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Anti-impunity vs. Sovereignty: Why the planned African mass exodus from the ICC failed to materialise.

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STUDENT DECLARATION

I hereby declare that the thesis submitted for the Master of Philosophy in Arts to The IIE is my own work and has not previously been submitted to another University or Higher Education Institution for a degree. I also declare that the electronic copy is a true and accurate reflection of the hardcopy.

Signature:	
Date:	22 November 2021

DEDICATION

This thesis is dedicated to my father, Thokozani Banda, who motivated me throughout my research journey. I am thankful to you for your consistent support, thoughtful feedback and encouraging words and believing in me when I didn't believe in myself.

I would also want to dedicate my thesis to two women whose mentorship from my formative years has remained a source of resilience and perseverance. It was important for me as a young African girl in Europe to my future self in Ms. Cassandra Castello, my fifth-grade teacher, who epitomised excellence and grace. To my high school science teacher, Ms. Amanda Watson, I remain grateful for having taught me the attention to detail required for simplifying complex information.

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Table of Contents

LIST OF ABBREVIATIONS	7
ABSTRACT	8
CHAPTER 1: INTRODUCTION	11
RATIONALE.....	12
PROBLEM STATEMENT.....	13
RESEARCH PURPOSE & QUESTION.....	14
<i>Research Question:</i>	15
<i>Thesis:</i>	15
CHAPTER 2: METHODOLOGY AND THEORETICAL FRAMEWORK.....	17
METHODOLOGY	18
RESEARCH APPROACH	18
CASE STUDY METHODOLOGY	19
CASE SELECTION CRITERIA	20
DATA COLLECTION.....	22
DATA ANALYSIS	22
ETHICAL CONSIDERATIONS	23
THEORETICAL FRAMEWORK.....	23
CONSTRUCTIVISM	24
RATIONAL CHOICE THEORY	34
<i>Understanding RCT in international relations theories</i>	<i>35</i>
<i>Limitations?</i>	<i>36</i>
APPLICATION OF THEORY	37
<i>Game theory.....</i>	<i>38</i>
KEY CONCEPTS	40

<i>International Institutions</i>	40
<i>Sovereignty</i>	41
<i>Sovereign Immunity</i>	42
CONCLUSION	42
CHAPTER 3: HISTORY AND LITERATURE REVIEW	45
CONTEXT.....	46
LITERATURE REVIEW	48
AFRICA & THE INTERNATIONAL CRIMINAL COURT	48
UNITED NATIONS DIPLOMATIC CONFERENCE OF THE PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT	49
<i>How to define the crimes under the ICC's jurisdiction?</i>	50
<i>How is ICC action triggered, and who can trigger it?</i>	52
<i>Who falls under the Court's jurisdiction?</i>	54
<i>Other arguments</i>	54
INTERNATIONAL CRIMINAL COURT	56
<i>PREAMBLE</i>	56
<i>JURISDICTION OF THE COURT</i>	57
<i>COMPOSITION AND ADMINISTRATION OF THE COURT</i>	59
<i>COOPERATION</i>	59
<i>ASSEMBLY OF STATE PARTIES</i>	60
<i>RESERVATIONS</i>	60
<i>AMENDMENTS</i>	60
WORSENING RELATIONS: SUDAN AND KENYA	61
CALLS FOR WITHDRAWAL	63
A REGIONAL RESPONSE: THE MALABO PROTOCOL	64
ANALYSIS AND CRITIQUE OF THE ICC.....	65
<i>Domestic political interests of African governments</i>	65
<i>Political interest vs. Legal obligations</i>	66
<i>ICC Bias</i>	67

CONCLUSION.....	70
CHAPTER 4: CASE STUDY	71
PREFERENCE FOR WITHDRAWAL (WITH ACTION): SOUTH AFRICA.....	73
<i>Al-Bashir</i>	74
PREFERENCE FOR WITHDRAWAL (NO ACTION): KENYA	76
<i>Kenya</i>	76
PREFERENCE FOR MASS WITHDRAWAL: THE AFRICAN UNION	78
ANALYSIS.....	79
CONCLUSION	91
CHAPTER 5: SUMMARY FINDING AND RECENT DEVELOPMENTS	93
THERE WAS A LACK OF RECIPROCAL COMMUNICATION BETWEEN THE ICC AND AFRICAN STATES.....	94
AFRICAN STATES SUPPORT ANTI-IMPUNITY EFFORTS BUT BELIEVE THEY SHOULD BE COMBINED WITH OR WEIGHED AGAINST PEACE EFFORTS	96
THE ICC HAD TO FIND ITS FOOTING	97
RECENT DEVELOPMENTS	98
<i>ICC Investigations</i>	98
<i>Resolution ICC-ASP/16/Res.3</i>	101
CONCLUSION.....	102
CHAPTER 6: CONCLUSION AND REFLECTIONS	104
REFERENCES	109

List of Abbreviations

ACJHR – African Court of Justice and Human Rights

AU – African Union

EU – European Union

ICC – International Criminal Court

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IGO – International Governmental Organisation

NGO – Non-Governmental Organisation

OAU – Organisation of African Unity

SADC – Southern African Development Community

UN – United Nations

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

UNSG – United Nations Secretary-General

UK – The United Kingdom

USA – The United States of America

Abstract

The establishment of the International Criminal Court as a permanent court that can dispense justice in the interest of all peoples came after a century of devastating human loss and human terror. African States were enthusiastic about the creation of the Court and ensured that certain Human Rights provisions were included in the Court's founding document, the Rome Statute. Behind this rosy image of all countries working towards a common goal, however, the seeds of discord between the Court and its Member States were inadvertently sown. In 2009, the International Criminal Court issued its first arrest warrant for former Sudanese President Omar al-Bashir. In the years that followed, resistance to the ICC grew within Africa and eventually resulted in calls for a mass withdrawal of African states from the Rome Statute. Bias and disregard for sovereign immunity of African heads of states became the tagline reasoning for why Africa should no longer be a part of the ICC. A regional alternative was sought and against this backdrop, three African States formally issued notices of withdrawal. In the end, the regional alternative was created but not ratified, and only one African country withdrew from the ICC. By the end of 2017, the momentum for a mass withdrawal had been lost and African states seemed once again willing to cooperate with the institution. This dissertation explored this unique phenomenon against the backdrop of only around 200 voluntary withdrawals from any international institutions to date. Much research exists into why states join international institutions. However, far less research is focused on why states voluntarily leave international institutions. Even less focuses on the motivations for blocs of countries to withdraw from an institution and therefore this study attempt to analyse the case study of the failed mass withdrawal of African states from the ICC after 2015. By using historical and documentary data, the identities and therefore preferences of African states were

constructed, and their goals explained. Through this, the conclusion was reached that the mass withdrawal was not truly an effort to withdraw from the ICC, but rather an exercise in diplomacy that yielded cooperation and open channels between African Member States of the Rome Statute and the International Criminal Court.

Keywords: international criminal court, Africa, treaty withdrawal, anti-impunity, diplomacy, treaty negotiation

Chapter 1: Introduction

In 2016, the international arena braced itself for a shift. South Africa, followed by the Gambia and finally Burundi issued withdrawal notices to the International Criminal Court in quick succession. During the following year there were numerous debates. What did this mean for international justice? Was this the beginning of the end for the International Criminal Court? Were African States going to withdraw *en masse*, form their own court and let the Court collapse? By mid-2017, the anticipated shift had not materialised. South Africa and the Gambia had rescinded their notices before the end of the year, leaving Burundi as the only African state to formally withdraw from the Court. Debates about the ICC's efficacy lingered although underlying all the debate was one question: Why did African states not leave the ICC *en masse*?

In order to answer this question, but more so to illuminate the conditions in which the mass withdrawal became a near reality, the following research was conducted. This following research is a single-case study in the discipline of International Studies at IIE MSA. The research centres around the failed mass withdrawal of African states from the International Criminal Court, focusing on the period 2015 – 2017. The thesis will begin by providing a contextual and literary justification for the research. Thereafter, I will explain the establishment of the ICC which will provide the foundation for the discord between African states and the ICC. This section will be followed by an overview of events leading up to and including the 2015 – 2017 period, after which I will summarize the findings and provide an answer to my research question.

Rationale

A significant amount of research has been conducted on the formation of international institutions (Keohane, 1984; Mearsheimer, 1994). However comparatively less research has gone into how and why states would voluntarily leave international institutions (Keohane, 1984; von Borzyskowski & Vabulas, 2019, p. 336). Sohn (1964) conducted an early study into why states might withdraw from institutions, but his research focused on forced withdrawals. By contrast, there is relatively little research on voluntary withdrawals (Woolaver, 2017, p. 450), which von Borzyskowski & Vabulas (2019, p. 336) attribute to the scholarly focus on joining and sustaining IGOs. One reason for there being a lack of research into the exit of states from international organisations is that international organisations do not make it easy to leave, and so this phenomenon rarely occurs. Sometimes there are financial implications for leaving (Jervis, 1999, p. 56), and sometimes the process of renegotiating policies can be protracted and difficult, as seen with the United Kingdom's attempted exit from the European Union. And yet, despite there being impediments to exiting an international institution, it is not impossible (Jervis, 1999, p. 57).

The move towards a mass withdrawal from the ICC is significant firstly because at 18 years since its establishment, it is a young institution; only 123 of the 195 countries recognized by the United Nations are members of the International Criminal Court (Human Rights Watch, 2020) and three out of the five permanent members of the UNSC are not party to the Rome Statute, but have referral power. This three are the United States of America, Russia and China (Kuwonu, 2017).

Problem Statement

There have been numerous calls for African states to withdraw from the ICC, both from individual African states and the African Union as a collective.¹ Sovereign immunity remains the main grounds for such calls. However there is a gap in the existing literature which has failed to explore what ultimately stopped the states from staging a mass withdrawal after the resolution was passed at the AU in 2017, as well as what may have undermined the feasibility of a mass withdrawal. The literature references a lack of political will or the lack of coordination between states to form an alternative but presents this explanation as an anecdote rather than a fully investigated concept. If the ICC has a bias problem as has been alleged repeatedly over the years, and if there is a structure in place regionally to accommodate the investigation and prosecution of grievous crimes in an African defined context, it remains to be explored why the mass withdrawal did not occur. In light of the novelty of the mass withdrawal effort, there remains a need to understand why this withdrawal failed and whether or not individual identity and preference formation impeded the collective action of withdrawal.

Research Purpose & Question

The purpose of the proposed research is to identify and understand the reasons for why the mass withdrawal of African states from the ICC failed. The objectives of the study will be:

- a) To understand how African states constructed their identity and preferences with respect to the ICC using the theory of constructivism, and why some African states developed a preference for ICC withdrawal.
- b) To explain why the mass withdrawal failed to materialise

¹ See Sections 2.1 to 2.4 of this thesis.

- c) To identify if there were unresolved concerns stemming from the negotiation of the Rome Statute that contributed to the tension between the ICC and African State, and the AU.

Research Question:

How did African states develop a preference for mass withdrawal from the ICC after 2015 and why did it fail?

Thesis:

The calls for a mass withdrawal and the actions of some states in issuing notices of withdrawal was a demonstration of political posturing to try and force the ICC to amend several of its provisions.

Chapter 2: Methodology and Theoretical Framework

This chapter will flesh out the research approach, methodology and theoretical framework employed in this thesis. I will do this by explaining why I chose a qualitative approach in which I use a single case study. This is followed by a justification of the theoretical framework I have chosen to use for the purposes of this thesis. This chapter concludes with a discussion on the key concepts related to this research.

Methodology

The research is a qualitative study of a single case. The case study will be conducted by collecting historical and documentary data and tracing the historical process. By tracing the historical process, I will be able to determine if the expectations drawn from my theoretical framework are proven true. The primary units of analysis in this study are African states, although the study will also consider the role of non-state actors such as the AU and the ICC. This section of my research will explain in further detail my research design and methodology.

Research approach

This research is a qualitative study. Qualitative methods are a prominent choice for research in International Relations (Bennett & Elman, 2008, p. 499). Qualitative research study in Political Science and International Relations is typically a study that examines the causes of effects, which is the route that the proposed research will be taking (Bennett & Elman, 2006, p. 456). In conducting a qualitative study on the reasons for the failed mass withdrawal of African states from the ICC, I will be investigating the causes of the failure to withdraw by using the event as a single case study. Bennett & Elman (2006, p. 458) describe this method

as a mainstream approach, that exists in a worldview that acknowledges the uniqueness of certain events due to occurring in a complex social world. Keohane (1988, pp. 379–380) asserts that when studying world politics, one is more likely to generate “conditional, context-specific generalizations” than to find universal laws of international relations. This is because we have a relatively small sample population to choose from when conducting studies on states and their behaviours, which can largely depend on human affairs (Keohane, 1988, p. 379).

Whilst modelling will form a section of the research, the overall research methodology will be based on the qualitative analysis of empirical data on events, motivations and actions of states, and not on purely mathematical or abstract reasoning.

Case study methodology

The failed mass withdrawal by African states from the ICC will be the primary case study used in the proposed research. A case study is the detailed examination of a single event in order to draw inferences about wider, complex phenomena (Gerring, 2013, p. 2). Whilst early uses of case studies in research in the International Relations field were not considered to be structured and to contribute enough, case studies have become more and more widely regarded as useful in IR research (Bennett & Elman, 2008, pp. 500–501). Case studies can be used to identify causal mechanisms as well as a test for theory (Bennett & Elman, 2006, p. 456; Bennett & Elman, 2008, p. 501). By employing process-tracing in the context of a single-case study, different theories and explanations can be tested to provide a clearer understanding of the causes of certain phenomena (Bennett & Elman, 2007, p. 183).

Process tracing is defined by Collier (2011, p. 823) as a fundamental tool of qualitative analysis and “the systematic examination of diagnostic evidence selected and analysed in light of research questions and hypotheses posed by the investigator.” Mahoney (2015, p. 200) explains that process tracing is “a set of procedures for formulating and testing explanations with case studies.” Successful process-tracing uses casual-process observations, careful description and attention to the sequence of events (Collier, 2011, p. 823). Causal-process observations entail the insights that confirm a causal inference about a single or multiple case studies (Beck, 2010, p. 500; Mahoney, 2015, p. 200).

Gerring (2013, p. 5) defines a case as “a spatially delimited phenomenon (a unit) observed at a single point in time or over some period of time.” Whilst a history of the relationship between the ICC and African states and the African continent as a whole will be provided to frame the context in which the move for a mass withdrawal intensified, the case study will focus on the period of three years from 2015 to 2017. Consequently, the case study will employ a state-centric framework. Using process tracing, the actions of states, the ICC and other international organisations in relation to the mass withdrawal will be given in chronological order. The motivations of the actors as well as the context in which the actions took place will frame the process-tracing. Thus, the study will attempt to determine whether the hypothesised causal mechanisms identified by the theories were operating in this particular historical case.

Case selection criteria

As outlined in the introduction, there has not been as extensive research done on why states leave an international institution as there has been on why they join an international

institution. This case study thus presents itself as an interesting case in that it concerns African states and that it is of an attempted *mass* withdrawal. Bennett & Elman (2007, pp. 172–177) note four types of case studies: least-likely, most-similar and least-similar case comparisons, cross-case and over-time comparisons, and deviant case studies. Least-likely case studies refer to cases where the theory predicts a specific outcome but the variables of the case point to another and the outcome is still the predicted one (Bennett & Elman, 2007, p. 173). Most-similar and least-similar comparison cases refer to comparing two cases that are similar in all but one of the independent variables and have different outcomes (Bennett & Elman, 2007, pp. 174–175). Cross-case and over-time comparisons are case studies that either compare a single case before and after an event, or where two cases are compared at different stages (Bennett & Elman, 2007, p. 176). Deviant cases are cases that do not have the same outcome as predicted by theory (Bennett & Elman, 2007, p. 176). My case study would mostly fit into the least-likely type as it is a single case study where the circumstances looked set for a mass withdrawal, however none occurred. Willis (2014, p. 2) locates least-likely case studies under crucial case studies within Harry Eckstein's (1975) taxonomy of case studies, with their cruciality lying in their ability to test theories.

The reason the attempted mass withdrawal of African states from the ICC was chosen as the case study is that mainly a state withdrawing from a formal international institution is not a frequent occurrence. A mass withdrawal of states is even less frequent and presents an opportunity to extend the study from why states wanted to withdraw to the coordination problem in a group of states withdrawing from a single institution within the same time frame. This is a recent incident that would have had implications for international justice, the ICC as an institution, as well as the role of international institutions in Africa.

Data Collection

Since the study is a case study which will utilise process tracing, the primary source of data will be the historical record, i.e., the record of events that occurred and the way these events were perceived by the relevant actors. The data will be collected from trustworthy sources such as peer-reviewed journal articles, primary documents produced by international organisations (such as indictments and warrants issued by the ICC, or resolutions by the African Union), statements issued by governments and the ICC, interviews and press-conferences held by government officials and books, as well as similar sources. In order for a qualitative study to be seen as trustworthy four criteria are used: credibility, transferability, dependability and confirmability (Korstjens & Moser, 2018, p. 121). These criteria will ensure that the case study is described as neutrally as possible, and the different perspectives on the event can be substantially unpacked. No information will be collected through interviews and focus groups or observations of individuals by the researcher.

Data Analysis

When analysing the case study, themes will be identified. The themes will pertain to identity formation, preference formation and the strategy chosen by countries. The grouping of states' actions and preferences within the overall themes will allow the reasons for the failure of the mass withdrawal to be deduced.

Firstly, using constructivism to guide the process, I will explain the identities created by specific actors in relation to the ICC. This will be based on findings drawn from process tracing. Secondly, I explain the reasons for tensions between the actors and the ICC and provide evidence that these tensions are long standing and rooted in the initial Rome Statute

negotiation process. The deduction drawn from both steps will help me to determine the veracity of my thesis statement; that the mass withdrawal was used as a diplomatic bluff to encourage the ICC to renegotiate the relationship between Africa and the Court.

Ethical considerations

According to Bhattacharya (2018), research ethics refers to a “comprehensive set of values, standards, and institutional schemes that maintain and regulate scientific activity,” in order to ensure the research is conducted morally. Most importantly, harm to human subjects and participants must be minimized (Orb et al., 2000, p. 93). Ethical principles include autonomy, beneficence and justice (Orb et al., 2000, p. 95), which involve aspects such as the confidentiality of participants.

Throughout the process of this research no human subjects were interviewed, observed or asked to join focus groups or fill in a questionnaire. The research was strictly focused on the collection and analysis of historical and documentary data. The topic of the ICC might prove sensitive if it were to focus on judicial and moral merits of the cases the ICC investigates and prosecutes. The scope of the research however allows solely for the neutral summary of certain individual cases, as well as the consequential actions of the ICC and states involved based on statements, treaties, press releases and other documentary data.

Theoretical Framework

Keohane (1988, pp. 381–382) used both rationalistic and what he terms “reflective theory” to analyse the need for international institutions. Using rationalistic theory, Keohane (1988, p. 386) explained that the significance of institutions stemmed from the “potential value of

agreements and the difficulty in making them". In other terms, nations aim to maximise their wants and needs when interacting with other nations in the international arena. In order to achieve this, nations often have to cooperate and compromise. Keohane (1988, p. 386) lays out the premise that because of the compromise and therefore cost that often accompanies agreements between nations be it on trade, diplomacy or war, mutual agreements are hard to come by, creating the need for international institutions to act as facilitators in these negotiations. The same premise underlying the need for international institutions can be used to demonstrate why states may be incentivised to leave said institutions. This can be done using the framework created to illustrate how an institution may no longer be seen as necessary in achieving cooperation between countries. Reflective theory, which I align with constructivist theory, is used by Keohane (1988, p. 391) to compliment the rationalistic approach. In the article, Keohane (1988, p. 391) contends that whilst rationalist theory enables the analysis of how the interest of nations influence their actions, it does not adequately address the factors that create the interests of states in the first place. When analysing international institutions, it is important to also take into account the geopolitical contexts of the institutions and its members. Utilising the two theories when analysing international institutions and the way nations act allows for a more complete understanding.

Constructivism

Constructivism is a theoretical framework in international relations that centres on the construction of identities and norms by states and institutions, and how these subsequently inform state behaviour. According to Wendt (1999, p. 1), constructivism is a theory where associations and interactions are framed and contextualized through shared ideas. These shared ideas in turn shape the identities and interests (goals) of actors. Kratochvíl & Tulmets (2010, p. 27) state that for constructivism, "actors' identities require compliance with

internalized norms irrespective of whether these norms bring these actors additional benefits or not.”

The constructivist theory is a relatively new theory within International Relations and stems mostly out of Alexander Wendt's *Social Theory of International Politics* (Guzzini & Leander, 2005; Hopf, 1998). Founded in part in symbolic interactionism (Suganami, 2004, p. 59), constructivist theory can be explained to understand the relationships between states and their perceptions of each other are dynamic and determined through past actions and responses. Furthermore, how a state views itself is partly determined through how the state perceives itself in relation to other states (Suganami, 2004, p. 59). Therefore, meaning is a socially constructed concept (Guzzini, 2013, p. 219). Economic power, political influence, military size, political stability, degree of democracy are all various lenses through which a state might measure its standing in the international community in comparison to other states.

Fundamentally opposing the mainstream theories of international relations such as neorealism and neoliberalism, constructivism provides an alternative understanding on key concepts within international relations. Ted Hopf (1998) contends that there are two main strands of constructivism: the conventional and the critical version. Critical constructionism has its roots in critical social theory and is most relevant to this research proposal. First, however, an understanding of what constructivism is, its fundamental principles and objectives will be traced.

In constructivism, power is another key component of analysis. Power is defined as being not only material wealth but also discursive. This nexus between power and knowledge is a concept not unique to constructivism but has been espoused by earlier writers such as

Michael Foucault, Antonio Gramsci and Max Weber (Hopf, 1998). Key to the practice of this power is that social practices have the power to perpetuate existing communities and reproduce these, be it on an international scale or a more local one. Both the local and international communities can then reflect each other. In relation to foreign policy, state action in the international arena is both constrained and enabled through the aforementioned practices within the nation-state's society and its preceding international actions (Hopf, 1998). It is important to highlight where exactly constructivism overlaps with critical social theory to then form critical constructivism. Critical constructivism takes conventional constructivism a step further in analysis in that it seeks to expose how the identities, practices and institutions are not solely a product of society, but rather a deliberate construction by individuals and groups. The notion that there is a single identity, or truth in the practices of a society is believed to be perpetuated by powerful groups within a society, as they are with powerful nation-states internationally. Therefore, there is a need to understand how power is used as a tool in social interactions, in identity formation. Critical constructivists do acknowledge their own role in influencing the social structures that they analyse, however believe it necessary that their research is done in an effort to prompt social change (Hopf, 1998).

Constructivism centres around the concept of identity in world politics and the theorization of domestic politics and culture in international relations (Hopf, 1998). The concept of identity is used by oneself and others to identify themselves and each other. The identity of a nation-state then determines its preferences, actions and interests, which are all framed by the unique historical and social processes that have taken place to shape the current contexts within the specific nation-state, which in constructivism is considered an actor. Moreover, constructivism contends that actors and the social structures are mutually constituted, in that whilst the structures act to restrict and enable action, it is also important to analyse how

actors can act in contravention to the parameters set by the structures as well as how actions can perpetuate the existing structures (Hopf, 1998). In order for these actions to have meaning they need to be made within an intersubjective social context, that is a context that is realized by more than one person. Furthermore, norms and practices influence how actors relate to each other and understand actions. A thorough constructivist investigation in international relations requires there to be an emphasis and understanding of the concept of meaning in the international arena. Meaning is oftentimes focused on the action of social subjects. Through the study of actions, one would be able to investigate why a subject acted a certain way as well as how that action was perceived by other subjects within the same arena. For the purposes of this paper, determining why a state acted in a particular way and explaining how such actions were perceived by other actors and institutions in the political arena allows for an a more thorough contextualisation in which the strategies of the individual states can be further examined.

According to realists the international realm is anarchical in nature. Anarchy is considered to be a fundamental assumption in international relations that describes the structure of the international arena (Lechner, 2017). Linked to sovereignty, international relations presupposes that all sovereign states are equal and there is no supreme authority² to regulate the behaviour of said states (Lechner, 2017). As such, states are autonomous actors that have to self-regulate their interactions which are predicated on socially constructed understandings of the material world. These actions, or 'performances' are, according to constructivists, are made as a result of the states' identities which are in turn created through social constructs and the meanings attached to them. State identity refers to the way a state perceives itself within the context of the material world and in relation to

² Although international institutions exist to regulate state behaviour, the institutions themselves are constituted by states and operate on consensus and agreement between the states. Therefore, international institutions would not be deemed to be superior in authority to states, but rather a structured vehicle for self-regulation of states.

other states (Yi, 2007, p. 15). Therefore, states develop an interdependence with each other which can then influence the actions it takes.

The sub-theory of constructivism, systemic interdependence theory, lends itself best in directly addressing the level to which cooperation is taken into account when a state is deciding on an action. In this theory, 'cooperative' actions depend on the gains that state will make in doing so (Yi, 2007, p. 19). Specifically, sensitivity to circumstantial changes is taken into account as well as the vulnerability to negative perceptions (Yi, 2007, p. 20). The benefit of incorporating systemic interdependence theory into my theoretical framework is in its ability to address the interdependence of states and how this can sometimes encourage a state to join an institution as well as prevent a state from leaving an international institution, such as the ICC.

More specifically, given that there is a regional set of actors that I am investigating, regionalism as a conceptual tool will be briefly explained. According to Yi (2007), regionalism is fundamentally about perceptions, ideas and identity in conjunction with the need to belong. The manifestation of regionalism in institutions such as the European Union and the African Union is a result of a geographical area being identified as an active subject "capable of articulating transnational interests" (Yi, 2007, p. 6). A theory used to explain the actions of states within a regional collective is *club theory*.

Club theory is a conceptual tool that lends itself to a dilemma that states face when deciding on whether or not to leave a political institution. Club theory dictates that the cost of being left outside the club depends on the degree of sensitivity and vulnerability (as defined in systemic interdependence theory) of a state (Yi, 2007, p. 20). In other words, when deciding whether or not to leave an international institution, for example, the state will have to

consider what comes with no longer being a part of the institution (the club): will there be less access to public information, goods or resources? Will the institution not taking the external states' interests into consideration be visibly detrimental? Will they no longer be protected from external threats? (Yi, 2007, p. 20).

Within constructivism, Finnemore & Sikkink (1998) identify norms as a key concept. While detailed explanation of norms will be given in a later section, it is important to briefly define the concept here. Finnemore & Sikkink (1998, p. 891) define a norm as a "standard of appropriate behaviour for actors of a given identity". In constructivism, norms influence identities which then determine interests of a given actor (Mills & Bloomfield, 2018, p. 105). Norms as a concept is key to the researched as the attempted mass withdrawal can be construed as a resistance to a new norm. Krasner (1982, p. 185) asserts that international institutions inherently affect the behaviour of states. According to Du Plessis (2008, p. 11), the function of the Court is to declare that grievous crimes will no longer be met with impunity. Relevant to this, Mills & Bloomfield (2018, p. 106) write that the norm that the ICC has been attempting to set in international politics is the norm of 'anti-impunity'. Anti-impunity is conceptualized by Mills & Bloomfield (2018, p. 107) to be a challenger norm to the status quo, and further argue that despite the formalization of the ICC and the ratification of the Rome Statute in 124 states, the norm itself has not yet become entrenched. They argue that this is primarily because of the structure of the international arena.

Within a state, there is a hierarchical power relation between the state and the people. This is best explained using Thomas Hobbes' *Leviathan*. The Leviathan in Hobbes' treatise represents a sovereign, to whom the people have given up most of their liberties in return for the sovereign's protection of their natural right to life. For Hobbes, this is the only way to

prevent a war of all against all, as in his view human beings are selfish and competitive. In what he calls a 'state of nature', human beings have complete freedom and therefore the selfish and competitive nature will lead to everyone competing in a violent and brutish war, rendering the lives of all short. Therefore, Hobbes believes there is a need for a central authority that can restrict human beings from acting on their impulses that will harm others and thus keep everyone safe (Hobbes & Plamenatz, 1976). The only time Hobbes' believes that individuals have a right to rebel against and/or completely remove the sovereign is when the sovereign itself has become too weak to suppress dissent, signalling its weakness in protecting the rights of individuals (Hobbes & Plamenatz, 1976, p. 133). Jean Jacques Rousseau critiqued the social contract on the basis of clarity, refining the concept brought forth by Hobbes. Rousseau, an eighteenth-century enlightenment philosopher, in agreement with John Locke, a seventeenth century philosopher (Bertram, 2020b), expressed the need to clearly distinguish between natural and civil liberties as well as possession and property (Bertram, 2020a).

The international system however, is anarchic (Krasner, 1982, p. 186) and thus for any international institution to have authority in any given individual state, that state must recognize the authority of that institution and see the ratification of its statute as binding. In some ways, this is based on the same principal espoused by Rousseau, that it is obedience and general will that guarantee or constrain human action. In international relations, norms act as the guarantee or constraint. Mills & Bloomfield (2018, p. 105) contend that anti-impunity thus is a felt norm; states must feel that complying is the right thing to do. Within this conceptualization, the ICC is characterized as the norm entrepreneur, and the states that attempted to withdraw from the Rome Statute post-2015 are classified as norm antipreneurs (Mills & Bloomfield, 2018, p. 121). Norm antipreneurs, a concept developed in Mill's & Bloomfield's 2018 article, are states that oppose the establishment and enforcement

of particular norms in the international arena. Anti-impunity as a norm is a key concept in this study as this paper will use a constructivist framework to demonstrate how the norm is influencing the behaviour of states. Additionally, it is important to note how the states perceive the ICC as a norm entrepreneur enforcing this norm within the African continent and the world.

In recent years, the scholarship around norms and their importance within the study of IR has increased substantially. However, comparatively less literature exists on the roles that less powerful, non-Western countries have played in the emergence of international norms (Coleman & Tieku, 2018, p. 2). In an effort to contribute to this arguably underdeveloped field of study, the purpose of this research is to explore the role of African States in both the creation and opposition to the anti-impunity norm that underlies the ICC through the examination of the attempted mass withdrawal. Coleman & Tieku (2018, pp. 3-5) put forth that African actors are crucial to the norm emergence and adoption process. Chipaike & Knowledge (2018, pp. 1-2) put forth that the lack of inclusion of African states in IR literature has created an impression that African states act passively, and reactively to primary actions by states in the Global North. As a result, the actions of African states are rarely taken into account as a basis for theoretical frameworks within IR. Chipaike & Knowledge (2018, p. 2) cite Fukuyama, Morgenthau and Waltz as seminal authors who discounted the value of states in the Global South in IR theory outside of their interactions with Western states.

In relation to the ICC and Africa, two avenues stand out as relevant: firstly, that African states are important in early adoption of international norms that may disproportionately affect them in order to stave off criticism that the new norms stem out of neo-colonialist intentions; and secondly that African states can, in unison, act effectively as norm sceptics and as such delay or prevent norm adoption (Coleman & Tieku, 2018, pp. 3-5). As discussed in Chapter

2 of this dissertation, African states were often in influential positions during the negotiations that resulted in the formation of the ICC, and now form the largest bloc within the Assembly of State Parties. Despite this, criticisms that accuse the ICC of neo-colonialist intentions were not staved off by the heavy involvement of African states, and that criticism became one of the main reasons used by various leaders of African nations as well as the AU to justify their intentions to leave the ICC. Building on this, the second avenue can be applied. The proposal to collectively leave the ICC as well as the various comments throughout the years disregarding the ICC's jurisdiction and legal authority to conduct its business can be defined to be a display of African states acting as norm sceptics, and thus affecting the perceived effectiveness and legitimacy of the ICC. It is important to note that African states using their number in international settings gives them considerable bargaining and coercive power (Coleman & Tieku, 2018, p. 5), especially when the issue at hand concerns the 54 recognised states, 33 of which hold ICC membership. The AU asking its members to ignore the warrant issued against former president al-Bashir is an example of how African state actors can influence the global norms by taking direct opposition to the norm imposed (Chipaike & Knowledge, 2018, p. 7; Coleman & Tieku, 2018, p. 12). In this case, the opposition was not only towards the ICC as an institution, but against the norm of universal jurisdiction (Coleman & Tieku, 2018, p. 12).

Another tool African states can use is encouraging non-state actors such as the media to take an opposing stand and thus aid in delegitimising the norm (Coleman & Tieku, 2018, p. 14). In recent years, civil society, NGOs and the media have become additional authorities in the production of norms. When governments are able to successfully use these alternate authorities as tools to advance their advantage, the public is more likely to support state agenda. In the case of establishing ICC bias as a reason to resist the Courts efforts to investigate grave crimes, media narratives supporting this can be very successful.

Coleman & Tieku (2018, p. 6) mention “norm subsidiarity” as a way in which African norms are developed in response to perception imposition of an external norm on African countries, particularly on their ruling elite. Using the ICC’s investigations into the leaders of Sudan and Kenya as an example, Coleman & Tieku, (2018, p. 6) demonstrate that African ruling elites may use this method in order to stand against perceived imposition on their sovereignty.

Chipaike & Knowledge (2018, p. 7) frame the actions of African states and their leaders in relation to IR within the ‘solidarity norm’. This norm applies to collectivist states that see their futures and successes as inextricably linked, thus prompting them to act in each other’s interests. Using this norm to explain the behaviour of African leaders when it comes to refusing to acknowledge the jurisdiction of the ICC over sitting heads of state, it could be construed that this is because other heads of states do not want to set a precedence that may end up affecting themselves. Chipaike & Knowledge (2018, p. 7) further outline four principles that underpin the solidarity norm. Firstly, at the very least, the appearance of harmony between African states and their leaders should not be undermined. Secondly, major decisions should be made by consensus. Thirdly, the AU must not be used against one another... Fourthly, criticism by a non-African state or entity cannot be tolerated. These four principles and therefore the solidarity norm can be used to explain why African states started pushing for a withdrawal from the ICC and the creation of a regional alternative.

A Nexus between rational choice theory and constructivism theory social norms plays a main role in both (Voss, 2001). In constructivism theory this relates to how in an anarchic arena, states self-control their actions through the use of internationally agreed upon norms. In in game theory, a branch of rational choice theory, social norms is the subject studied by analyzing social action and social relation amongst rational agents is what is studied (Voss,

2001). Furthermore, similarly in both constructivist, theory and game theory the success of a norm depends on mechanisms that make the norm more likely to be self-enforcing and this is due to incentives that the norm may provide for norm conformity and may include sanctions (Voss, 2001).

Rational Choice Theory

Rational choice Theory is a theory that is usually applied in positive research; however, it can also be applied to normative research to understand how actors behave (Snidal, 2013, p. 87). Rational choice theory is a framework of modeling social behavior and is an aggregate of actors' choices. What underlies rational choice theory is the idea that if presented with options an individual will choose the option that is in their best interests and will maximize the benefits over the potential costs. Furthermore, rational choice theory presumes that human beings make choices based on available information and the probability of how well that choice will be perceived by others but also how well it will maximize the benefits for the actor.

In this theoretical framework in International Relations, it is used to explain broad phenomena being the sum choices of individuals based on individual preferences and states are the main actors who act in order to achieve their preferences. These preferences can be either materialistic or normative/ideational. In using Rational Choice Theory, endogenous and exogenous factors will have to be identified in order to determine the constraints within which the states act as well as the incentives that drive their action (Keohane, 1988, p. 390). This theory allows for alternate choices to be presented and analysed, as well as provide an opportunity to analyse factors outside of the actors' interests (Snidal, 2013, p. 87). Within

this framework, the 'coordination problem' will be used to provide insight into why, although there was widespread support for a mass withdrawal, only one state left the ICC.

Rational choice theory results from the premise that individuals are self-interested creatures that act in their own best interest after considered rational thought. In the context of nation states this means that any moves that nation state makes would take into consideration most, if not all, outcomes so that the state can make the choice that most aligns with their national goals. For example, a state would have to consider the international fallout and, more specifically the way in which their neighboring states might react to the potential choices made.

It is within this school of thought that game theory is located.

Understanding RCT in international relations theories

Realpolitik is the practice of realism in decision-making in the international arena. Hans Joachim Morgenthau was the main author that brought realism in international politics into academic discourse (Cox, 2007). Realism rests on the assumption that decision-making by an individual state is dependent on its power status internationally, its national interests and human security (Chance, 2013; Cox, 2007; Geuss, 2010). Power is central to the enforcement of the decision made, and power can be both hard and soft. Hard power refers to material power that a state may have, such as its military. Soft power is used to describe the less coercive methods of influence a state may possess, such as the ability to persuade other states to follow suit (Geuss, 2010). Essentially, realpolitik explains that politics and foreign policy values human security and the national interest over the pursuit of justice

(Chance, 2013) and thus state action is dependent on whether or not the issue at hand negatively impacts the state's interests abroad or domestically (Cox, 2007).

Limitations?

According to academics and scholars like Herbert Gintis, a limitation of rational choice theory is that it does not take into consideration the potential for solidarity playing into the decision-making process of an individual (Centre for the Study of Governance and Society CSGS, 2018). In the context of this research, I would like to dispute that because if showing solidarity will gain a nation more solidarity from other nations, then choosing the option with that outcome is acting in self-interest, and thus solidarity itself can be considered a benefit and part of a nation's reasoning.

Quackenbush (2004) establishes that much critique of rational choice theory stemmed from a misunderstanding of both the conceptualization and function of RCT. In his 2004 paper, he explains that rational choice theory is firstly not a singular theory, but rather an umbrella term for various approaches to studying political sciences and international relations that all center rational decision-making. He is also clear to point out that rationality itself has oftentimes been misunderstood to be fully separate from emotional considerations. Instead, he explains that rational decision-making, that is an actor choosing the option in a game that realizes the most utility, will oftentimes take into consideration preferences that can be predicated on symbolic factors.

Quackenbush (2004, p. 94) further explains that rationality can be understood as "procedural rationality" or "instrumental rationality." Procedural rationality refers to

“omniscient actors” that are capable of dispassionate ends-means calculations when making decisions (Quackenbush, 2004, p. 94). When discussing rationality in rational choice theory, however, Quackenbush (2004) explicitly refers to instrumental rationality. Here, a rational actor chooses the option out of those they presented with that most likely to produce the more preferred result (Quackenbush, 2004). In conceptualizing the rationality of an actor like this, it allows and requires the correct identification and understanding of an actor’s preferences in relation to the subject under review (Quackenbush, 2004).

Application of theory

For the purposes of the research, I have used both constructivism and rational choice theory to analyse the preferences and actions of states that led to the failed mass withdrawal of African states from the ICC. I used constructivist theory to analyse the way in which African states have constructed their identities in the international community as well as in the regional African community, and how this influences their preferences and actions when acting as part of a collective unit. I then used rational choice theory as a guide in my explanation of why these preferences led them to make certain policy choices, and why the eventual outcome was not a mass withdrawal of African states from the ICC, but rather only a single state withdrawal.

Whilst presuming that there was rational reasoning behind the decision making of nation states to withdraw or not withdraw from the ICC, it is important to note that even though the main concept within this paper is a mass withdrawal from the ICC there needs to be a focus on the individual nation States and actors such as the AU decision making that would then as a whole either result in a mass withdrawal or none. This is because of all mass withdrawal

was the ultimate goal there were legal parameters around how individual nation states can leave the ICC and that had to be done individually it couldn't have been done as a collective group and as such there is a need to examine the decision-making of individual actors to determine why this goal of a mass withdrawal at the same time was not achieved despite the fact that three countries took the first step and in the end, only one nation withdrew from the ICC.

Game theory

Game theory is a subset of rational choice theory to describe the potential decision-making process that individual actors go through.

Voss (2001) notes that there are two overarching types of 'games' that can be used to explain state action: incentive problems and coordination problems. Incentive problem games, of which the prisoner's dilemma is one, is predicated on the interest of one player who faces either the best result, when everyone chooses the same option, and some form of punishment if their chosen action differs to that of others. For examples, the 'Prisoners Dilemma': Person A and Person B have both been arrested after a crime has been committed. The police have no hard evidence proving that either one is guilty of the crime and thus try and turn the two against one another with the following offer: whoever confesses first will go free, whilst the other goes to prison. If however both person A and person B confess then both will go to prison. If neither confesses, both will go free. The dilemma is that person A and person B have been separated and neither have the opportunity to discuss and guarantee silence from the other. Both will therefore have to decide if they will take the risk and confess whilst unaware until after what the other person will do. Neither one of them want to risk doing jail time and so would rather not confess however, both are

still keenly aware of the fact that if they stay silent and the other person confesses, they will do their jail time. At the core of it, the *prisoner's dilemma* is about making a decision in your self-interest, that will impact others, whilst unaware of the decision of the other that may impact yourself. What is important to note, is that although a player may face a sanction for not choosing the same option as the others in the game, there is a strong incentive to unilaterally to cooperate as that sanction will be smaller than if the actor chooses to not cooperate, and the others do (Voss, 2001).

Coordination problems on the other hand are games where there are the strongest incentives for all parties to cooperate and reach a convention and therefore little to no incentive to act unilaterally (Voss, 2001). For the purposes of this dissertation, the game constructed will be a coordination problem. When setting up a coordination problem one has correctly identify the preferences and assumptions of states (Quackenbush, 2004). Furthermore, a key aspect of coordination problem is that the norms present in the arena of analysis are strong enough to be self-enforcing and thus encourage cooperation from the actors being studied (Voss, 2001).

When applying this to the situation of the mass withdrawal from the ICC, there are countries that would like to withdraw from the ICC in *en masse* as that would be the best way to make a statement and remain shielded from international pariah status. However, leaving the ICC requires individual action from each country in issuing a withdrawal notice and then not wavering in that decision during the allotted transition time. As it turned out, two of the three countries that issued formal notices of withdrawal, ended up rescinding the notices within a year of issuance. Moreover, where the reason was incorrect procedure, as it was for South Africa, no effort has been made to withdraw membership subsequently.

Key Concepts

International Institutions

Determining a universal definition for international institutions is difficult as there have been many different interpretations (Keohane, 1988, p. 382; Snidal, 2013, p. 87). Krasner (1982, p. 185) defines international institutions as a set of norms that guide state actors' expectations when interacting in the international arena. For the purposes of this research, however, I conceptualise international institutions a step further by using Mearsheimer's definition: "a set of rules that stipulate the ways in which states should cooperate and compete with each other formalized in international agreements, and are usually embodied in organizations with their own personnel and budgets," (Mearsheimer, 1994, pp. 8–9). Mearsheimer's definition is more definitive in describing the formalized and tangible aspect of international institutions, as presented by organizations such as the United Nations and the World Trade Organization but more relevantly the International Criminal Court. Furthermore, Mearsheimer (1994, p. 8) indicates the importance of states negotiating the agreed up set of rules that form the basis of the international institutions, which in the case of African states and the ICC is important in providing context for the actions of the African states post 2015.

International institutions are defined by Krasner (1982, p. 185) as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." International institutions are perceived to enhance cooperation and coordination amongst nations (Keohane, 1988, p. 380; Guzman, 2013, p. 1000). To achieve this cooperation, states must mutually change their

actions to not solely benefit their own individual strategic interests, but rather to achieve policy coordination (Keohane, 1988, p. 380).

Keohane (1984, p. 107) argues that when states enter into international institutions, they do so from behind a “veil of ignorance”, in the sense that they cannot predict the future of such organisations. Keohane (1988, p. 390) and Jervis (1999, p. 61) further argue that the institutions change as the political landscape and economic realities change throughout time. As such, Guzman (2013, p. 1000) compares the problem of predicting the behaviour of international organizations to Dr. Frankenstein and his monster: while Dr. Frankenstein created his monster as an improvement on human life, states may create international institutions to improve international cooperation. However, as with Frankenstein, states cannot predict the future impact of the institutions they create, running the risk that these institutions may prove harmful to their sovereign interests (Keohane, 1984, pp. 107–108; Guzman, 2013, p. 1000). This raises an important question: if a state joins an international institution and later comes to regret that decision, how easily can it leave?

Sovereignty

Sovereignty is a key concept for the proposed research as sovereignty is an established norm against which anti-impunity acts as the norm challenger. Sovereignty has been used in the context of international law to constrain the jurisdiction of international institutions (Cryer, 2005, p. 984). As a concept, however, sovereignty ensures that in an anarchic international setting, all states are equal and thus are unable to exercise judicial authority over one another (Dyani-Mhango, 2017, p. 557). This creates the need for a non-state institution that is created to hold individuals accountable for crimes committed which domestic courts are unable to adequately adjudicate. Mills & Bloomfield (2018, p. 106)

explain that sovereignty is the underlying norm in the international arena, and from sovereignty, the concept of sovereign immunity and thus diplomatic and head of state immunity are derived. These are important concepts both in international relations (Keohane, 1988, p. 385) and in the proposed study, as they are at the core of the first events which triggered African backlash towards the ICC, as well as the event that prompted the move for a mass withdrawal (Dyani-Mhango, 2017, p. 541; Mills & Bloomfield, 2018, p. 110; Mokoena & Jegede, 2018, p. 96).

Sovereign Immunity

Sovereign immunity is a key concept in this area of research as sovereign immunity has been the issue that African states and the ICC have been most adversarial about (Kerr, 2020, p. 197). Sovereign immunity guarantees that states are not under the jurisdiction of an external court (Mills & Bloomfield, 2018, p. 106). By extension, although not codified, out of respect for the independence of a state, the Head of State is also granted immunity from external prosecution. If respect for complete sovereign immunity were to be classified as a norm, it would justify why none of the 8 African states President al-Bashir visited over 13 trips arrested him. Importantly, this behaviour is not restricted to the African states, as the 13 trips are a fraction of the 74 total trips that President al-Bashir took globally in during the period 2009-2016 (Kerr, 2020, p. 215), implying that the argument of sovereign immunity that AU made was not a symptom of African resistance to the ICC, but rather a globally accepted norm.

Conclusion

Since World War II, there have been approximately 200 voluntary withdrawals by states from international governmental organisations (IGOs) (von Borzyskowski & Vabulas, 2019, p. 335). And yet, the question of how and why states might choose to leave international institutions is an under-studied topic in International Relations. This study investigates this issue by focusing on an important case study: the attempt by a bloc of African States to organize a mass withdrawal from the International Criminal Court (ICC) after 2015. Through a detailed and careful study of the historical record, the research will investigate why African States and the African Union showed a preference for withdrawal, and ultimately why this preference did not manifest as a mass withdrawal.

Chapter 3: History and Literature

Review

In the previous chapter I established the methodological framework for my research as well as the theoretical lenses I will employ to analyse the data collected through process-tracing of events leading up to and during the case study. This following chapter will build on the previous work by providing a detailed literature review of the topic as well as historical understandings of the events leading up to the case study.

Context for the events analysed will be given by firstly summarising key debates that arose during the conference that established the ICC. A brief understanding of the Rome Statute will be given after which I will provide a timeline of events starting with the Courts establishment and ending with the period before President al-Bashir's visit to South Africa in 2015. This chapter will conclude with key debates picked up from the literature regarding the relationship between African States and the ICC.

Context

The official website for the International Criminal Court states that “the Court is participating in a global fight to end impunity” (International Criminal Court, 2020a). When the Court was established in 1997 and the Rome Statute came into effect, there was much hope that the Court would become a vehicle to end impunity and further the ends of justice in the international arena (Du Plessis, 2008, p. 1; Kerr, 2020, p. 198). Unfortunately, attitudes towards the Court have changed and often times the Court's mission is questioned (Rossi, 2018, p. 374; Kerr, 2020, p. 199). Is the Court truly aiming to end injustices worldwide, or has the ICC become merely a tool of the West to impose on African governments?

Initially seen as a tool to confront power imbalances and the culture of impunity that protected perceived Western interferences in the Global South (Kerr, 2020, p. 200), African

states soon began to view the ICC with increasing suspicion. The anti-ICC sentiment grew and manifested rapidly throughout the African continent after the indictment of the former Sudanese president, Omar al-Bashir. In the period before Sudanese President al-Bashir's indictment, many democratic African states such as South Africa and Kenya were keenly supportive of the ICC and the norms it stood for, whilst more authoritarian states such as Libya and Sudan were not. Although some of the activities were not popular, the backlash against the ICC was not overt and the African Union passed a resolution encouraging states to join the ICC and ratify the Rome Statute in 2004 (Mills & Bloomfield, 2018, p. 109).

In response to growing dissatisfaction with international institutions taking on the role of enforcing justice, both democratic and non-democratic African states started to resist these measures and began calls for regional and continental justice institutions and mechanisms to be formed. Examples of this include the efforts and eventual establishment of the African Court of Justice and Human Rights in 2013 (Mills & Bloomfield, 2018, p. 113). Outside of Africa, however, criticism against the ICC has come from different actors. For example, China, Russia and the United States, as permanent members of the United Nations Security Council (UNSC) were concerned with how the ICC would impact the UNSC's role in preserving international peace. The dissatisfaction with how the ICC would carry out its mandate without impeding state sovereignty was a reason for India to not ratify the Rome Statute.

This section will explore the above-mentioned reasonings in more depth by providing a detailed history of the International Criminal Court and the events that led up to the mass withdrawal campaign. Throughout this section, the insight of other scholars will be provided as well.

Literature Review

The issue of tensions and conflict between the International Criminal Court and African states, which are collectively represented by the African Union, has been studied and analysed for years by many scholars. Additionally, a number of papers have been written on why individual states, such as South Africa, did not end up withdrawing from the ICC post-2015. What my research aimed to add to these discussions is an analysis on why the “mass” withdrawal of African countries as called for by the AU did not happen post-2015. Importantly, however, the sources consulted do all have common themes and discussions that are pertinent to my research.

Africa & the International Criminal Court

In recent years there has been growing criticisms of international institutions being a tool of the West (Mills & Bloomfield, 2018, p. 110; Mokoena & Jegede, 2018, p. 96; Rossi, 2018, p. 375; Omorogbe, 2019, pp. 291–292; Kerr, 2020, p. 212). This can be seen with calls to reform the United Nations Security Council, as no African state has a permanent seat, as well with the growing criticism of the ICC.

The International Criminal Court (hereafter the ‘Court’ or ‘ICC’) was established in 1998 after 120 countries adopted the Rome Statute (Kerr, 2020, p. 198), the founding document of the Court. Africa’s relationship with the Court has always been intricate. Some scholars argue that Africa and the Court had had a positive relationship since before the negotiation processes to establish the Court (Du Plessis, 2008, p. 1; Kerr, 2020, p. 198), whilst others have argued that tension between African states and the concept of the ICC and Western-based concepts of justice, if not the institution itself, has been lingering since the 1990s

(Ssekandi & Tesfay, 2017, p. 78; Rossi, 2018, p. 375). Africa has maintained the largest representation on the ICC Assembly of State Parties and therefore the significance of critique directed towards the Court by African nations and regional blocs cannot be understated (Kerr, 2020, p. 199).

The establishment of the ICC came on the heels of the collapse of colonialism, the end of the Cold War and the Hague tribunals for grievous crimes committed in various parts of the world. In the time that had passed between the Nuremburg trials post-World War II and the creation of the Hague tribunals, heinous crimes committed by states and the leaders had been met with impunity (Du Plessis, 2008, p. 2). The international community noted that the culture of impunity needed to end, and a body needed to be established that was a-political, international and would hold perpetrators of grievous acts accountable. Though an international effort, African states were often in key positions during the negotiation processes, with the bloc of SADC countries being credited to have influenced certain Human Rights considerations (Du Plessis, 2008, p. 4). The Organisation of African Unity, the organisation that preceded the African Union, adopted the resolution to support the Court's establishment at a summit in Burkina Faso in 1998 (Du Plessis, 2008, p. 4).

[United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court³](#)

Support for establishing a Court that could prevent future acts of impunity was not in question during the Conference. Rather, the concerns can be outlined under one overarching topic: jurisdiction.

³ Hereinafter referred to as the "Conference"

According to Merriam-Webster (2021), jurisdiction refers to “the authority of a court or official organization to make decisions and judgments.” In elaboration, Ford (1999, p. 843) provides that territorial jurisdiction refers to the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions. “In the context of this paper, the definition of territorial jurisdiction is important in providing a clear distinction between the type of jurisdiction the Court requires to be functional – universal jurisdiction – and the type of jurisdiction that supports the concept of sovereignty. Universal jurisdiction was defined by the former United Nations High Commissioner for Human Rights as “based on the notion that certain crimes are so harmful to international interests that states are entitled – even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim,” as quoted in Berman (2002, p. 360).

Within the concept of jurisdiction, the concerns raised were linked to three fundamental questions: how to define the crimes under the ICC’s authority, how the ICC can be triggered into action and who would fall under the Court’s jurisdiction.

How to define the crimes under the ICC’s jurisdiction?

A key area of debate during the Conference was on firstly which crimes would fall under the Court’s jurisdiction as well as how to define the crimes agreed upon. This section will address this by looking at two debates that delineate the tension between nation states at the Conference.

The first debate was about which crimes should fall under the jurisdiction of the Court. Whilst there was consensus to include the crime of genocide, war crimes and crimes against

humanity, there was debate over the crimes of aggression as well as terrorism, the inclusion of nuclear weapons and other crimes. The representative for the Libyan Arab Jamahiriya⁴ advocated for the need to include “terrorism, forbidding of religious rites, economic crimes and aggression against the environment” (United Nations, 1998, p. 102). Representatives from Sri Lanka and Turkey mentioned their regret that the crime of terrorism ended up not being included in the final draft of the Rome Statute (1998). Similarly, the representative from Sudan expressed that nuclear weapons should be included in the list of banned weaponry, the use of which would result in committing a war crime (United Nations, 1998, p. 161). After the vote on the adoption of the Rome Statute, the representatives from India, Cuba and Egypt indicated that the omission of nuclear weapons from the banned weapons list was a reason for the abstention in the vote (United Nations, 1998).

The second debate involved the definition of the crimes that were to be included. Specifically, extensive debate across multiple plenary meetings involved whether or not the jurisdiction of the Court over crimes against humanity should include those committed internally or should be expanded to include crimes against humanity committed in international conflict. Representatives from Syria, the United Arab Emirates, Bahrain, Tunisia and Sudan all agreed that the definition of crimes against humanity shall be limited to international armed conflict (United Nations, 1998). On the other side of the argument, representatives from Cuba, Guinea, Niger, Sierra Leone and Kenya stressed that in order for the Court to effectively exercise its functions, the definition of crimes against humanity must firstly include those committed internally, and secondly, must not be linked to armed conflict but rather apply to the commission of any crimes against humanity in any condition and context (United Nations, 1998).

⁴ Henceforth referred to as Libya

How is ICC action triggered, and who can trigger it?

The second key question during the Conference was that of the ICC's trigger mechanism. This involved debates about who can refer cases to the ICC for investigation and what powers the Prosecutor would have.

When addressing the question of who could refer cases to the ICC, contention was clear about the role of the UNSC. Most African states warned against allowing the UNSC to refer cases to the ICC as this could damage the credibility of the Court and also allow for political interference (United Nations, 1998). The representatives of Nigeria, Libya, Burkina Faso, the Democratic Republic of Congo and Gabon all made reference to the fact the UNSC is a political body, and thus its referral mechanism may be misused to enforce the political wills of its members, particularly the permanent members (United Nations, 1998). The representative for Libya referred to previous interactions between the International Court of Justice and the UNSC, where the UNSC was seen to be interfering with the ICJ's processes (United Nations, 1998, p. 101). The representative for India noted in their comments on their abstention on the vote that the Rome Statute provided for too much interference from the UNSC.

In addressing the issue of the UNSC being able to refer cases to the ICC, the representative of India referenced the law of treaties. The law of treaties is a principle whereby a nation-state may not be bound by the provisions of a treaty they had not signed (United Nations, 1998, p. 122). By allowing the UNSC to refer cases, where resolutions passed by the UNSC were binding, the Rome Statute was effectively contradicting the principle (United Nations, 1998, p. 122). A further problem was that the UNSC 5 permanent members were not party to the Statute who were then given the power to compel non-member States to cooperate

with the Court (United Nations, 1998, p. 122). The representative for Sudan, in the same meeting, indicated on behalf of the Group of Arab States that in order to balance out the extensive powers given to the UNSC, similar powers should have been granted to the UN General Assembly, the lack of which formed part of the reason for the Group voted against the Statute (United Nations, 1998, p. 126).⁵

In countering the skepticism about including the UNSC referral mechanism, the representatives from Malawi, Namibia and Kenya emphasized the UNSC would undoubtedly have a role to play given their role as prescribed in the UN Charter (United Nations, 1998). The representatives from Egypt and Lesotho, whilst acquiescent if not supportive of UNSC referral, suggested that the inclusion of the referral would be subject to checks and balances, and potentially giving the Prosecutor the mandate to open cases *proprio motu* in order to balance out the UNSC (United Nations, 1998). In order to protect the Prosecutor from undue influence by the UNSC, the representative from Libya suggested that the Prosecutor not have to disclose sources to the UNSC (United Nations, 1998, p. 201).

The third debate relation to the trigger mechanism of the Court was whether or not the Prosecutor should be enabled to initiate investigations *proprio motu*. On this issue, African states were split; the representatives from Burkina Faso, Guinea, Zambia, Senegal, Sierra Leone, Togo and Lesotho agreed the Prosecutor should be enabled to initiate cases *proprio motu*, whilst Algeria, Nigeria, Libya and Tunisia disagreed, indicating that only Nation States party to the Statute should be enabled to trigger Court action.

⁵ The representative of Sudan indicated that under the Rome Statute, the powers of the UNSC had exceeding those stipulated in Chapter VII of the UN Charter. This provides the UNSC with the mandate to maintain peace by determining “the existence of any threat to peace, breach of peace, or act of aggression”. It furthermore allows the UNSC to authorize military action to “restore international peace and security”.

Who falls under the Court's jurisdiction?

The final key debate during the Conference was whether or not the ICC would have inherent jurisdiction or require express consent from nation states to begin an investigation. The major split was not over whether or not nation states party to the Rome Statute would accept the Courts jurisdiction, as this would be inherently assumed.⁶ Rather the debate was over the application on states not party to the Rome Statute. As mentioned previously, the principle of the law of treaties is that states who have not signed on to a treaty may not be obliged to cooperate as a result of universal jurisdiction. Here, the divide seemed to lie between the Global North and the Global South⁷. Countries from the Global North, such as Portugal, New Zealand and Canada supported that the court have inherent jurisdiction over the three core international crimes regardless of the State's acceptance of the Statute. The reasoning was overwhelmingly that not enforcing universal jurisdiction for grave crimes would impede the Court's functionality (United Nations, 1998, p. 194). Representatives of nation states from the Global South such as Thailand, Cuba, Morocco and Senegal indicated that for the State to exercise its functions over a non-member State, that State must give express consent (United Nations, 1998).

Other arguments

There were other debates through the Conference, however one debate that does warrant mentioning although it is not identified as the main debate is over the inclusion of

⁶ This is not to say that there was some opposition to even state parties inherently accepting the Courts jurisdiction by acceding to the Statute. The representatives from states such as Cote d'Ivoire and Libya expressed that even if a state was party to the Statute, the state must give explicit consent for the Court to initiate proceedings (United Nations, 1998, pp. 197–198).

⁷ This is not an absolute statement: the representatives from Ghana and Sierra Leone indicated their country's support for inherent jurisdiction in order to allow the Court to effectively exercise its functions (United Nations, 1998).

reservations. States such as Mexico and Sudan, on behalf of the Group of Arab States, regretted the omission of the right to express reservation (United Nations, 1998). The problem with this omission is that states acceding to the Rome Statute would not be allowed to register their concerns, that could firstly be tabled for later discussion but also provide a basis for hesitancy to cooperate in the future.

The final important observation after going through the minutes of the Conference is the statement made by the representative of Singapore after the vote to the Statute. The representative indicated that the final text of the Statute seemed to be a result of discussions that “smaller States” had not been a part of (United Nations, 1998, p. 124). This statement rings true to the claim that perhaps the process establishing the ICC was not as inclusive, and fair as portrayed.⁸

As a final comment on the proceeding of the Conference, a commonality remained: that in order to ensure cooperation, the Court had to remain credible in the eyes of all countries.

Kerr (2020, p. 198) argues that the ICC presented to African states as a tool to address the power imbalances within international law. Scholars such as Ssekandi & Tesfay (2017, p. 82) contrarily construct the ICC to have been an additional example of the power imbalance in the international arena. What most scholars do agree on is that firstly, the Court has continually been subject to politicisation albeit from different actors, and secondly, African

⁸ In relation to earlier mentions of African countries being heavily involved in the establishment of the Court, it seems that when looking at the records African countries had a smaller voice than originally purported. Out of 31 Vice-Presidents of the Conference, 8 were representatives from African States (United Nations, 1998, p. 63) as compared to 9 from Europe. Out of 25 States represented in the Drafting Committee, 6 were African (United Nations, 1998, p. 64) as compared to the 8 from Europe.

sentiments towards the Court decisively worsened after the 2005 referral of the Sudan situation by the United Nations Security Council.

International Criminal Court

This section will provide an overview and understanding of the ICC as established at Rome in 1998. To do this, I will cover its provisions, the organs and the powers that the ICC has as set out by the *Rome Statute of the International Criminal Court*.

The Rome Statute was adopted at the Conference in order to establish the ICC as well as lay out all the provisions, mechanisms and authorities that the Court will have.

PREAMBLE

The Preamble of the Statute is interesting as it recognizes that although there are commonalities between every culture, it is a “delicate” commonality (Rome Statute of the International Criminal Court, 1998, p. 1). As the first line of the Preamble, this is significant as it does acknowledge that the pursuit of justice will be taking place amongst a multifaceted international society. The Preamble goes on to recognise the sovereignty of individual States, specifically in relation to the UN Charter, going as far as to specify that “nothing in this Statute shall be taken as authorizing any State Party to intervene in armed conflict or the internal affairs of any State” (Rome Statute of the International Criminal Court, 1998, p. 1). The Preamble concludes by emphasizing that the establishment of the permanent Court was to complement national criminal jurisdictions, and aid in ensuring respect for international justice (Rome Statute of the International Criminal Court, 1998, p. 1).

JURISDICTION OF THE COURT

The crimes within the jurisdiction of the Court are outlined to be that of the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Rome Statute of the International Criminal Court, 1998, p. 3). The Statute indicates that the Court only has jurisdiction over crimes committed after the Statute enters into force, and when a State becomes a Party after the Statute enters into force, only crimes committed after that entry can be investigated by the Court unless requested otherwise by the State (Rome Statute of the International Criminal Court, 1998, p. 4). None of the crimes under the jurisdiction of the Statute are subject to statutes of limitations (Rome Statute of the International Criminal Court, 1998, p. 15).

The Court may exercise its jurisdiction after a situation being referred to it by a State, the UNSC or the Prosecutor initiating the investigation (Rome Statute of the International Criminal Court, 1998, p. 5). With regards to the Prosecutor being able to initiate an investigation, this is after the Prosecutor has received information regarding a situation. Before initiating a case, the Prosecutor may make States and other political organisations and organs aware of the information in order to verify, qualify and get additional information (Rome Statute of the International Criminal Court, 1998, p. 5). In order for the investigation to commence, the Prosecutor must submit a request for authorizing to the Pre-Trial Chamber, which will consider the information presented and make a determination on whether or not the situation warrant further official investigation by the Court (Rome Statute of the International Criminal Court, 1998, p. 9).

With regards to the crime of aggression, the ICC may investigate the crime after either the UNSC has determined that the acts concerned fall under the label 'crime(s) of aggression',

and, in lieu of such a determination, if the UNSC has not deemed the acts to not fall under the label of 'crime(s) of aggression) within six months of being notified of the Prosecutor (Rome Statute of the International Criminal Court, 1998, p. 10).

In the case of a situation being referred to the Court, the Court may determine that the situation does not warrant investigation if the Court finds that the State concerned is capable and actively investigating said situation (Rome Statute of the International Criminal Court, 1998, p. 10). This further applies, if an investigation conducted by the State has found no grounds to prosecute the person concerned (Rome Statute of the International Criminal Court, 1998, p. 11).

The Statute also lays out the reasons for which a State may be deemed to be unwilling to investigate a case. This includes whether the State actively did not prosecute in order to shield the person from criminal prosecution, proceedings have unjustifiably been delayed and/or the proceeding conducted were not found by the Court to be independent or impartial (Rome Statute of the International Criminal Court, 1998, p. 11).

The Statute applies to natural persons⁹, and therefore if a national of a State commits any grave crime in another country, even if the country is not party to the Statute, may be investigated, charged and subsequently investigated by the Statute (Rome Statute of the International Criminal Court, 1998, p. 14).¹⁰

⁹ Natural Persons is defined as "a living human being" to which "legal systems can attach rights and duties to natural persons without their express consent." (Cornell Law School, 2021).

¹⁰ The Court makes the provision in article 26 that it has no jurisdiction over persons under the age of 18 when the crimes were committed (Rome Statute of the International Criminal Court, 1998, p. 15), which interestingly means that the Court may not prosecute child soldiers for crimes they committed.

Article 27¹¹ provides that the Statute would be applicable to persons regardless of official status (Rome Statute of the International Criminal Court, 1998, p. 15).

COMPOSITION AND ADMINISTRATION OF THE COURT

The ICC is composed of four organs: the Presidency, an Appeals, Trial and Pre-Trial Division, the Office of the Prosecutor and the Registry (Rome Statute of the International Criminal Court, 1998, p. 17).

The Judges of the Court must be comprised of nationals from different States (Rome Statute of the International Criminal Court, 1998, p. 17), and when State Parties vote they must ensure that there is equitable geographical distribution and have representation of various legal systems throughout the world (Rome Statute of the International Criminal Court, 1998, p. 18).

COOPERATION

Article provides that a State may not cooperate with the Court if such cooperation contradicts its obligations under international law as it pertains to the immunity of a person, and when the cooperation would force the member State to not comply with international agreements (Rome Statute of the International Criminal Court, 1998, p. 48) These clashes are considered waived if the Court has received consent from the third-party State to either waive immunity or the third-part State consents to the surrender of the concerned person(s) (Rome Statute of the International Criminal Court, 1998, p. 48).

¹¹ This article will be brought up again in reference to how it adds to the confusion as to how states may exercise their obligations, specifically in direct correlation to article 98.

ASSEMBLY OF STATE PARTIES

Each State party to the Statute is entitled to have one representative in the Assembly of State Parties¹², and States who have signed the Statute may have an observer in the Assembly (Rome Statute of the International Criminal Court, 1998, p. 53). Among its duties, the Assembly may consider queries from State Parties regarding cooperation (Rome Statute of the International Criminal Court, 1998, p. 53). The Assembly can reach decisions through a two-thirds majority approval for pertinent matters, of a simple majority for smaller matters; however, the Assembly should strive to make decisions by consensus (Rome Statute of the International Criminal Court, 1998, p. 53). Although the seat of the Court is in the Hague, the Netherlands (Rome Statute of the International Criminal Court, 1998, p. 2), the Assembly can meet either at the seat of the Court or at the United Nations in New York, NY, USA (Rome Statute of the International Criminal Court, 1998, p. 53), and is required to meet at least once a year.

RESERVATIONS

Article 120 guarantees that no reservations may be made (Rome Statute of the International Criminal Court, 1998, p. 55).

AMENDMENTS

Amendments to the Statute were allowed to be made after seven-years post-entry into force had elapsed (Rome Statute of the International Criminal Court, 1998, p. 55). Pursuant to Article 121, any amendments made to the Statute have to be accepted by a two-thirds majority of States Parties in lieu of a consensus (Rome Statute of the International Criminal

¹² Hereinafter referred to as the “Assembly”

Court, 1998, p. 55). Where a State Party has not voted in favour of an amendment, if passed, that amendment shall not be applicable to said State Party. This holds unless there was a seven-eighths majority, where a disagreeing State Party may withdraw from the Statute.

Having gone through the formation of the Court, identifying key points of tension and explaining the constitution of the Court, this section will continue by explaining how the somewhat optimistic and collaborative relationship between the ICC and African States began to shift towards adversarial.

[Worsening relations: Sudan and Kenya](#)

Various scholars contend that the relationship between Africa and the ICC has two chapters: before the al-Bashir indictment (2002-2008) and after the issuing of arrest warrants (2009-present day) (Dyani-Mhango, 2017, p. 541; Mills & Bloomfield, 2018, p. 108; Mokoena & Jegede, 2018, p. 96). The worsening of relations between Africa and the Court can be linked to three investigations: President al-Bashir of Sudan, President al-Gaddafi of Libya, and President Kenyatta and Vice President Ruto of Kenya (Du Plessis, 2008, p. 16; Rossi, 2018, p. 388; Omorogbe, 2019, p. 288; Kerr, 2020, p. 197). Throughout the course of these cases, the African Union was at the forefront of the shifting of attitudes of African states towards the ICC. In all three cases, the AU cited the perceived disregard of sovereign immunity by the ICC towards these heads of states being the result of a colonialist attitude towards Africa (Kerr, 2020, p. 197). A key justification for this argument has continually been that the cases of Sudan and Libya had been referred to the ICC by the UNSC (Rossi, 2018, p. 403; Kerr, 2020, p. 197).

In 2005, the UNSC referred the case of Sudan and al-Bashir to the ICC. Initially, the AU obligated Sudan to cooperate with the investigations of the Prosecutor despite the fact that Sudan was not a member state party to the Rome Statute. This position changed when in 2009 and 2010, the Prosecutor issued arrest warrants for President al-Bashir (*The Prosecutor v. Omar Hassan Ahmad al Bashir* (“Omar al Bashir”), 2009); (*The Prosecutor v. Omar Hassan Ahmad al Bashir* (“Omar al Bashir”), 2010); Dyani-Mhango, 2017, p. 541; Mills & Bloomfield, 2018, p. 110; Omorogbe, 2019, p. 288). The AU insisted that a head of state of a non-member state has immunity from arrest on an ICC warrant when in a country that is party to the Rome Statute (Dyani-Mhango, 2017, p. 549 ; Mokoena & Jegede, 2018, p. 103; (Omorogbe, 2019, p. 288; Kerr, 2020, p. 197) in line with Article 98 of the Rome Statute. In 2009, the AU encouraged African states to not act on the arrest warrant, and subsequently President al-Bashir made 13 continental trips, visiting 8 African countries (Omorogbe, 2019, p. 288). The policy of non-cooperation on ICC warrants was then extended to President al-Gaddafi of Libya after the ICC issued warrants for his arrest in 2011 (*Situation in the Libyan Arab Jamahiriya*, 2011; Omorogbe, 2019, p. 288).

Kenya was investigated by the Prosecutor using their *proprio motu*¹³ powers. The Prosecutor investigated the 2007-2008 post-election violence and subsequently charged Uhuru Kenyatta and William Ruto, who had both stood as presidential candidates. In 2013, Kenyatta was elected as President and Ruto as Vice President, which prompted resistance against the ICC investigation from the AU. Although the ICC commenced with the trial of Vice President Ruto in September 2013, the charges against both were dropped due to lack of evidence and alleged witness intimidation (Kerr, 2020, p. 203). The AU had now amended their position on sovereign immunity to not only cover heads of states of non-member states,

¹³ *Proprio motu* is a Latin phrase meaning “of one’s own initiative” (Duhaime’s Law Dictionary, 2020). In the context of the ICC, *proprio motu* is used to indicate a case that the Prosecutor has opened on their own initiative.

but to now extend towards all sitting heads of states, regardless of ICC membership (Omorogbe, 2019, p. 288; Kerr, 2020, pp. 202–203). Importantly, the AU's stance on prosecution by the ICC of heads of states is limited to their time in office and does not prevent prosecution once they are no longer in power. The current President of the Gambia, Adama Barrow, argues that “[prosecuting] someone who has chosen to leave power might be a bad idea politically” (Omorogbe, 2019, p. 294), pointing to a concern by African states that the threat of prosecution might hinder peaceful political transitions and destabilize the peace processes on the continent (Ssekandi & Tesfay, 2017, p. 83).

Calls for withdrawal

In 2009, President al-Bashir was indicted, and arrest warrants were issued by the ICC. This prompted the governments of Libya, Senegal, Djibouti and Comoros to start agitating for African states to withdraw from the ICC (Rossi, 2018, p. 389). In 2013, a special AU summit discussed the concept of a mass withdrawal and although no state withdrew from the ICC at that time, the topic was tabled for a later date (Rossi, 2018, p. 371). States that led the call for a mass withdrawal at that summit were Kenya, Rwanda, Uganda, Ethiopia, Chad, Namibia and Sudan. In the same year, following the charges against the President and Vice President, Kenya began discussing the possibility of withdrawing from the Court (Rossi, 2018, p. 372). Namibia and Uganda joined in with the calls to withdraw. In 2015, after President al-Bashir visited the country for an AU summit, South Africa filed a formal notice of withdrawal with the Secretary General of the UN as per Article 127(I)¹⁴ of the Rome Statute (Mokoena & Jegede, 2018, p. 99). In 2016, Burundi became the second country to notify the ICC of its intended withdrawal following the Prosecutor's investigations of human

¹⁴ Article 127(1) of the Rome Statute states that “A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification unless the notification states a later date. (Rome Statute of the International Criminal Court, 1998)

rights abuses after the 2016 elections (Rossi, 2018, pp. 371–372). Soon thereafter, the Gambia announced its intention to withdraw from the ICC. South Africa, Burundi and the Gambia are the only African countries to have issued formal notices of withdrawal to the ICC. In January 2017, the AU adopted a strategy of mass withdrawal from the ICC at the bi-annual summit, citing the “systemic imbalance in international decision-making processes,” (Kerr, 2020, pp. 219–220). This strategy however was met with resistance by 16 states, including Botswana, Cape Verde, Gambia, Malawi, Nigeria and Senegal (Ssekandi & Tesfay, 2017, p. 80; Omorogbe, 2019, p. 296). One criticism was that the Rome Statute had been entered individually and the AU was not a state and thus had not ratified the treaty. As a result, the AU does not have the mandate to lead a collective strategy for withdrawals that should be carried out on an individual basis (Omorogbe, 2019, p. 296). In February 2017, after a change in power, the Gambia rescinded its withdrawal notice and South Africa rescinded its withdrawal the next month (Omorogbe, 2019, p. 297). Burundi did not rescind its notice and in October 2017 became the first country to withdraw from the ICC since its inception (Omorogbe, 2019, p. 296; Kerr, 2020, p. 204).

[A regional response: The Malabo Protocol](#)

In 2012 a protocol was drafted by the Ministers of Justice and Attorney Generals of the AU states. This protocol had provision to extend the jurisdiction of the African Court on Human and People’s Rights to include internationally recognized grievous crimes. This was a response to the growing criticism of the ICC and calls to create a regional solution (Mills & Bloomfield, 2018, p. 115; Omorogbe, 2019, p. 297). In 2013, the AU decided that due to lack of funding, there would be a hold placed on these plans. In June 2014, the AU adopted the protocol, referred to as the Malabo Protocol, with a provision that sitting Heads of State would be immune from prosecution. No mention was made of the Court in the protocol and

this was seen to be a move to displace the ICC in Africa (Omorogbe, 2019, p. 294). As of 2018, only 11 states have signed the protocol, and out of the 30 states needed to officially recognise the protocol, none have ratified the protocol (Omorogbe, 2019, p. 294). Inadequate funding and/or a lack of political will hampered the Malabo Protocol from becoming a realised extension of an existing regional justice body. The Protocol instead acts as a firm statement about the concerns that African States individually, and the AU as a collective, have about the ICC (Omorogbe, 2019, p. 309).

Analysis and Critique of the ICC

The following section will provide an overview of scholarly insight into the relationship between the ICC and African States, as well as the AU. The views have been categorised into the three most dominant critiques of the ICC and African States in relation to each other and the pursuit of justice.

Domestic political interests of African governments

Du Plessis (2008, p. 11) and Rossi, (2018, p. 377) argue that the ICC has been politicised by African governments to operate in their best domestic political interest. In order to fully explore this, the Court's jurisdiction must be firstly outlined.

The Court, or more accurately, the Office of the Prosecutor may only investigate cases if the case has been either self-referred by a member state, referred by the UNSC or the Prosecutor acts in *proprio motu* (without referral). The Prosecutor has strict restrictions on when they can use their *proprio motu* powers (Quadri, 2014, pp. 11–12): Out of 11 active investigations at the time of the prospective ICC withdrawal, 3 had been *proprio motu*

(Ssekandi & Tesfay, 2017, p. 82; Omorogbe, 2019, p. 296). Five of the cases have been the result of self-referrals (Ssekandi & Tesfay, 2017, p. 82). Self-referral is the preferred method by the Court as this is more likely to guarantee cooperation by the affected country, however in all self-referral cases, the blame was solely placed on the rebel factions.

In 2005 the ICC issued arrest warrants for rebel group Lord's Resistance Army and their leader, Joseph Kony, after being invited by the Ugandan government to investigate the war occurring in the northern part of the country. The main victims of the violence between the government and the LRA, the Acholi people, accused the ICC of conducting a biased and incomplete investigation that ignored the actions of government soldiers (Ssekandi & Tesfay, 2017, p. 83). In 2016, the Gabonese government invited the ICC to investigate events surrounding the 2016 presidential elections, accusing the main opposition leader Jean Ping of inciting genocide (Behles, 2018). Mr. Ping in turn invited the ICC to investigate the President for the events surrounding the elections (Rossi, 2018, p. 376). The Prosecutor closed the pre-liminary investigation (Behles, 2018). These are two cases in which there were clear political gains to be made by the self-referral (Du Plessis, 2008, p. 20) and in fact, in all self-referred cases, the alleged crimes were perpetrated solely by non-state actors (Ssekandi & Tesfay, 2017, p. 83), leading some scholars to assert that states use the ICC to avoid accountability themselves (Ssekandi & Tesfay, 2017, p. 83).

Political interest vs. Legal obligations

A key discussion that occurs when addressing African states' action and nonaction with the ICC stems from the idea that sometimes political interests will outweigh legal obligations, whether internally or externally. It can be argued that the legal guidelines are not clear enough to constrain a state into one lane of action (Dyani-Mhango, 2017, p. 543). For

example, the Rome Statute has two articles that address immunity but contradict each other: Articles 27(1)¹⁵ and 98(1)¹⁶. Article 27(1) contends that immunity cannot hold if it will interfere or hinder the ICC in applying its jurisdiction on individuals. In addition, the case of President al-Bashir was a United Nations Security Council referral case. Given that UNSC resolutions are binding, South Africa and any other state party to the Rome Statute had a legal obligation to arrest him if he set foot in their country (Dyani-Mhango, 2017, p. 548). Article 98(1), however, states that the ICC cannot force a state to act on issued warrants if this would interfere in the 'customary' international law. In the case of President al Bashir, customary international law would confer immunity onto President al Bashir for his visit to the AU summit in South Africa as a head of state (Dyani-Mhango, 2017, p. 543). Furthermore, the AU passed several resolutions that encouraged African states to not arrest President al Bashir in direct contravention of the party states' legal obligations under the Rome Statute (Dyani-Mhango, 2017, p. 552). This scenario exposes that there is no clear constraining legal framework, and states will thus follow what is in their political interest. The South African government justified not arresting President al-Bashir because it would firstly undermine his immunity and secondly, impede future peace-keeping efforts on the continent.

ICC Bias

¹⁵ Article 27(1) on the irrelevance of official capacity, states: This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as 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. (Rome Statute of the International Criminal Court, 1998)

¹⁶ On the cooperation with respect to waiver of immunity and consent to surrender, Article 98(1) states: The Court may not proceed with a request for surrender or request for 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. (Rome Statute of the International Criminal Court, 1998)

A popular criticism of the ICC is that it is biased against African states (Du Plessis, 2008, p. 18; Mills & Bloomfield, 2018, p. 125; Ssekandi & Tesfay, 2017, p. 77; Mokoena & Jegede, 2018, p. 96; Rossi, 2018, p. 403; Omorogbe, 2019, p. 292; Kerr, 2020, p. 199). Statistically, it is true that the ICC has prosecuted Africans far more frequently than individuals from any other region or continent. Despite preliminary examinations currently happening in countries outside of Africa, e.g. Colombia, Ukraine and Venezuela, and an examination being launched in March 2020 into alleged crimes against humanity and war crimes in Afghanistan (International Criminal Court, 2020b), out of the 15 current investigations, 10 concern African states.¹⁷ All people indicted by the Court are African (The International Criminal Court, 2020).

However, Rossi (2018, p. 403) postulates that the persistent claim that the ICC is biased does not only stem from the statistics but rather due to the context of the world in which the ICC was born.

Using Jacques Derrida's concept of 'hauntology', Rossi (2018) theorises that due to past instances of Western countries' efforts to impose their morality and standards on African countries, the ICC can easily be conceptualised to be a neo-colonial tool to continue such efforts. As mentioned previously, international institutions have historically often been created with the intent of providing a strategic political or military advantage to a select number of nations (Keohane, 1988, p. 380), and realists claim that institutions reflect the balance of political power (Mearsheimer, 1994, p. 7). Referring to the *mission civilisatrice*, Rossi (2018, p. 375) links the creation of the ICC to the colonial efforts of Western countries following the Berlin Conference in 1884. Specific to this, Rossi draws attention to the ICC

¹⁷ Since 2004, the ICC has begun 13 separate preliminary examinations of countries not in Africa. Of these 13, 7 are still ongoing, 3 were approved for an official investigation and 3 were closed with the decision not to prosecute. As of June 2020, 3 of the ongoing investigations are of non-African nations. At the time of the prospective mass withdrawal, there was only one non-African nation being investigated (International Criminal Court, 2020c)

championing the concept of universal jurisdiction. The ICC does not have the mandate to investigate crimes committed in non-member states unless it receives a referral from the UNSC (Mills & Bloomfield, 2018, p. 107; Kerr, 2020, p. 195). The UNSC has 5 permanent members that have veto-power, and three of those are not party to the Rome Statute. This creates the perception that whilst they themselves and their allies are safe from scrutiny, the USA, China and Russia can direct the ICC to investigate less powerful states (Ssekandi & Tesfay, 2017, p. 82; Kerr, 2020, p. 215). This argument is further bolstered by the UNSC's referrals of Sudan and Libya, two non-member states, to the Court, whilst not referring the actions of UNSC allies, such as those of Uganda and Rwanda in the DRC, to the Court (Kerr, 2020, p. 215).

Historically, the creation of the ICC is also perceived as having been a biased process that was less beneficial to African countries. The drafting process of the Rome Statute had been politicised by both Western powers and African states. Ssekandi & Tesfay, (2017, p. 79) contend that the drafting process demonstrated that the power structures had not in fact been altered. When drafting the list of crimes to be subject to the jurisdiction of the future Court, contributions by African states as well as less powerful states had been deemed too controversial for inclusion. Colonial domination, apartheid, illicit trafficking in drugs and mercenaries were suggestions that drew opposition from bigger powers. Colonialism, as an example, was deemed a "relic" and no longer relevant enough to be included in the list of crimes. It is interesting to note that although apartheid did not end up being listed as a crime category on its own, it was included as a crime against humanity in the final version of the Rome Statute. In the interest of universal acceptance, many suggestions were removed from the list of crimes and the Rome Statute now lists the crimes under the jurisdiction of the ICC as being genocide, crimes against humanity, war crimes and crimes of aggression. The exclusion of grievous crimes committed against mostly African states by Western

powers, such as colonialism, serves to demonstrate how the ICC may be construed as an institution for dispensing Western liberal justice, rather than one that takes in context the varied histories of different countries and regional blocs (Ssekandi & Tesfay, 2017).

Despite the UNSC only referring two of the current 12 investigations of the ICC and the number of self-referrals, due to the context of colonial rule and Western imposition the ICC is easily affixed to be a tool of the West, and therefore susceptible to politicisation by autocratic-type rulers who wish to escape the potential prosecution of the Court (Du Plessis, 2008, p. 2; Rossi, 2018, p. 381).

Conclusion

This chapter has provided an overview of the literature related to the case study and the overarching topic of relations between African States and the Court. Furthermore, I have given insight into the Conference where the Rome Statute was drafted as well as the Rome Statute itself in order to explain the origin of tensions between African States and the Court. The following Chapter will build on this by detailing three preferences to explain the case study.

Chapter 4: Case Study

As Chapter 3 demonstrated, there are various contexts for tensions between African States and the Court. The key event that ties in most of these reasons, including unclear procedures, the question of sovereign immunity and Western imposition of norms on African States is the case of President al-Bashir. The mid-year 25th AU Summit in Johannesburg, South Africa decisively initiated a series of events that led to withdrawal notices. This chapter will provide an understanding of the events of 2015-2017 through the close study of three actors that represent three preferences: South Africa, Kenya and the African Union.

In order to understand why some African states were looking to withdraw from the Rome Statute, preference formation should be taken into account. There are two overarching preferences: preference to withdraw (PW) and preference to remain (PR). The preference for withdrawal can be further split into three distinct formats:

- I. Preference for withdrawal (with action)
- II. Preference for withdrawal (with no action)
- III. Preference for collective withdrawal.

Three countries fall under the preference for withdrawal with action: Burundi, the Gambia, and South Africa. A summary around the issuing of withdrawal notice will be given for each of the three countries. Despite Burundi being the only state to ultimately withdraw from the International Criminal Court, and South Africa and the Gambia remaining, for the purposes of this analysis South Africa's preference formation will be the one we use to explain this preference. South Africa is counterintuitively more relevant to this discussion than Burundi because of the ability to generalise conclusions that might be drawn. South Africa is not the subject of any preliminary or ongoing investigation by the ICC, and as such the issue of the

withdrawal notice would not be attributed to retaliation for an investigation, as can be said to be the case for both Burundi and the Gambia.

In order to explain the preference for withdrawal, with no action, Kenya's relationship with the ICC will be analysed. I will also demonstrate that this preference was intentional, and that Kenya did not want to leave the ICC but rather used the threat of withdrawal to put pressure on the ICC for future reform. Furthermore, I also intend to demonstrate that this preference also to shift its focus away from the almost only African investigations.

Finally, the preference for collective withdrawal will be explored through the preference formation by the African Union. This will involve exploring the individual preferences of different states within the AU at different stages of this preference formation and explain why ultimately the AU as a collective passed a resolution for a collective withdrawal.

Preference for withdrawal (with action): South Africa

South Africa was a member of the African delegation of countries that took part in the drafting process of the Rome Statute, (Justice Portfolio Committee, 2000), culminating in the United Nations Diplomatic Conference of Plenipotentiaries in 1998, where the Rome Statute was adopted. South Africa was one of the first signatories of the Rome Statute in October of 2000,. There, Professor Rwelimira from the Department of Justice addressed the Justice Portfolio Committee on the implications of ratifying the Rome Statute in South Africa (Justice Portfolio Committee, 2000). In this meeting, the Professor was asked questions about the logistics of the functioning of the courts and answered the question of state noncompliance by saying that "enforcement is always the major obstacle in international law. There is not much the international community can do if a state refuses to comply,"

(Justice Portfolio Committee, 2000). As part of the meeting, the document given to the Members outlined that the obligations that would come with ratification of the Rome Statute including the need for South African law to domesticate the procedures in the Rome Statute which include the arrest and surrender of individuals to the ICC.

Al-Bashir

As mentioned in Chapter 2, the ICC issued arrest warrants for President al-Bashir in 2009 and 2010 for a total of 10 counts of crimes against humanity, genocide and war crimes (de Wet, 2015, p. 1050). The first arrest warrant was issued for President al-Bashir on the 4th of March 2009. On the 9th of March 2009, the South African Department of Justice forwarded the arrest warrant and request for cooperation from the ICC to a magistrate's court. This warrant was endorsed on the same day, meaning that South Africa had effectively issued a domestic arrest warrant for al-Bashir¹⁸ (Tladi, 2015, p. 1037). During a question-and-answer session in parliament, President Zuma of South Africa answered the question of whether or not South African authorities would arrest President al-Bashir if he set foot in South Africa by saying that South Africa respects international law and their duty as signatories of the Rome Statute, but also that they are of the same position as put out by the AU that the arrest warrants should be rescinded.

Before 2015, South Africa had successfully avoided having to act on the arrest warrant by discouraging al-Bashir from visiting the country. Due to this, the al-Bashir did not attend the

¹⁸ Interestingly, the South African arrest warrant is effectively more problematic than the ICC warrant, as South Africa as a state is expected to follow customary international law and therefore was expected to *not* arrest President al-Bashir. In the capacity of a state party to the Rome Statute, however, South Africa was under obligation to arrest President al-Bashir because of International law (the Rome Statute treaty).

inaugurations of President Zuma nor the funeral of Nelson Mandela. (du Plessis et al., 2013, p. 4). South Africa could no longer avoid the conflict when the country was delegated the 2015 AU Summit in Johannesburg. When the then President al-Bashir attended the Summit, the ICC issued an order for South African authorities to arrest him. On the first day that President al-Bashir landed in South Africa, an NGO brought an application for his arrest to the North Gauteng High Court, two days after which the court ruled and ordered the relevant authorities to effect the arrest (de Wet, 2015, p. 1051), the day after which al-Bashir left the country with no arrest having been executed.

During a parliamentary session on the 6th of August 2015, the leader of the main opposition party in South Africa Mmusi Maimane asked then President Zuma why al-Bashir was able to leave South Africa without being arrested (My Africa, 2015). President Zuma defended the move to not arrest President al-Bashir by saying that he was in South Africa as a “guest of the AU” (My Africa, 2015, 2:49), and as such was in the jurisdiction of the AU during the summit. He further explained that it was “gazetted” that the path from the airport to the designated areas for the AU summit were also under AU jurisdiction, (My Africa, 2015, 3:29). Due to this, it was deemed that President al-Bashir was not visiting South Africa, the state, but the AU summit under AU jurisdiction, therefore preventing South African authorities from arresting him.

South Africa notified the Secretary-General of the UN in October 2016 of its intent to withdraw from the ICC (Kemp, 2017, p. 414). In the withdrawal notice that was sent to the SG of the UN, the case is made that the contradictions between Articles 27 and 98 (as noted in Chapter 2), were the main reasons as to why the country did not arrest former president al-Bashir (Secretary General of the United Nations, 2016). Furthermore, South Africa justified not arresting al-Bashir by saying that it would have violated international law, and when the

country attempted to consult with the ICC as per Article 97 of the Rome Statute it received no assistance. As such, against the backdrop of having asked for clarification of the aforementioned articles multiple times before, and catalysed by the 2015 incident, South Africa concluded that being a member-state party to the Rome Statute would not serve to build “peace and security” on the continent (Secretary Genral of the United Nations, 2016, p. 3). As such, on the 19th of October 2016 the UNSG announced that South Africa will withdraw from the ICC effective one year later, on the 17th of October, 2017 (Secretary Genral of the United Nations, 2016). After the notification had been issued, the South African Minister of Justice and Correctional Services at the time justified the move, contending that remaining a member state of the ICC would hamper future peace-keeping efforts on the African continent by the country (*Leaving the ICC Will “help SA Negotiate Peace in Africa”* | ENCA, 2016). Furthermore, the minister drew attention to the fact that certain provisions within the Rome Statute were incompatible with South Africa’s Diplomatic Immunities and Privileges Act 37 of 2001¹⁹ (*Leaving the ICC Will “help SA Negotiate Peace in Africa”* | ENCA, 2016). In November of 2016, the Minister tabled a Bill in parliament to repeal the Implementation of the Rome Statute of the International Criminal Court Act, in order to gain parliamentary approval for the move to withdraw from the Rome Statute.

Preference for withdrawal (no action): Kenya

Kenya

¹⁹ One provision that could be used to demonstrate this incompatibility is Section 4(1)(a): A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as heads of state enjoy in accordance with the rules of customary international law (Diplomatic Immunities and Privileges Act 37 of 2001, 2001)

Kenya became a state party of the Rome Statute in 2005 and as such any atrocity crimes committed in Kenya or by Kenyan nationals fell under the Court's jurisdiction (Lynch & Zgonec-Rozej, 2013, p. 5).²⁰

In 2010, the ICC opened up a case to investigate the election violence that occurred after the 2007 presidential elections in Kenya (Jalloh, 2012, p. 270; Sriram & Brown, 2012, p. 220). That same year, President al-Bashir visited the country despite there being a warrant out for his arrest. During the outcry about his visit, it became clear that the host government officials were not all unified and informed of the decision to allow him to visit the country without arrest, with the then Kenyan Prime Minister stating that he had not been consulted (Keppler, 2012, p. 5). As a result of the backlash from within government, the public and civil society, and under pressure to publicly commit to arresting al-Bashir if he visited the country again, Kenya postponed an intergovernmental meeting taking place later that year (Keppler, 2012, p. 5). After negotiations, the meeting was relocated to Ethiopia, a non-party state (Keppler, 2012, p. 6). At the end of the year, Kenyan MPs passed a motion that called for Kenya to withdraw from the ICC and although it was a nonbinding motion, Kenya then tried to organise African states to collectively withdraw from the ICC (Sriram & Brown, 2012, pp. 226–227). The parliamentary motion notwithstanding, amongst those issued summons in 2011 were the Deputy President Kenyatta and the then Minister for Higher Education, Science and Technology Ruto (Jalloh, 2012, p. 270).

In 2013, support for Uhuru Kenyatta and Benjamin Ruto whilst they were campaigning for the elections that year grew in part as a result of the summons they had been issued by the ICC (Lynch & Zgonec-Rozej, 2013, p. 10). The indictments were seen as interference by

²⁰ It is important to note that the ICC can only exercise this jurisdiction when the member state is unwilling or unable to prosecute individuals suspected of crimes outlined in the Rome Statute. This would become the key bone of contention.

Western forces in Kenyan affairs with the help of incumbent Prime Minister Raila Odinga (Lynch & Zgonec-Rozej, 2013, p. 10). With the domestic support²¹, Kenya again pushed for the AU to pass a resolution insisting that the cases before the ICC be referred to Kenyan courts, re-asserting that ICC involvement could prove harmful to regional peace processes (du Plessis et al., 2013, p. 5)

Preference for Mass withdrawal: The African Union²²

The AU and the ICC have not always had a contentious relationship. As was mentioned in Chapter 2, after the Rome Statute came into effect and the ICC was established in 2002, the AU often encouraged African countries to become signatories and ratify the Statute. Relations between the AU and the West relating to matters of international justice started breaking down after European countries issued warrants of arrest for African government officials (du Plessis et al., 2013). In 2008, the AU passed a resolution encouraging non-cooperation with warrants issued by Western states as the AU resolved that the Western states were 'abusing' universal jurisdiction²³ to undermine African governments.

In 2009, the arrest warrant for al-Bashir was issued and the AU had to reckon with the reality of their member states' commitments to the ICC. This brought up two key issues, the first of which was that the AU was conducting several regional peace-keeping and peace-making efforts. As a result, the AU had to consider how these efforts, mostly conducted through negotiations and mediations, could co-exist with more aggressive actions like those called

²¹ The Kenyan Parliament passed another motion in 2013 to withdraw from the ICC (Smith, 2013).

²² The AU is here analysed separately as an entity on its own as despite it being made up of individual states and in theory supposed to be the reflection of the member states' preferences, in this case the AU acted on its own volition to call for a collective withdrawal.

²³ Universal jurisdiction exists for certain crimes due to their gravity and thus covers individuals deemed to be perpetrators of such kind. Du Plessis (2007, pp. 462–463) characterizes these individuals as being labelled as "common enemies of mankind"

for by ICC warrant of arrest called for (du Plessis et al., 2013, p. 4). Secondly, the issuing of these warrants started the discourse as to whether or not the Rome Statute trumps customary international laws.

Analysis

Tracing the attitudes from the time of the establishment of the ICC to that of South Africa issuing a formal notice of withdrawal, it stands to reason that South Africa is not averse to the concept of the ICC but is, rather, sceptical about the effectiveness of the ICC at its current capacity. As justified in their official notice of withdrawal, the main reason why the country decided to leave the institution was due to the lack of clarity in its statutes, and thus lack of clarity in how the Court can reasonably and legally operate and expect cooperation from its member states. Additionally, it stands to further reason that South Africa developed split preferences at the same time – the government of SA decided to withdraw from the statute, the opposition parties and NGOs backed staying, and the courts were neutral, concerned rather with the legality of how the government decided to withdraw.

The preferences for withdrawal that led South Africa to issue its notice was uniquely different from those issued by Burundi and the Gambia in that no South African official was under investigation by the ICC. Furthermore, the reasoning contained in the notice points to the need for legal clarification, and having received none, the state believed the best course of action would be to withdraw.

Kenya, as the subject of an ICC investigation, has been one of the most consistent critics of the Court. Despite the Kenyan government pushing for both domestic support and regional support to leave the Court, as well as having been the main driver for the establishment of

a regional African court mandated to handle cases of international crime, it did not fund the project and has to date not yet ratified the regional court. This begs the questions whether or not the intentions of Kenya were not to leave the ICC, but to pressure the Court into either reforming itself or simply ceasing investigations in Africa.

Tladi (2014, p. 381) expresses that the tensions between the ICC and the AU are ideological.

In acknowledging that the differences between the two institutions are complex, Tladi (2014, p. 382) also makes the case that the core split is due to the different approaches to cooperation that are further exasperated by the interconnected relationships between the AU, the ICC and the UNSC (Tladi, 2014, p. 384). States and institutions have likewise acknowledged that success in the fight against impunity is dependent on the effective cooperation of individual nation states (Tladi, 2014, p. 386). Nkansah (2014, p. 9) further explains that the AU does not only see the ICC as an institution that imposes and pursues selective justice.

The schism between the AU and the ICC may also be due to their different institutional purposes. The ICC, although sometimes regarded as an institution that has politically determined focuses, is a fundamentally judicial institution with the focus of prosecuting and penalizing those accused of atrocity crimes (Nkansah, 2014, p. 22). Whilst this may denote the Court's responsibilities to a sole pursuit of justice, the Court was created to be a complementary tool that is implemented alongside, or in lieu of, national institutions (Nkansah, 2014, p. 23), thus the Court must take into consideration the national context of the states it wishes to aide in the pursuit of peace and stability (Nkansah, 2014, p. 23). It then follows that the Court must understand itself to be a part of the peace process and not in isolation of other efforts (Nkansah, 2014, p. 11).

The ICC was initially conceptualized to help bring about an end to impunity by imposing universal justice, unlike the *ad hoc* tribunals that had preceded it. In addition to the selection of cases that the ICC is pursuing not fully supporting this ideal, the ICC state parties only make up 27% of the world's population (Nkansah, 2014, p. 14).

African countries are developing and young democracies and therefore the focus of governments should be to create and sustain peace and political stability (Nkansah, 2014, p. 21). Given that Africa is a continent with various conflict situations and widespread instability, the ICC would do well to take into consideration that its anti-impunity efforts should not cause further instability, nor misdirect the attention of leaders to their own court cases instead of the betterment of their citizens and state (Nkansah, 2014, p. 21).

The AU's contention with the ICC is often understood as a pushback against perceived neocolonial impositions by the West (Nkansah, 2014, p. 21). It is important here to note that the AU's dissatisfaction with the ICC can be tied to the Court's efforts to have sitting heads of states arrested and presented for trial (Nkansah, 2014, p. 20). The AU's worries are not unfounded and there are several considerations that need to be taken seriously. Arresting sitting heads of states has consequences for the stability of states and their region. If the sitting head of state and/or members of the state are arrested, how would a country continue to function? Who would legitimately take over? (Nkansah, 2014, p. 20) The AU advocates that indictments and arrests should take place after the individual or individuals have left positions of power so as to not impact the functioning of the relevant state (Nkansah, 2014, p. 20).

Nkansah (2014, p. 24) identifies a core issue with the implementation of universal justice by an independent institution. Historically, prosecution and punishments were implemented by the victors of a conflict as they now had legal coercive powers over the accused (Nkansah, 2014, p. 24). In criminal justice systems, that coercive power is prescribed to the government and its judicial systems over accused individuals. The problem with an independent international institution is that it holds very little coercive power (Nkansah, 2014, p. 24) and more often than not completely relies on the cooperation of its member states for the execution of its mandate (Tladi, 2014, p. 386).

Allegations of a politicised ICC are not unfounded and the involvement of the UNSC in the referral of cases of non-member African states can be identified as evidence of this (Tladi, 2014, p. 381). Given that similar cases of atrocity crimes by either UNSC states or their allies have not been referred to the Court for prosecution, and that the UNCC member states that are not party to the Rome Statute have entered into bilateral agreements to protect their citizens from ICC prosecution, the perception of a biased Court is strengthened (Nkansah, 2014, p. 14).

Governments have a responsibility to their citizens and the world to bring to justice perpetrators of atrocity crimes (Nkansah, 2014, p. 12). In contrast to this, African solutions to past grave crimes and human rights violations can include the granting of amnesty. Given that the administration of justice by the new regime is dependent on its power relation to the outgoing regime (Nkansah, 2014, p. 25), the granting of amnesty may seem like the most viable way to turn a new leaf. In criticism of this, Nkansah (2014, pp. 26–27) points out the amnesty laws could violate the state's obligation to punish international crimes committed within said state. Amnesty as such can then present itself as a tool of peace rather than justice (Nkansah, 2014, p. 26).

The ICC's role as a complementary justice mechanism is not limited to its prosecutorial capabilities. The Court may also prove its cooperation by providing the resources knowledge and tools to a state's domestic judiciary to further enable the state to carry out justice (Nkansah, 2014, p. 33).

A problem that the pursuit of justice may face if the ICC is conducting its own processes alongside that of the domestic processes is the creation of divergent norms (Nkansah, 2014, p. 34). For example, the death penalty is not an option for sentencing by the ICC, whereas some African jurisdictions may allow for capital punishment. If individuals were to face different consequences for the commission of the same or similar grave crimes, this may undermine the entire process (Nkansah, 2014, pp. 33–34).

The ties between the ICC and the AU cannot be overlooked although it must be made clear that the establishment of the ICC was via consensus of states and not the enforcement of the UNSC (Swart & Krisch, 2014, p. 39). This aided in initially giving the Court widespread legitimacy as an institution vested in the universal enforcement of justice (Swart & Krisch, 2014, p. 39). Whilst true universal justice is impossible to achieve the ICC had by 2015 consistently fallen short of showing a true effort to demonstrate its commitment to universal justice (Swart & Krisch, 2014, pp. 38–41).

In 2013, African states had begun to mention the possibility of their withdrawal from the ICC (Swart & Krisch, 2014, p. 40). It is therefore important that, in order to understand the relationship between African states and the ICC, the domestic politics of individual states as well as the international power dynamics of the time period under observation receive equal consideration (Swart & Krisch, 2014, p. 41).

The ICC can be seen to be the continuation of neocolonial impositions of justice. Swart & Krisch (2014, p. 41) present that the ad hoc criminal tribunals that preceded the ICC, set up by the UNSC, were either due the horrors of seeing European victims of atrocities (ICTY)²⁴ or post-violence political propaganda (ICTR)²⁵. The ICC thus would present as a permanent iteration of the preceding ad-hoc tribunals.

African States' initial core involvement with the ICC may have stemmed from external pressures other than the desire to counteract impunity (Swart & Krisch, 2014, p. 41). As will be demonstrated with the attempted mass withdrawal, the implementation of rational choice in their considerations could have led African states to conclude that not supporting the establishment of the ICC could lead to international marginalization and the withdrawal of international development assistance (Swart & Krisch, 2014, p. 41). The idea that the ICC suffers from a limited jurisdiction is in some cases counterbalanced by its relationship with the UNSC. Resolutions issued by the UNSC are binding to all members of the UN, therefore Sudan and Libya were mandated to cooperate with the Court's investigation despite not being party to the Rome Statute by virtue of the UNSC referring their respective cases (Swart & Krisch, 2014, p. 42).

Allegations of ICC bias in its case selection is also based on the reliance of the Court on funding it receives via the UN, with most of this funding stemming from the West (Swart & Krisch, 2014, p. 41). Although the concerns that the AU has with regards to the Court may be valid, some of the measures that the institution takes are viewed to be in contradiction with its goal to end impunity. This is further entrenched when individual countries distance

²⁴ International Criminal Tribunal for the former Yugoslavia

²⁵ International Criminal Tribunal for Rwanda

themselves from the AU resolutions that question the ICC's mandate and authority (Swart & Krisch, 2014, p. 43).

The AU as an institution cannot be viewed to be on par with individual states with regards to treaty negotiations and implementations (Udombana, 2014, p. 64). In particular, the AU is not party to the Rome Statute (Swart & Krisch, 2014, p. 46; Udombana, 2014, p. 66) and can therefore not directly submit concerns and criticism to the ICC (Swart & Krisch, 2014, p. 46).

The establishment of the Malabo Protocol lacks legitimacy as an answer to the ICC's perceived bias towards African countries for multiple reasons. Key, however, is that the Malabo Protocol recognizes the functional immunity of sitting heads of state even when accusations of atrocity crimes have been levelled against them (Swart & Krisch, 2014, p. 46). The Protocol came at a time when more and more consensus was reached in international justice scholarship that functional immunity does not, in fact, cover atrocity crimes as these acts are not considered to be official state functions (Swart & Krisch, 2014, pp. 48–50). Furthermore, it fails to recognize that countries such as Kenya and South Africa, removed need to recognise the immunity of heads of states for international crimes when the Rome Statute was domesticated (Swart & Krisch, 2014, p. 52).

Strikingly, even if a state withdraws from the ICC during an investigation or prosecution, the case is still legally valid and the Courts authority is not removed (Swart & Krisch, 2014, p. 46) given that the case began whilst the state was under the Court's jurisdiction. This renders calls and moves to withdraw from the ICC as political posturing rather than measures to frustrate the Court or otherwise render its mandate in Africa invalid. In fact, for a withdrawal from the ICC to be effective and have a lasting debilitating impact on the Court,

a collective group of African countries would either have to simultaneously withdraw or at least issue their notices in quick succession.

The Kenyan case with the ICC did not necessarily intensify widespread calls for actual withdrawal from the ICC. Rather, the case prompted multiple calls for reform and the suggestion of an expansion of the ICC's consideration of its role in complement to existing domestic processes to include regional processes (Swart & Krisch, 2014, p. 47).

The investigation and indictment of heads of states is not only controversial because of its impact on immunity and sovereignty. It also necessitates a discussion of the democratic rights of a people of a sovereign state. The Kenyan case in particular presented a poignant example of the potential problems in that, although Kenyatta and Ruto were charged before being sworn in as President and Vice President of Kenya, respectively, prosecution of the leaders would have created a power vacuum and simultaneously deny Kenyans a fulfilment of the democratic right to a government that the majority voted for (Swart & Krisch, 2014, p. 45). The ICC only intervened in the Kenyan case after several attempts at a domestic tribunal were halted (Swart & Krisch, 2014, p. 44).

States party to the Rome Statute are not only required to effect the fulfilment of warrants but also the enforcement of sentencing of an individual as the ICC prosecutes on behalf of a specific state that is either unable or unwilling to prosecute (Udombana, 2014, p. 60)

The ICC ultimately is a judicial institution and even though there should be consideration of local political contexts, its judicial functions ultimately cannot be impeded by political considerations (Udombana, 2014, p. 63). According to some scholars, the compliance of member states with the Rome Statute does not legally lie under the purview of the AU as it

does not have authority over the ICC. The AU is a political institution and ultimately the compliance of states with treaties is a legal matter, not a political one (Udombana, 2014, p. 66).

The creation of a permanent regional court with the legal authority to investigate, prosecute and punish perpetrators of grave crimes whilst not currently in effective existence, is one that may need to be considered more closely (Udombana, 2014, p. 69). States may not be as willing to accede to the impositions of an international institution, as African states and the AU seemingly are with regards to the ICC. States may, however, be more willing to accept and adhere to a regional court that does not have ties to perceived outside influences (Udombana, 2014, p. 69). Swart & Krisch (2014, p. 54) do point out in warning that worries persist that a regional African Court could not be independent of political influence. Udombana (2014, p. 73) quotes former UN Secretary-General Kofi Annan in advancing the idea that even if the ICC is guilty of ignoring similar cases of grave crimes occurring outside the continent, the justice for victims of these crimes on the continent should not be cast aside.

Preempting a statement that would be given by former South African President Zuma to justify al-Bashir's presence in South Africa in 2015, South African officials explained that the reason for not arresting al-Bashir when he visited an AU Summit in South Africa, is that the host country does not invite AU Member States to an AU Summit (Udombana, 2014, p. 65). This then means that the individual is in the country at the behest of the AU and within the jurisdiction of the AU.

Previous sections have addressed the tension between the ICC and a specific state (or group of states). The case of tensions between the AU and the ICC is a unique one that not only requires separate analysis but also an explanation of its own relationship to the ICC.

In the international arena and within international legal frameworks, various mechanisms exist to solve disputes or matters of differing interpretations between states as well as between a state and an international institution (Nmaju, 2014, p. 156). In cases of arbitration, or where there is a neutral third party required, states can approach the International Court of Justice, another organ of the UN (Nmaju, 2014, p. 156).

To understand the context of the tension between the ICC and the AU, the international legal framework will be briefly explored. Fundamentally, there exists three tenets of international law that regulate international institutions, namely, immunity, diplomatic relations and treaties (Nmaju, 2014, p. 166). The growing chasm between the ICC and the AU has elements of all three tenets. The AU has repeatedly advocated for the amendment of provisions contained in the Rome Statute that regulate its application to sitting heads of states and the responsibilities that member states have towards effecting warrants of arrest for heads of states (Nmaju, 2014, p. 166). In the case of the AU and the ICC, member states have legal responsibilities that have in recent years become untenable to adhere to simultaneously (Nmaju, 2014, p. 164). States now have to decide whether to follow the Rome Statute, that obligates them to effect arrest warrants for individuals indicted by the Court, or to alternatively adhere to the policy of noncooperation advocated by the AU (Nmaju, 2014, p. 164). If states do not comply with either, they may suffer sanctions by the institution as well as the international community (Nmaju, 2014, p. 176).

Contrary to popular understanding, Nmaju (2014, pp. 175–176) argues that the AU can effect binding decisions upon its member states. As long as the decision was reached with a quorum present, and either consensus or a two-thirds majority vote of members, the AU can enforce policies on its member states even if this impacts member states' other obligations to other institutions. Nmaju further states that in particular, the AU's insistence on the policy of noncooperation as it relates to the indictments of sitting African heads of states, that this may be to promote fundamental tenets of the AU and prevented increased instability on the continent such as an interstate war.

In further defense of not arresting sitting heads of states that enjoy functional immunity, Nmaju (2014, pp. 182–183) insists that the violation of this immunity could have far-reaching consequences for the arresting state. The state may face increasing regional or global isolation, and in some cases may be referred to the UN for breaching diplomatic protocols. Interestingly, the validity of Nmaju's case is not diminished by other scholars' arguments against the validity of functional immunity in the face of grave crimes. Rather, Nmaju approaches the subject from a purely legal consideration, whereas other scholars discussed in this paper take into account the political overtones of the situation and thus the malleability of international norms.

Murithi (2015, p. 75) states that the ICC has an explicit criminal jurisdiction over individuals that commit grave international crimes, which is in direct contradiction to norms of sovereign immunity. Customary regional norms entails states protecting the diplomatic immunity of foreign dignitaries that visit the country (Nmaju, 2014, p. 182). As such, this is seemingly in direct opposition to the requirements of Article 98 of the Rome Statute which, in giving birth to the creation of the Court, 120 countries voted in favour of the Rome Statute, 21 abstained and 7 voted against (Murithi, 2015, p. 76). Given that three of the major international powers

and of the permanent five of the UNSC voted against the establishment of the ICC, wariness about the ICC's universal application was almost instant (Murithi, 2015, p. 176).

The AU's criticism that ICC indictments impede and sometimes undo the work of other regional and international peace efforts is substantiated. The indictment of top LRA leaders prompted harsh escalations in violence by LRA forces in Uganda and the indictments issued for former Sudanese President al-Bashir interrupted the ongoing peace negotiations and led to the expulsion of various NGOs (Nkansah, 2014, p. 10). Moreover, indictments do not solely impact domestic peace processes, but can also impede the work of governments in regional interventions. If the indictments led to the prosecution and thus incapacitation of a government leader, this would collapse regional efforts, such as Kenya's work in fighting terrorism on the continent (Swart & Krisch, 2014, pp. 52–53). International institutions are important for the regulation of the international arena in that they provide mechanisms to develop rules of engagement as well as monitor state adherence to these rules (Nmaju, 2014, p. 167). In most cases where states are party to multiple international institutions there is little contradiction between the obligations. In contrast, the obligations under the Rome Statute and ordinary international norms of sovereign immunity prove to be challenging and not easily conquered. The complexity lies in the paradox that for the Court to carry out its functions, it needs the cooperation of member States to arrest, extradite and eventually imprison successfully prosecuted persons. The AU espousing a policy of non-cooperation provides its member states legal cover for not complying with arrest requests by the ICC as the states cannot legally rely solely on their respective domestic laws to contravene treaty obligations (Nmaju, 2014, pp. 164–165). Additionally, the growing rift between the AU and the ICC is that this could become an exploitable narrative for leaders that need the ICC to be portrayed as the villain to distract from their potential human rights violations (Nmaju, 2014, p. 162). Fundamentally, in order to facilitate the smooth maintenance of diplomatic

relations, States must respect the concept of immunity and sovereign immunity for Heads of States for fear of becoming pariah states in their own region.

Conclusion

This Chapter has provided insight and analysis by detailing each preference variable and their resulting consequences. The first preference, withdrawal with action, as demonstrated through the use of South Africa illuminated that withdrawal can stem from reasons other than perceived persecution by the ICC such as contradicting statutes. The second preference, withdrawal with no action, as demonstrated through the Kenyan scenario was to utilise the potential withdrawal as an inducement to encourage dialogue with the ICC. The third preference, a collective withdrawal, served to amplify the urgent need for the ICC to engage in reciprocal communication on the concerns of African States.

The following chapter will succinctly engage with the findings of this chapter as well as tying in recent developments that may have happened as a consequence of the case study.

Chapter 5: Summary finding and recent developments

Based on the findings made in the previous chapter, it can be surmised that there was no failed mass withdrawal as the threat of mass withdrawal of African States from the ICC was not real in the first place. The three states that issued withdrawal notices did so for different reasons, and some of the states that vocally pushed for a mass withdrawal did not issue formal notices. I will elaborate on the following key themes gleaned from the research conducted:

1. There was a lack of reciprocal communication between the ICC and African states
2. African states support anti-impunity efforts but believe they should be weighed against peace efforts
3. The ICC had to find its footing

There was a lack of reciprocal communication between the ICC and African states

The lack of reciprocal communication between the Court and African States, as well as with the AU, can be traced back to the Conference establishing the Court and drafting the Rome Statute. African States and other non-Western States lamented the exclusion of the reservation clause. This meant that states acceding to the Rome Statute had to do so unilaterally without their concerns being noted. Concerns such as Security Council influence, complementarity and jurisdiction were concerns raised at the Conference, and have continued to be echoed throughout the years by African States and the African Union.

The lack of reciprocal communication between the ICC and African States/AU has also contributed to the perception that the ICC is a tool of Western imposition. The perceived

one-way communication of ICC initiated investigations, ICC issued warrant and ICC calls for cooperation due to legal obligation has contributed to the idea that the ICC is there to enforce justice as the Court sees fit and is not open to deliberations and adjustments to adapt to local environments. García Iommi, (2020) noted that for treaties and norms to be fully implemented, the context in which they are applied need to be considered. Given the confusion over clashing norms and obligations, the lack of grace given to African states to exercise the regional norm of immunity even when this may contradict the obligation to arrest an individual is highly problematic.

The withdrawal notice issued by the South Africa government pointed to a lack of responsiveness from the Court and it concerns clauses that have been identified multiple times throughout the years to be contradictory. If states perceived the lack of engagement in procedural issues to signify the ICC not being willing to accept alternative views, it would explain why there would be need to employ a diplomatic bluff to force the ICC to the negotiating table with its biggest bloc of countries.

On the other hand, the efforts of the African Union to coordinate and organise a mass withdrawal of African States from the ICC may have also been perceived as efforts to undermine the Court's pursuit of justice. While this may have been in response to the ICC's perceived rigidity, the actions of the AU helped to bolster the Court's stance that the AU was impeding the anti-impunity agenda. Furthermore, despite there being numerous dissenting views and resistance to the withdrawal resolution being passed, the AU insisted on promoting the narrative that African States were willing to withdraw from the Court. The narrative may have put pressure on the Court to take the concerns of African States seriously, as well as dampened the need for African States

African states support anti-impunity efforts but believe they should be combined with or weighed against peace efforts

García Iommi (2020) notes that the lack of communication between African States and the ICC is due to a normative crisis – in other words, African states and the AU no longer subscribe to the anti-impunity norm espoused by the Court in its current form. The anti-impunity norm is being propagated as the unfettered pursuit of justice through investigations and court process conducted by the ICC. African states have noted that the pursuit of justice by the ICC has come at the expense of peace and stability, two priorities that African countries need in the face of continent-wide instability. The peace versus justice debate is another result of the lack of reciprocal communication between the two blocs of actors as these concepts need not necessarily be mutually exclusive.

The extension of the jurisdiction of the African Court of Human and People's Rights to include grave crimes represents an attitude of anti-impunity, however the clause that no sitting official can be prosecuted indicates the balance that African states are attempting to strike between the pursuit of justice and the maintenance of peace.

The attainment of peace can happen simultaneously with the pursuit of justice, however there would be a need for both sides to work together to adjust and balance their efforts so that one does not override the other. As previously mentioned, the Preamble to the Rome Statute makes mention of the different cultures in the world, and that the composition of the Court judges should reflect different justice systems in the world. This points to the reality that differing systems of justice were taken into account by the drafters of the Statute, however these differences may not have been integrated into the fabric of how the Court exercises its duties.

Further to this, the lack of ratification of the Malabo Protocol indicates that African States are not looking for alternative institutions in the fight against impunity. Despite the years of discord between themselves and the Court, African States and the AU are willing to cooperate with the Court in the pursuit of justice.

The ICC had to find its footing

The ICC came into existence with stark resistance from a multitude of states with varying degrees of influence on the international stage. Unlike the United Nations and the International Court of Justice that had immediate subscription from the world powers at the time, the ICC faced loud opposition from the onset from some of the most powerful states, such as the United States of America and the People's Republic of China. As a result, the institution faced with the dilemma of needing to present as a strong, infallible institution pursuing justice for all whilst not further upsetting the powers that have the influence to cause wider dissent. Fortunately, for the institution, the African continent presented with a number of states eager to pursue anti-impunity, often referring cases themselves.

Where it fell apart was when the United Nations Security Council got involved and referred two cases that directly implicated sitting Heads of African States. African states began to take note that the ICC seemingly had only opened investigations and issued warrants for African persons and non-Member states were involved in the referral of more African persons to the Court's attention. Given the history of colonialism and imposition, it stands to reason those African states began taking a more self-preserving stance. The ICC did not do itself any favours by continuing to initiate investigations into situations on the African continent whilst devastating wars were happening in Afghanistan and Iraq, for example.

On the other hand, it could be said that the ICC chose to investigate cases of impunity involving less geopolitically powerful actors before it could pivot and focus its attention on more globally controversial cases that were more likely to draw the backlash from major powers. Given recent investigations, however, there is hope that the ICC has found its footing and no longer needs to do so at the expense of the continent, but only time will tell if the investigations evolve into prosecutions, indictments, and arrest warrants.

In order to wrap up the research, it is necessary to address recent developments in the relationship between the ICC and African States in order to holistically qualify the success of what I have determined to be a diplomatic bluff.

Recent Developments

Including a section on recent developments since 2017 is crucial in order to assess the impact of the non-withdrawal. This section will focus particularly on investigations initiated since the first agitation to withdraw from the ICC *en masse* began in 2014, and resolutions passed by the Assembly of State Parties to the ICC.

ICC Investigations

The first investigation authorised by the ICC since the initial agitations for mass withdrawal was into the situation in Georgia (The International Criminal Court, 2021d). This investigation was requested by the Prosecutor of the ICC to investigate alleged crimes against humanity and war crimes committed in the country during the conflict between 1st of July 2008 and 10th of October 2008. The preliminary investigation implicated Georgian, Ossetian and

Russian armed forces in the commission of the grave crimes (The International Criminal Court, 2021d). As a result, Russia removed its signature²⁶ from the Rome Statute in November of 2016 (BBC News, 2016), indicating its disapproval of the investigation and the Court as a whole.

The second investigation authorised by the ICC post-2014 was into the situation in Burundi (The International Criminal Court, 2021c). This *proprio motu* investigation was initiated by the Prosecutor, and the Pre-Trial Chamber authorised investigation in October 2017. Despite this authorisation taking place one day before Burundi had officially withdrawn from the Rome Statute after its completion of the one-year withdrawal notice, the Court still had jurisdiction over crimes it suspected during Burundi's membership of the Court²⁷. The investigation concerns crimes allegedly committed by Burundian nationals in and outside of Burundi (The International Criminal Court, 2021c).

The third investigation was opened by the ICC in November 2019 which focuses on the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar²⁸ (The International Criminal Court, 2021b). The investigation is focused in part on crimes against humanity alleged to have been committed against the Rohingya population²⁹ (The International Criminal Court, 2021b).

²⁶ Russia had signed the Rome Statute in 2000, but never ratified the Statute and thus was not considered a member state of the ICC (BBC News, 2016) This move therefore was not necessarily damaging to the efficacy of the Court but did send a message to international observers.

²⁷ Article 127(2) of the Rome Statute indicates that: "Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective." (Rome Statute of the International Criminal Court, 1998, p. 56).

²⁸ Henceforth referred to as Myanmar

²⁹ The Rohingya are a minority ethnic group in Myanmar, presenting the largest percentage of Muslims in the majority-Buddhist country. The Rohingya have allegedly faced genocidal efforts by the Myanmar army, however the Myanmar state insists that it is fighting Rohingya militants (BBC News, 2020).

The fourth investigation opened by the Court since 2014 is into the situation in the State of Palestine³⁰ (The International Criminal Court, 2021e) upon referral by the Palestinian State. This was after the Government of Palestine declared its acceptance of the Rome Statute in January of 2015, followed by its accession being recognised by the UNSG, after which the Rome Statute entered into force in April 2015 (The International Criminal Court, 2021e).

The fifth investigation initiated by the ICC since 2014 was into the situation in Afghanistan, and was unanimously authorised in March 2020 (The International Criminal Court, 2021a). This authorisation was given by the Appeals Chamber of the International Criminal Court after the Pre-Trial Chamber in 2019 rejected the Prosecutor's request for authorization to investigate the situation in Afghanistan, stating that not doing so was not in the interest of Justice (The International Criminal Court, 2021a). After the USA blacklisted the former ICC Prosecutor³¹ in 2020 over the probe into war crimes committed in Afghanistan (Psaledakis & Nichols, 2020), the investigation was restarted in 2021 by the current Chief Prosecutor, Karim Khan with the focus on the USA's involvement being deprioritised (Ohanes, 2021). This move was met with much international backlash (Ohanes, 2021).

The sixth investigation initiated by the ICC since 2014 is the investigation into the situation in the Philippines (The International Criminal Court, 2021f). This investigation was authorised by the Pre-Trial Chamber in September 2021 with a focus on crime against humanity, specifically murder, committed during the 'war on drugs' campaign between November 2011 and March 2019 (The International Criminal Court, 2021f). Despite the government of the Philippines issuing a notice of withdrawal in 2018 and withdrawing the following year after the ICC began its preliminary investigation, the Supreme Court of the

³⁰ Palestine is here referred to as a State as per indication on the ICC website, as well as the status of being an observer state to the UN (United Nations, 2021)

³¹ Fatou Bensouda's term as ICC Chief Prosecutor ended on the 15th of June 2021 after 9 years in office (The International Criminal Court, 2021g)

Philippines ruled the country had an obligation to cooperate with the Court's investigation (Amnesty International, 2021).

Resolution ICC-ASP/16/Res.3

The other significant development since events unfolded was the adoption of the *Resolution on the consultations pursuant to article 97³² (c) of the Rome Statute of the International Criminal Court* in December 2017 by the Assembly of State Parties at the 12th plenary meeting (The Assembly of State Parties, 2017). This resolution laid out the process through which States can approach and engage with the Court with concerns regarding the execution of the State's obligations under the Rome Statute (The Assembly of State Parties, 2017).

This resolution addressed the request for clarification on article 97 of the Rome Statute made by South Africa in May of 2016 after it rescinded its withdrawal notice (*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*, 2016). The resolution provides for a time-sensitive process wherein a State makes a request for consultation to the Court or its relevant organs after the State has received a request for cooperation. After this, the Court is obliged to respond with arrangements for the consultation to take place. Allowing this mechanism provides for States to timeously raise issues that may impede its cooperation without immediate threat of sanction by the Court.

³² Article 97 of the Rome Statute refers to the process for consultations: "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia: (a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State." (Rome Statute of the International Criminal Court, 1998, p. 48)

This mechanism being spelled out in more detail also sets a precedence that the ICC is willing to work on becoming more responsive to the issues raised by its member States, and potentially have more reform measures taking place in the near future. As a result, channels of communication between the Court and its Member States appear more reciprocal, transparent, and efficient, thus avoiding the possibility of misunderstandings that lead to confrontations between parties.

Conclusion

In conclusion, the non-withdrawal of African States from the ICC still remains a significant event in international relations, specifically in studying issues of cooperation, institutions and norm enforcement. Surface level observation of the case study would provide an example of what may happen when institutions do not adapt and listen to the concerns of their member states. When evaluated more closely, the case highlights the delicate constitution of international institutions that require cooperation from their member states in order to effectively execute their mandates.

Chapter 6: Conclusion and Reflections

I began this research journey with the assumption that I would find clear presentations of political intent on the part of States for why they subscribed to the idea of a mass withdrawal. I believed I would find a trove of statements, treaties, resolutions and policy documents that would provide a detailed portrayal for state identities and orientations towards the ICC. Many of the sources consulted made mention of the lack of cooperation being due to personal, political interests and maybe even a resistance to anti-impunity efforts, however what presented was rather a sketch of the realities of balancing national interests, the pursuit of peace and the fight for impunity. The engagement of African states in the Conference establishing the Court demonstrates that the states were not against the establishment of the Court, rather they were concerned with creating a Court independent enough to resist political influence from States as well as political organs such as the UN.

What became evident quite early on in the research process, however, was that there was no real effort for a mass withdrawal. Rather the timing of events made it possible for non-state actors, such as the African Union, to portray individual state action as a collective move against the ICC. Burundi, which was the only state at that time that formally withdrew after their one-year notice period still remains under investigation by the ICC. The Gambia rescinded its withdrawal notice after a change in power and South Africa rescinded its notice after the rescission was deemed unconstitutional by the Constitutional Court of the Republic of South Africa. Despite the Kenyan Parliament passing a resolution to withdraw from the Rome Statute, no formal withdrawal notice was sent to the UNSG. The passing of the Malabo protocol also yielded no tangible action from African States as the 15 ratifications mark has still yet to be reached. All this points to the perception that the emphasis was on the threat of a mass withdrawal of African states from the AU, be it coordinated or not, and a goal of bringing the ICC to the negotiating table.

My research then had to shift its focus from no longer being an investigation of a failed mass withdrawal, but rather an investigation into diplomatic posturing after years of dissatisfaction. Despite what my preliminary literature review indicated, African states were not trying to counter anti-impunity efforts and the ICC was not an agent of Western imperialism. Rather, African States were striving to negotiate with and engage the ICC in dialogue to improve its Statutes, therefore bolstering its integrity and perception by States. The ICC was not unilaterally attacking African States and its persons, but rather resistant to change whilst finding its footing as a young international institution.

Taking into account recent developments, it could be said that the threat of a mass withdrawal was successful in bringing the ICC to the negotiating table. Since 2017, the ICC has passed ICC-ASP/16/Res.3, which addressed specific issues of non-reciprocal communication between the ICC and African States. In addition, since 2014, the ICC began investigations in 6 additional cases, 5 of which pertain to states outside of the African continent. Of the 5 non-African focused investigations, all have been initiated *proprio motu*. Furthermore, investigations into the situations in Afghanistan and the State of Palestine extend to crimes committed in their respective territories, allowing the ICC to extend its jurisdiction on non-nationals, even if the non-national's country of origin is not a member party to the Rome Statute. The opening of these investigations into cases is delayed, but welcomed, has it signifies another layer to ICC action. When the ICC opened its investigation into Afghanistan, it was met with fervent backlash and its Prosecutor was blacklisted by the United States. This points to the realities of an international system attempting to be effective in its unilateral application of justice. Going against dominant world powers runs the risk of impeding investigations and further threatening the integrity of the institution.

To answer my research question: the mass withdrawal of African States from the International Criminal Court did not fail. It did not fail because there is no evidence that there was a coordinated effort to withdraw from the Court in the first place. If the attempted mass withdrawal is conceptualised in line with my findings to be an incentive for the ICC to negotiate with African States and the AU, the attempted mass withdrawal succeeded in its ambitions. Given the recent developments and wider geographical span of ICC investigations as well as conferences on the clarification and/or reforming of specific clauses, the Court is showing itself to be increasingly responsive and therefore weakening the image of rigidity. The evidence thus points to the AU and African States emphasising their power so that the ICC treats them as partners in the pursuit of justice, and not as targets. As partners, both sides are then able to freely, effectively and positively communicate in order to reach a mutually beneficial agreement.

Further research is needed into the potential implications of withdrawal from international institutions at similar scale to the ICC. As criticism and discontent with institutions such as the United Nations, the World Bank, and the International Court of Justice grow, it would be prudent to identify avenues of reform that can respond to demands for change in an accessible and transparent process. Research into this field would additionally better equip future institutions to not repeat similar mistakes of exclusion in the negotiation phases and prioritisation of the needs of greater powers over those of relatively smaller countries. The continuing shift in the polarity of the international arena illuminates the need for deeper research into institutions, their responsiveness to change and to the demands of their member states.

Therefore, there is hope that African States will continue to work to reform the ICC from within, hold it accountable but not unduly criticise. As pointed out in the literature review,

international institutions seldom succeed without the support of the US. Thus, there may be merit to why, for its own survival rather than to punish African States and its persons, the ICC has not turned its lens on the more powerful states in its fight against anti-impunity.

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