section discusses and analyses the attitude of different United States administrations towards the ICC. It also examines the strategies the country has employed in its crusade to discredit the Court.

3 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others).*

The United States has played a significant role as a proponent of international criminal justice to ensure that perpetrators of heinous crimes do not go unpunished. This is evident in the United States' instrumental role in the establishment and operations of the International Military Tribunals at Nuremberg and Tokyo (Amann and Sellers 2002, 382), and the United Nations' International Tribunals for the former Yugoslavia, Rwanda, and Sierra Leone (Willianson 2007, 823–824). This was through participating in the drafting of the statutes of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and providing funds and personnel for the tribunals' operations (Amann and Sellers 2002, 383). The United States was also instrumental in the trial of the former Sierra Leonean president, Charles Taylor, where it played a role in his arrest and prosecution (Falk 2012). The United States is also one of the countries that financed the Special Court for Sierra Leone (Falk 2012).

The United States' support for the creation of international criminal tribunals extended to the establishment of the ICC. This was evident during President Clinton's administration when the United States showed a "significant and positive interest" in the ICC (Falk 2012). The United States' representatives were further actively involved in the drafting of the Rome Statute which was eventually considered at length at the 1998 United Nations Diplomatic Conference in Rome (Amann and Sellers 2002, 383). Despite this positive role, it must be noted that prior to this (in 1995), the United States had been opposed to the Rome Statute containing the crime of aggression (Koh and Buchwald 2015, 257). This is understandable because the United States troops have always been engaged in war in various countries such as Somalia, Afghanistan, Iraq, and Syria. The United States had raised concerns that the crime of aggression might unduly expose its troops to the jurisdiction of the ICC (Reeves 2000, 4). The legality or otherwise of such wars is, however, beyond the scope of this article. Given the ramifications that the Rome Statute would have on the United States, in particular as it pertained to the liability of its troops, it was not surprising that it voted against the adoption of the Rome Statute in Rome in 1998 (Danilenko 2000, 446).

Post the adoption of the Rome Statute, the Clinton administration continued to participate in the ICC preparatory sessions (Koh and Buchwald 2015, 446). However, the major reason for the United States' participation in those negotiations was to ensure that it was shielded from the reach of the Rome Statute (Koh and Buchwald 2015, 383). This is evidenced by the United States' unsuccessful attempt to have the elements of the crime of aggression narrowed down so that its nationals would fall outside the jurisdiction of the ICC (Koh and Buchwald 2015, 446). Despite the failed attempts to narrow down the elements of the crime of aggression, on 31 December 2000, the United States signed the Rome Statute "for the express purpose of maintaining influence over the Court's development" (Koh and Buchwald 2015, 446).

The discussion above shows the apparent positive role the United States played in the development of international criminal justice and the prosecution of those who have

committed gross violations of human rights since World War II. As has already been indicated, the United States has also played a central role in the establishment of the ICC. Not only did it get involved in drafting the Rome Statute, but it also contributed to financing the Court's operations. Even though the United States supported the establishment of the ICC, it later tried, unsuccessfully, to negotiate for an ICC with a narrower jurisdiction that would have excluded its nationals from the Court's jurisdiction. The early attitude of the United States towards the ICC was that, while it supported the idea of a permanent international criminal court that could facilitate the prosecution and punishment of those accused of the most serious international crimes, it, however, was wary of exposing its "warriors" to criminal liability in the ICC. In other words, the United States found itself caught in the irony of the need for international criminal liability of despotic leaders and those committing serious international crimes under the orders of such leaders and the need to protect its own troops from international criminal liability for committing the same crimes. With regard to the latter, the United States has always seen itself as a crusader for democracy and accountability (Sadat and Drumb 2016, 2–3. To the United States, therefore, it would be illogical for its troops to be punished for some of their actions while in the service of democracy and accountability (Sadat and Drumb 2016, 2,7, and 8). That is the "exceptionalism" that has resulted in the continuing United States' hostile attitude towards the ICC.

The end of the Clinton administration on 20 January 2001 and the subsequent election of President Bush marked a new global era in international politics that had adverse implications for the ICC. Barely six months into office, the new administration started a political war against the ICC. John Bolton, the then-Under Secretary of State for Arms Control and International Security, wrote to the UN Secretary General, Kofi Annan, indicating the United States' position on the ICC. The letter read:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[4]

This letter should be understood in the context of the *pacta sunt servanda* principle as codified in article 26 of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention). While the mere signing of a treaty (even in the absence of subsequent ratification of a such treaty) obligates a signatory State to respect the terms and spirit of a treaty, subsequent communication by a signatory State indicating that the State does not intend to be a party to the treaty frees such State from the obligations arising from the Vienna Convention. Thus, the United States for the first time employed a legal

4 The letter can be found on the US Department of State website at www.//2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

instrument in its assault on the ICC. Hitherto, it has acted solely within the realm of diplomacy when raising its concerns about the ICC.

The United States did not only "withdraw" from the ICC, but its public officials continued to publicly denounce the Court. Pierre Prosper, the former United States Ambassador-at-Large for War Crimes Issues openly advocated for separate, *ad hoc* tribunals for accountability for specific gross human rights violations. He stated:

> … [s]eparate tribunals are appropriate because each conflict is different. But it also seems to be the only approach that is acceptable to President Bush and Congress, which have rejected the creation of a proposed international criminal court to prosecute crimes against humanity (Kempster 2001).

This statement was clearly designed to undermine the ICC as the recently created permanent international criminal court. Indeed, the establishment of the ICC marked a break from the past where international criminal tribunals had been *ad hoc* in nature and created to deal with a particular conflict or situation, for example, the Nuremburg and Tokyo Tribunals (World War II), International Criminal Tribunal for Rwanda (Rwanda Genocide), and the International Criminal Tribunal for the former Yugoslavia.

The United States' efforts to undermine and destroy the ICC are far from being over. The enactment of the American Servicemembers Protection Act of 2002 limits support and assistance to the ICC, reduces military assistance to many countries that have ratified the Rome Statute, and authorises the president "to use all means necessary and appropriate to bring about the release of a United States person or United States allied person who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court" (Cowley 2002). This provision indicates the lengths to which the United States is prepared to go to escape from any form of accountability to the ICC.

Further remarks from Pierre Prosper signalled a concerted effort by the United States to undermine the existence of the ICC. He accused the ICC of, among other things, not being accountable to anyone and that the prosecutor had unfettered discretion that may be used for political reasons (Prosper 2002). In his view, United States soldiers deployed in conflict situations abroad could be engaged in lawful activities, but the Prosecutor could decide to investigate, arrest, and prosecute them. According to him, "this is something that we [the United States] cannot accept" (Prosper 2002).

The United States decided to broaden its legal stratagems in its onslaught against the ICC. In addition to the purely domestic legal instruments referred to above, the United States embarked on a controversial campaign of approaching individual states to negotiate bilateral treaties with the aim of circumventing the jurisdiction of the ICC (Rossen and Griner 2004, 183). These are referred to as "Article 98 of the Rome Statute of the ICC agreements" (Article 98 bilateral agreements). The bilateral agreements aim to ensure that United States nationals are not handed over to the ICC if they are accused

of committing serious international crimes within the jurisdiction of the ICC (Griner 2008, 225). To this end, the United States has signed agreements with more than 100 countries obligating them not to hand over its citizens to the ICC without its consent (Johansen 2006, 301). All these countries have promised that they will not surrender United States citizens to the ICC unless both parties consent in advance to the surrender (Elsea 2006, 26). For example, the agreement between the Government of the Kingdom of Lesotho and the Government of the United States Regarding the Surrender of Persons to the ICC in part reads:

> 2. Persons of the United States of America present in the territory of the Kingdom of Lesotho shall not, absent the express consent of the Government of the United States of America,
>
> (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
>
> (b) be surrendered or transferred by any means to any other entity or a third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
>
> 3. When the Government of the Kingdom of Lesotho extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Kingdom of Lesotho will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the express consent of the Government of the United States of America.[5]

The implications of these agreements are quite serious. Given the fact that the United States has concluded more than 100 Article 98 bilateral agreements with other countries, it means that the ICC cannot get cooperation to apprehend United States nationals from those 100 countries. In other words, the cooperation as required by the Rome Statute with those countries has been rendered impossible by the United States and those individual states that are signatories to those bilateral agreements. The United States pressured many countries to sign these bilateral agreements and those that refused, such as South Africa and Kenya, saw a significant reduction in foreign aid (Rosen and Griner 2007). This brings sharply into perspective the question of whether the ICC is garnering the support of and cooperation from the international community when more than 100 states have entered into these agreements with the United States with the purpose of shielding their nationals (particularly the United States nationals) from surrender to the ICC. Therefore, the credibility and efficacy of the ICC are clearly at stake.

Under the Bush administration, the United States enacted laws to prohibit economic support to countries that are ICC members and who refused to enter into Article 98

5 See Agreement between the Government of the Kingdom of Lesotho and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court. https://2009-2017.state.gov/documents/organization/70931.pdf. Accessed 19 April 2022.

bilateral agreements with the United States (Rosen and Griner 2007). Furthermore, these laws prohibit any nature of support or other assistance to the ICC.[6]

It is evident that under the Bush administration, the United States' aim was to weaken the ICC by all means possible. It was during the Bush administration that the ICC's effectiveness was gravely undermined and the Court's existence seriously imperilled. The United States went all out to weaken the ICC's effectiveness by refusing to cooperate with it and by constantly questioning its legitimacy. It also applied pressure on some countries to be part of Article 98 bilateral agreements that shield the United States nationals from the ICC's jurisdiction.

Under the Obama administration, there was a slight, although evident shift in the United States' relationship with the ICC. The United States indicated its readiness "to support the Court's prosecutions and provide assistance in response to specific requests from the ICC Prosecutor…"[7] Notably, the United States stopped pursuing bilateral agreements with other nations preventing its nationals from being surrendered to the ICC (Taft et al. 2009, 5). To this end, the United States assisted the ICC and cooperated with it in the arrests of Dominic Ongwen and Bosco Ntaganda, who were transferred to the ICC by United States embassies (Sadat and Drumbl 2016, 8). Despite these positive developments, the United States maintained its stance of protecting its personnel from the jurisdiction of the Court (Johansen 2006, 301). Unwarranted political attacks on the ICC stopped. In other words, this era resembled that of former President Clinton, which had also supported the ICC. However, the Obama administration continued to hold on to the view that it would continue shielding United States officials from the jurisdiction of the ICC.

The Trump Administration was to a large extent not different from the Bush Administration (Sterio 2019, 201). In November 2017, the ICC's former Prosecutor, Fatou Bensouda, unsuccessfully requested the ICC's Pre-Trial Chamber in November 2017 to investigate the alleged crimes against humanity and war crimes committed in Afghanistan since 1 May 2003 (Situation in the Islamic Republic of Afghanistan). However, this decision was later overturned on appeal and the ICC prosecutor was given the go-ahead to probe alleged war crimes committed by United States military personnel in Afghanistan (Situation in the Islamic Republic of Afghanistan).

The ICC Prosecutor's announcement of the investigation into the atrocities committed in Afghanistan revived the United States' attacks on the ICC. First, the United States revoked ICC Prosecutor's visa on 4 April 2019 and undertook to take further actions against all those who are involved in the investigation of its personnel (Sterio 2019, 201). Second, the United States adopted what the former National Security Adviser, John Bolton has referred to as the "US policy toward the International Criminal Court,

6 See Sec. 8173 of the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002.

7 See International Criminal Court, US. Department of State. http://www.state.gov/j/gcj/icc/.

or ICC" (Bolton 2018). Bolton did not mince his words against the ICC: "The Court has been ineffective, unaccountable, and indeed, outright dangerous" (Bolton 2018). He further accused the ICC and its prosecutor of being given too much power and not being answerable to anyone. According to him, the ICC violated the United States' sovereignty. He further stated that:

> The United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court. We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.

Bolton's assertions were clearly aimed at undermining and destroying the ICC. His claim that the ICC has unaccountable powers is without doubt misplaced. The powers of the ICC are precisely spelt out in the Rome Statute (Article 15 of the Rome Statute) and the Court can only deal with the crimes that are listed in the Rome Statute. Further, the Assembly of State Parties, which comprises all State Parties to the ICC, is a pivotal accountability mechanism over the Court.[8] Additionally, the judges of the ICC can be removed by a two-thirds vote of State Parties to the Rome Statute (Article 46 of the Rome Statute). Even the Prosecutor, whom Bolton has accused of having ulterior motives, can also be removed by a majority vote of State Parties (Article 46 of the Rome Statute).

In another outburst in 2018, John Bolton made the following threats:

> We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans (Bolton 2018).

If anything, the ICC Prosecutor's decision to investigate crimes allegedly committed by United States troops in Afghanistan may be viewed as proof of the Court's independence. This has the potential to restore the credibility of the ICC because for too long, the Court has been accused of targeting only African states (Phooko 2011, 194).

How then can one summarize the relationship of the United States with the ICC? While some may view the United States' relationship with the ICC as complex,[9] the truth of the matter is that it is easy to interpret it. While the United States may be interested in

8 See Assembly of States Parties, int'l crim. Ct. https://www.icc-cpi.int/asp [https://perma.cc/QS2Q-5QLG].

9 See, for example, S, Ochs. 2020. "The United States, the International Criminal Court, and the Situation in Afghanistan." *Notre Dame Law Review* 89: 90−92; R.C, Johansen. 2006. "The Impact of US Policy Toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity." *Human Rights Quarterly* 28: 301−311; M.D Kielsgard. 2010. *Reluctant Engagement: U.S. Policy and the International Criminal Court*. Brill | Nijhoff.

seeing those who commit serious international crimes within the jurisdiction of the ICC arrested, prosecuted, and punished, it changes tack when it is United States nationals who are at the receiving end of international criminal justice. It is this "othering", underpinned by the United States' self-defined exceptionalism and its oftentimes unilateral pursuit of geo-political interests that has defined its relationship with the ICC.

And in seeking to undermine and destroy the effectiveness of the ICC, if not obliterate its entire existence, the United States has over the years employed a plethora of stratagems ranging from high-level political denunciation of the ICC and the use of a combination of domestic and international legal instruments to shield its personnel from the jurisdiction of the ICC. But another notable aspect of the United States' relationship with the ICC is its unwavering interest in protecting its "warriors"—the troops it uses year in, year out—in the pursuit of its geo-political interests. While some in its political class have been threatened with arrest and possible prosecution for committing international crimes (Johansen 2006, 301), the United States is not so much concerned about protecting its political leaders, but rather its troops.

The African Union and the ICC

The origins of the AU are traceable to the Organization of African Unity (OAU), which was primarily formed to fight against colonialism and defend Africa's sovereignty (Preamble and article 1 of the Organization of African Unity). The OAU morphed into the AU in July 2002 (Adejo 2001, 134−138). The AU was instrumental in the establishment of the ICC (Bachmann and Sowateyi-Adjei 2020, 254−257). For example, many discussions that eventually resulted in the adoption of the Rome Statute were held in Africa. In addition, in February 1998, 25 African states met in Senegal where the "Dakar Declaration" was unanimously adopted, calling for the creation of the ICC. Further, at the adoption of the Rome Statute, Africa was well represented (Bachmann and Sowateyi-Adjei 2020, 255).

Despite the aforesaid support of the ICC, it must be noted that the AU has generally been uncomfortable with the use of the principle of universal jurisdiction over crimes committed in African states (Omorogbe 2019, 290−291). For example, there was an outcry (Kayitana 2018, 14) when the German courts executed an international warrant of arrest issued by a French judge for the arrest of the former senior Rwandan Army official, Rose Kabuye, for her alleged complicity in the murder of the then president of Rwanda, Juvenal Habyarimana (Kayitana 2018, 14).

A similar outrage was witnessed when the ICC, through a referral by UN Security Council, issued a warrant of arrest for President Omar Al Bashir of Sudan in 2009 for the alleged commission of war crimes (van der Wyser 2011, 684). The AU reacted by

adopting a policy of non-cooperation with the ICC in the execution of the warrant of arrest against President Al Bashir.[10]

The same attitude was displayed when a warrant of arrest was issued against President Gaddafi of Libya in 2011. Again, the AU reacted by taking a stance against the ICC for the issuing of the said warrant of arrest (Ssenyonje 2013, 385). The ICC's decision to issue the warrant of arrest against President Gaddafi troubled the AU so much to the extent that it led "the AU Assembly to question how Africa's interests can be fully defended and protected in the international judicial system".[11]

The main basis of the AU's refusal to cooperate with the ICC is the AU's view that seating "heads of non-party states are entitled to immunity from arrest in third states under customary international law".[12] It was precisely because of the AU's policy of non-cooperation with the ICC that President Al Bashir was able to visit various countries, such as Djibouti, Jordan, Kenya, and South Africa, without being arrested.[13]

The continuing uneasy relationship between the AU and the ICC led the AU Assembly to request the AU Commission, and the African Commission on Human and Peoples' Rights to investigate whether the African Court on Human and Peoples' Rights should be empowered to prosecute international crimes. This resulted in the adoption of the 2014 Malabo Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol).[14] As of 2 December 2022, there are 30 African States that have ratified the Malabo Protocol (Chella 2001, 1). The Malabo Protocol extends the jurisdiction of the African Court on Human and Peoples' Rights to include international crimes. The Malabo Protocol provides immunity for heads of state, something that the Rome Statute expressly prohibits (article 46A*bis* of the Malabo Protocol). There have been mixed reactions to the Malabo Protocol, especially after immunity from prosecution before the Court was granted to, among others, heads of state or governments and other senior state officials (Tladi 2015, 3). Further, it is said that the immunity clause conflicts with various international law principles prohibiting

10 See "Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Tribunal (ICC)", 3 July 2009, AU Doc. Assembly/AU/Dec. 245(XIII) Rev. 1, para. 10; and "Decision on the International Criminal Court", 28–29 January 2018, AU Doc. Assembly/AU/Dec. 672(XXX), paras. 2(iii)–3(i) and 5. Accessed 13 January 2023 https://reliefweb.int/report/sudan/decision-meeting-african-states-parties-rome-statute-international-criminal-court-icc.

11 See AU Assembly, "Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)", 30 June−1 July 2011, AU Doc. Assembly/AU/Dec. 366(XVII), paras. 5–6.

12 See Article 9 of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013).

13 *The Prosecutor v Omar Hassan Ahmad Al Bashir*.

14 See Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII). Accessed 13 January 2023. https://archives.au.int/bitstream/handle/123456789/172/Assembly%20AU%20Dec%20529%20%28XXIII%29%20_E.pdf?sequence=1&isAllowed=y.

immunity before international tribunals (Kariri 2014, 1). Ultimately, it is said that the immunity clause in the Malabo Protocol will undermine the legitimacy of the African Court on Human and Peoples' Rights and the fight against impunity on the African continent.

There have also been some concerns, however, about Africa's capacity to prosecute international crimes, given the continent's lackadaisical approach to dealing with political leaders who have committed gross violations of human rights.[15] The abiding refrain in the AU's relationship with the ICC has been that the ICC unfairly targets African heads of state.[16]

Probably taking a cue from the AU as well as from the United States, individual African states have had their run-ins with the ICC. Burundi withdrew its signature from the Rome Statute on 27 October 2017[17] after the ICC commenced investigations on it (Nel and Sibiya 2017, 98). Also, on 21 October 2016, South Africa announced its withdrawal from the Court (Veselinovic and Park 2016). However, South Africa subsequently reversed its decision in March 2017. Furthermore, on 10 November 2016, Gambia notified the ICC about its withdrawal from the Rome Statute (Senyonjo 2018, 64) but later reversed its decision (Kennedy 2017). These actions are undesirable for the credibility and effective functioning of the ICC. They also give those who have committed crimes an excuse to hide behind the alleged bias of the ICC.

While both the United States and the AU have been the foremost nemeses of the ICC, it is important to note that they have not necessarily been singing from the same hymn book. As I have already indicated, the United States is mainly concerned about protecting its warriors in uniform. On the other hand, the AU's main preoccupation has been protecting African "kings" from the jurisdiction of the ICC. The main concern about the African political elite has, therefore, been sovereignty, not in its broad sense, but in the limited sense of not subjecting African heads of state to international criminal prosecution.

15 There is a glimmer of hope though that political attitudes may be changing as evidenced by the trial of President Hissène Habré, former president of Chad. See S. Ncube. 2017. "In Search of International Criminal Justice in Africa: What Role for the United Nations?" *SAJIA* 24: 423, 427.

16 See, for example, N. Nyabola, "Does the ICC Have an Africa Problem? https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html; T Mude. 2017. "Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric." *Open Journal of Political Science* 7: 178; R Chipaike et al. 2019. "African Move to Withdraw from the ICC: Assessment of Issues and Implications." *India Quarterly: A Journal of International Affairs* 75: 334; MR Phooko. 2001. "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court." *Notre Dame Journal of International and Comparative Law* 1 (182):197−199.

17 See ICC statement of the withdrawal of Burundi. https://www.icc-cpi.int/burundi; M. Apuzzo and M. Simons, "US Attack on ICC Is Seen As Bolstering World's Despots" www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html.

In terms of strategies, the AU has adopted a united approach, whereby the AU Assembly has been seen adopting policy positions on the ICC, like the non-cooperation policy. On the legal front, the AU has tried, although without much success, to establish its own international (continental) international criminal justice mechanism, albeit with a watered-down jurisdiction. The assumption may be that once this has been attained, then African states would *en masse* withdraw from the ICC. Besides this strategy, individual African states have also withdrawn from the ICC, with some of them reversing their withdrawal decisions.[18] In the case of South Africa, the executive decision to withdraw was thwarted by the courts.

How did the AU find itself in this situation with regard to the ICC, especially since it had largely supported the establishment of the Court? One can speculate that most AU political leaders, so accustomed to unaccountability and the absence of the rule of law in most AU Member States, had paid very little attention to the letter and spirit of the Rome Statute. Maybe they could not bring themselves to imagine that the ICC could ever strike so close to home, and they had a rude awakening when warrants of arrest were issued against presidents Al Bashir and Ghaddafi.

Non-state Party Procedures

Having dealt with the United States and AU relationship with the ICC and how these two have posed significant existential threats to the ICC, it is necessary to now turn to discuss another issue with the potential to damage the legitimacy of the ICC. This is the issue of non-state parties to the ICC (in the form of states and an international organisation) being involved in referring cases to the ICC.

The UNSC is the main United Nations organ that is tasked with the primary responsibility of maintaining international peace and stability (Art. 24(1) of the UN Charter). Consequently, it can also make referrals to the ICC under article 13(b) of the Rome Statute for investigation and possible prosecution of anyone accused of having committed crimes that fall within the jurisdiction of the ICC (Art. 41 of the UN Charter). The UNSC has previously exercised its powers under the UN Charter and referred the Sudan and Libya cases to the ICC. To do so, a resolution must pass in a session with the UNSC's 15 members. The UNSC has five permanent members—China, the United States, France, the United Kingdom, and Russia. It must be noted that of the five permanent members, three of them are not State Parties to the Rome Statute—China, the United States, and Russia.[19] This creates an awkward situation whereby states that are not State Parties to the Rome Statute—some of which, like the United States, are in

18 Following the election of new presidents, South Africa and the Gambia reversed their decisions.

19 China never signed the Rome Statute, while Russia withdrew on 13 September 2000. The United States did not ratify the Rome Statute and had, after signing it, decided to withdraw its signature.

the business of actively undermining the ICC—are seen to be at the forefront of getting persons from other states arrested and prosecuted in the ICC.

The other difficulty with the UNSC procedure is that permanent members have a veto vote (Articles 27(3) and 23 of the UN Charter*)*. Other members have a rotational seat every two years. Vetoes are problematic in that a veto-wielding UNSC member is able to prevent a decision even though 14 members have voted in support of that particular decision. For example, if 14 members of the UNSC agree to refer a case for the investigation of war crimes allegedly committed by the United States in Afghanistan to the ICC, the United States may block such a referral using its veto power. Further, the ICC's investigation into the conduct of Russian forces in Ukraine in 2022 could also have been prevented by a veto power if the matter were to be discussed in the UNSC. What does this mean in practice? It means that nationals of countries such as the United States or China may never be referred to the ICC for investigation of any crimes unless their countries support such a resolution. It is, however, unlikely that a country would support an action that seeks to investigate its own for possible prosecution before the ICC.[20] These are some of the realities of the veto power that prompted the United Nations General Assembly to adopt a resolution aimed at holding five permanent members of the UNSC accountable for the use of veto power (A/RES/76/262).

Furthermore, the UNSC may also refer nationals of countries that are not members to Rome Statute for investigation and possible prosecution. The referrals of cases from both Libya and Sudan to the ICC by the UNSC are good examples.[21] As observed by Olugbuo, "one major contention between the ICC and the AU is the involvement of the of the UNSC in the affairs of the ICC to the detriment of the African continent in the referral of cases to the ICC" (Olugbuo 2014, 360−361).

20 For a detailed discussion on challenges posed by veto power, see N. Akiyama. 2009. "Article 24 Crises and Security Council Reform: A Japanese Perspective" 2(1) *J. E.Asia and Int'l L.* 159; J. Muller.2010."Reforming the United Nations: The Challenge of Working Together"; J. Von Freiesleben. 2013."Reform of the Security Council 1945–2008." In *Governing and Managing Change at the United Nations: Security Council Reform from 1945 to September 2013*; G. Finizio and Ernesto G (eds.). 2013. *Democracy at the United Nations: UN Reform in the Age of Globalisation*; D. Bourantonis. 2005. *The History and Politics of the UN Security Council Reform*; L. Stone. 2011. "The Feasibility of Reforming the UN Security Council: Too Much Talk, Too Little Action?" *J.E. Asia and Int'l L* 4:405.

21 See Situation in Darfur, Sudan. https://www.icc-cpi.int/darfur. The statement on the ICC website also states that "Sudan is not a State Party to the Rome Statute. However, since the United Nations Security Council (UNSC) referred the situation in Darfur to the ICC in Resolution 1593 (2005) on 31 March 2005, the ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur, Sudan, or by its nationals from 1 July 2002 onwards".

Therefore, a referral of a matter to the ICC by the UNSC as provided for in article 13 of the Rome Statute is clearly problematic. It is also fraught with political considerations and is open to political abuse to settle political agendas.[22]

The proposals for the reform of the UNSC should therefore receive the attention that they deserve.[23] Additionally, until such time that the UNSC is reformed, there may be a need to amend the Rome Statute to provide that members of the UNSC that have not signed and ratified the Rome Statute should not participate in processes that involve referral to the Court.

Recommendations and Conclusion

It is submitted that articles 13(b) and 16 *ter* of the Rome Statute that deal with referrals and deferrals from the UNSC need to be amended to the effect that members of the UNSC that are not signatories or parties to the Rome Statute have no say whatsoever on the cases before or to be referred to the ICC. It is submitted that until such a time that members of the UNSC have equal status and voting rights, the aforesaid clauses are dangerous to the independence and operation of the ICC. In addition, the veto vote may be used for political agendas.

The above discussion has revealed that the Obama and Clinton administrations, to a large extent, supported the ICC even though they consciously pronounced about protecting United States personnel from the Court's jurisdiction. The discussion has also shown that the Bush and Trump administrations were against the ICC. This is unfortunate because the United States has played a significant role in the establishment of the Court and the general pursuit of global criminal justice. It was also central in the early development of the ICC by providing financial and human resources support.

22 See A.S Galand. 2018. "UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits." *Brill Nijhoff* 5: 31−39; D Akande. 2007. "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities." *Journal of International Criminal Justice* 7: 333−342; L Condorelli and A Ciampi.2005. "Comments on the Security Council Referral of the Situation in Darfur to the ICC." *Journal of International Criminal Justice* 3: 590−592.

23 K.O. Kufour. 2006. "The African Union and the Reform of the Security Council: Some Matters Arising". *Afr. J. Int'l and Comp. L.* 14: 288−296; A. Venter. 2003. "Reform of the United Nations Security Council: A Comment on the South African Position." *IJWP* 4: 29; T. Shihepo, "SADC Leaders Reiterate Calls to Reform UN Security Council." https://southerntimesafrica.com/site/news/sadc-leaders-reiterate-calls-to-reform-un-security-council; M. Du Plessis and C. Gevers. 2018. "South Africa's Foreign Policy and the International Criminal Court: Of African Lessons, Security Council Reform, and Possibilities for an Improved ICC". In *African Foreign Policies in International Institutions* edited by J. Warner and T.T Shaw J. New York: Palgrave Macmillan.

One can also conclude that the United States has been advocating for accountability for international crimes for everyone else except its nationals. To this end, it has been challenging the legitimacy of the ICC and has sought to weaken the Court by pressurising other states to conclude bilateral agreements with it. The effect of such bilateral agreements is that it will always be difficult to surrender United States nationals to the ICC. International criminal justice should be pursued against any person accused of committing international crimes regardless of their nationality and geographical location. The selective brand of justice pursued by the United States has affected the proper functioning of the ICC as other states such as South Africa, Chad, and Malawi opted not to surrender former president Al Bashir to the ICC. All in all, it is submitted that through its earlier positive and later negative attitude, the United States is behind the rise and fall of the ICC.

Equally, African states are not immune to criticism. The calls for the reform of the UNSC have been made since time immemorial. However, decades later there has been no significant progress. African countries were part of the deliberations that led to the adoption of the Rome Statute. Therefore, they were aware that states, such as the United States as a member of the UNSC, may refer a case to the ICC even though they are not signatories to the Rome Statute. Accordingly, this should have been prevented during the negotiations.

The time has come for African states to familiarise themselves with the obligations arising from treaty law prior to ratification. There is no legitimate excuse for the failure to surrender former president Al Bashir regardless of the politics surrounding the operations of the ICC. It nonetheless needs to be mentioned that Al Bashir is currently standing trial in Sudan for various charges like possession of foreign currency and leading the 1989 military coup and faces the possibility of being handed to the ICC (Chutel 2021, 1). Treaty obligations must be discharged in good faith. Otherwise, the concept of binding international law will remain elusive if countries enter into treaties but later withdraw for whatever reason and without fear of being held accountable by the people.

Ultimately, I am of the view that the only possible way to save the ICC is to do away with the veto power in the UNSC.

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