

Rule of law or *realpolitik*? The role of the United Nations Security Council in the International Criminal Court processes in Africa

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Summary

*At its inception in 1998, the International Criminal Court was perceived as a permanent solution to the problem of lack of accountability for past crimes. Despite their initial excitement about the Court, the African Union and its state parties have made an about-turn and they now seek an African solution to Africa's problem of impunity. Central to this ICC-AU collision is the role played by the United Nations Security Council in the Court's processes. The UNSC has failed to apply the doctrines of referral and deferral equally. According to the AU, it has selectively exercised its referral powers with respect to African-based situations, yet heinous crimes committed in other areas go unnoticed. The UNSC has also been selective in the recognition and waiver of immunities for international crimes in favour of the interests of its permanent members. While it is a reality that international criminal justice operates in an environment instilled with politics, such politics seldom reflect Africa's interests. These factors have heavily compromised the legitimacy of UNSC's role in the Court processes. Thus, in its own legal framework, the AU asserts that its heads of state enjoy absolute immunity from prosecution. This position, however, is problematic for several reasons. For example, how does one reconcile a state's obligations under the Rome Statute, which abhors immunities, and that of the Malabo Protocol, which upholds immunities? Second, the Malabo Protocol lacks a clear distinction between immunity *ratione personae* and immunity *ratione materiae*. The Protocol also is not clear on the nature of its immunity *ratione materiae*. However, although the AU and its member states are vehemently opposed to impunity, it does little to combat the vice. It is in this context that the article critically*

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analyses the role of the UNSC in the processes of the ICC and how this has impacted on Africa's perception of the Court.

Key words: *ICC-AU collision; Africa and the ICC; UN Security Council; referral of cases to ICC; UN Security Council and recognition and waiver of immunities; immunity for international crimes*

1 Introduction

The adoption and entry into force of the Statute establishing the International Criminal Court (ICC) raised much hope, with some commentators describing it as a 'Grotian' moment for international law.¹ At its inception in 1998, the ICC was perceived as offering a permanent solution to the problem of accountability for past crimes. With a clearly-defined mandate embodied in a philosophy to shun impunity,² the ICC exercises jurisdiction over the most serious crimes of concern to the international community.³ Its objectives are, therefore, to prosecute those perpetrators bearing the greatest responsibility and to ensure reparation to victims.⁴ This may explain the initial excitement about the ICC among member states of the African Union (AU). The majority of African states took part in the negotiation rounds and the signature and ratification of the Rome Statute.⁵ In 2003, the Democratic Republic of the Congo (DRC) was the first state to trigger the ICC jurisdiction through its self-referral mechanism. Efforts by African states and the international community to rid the continent of impunity through 'self-referrals' and referrals by

1 CC Jalloh 'Africa and the International Criminal Court: Collision course or co-operation' (2011-2012) 34 *North Carolina Central Law Review* 203. Jalloh uses the term 'Grotian' to illustrate the significance of the ICC as an international institution. He argues that since the establishment of the UN in 1945, the ICC is the most significant international institution of the 20th century. According to the author, the term 'Grotian' finds its import in the founder of the international law, Hugo Grotius.

2 Rome Statute of the International Criminal Court, para 5, Preamble underscores that the philosophy underlying the Rome Statute is to put an end to impunity for the perpetrators of crimes of concern to the international community, thus contributing to their prevention.

3 Art 5 Rome Statute. These crimes include genocide, war crimes and crimes against humanity.

4 Art 75 Rome Statute.

5 Thirty-three African states are parties to the Rome Statute. In comparison to other continents, Africa has the largest membership to the Court; M du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' (2008) ISS Paper 173 on the general involvement by African states and regional blocks in the various processes leading to the adoption of the Rome Statute; M du Plessis 'The International Criminal Court that Africa wants' (2010) ISS Monograph 172.

the United Nations (UN) Security Council (UNSC) to the ICC ensued.⁶ This euphoria has come to naught. The enthusiasm about the ICC being the solution to impunity seems to have faded as numerous criticisms continue to be levelled against it amidst calls by the AU for an African solution to Africa's problem of impunity.⁷

The UNSC is one of the central players in international criminal justice whose political acumen compromises effective collaboration between Africa and the ICC. General criticism against the UNSC may be traced back to the aftermath of World War II. Packaged as 'victors' justice', the big five – China, the United States of America (US), France, Russia and Great Britain – formed themselves into permanent members of the UNSC, bestowing upon themselves the veto power. The undemocratic nature of the UNSC in relation to veto powers, coupled with the fact that chapter VII of the Charter of the United Nations (UN Charter) bestows the UNSC with primary jurisdiction over matters of peace and security, which makes binding decisions, has exposed the UNSC to criticism amidst calls for the reform of its membership.⁸

The UNSC has equally faced regional criticism from the AU and its member states for its imposing powers in numerous Court processes, mainly manifested through the exercise of its referral and deferral powers. In fact, the article argues that the UNSC is at the centre of the AU and ICC collision.⁹

In this regard, the article critically analyses the role of the UNSC in the processes of the ICC and how this has impacted on Africa's perception of the Court. After a brief introduction follows an analysis of the UNSC's powers of referral and deferral of situations and cases to the Court. This is followed by a critique of the UNSC's role in the question of immunity in relation to the Court. The article further evaluates Africa's position in this discourse. Finally, conclusions are drawn.

6 For a chronology of African cases referred to the ICC and their respective trigger mechanisms, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2008) 8 *African Human Rights Law Journal* 274; A Usacka 'Promises fulfilled? Some reflections on the International Criminal Court in its first decade' (2011) *Criminal Law Forum* 473-492; O Maunganidze & A Louw 'Mali: Implications of another African case as Mali self-refers to the ICC' AllAfrica.com 24 July 2012, as cited in M du Plessis 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (2012) *ISS Paper* 214 on Mali's most recent 'self-referral' and its implications.

7 African Centre for the Constructive Resolution of Disputes 'The report by the AU Panel of the Wise: Strengthening relations with similar regional mechanisms' (2013) 30 underscores the call for 'African solutions' (my emphasis).

8 AS Akpotor & PE Agbebaku 'The United Nations reforms and Nigeria's quest for permanent seat' (2010) 24 *Journal of Social Science* 51; S Tharoor 'Security Council reform: Past present and future' (2011) 24 *Carnegie Council for Ethics and Global Affairs* https://www.carnegiecouncil.org/publications/journal/25_4/essay/001.html /:pf_printable (accessed 8 July 2014).

9 Other commentators also share this view. D Tladi 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African Year Book on International Law* 29.

2 Referral and deferral powers of the United Nations Security Council

The UNSC and the ICC are independent entities.¹⁰ The UNSC is able to refer a situation to the ICC, thus prompting the Court to exercise its jurisdiction over international crimes.¹¹ In line with these powers, the UNSC has previously referred the situation in Sudan and Libya to the ICC. However, it is of concern that the UNSC has exercised its referral powers with respect to African-based situations, yet heinous crimes committed in other areas go unnoticed. In this regard, the case of Israel and Palestine is an illustration. Following Hamas's electoral win in 2006 and 2007, Israel and Palestine have been involved periodically in hostilities.¹² For example, on 27 December 2008, Israel launched the famous 'operation cast lead' against Palestine. During the three-week operation, Israel carried out 2 360 air strikes combined with ground assaults.¹³ This left 50 000 Palestinians displaced, 1 300 Palestinians dead and more than 5 300 wounded.¹⁴ Of these 34 per cent were children.¹⁵ In response, Hamas bombed Israel, killing three civilians and wounding more than 500 others, while nine Israeli soldiers were killed in Gaza.¹⁶ Again, on 7 July 2014 Israel launched 'operation protective edge' in which numerous atrocities were committed.¹⁷ It has generally been agreed that international crimes – within the jurisdiction of the ICC – were committed in Gaza.¹⁸ To date, these crimes do not seem to have persuaded the UNSC to refer these situations for possible investigation and prosecution.

Incidents in Guantanamo Bay parallel those over which the ICC jurisdiction has been or is being exercised in Africa. Despite the UN finding that Guantanamo Bay was characterised by massive violations of human rights and humanitarian law, coupled with the UN's call for

10 Art 2(1) of the Relationship Agreement between the UN and the ICC recognises the Court as an independent judicial body with international legal personality. Art 2(2) of this Agreement further calls upon the two institutions to respect each other's status and mandate.

11 Art 13(b) Rome Statute.

12 OTP-ICC 'Report on preliminary examination activities' (2016) 25 https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (accessed 22 March 2017).

13 Y Ronen 'ICC jurisdiction over acts committed in the Gaza strip: Article 12(3) of the ICC Statute and non-state entities' (2010) 8 *Journal of International Criminal Justice* 3.

14 S/PV.6077 (2009) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza%20SPV6077.pdf> (accessed 9 June 2014)

15 As above.

16 Ronen (n 13 above) 3-4.

17 OTP-ICC (n 12 above) 25.

18 Human Rights Council 'Human Rights in Palestine and other occupied Arab territories: Report of the United Nations fact-finding mission on the Gaza conflict' A/HRC/12/48 25 September 2009 paras 482-1335 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (accessed 9 June 2014).

its closure,¹⁹ Guantanamo Bay is still in operation with no condemnation or even preliminary investigations for crimes against humanity. Similarly, in 2014 ‘unthinkable atrocities’ were committed in Syria under the leadership of Bashar Hafez al-Assad, yet the UNSC remained unmoved.²⁰ More so, the merciless killing of civilians in Iraq by American forces and the controversial use of drones,²¹ which have been classified as possibly constituting war crimes,²² have seemingly not attracted any form of intervention from the UNSC. This fortifies the perception that the UNSC serves the interests of major powers. I am, however, aware that attempts by the UNSC in this regard are likely to face challenges that may render prosecution efforts futile. It cannot be ignored, for instance, that a probable veto by the US is most likely, given the reality that any such case directly implicates the US who is a member of the UNSC. It is, however, not sufficient that the UNSC has made no such initiatives. An initiative of this nature is most likely to assuage concerns of African states, the AU and like-minded scholars that the ICC is Afro-centric.

While crimes of similar magnitude are committed elsewhere on the globe, the UNSC has been quick to refer African-based situations to the ICC and is most hesitant to refer situations from other regions. As far as Africa is concerned, the UNSC has adopted a very liberal interpretation of article 12 of the Rome Statute. The UNSC’s referral of Libya and Sudan to the Court – both non-state parties to the Rome Statute – best exemplifies this.²³ Legally, this is a sound step. Article 25 of the UN Charter recognises the binding nature of UNSC decisions on member states. The UNSC’s decisions on referral and

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- 19 Commission on Human Rights ‘Report on the situation of detainees at Guantanamo Bay’ E/CN.4/2006/120 27 February 2006, parts II, III & V. These atrocities were characterised by extreme interrogation techniques, the conditions of detention, the use of excessive violence, and the transfer of prisoners to countries that pose a serious risk of torture, violating the basic human right to be free from torture. Centre for Constitutional Rights ‘Report on torture and cruel, inhuman and degrading treatment of prisoners at Guantanamo Bay, Cuba’ (2006) 14-29 <http://ccrjustice.org/files/Report/ReportOnTorture.pdf> (accessed 29 March 2017).
- 20 Amnesty International ‘Syria war: Unthinkable atrocities documented in report on Aleppo’ <https://www.theguardian.com/world/2015/may/05/syria-forces-war-crime-barrel-bombs-aleppo-amnesty-report> (accessed 22 March 2017); BBC ‘UN implicates Bashar al-Assad in Syria war crimes’ *BBC News* 2 December 2013 <http://www.bbc.com/news/world-middle-east-25189834> (accessed 22 March 2017).
- 21 R Thakur ‘International criminal justice: At the vortex of power, norms and a shifting global order’ in C Samford & R Thakur (eds) *Institutional supports for the international rule of law* (2014) 43-44.
- 22 P Alston ‘Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions’ A/HRC/14/24/Add.6 (2010) paras 43 & 72. The UN Special Rapporteur, Philip Alston, argues that the use of drones may constitute war crimes.
- 23 United Nations Security Council Resolution 1593, S/RES/1593, 31 March 2005 – referring Sudan to the ICC; United Nations Security Council Resolution 1970, S/RES/1970, 26 February 2011 – referring Libya to the ICC.

deferral are made in terms of Chapter VII of the UN Charter. Thus, such referrals do not necessarily require state consent.²⁴ Nonetheless, genuine questions such as why this should only be exercised in Africa must be tackled. Despite the imminent possibility of a veto, the UNSC ought to have made attempts to refer the Gaza situation much earlier, or it could as well refer incidences in Guantanamo Bay. I am aware of the complex questions arising from UNSC's referrals to the ICC.²⁵ First, given the political dynamics of the UNSC, such referrals are likely to be 'nothing more than point scoring'.²⁶ This is because of the high probability of such a resolution failing to pass. Second, although such referrals are motivated by the need to end bloodshed, the Darfur referral was incapable of having this effect.²⁷ Nonetheless, the failure to equally apply the doctrine of referral compromises the legitimacy of the UNSC's role in the Court's processes.

The Rome Statute allows the UNSC not only to refer cases to the ICC²⁸ in which international crimes have been committed, but also to defer cases from investigations or prosecution by the ICC.²⁹

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

According to Nsereko, even though the wording is couched as a 'request', in reality this is a command to the Court to defer its jurisdiction.³⁰ Similarly, while the deferral is initially limited to 12 months, the UNSC has the power under article 16 of the Rome Statute to subsequently renew it on similar conditions. This, however, may be indefinite since the Rome Statute does not seem to impose any time limitations on such renewals, implying that the UNSC has the absolute power to obstruct any probable prosecution that may not be in their interest.

24 As member states to the UN Charter, it can be argued that Sudan and Libya are bound by their international obligations emanating from the Charter, specifically under art 39 which allows the UNSC to 'determine the existence of the any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'; and art 25 according to which UN members 'agree to accept and carry out the decisions of the Security Council'. It can thus be argued that the UNSC acts within its mandate by referring cases to the ICC as a way of restoring or maintaining international peace or security.

25 D Tladi 'ICC and UNSC: Point scoring and the cemetery of good intentions' *ISS Today* 10 October 2014 <https://issafrica.org/iss-today/icc-and-unscc-point-scoring-and-the-cemetery-of-good-intentions> (accessed 6 June 2017).

26 As above.

27 As above.

28 Art 13(b) Rome Statute.

29 Art 16 Rome Statute (my emphasis).

30 DN Nsereko 'Triggering the jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Law Journal* 268.

Connivance within the UNSC on how to maintain control over the Court seems to have begun much earlier during the drafting of the Rome Statute. It is worth noting that article 23(3) of the draft Rome Statute (drafted by the International Law Commission (ILC) provided:³¹

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

This draft, which was most preferred by the 'big five',³² essentially forbids the ICC from prosecuting any case arising from a situation that the UNSC was dealing with under Chapter VII of the UN Charter unless the UNSC so decided. Effectively, the UNSC had become the ICC's gatekeeper.³³ Through this provision the US, in particular, wanted to have effective control of all ICC prosecutions.³⁴ It would, therefore, have the ability to block any unfavourable prosecutions, especially those relating to its nationals.³⁵ The draft of the International Law Commission (ILC) made it possible to bar the Court's jurisdiction from certain situations, especially where the interests of the 'big five' were at stake. Middle power and developing countries found this provision an encroachment on judicial independence.³⁶ Although this particular provision was done away with, the Rome Statute in article 16 continues to bestow deferral powers upon the UNSC. A deferral would effectively have similar consequences as was the initial intention – to keep the ICC at bay where the UNSC was dealing with a situation. It may be argued that the UNSC, eventually, indirectly managed to retain the ILC draft provisions intended to bar the Court from situations seized by the UNSC under chapter VII of the UN Charter. In this case, the only difference is that there has to be a deferral.

The AU has seriously lamented the UNSC's discriminatory approach in the implementation of this power. For example, the AU has

31 *Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court*, Extract from the Yearbook of the International Law Commission, 1994 UN Doc A/49/10 27 http://legal.un.org/ilc/documentation/english/A_49_10.pdf (accessed 5 June 2014).

32 CC Jalloh et al 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 16.

33 WA Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (2004) 15 *European Journal of International Law* 701 715.

34 As above.

35 As above.

36 P Kirsch & T Holmes 'Developments in International criminal law: The Rome conference on the International Criminal Court: The negotiating process' (1999) 93 *American Journal of International Law* 2.

previously sought to have the UNSC defer the indictment of the Sudanese President as well as the Kenyan cases.³⁷ South Africa and Libya also jointly proposed the inclusion of a deferral of the ICC proceedings against Al Bashir in the resolution renewing the mandate of the African Union/United Nations Hybrid Operation in Darfur (UNAMID). The United Kingdom, the US and France opposed a deferral. The US threatened to veto a deferral, forcing the adoption of a compromised Resolution 1828 in which the UNSC took note of the AU's request for a deferral and their intentions to further consider the issue.³⁸ Kenya subsequently sought a UNSC deferral of its cases under article 16. In January 2011, the AU endorsed this request. The UNSC then engaged Kenya in a dialogue on 18 March 2011 and later in an informal discussion on 8 April 2011.³⁹ The subsequent inaction by the UNSC in these matters prompted the AU to express its displeasure.⁴⁰ As a result, the AU declared its non-co-operation with the ICC in so far as the arrest and surrender of Al Bashir were concerned.⁴¹ This further prompted the AU to recommend an amendment to article 16 of the Rome Statute to allow the General Assembly of the UN (UNGA) to exercise the power to defer cases where the UNSC had failed to do so within six months.⁴² The basis of this proposal was the UN General Assembly Resolution 377A(V), the 'Uniting for peace resolution'. In August 1950, the Union of Soviet Socialist Republics (USSR) vetoed a US draft resolution condemning North Korea's continued defiance of the UN. This prompted the US to persuade the UNGA to 'claim for itself subsidiary responsibility with regard to international peace and security'⁴³ in line with article 14 of the UN Charter, which allows it

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- 37 Ext/Assembly/AU/Dec.1 (2003) 3 'Decision on Africa's relationship with the International Criminal Court' Extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia. It is instructive to note that the Court has since terminated the case against Uhuru Muigai Kenyatta, the current President of Kenya, for lack of sufficient evidence to prosecute the case. *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11.
- 38 Resolution 1828 (2008), adopted by the Security Council at its 5947th meeting, on 31 July 2008, para 9.
- 39 L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' (2012) 9 *Friedrich Ebert Stiftung* <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 19 June 2017).
- 40 Assembly of the African Union 13th ordinary session 1-3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec 243-267 (XIII) Rev.1 Assembly/AU/Decl.1- 5(XIII), Assembly/AU/Dec.245(XIII), Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) Doc Assembly/AU/13(XIII) 1.
- 41 As above. This position was reiterated by the heads of state of the AU in its 5th summit in Kampala. See Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/10(XV), 15th ordinary session of the AU Assembly, Kampala, Uganda, 25-27 July 2010.
- 42 AU ministerial meeting on 6 November 2009, prior to the 8th Assembly of State Parties in The Hague; Jalloh et al (n 32 above) 9.
- 43 C Tomuschat 'Uniting for peace' United Nations audiovisual library of international law.

discretion to 'recommend measures for peaceful adjustment of any situation'.⁴⁴

Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain and restore international peace and security.

The International Court of Justice (ICJ) has upheld the validity of this resolution. In its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, the ICJ confirmed that the UNGA could properly be seized of a matter in case of inaction on the part of UNSC.⁴⁵ Thus, both UNGA and UNSC can deal in parallel with the same matter concerning the maintenance of international peace and security.⁴⁶ The AU's suggested proposal was, therefore, not off the mark but well-grounded in international law and practice.

This suggestion, however, raised numerous genuine legal concerns. The first is the import of article 16 of the Rome Statute. In reality, the crimes under the Rome Statute are similar to and can be subject to the UNSC's mandatory powers under Chapter VII of the Charter of the United Nations. In this regard, the US ambassador to the Rome conference underscored the need to guard against conflicts of interest.⁴⁷

The Council's mandatory chapter VII powers will be absolutely essential to the workings of the Court – not only for enforcement but also to ensure the true universality of its jurisdiction and powers. From the point of view not only of law but of vital policy, the Court must operate in coordination – and not in conflict – with the Security Council and its role and powers under the UN Charter.

This implies that if the UNSC is seized of a matter under chapter VII – conducting an investigation to determine whether it constitutes a threat to international peace – then the Office of the Prosecutor (OTP) must refrain from conducting any investigations in the matter where the UNSC requests otherwise. This further explains the import of article 23(3) of the draft Rome Statute. The spirit of the draftsmen seemed to guard against a conflict of interest between the ICC and

44 UNGA Resolution 377 A, Part A.

45 ICJ Reports, Advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004 3 paras 13-42.

46 As above.

47 B Richardson 'Statement in the plenary session of the UN Diplomatic conference of plenipotentiaries on the establishment of an international criminal court' 19 June 1998 in J van der Vyver 'International human rights: American exceptionalism: Human rights, international criminal justice and national self-righteousness' (2001) 50 *Emory Law Journal* 798-799.

the UNSC where the UNSC was dealing with a situation. In both the Darfur and Libyan cases, although the AU sought the UNSC to defer the situations, the UNSC was not seized of these situations. In fact, it was the UNSC that referred the two situations to the Court. It would have been ridiculous for the UNSC to seek a deferral of situations it was not dealing with, as there was no conflict of interest as envisaged under article 16.

More so, an African expert study group has asked whether the proposed change under article 16 fits well with the powers bestowed on the UNGA under the UN Charter or whether it introduces a conflict that will yet again necessitate an amendment of the UN Charter, since an amendment under the Rome Statute cannot purport to amend the UN Charter.⁴⁸ Alternatively, it may also be asked whether the Rome Statute can be amended in a way that conflicts with the UN Charter.

Some scholars have observed that the UNGA cannot make such a decision since, first, under the UN Charter, unlike the UNSC, it has no mandate to make binding decisions. In the case of the Rome Statute, it would only make sense if such a decision to defer was binding on the Court.⁴⁹ More so, the request for a deferral should be made when the situation in question is a threat to peace and security, in which case only the UNSC has a mandate to make such a determination.⁵⁰

Since the UN Charter and the Rome Statute are two independent legal regimes, it has been argued that nothing bars the Rome Statute from providing the UNGA with the power to make binding decisions in relation to the deferral of cases.⁵¹ Conversely, the UNSC cannot, in theory, exercise its powers under the UN Charter to make binding decisions to the ICC unless it has been expressly provided for under the Rome Statute, which article 16 does.⁵² Similarly, the fact that the UN Charter bestows upon the UNSC the primary mandate over peace and security would not bar the UNGA from deferring cases, unless the UNSC is dealing with the matter. Besides, even though the maintenance of peace and security is a power vested primarily in the UNSC, the UN Charter also envisages some limited and secondary circumstances under which the UNGA can have such powers.⁵³ However, this stance has been dismissed by some international scholars who argue that it would be unsuitable to change the roles of the UNGA and UNSC in relation to the ICC.⁵⁴

48 As above.

49 D Akande et al 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' ISS Africa position paper.

50 As above.

51 As above.

52 As above.

53 Arts 10, 12 & 14 of the UN Charter.

54 E de Wet 'Africa and international justice: Participant or target. Speaking notes on the AU's proposed amendment of art 16 of the Rome Statute' at the conference on the Al Bashir warrant, 26 April 2010, cited in Akande et al (n 49 above) 15.

Interestingly, while it has become impossible for the UNSC to defer ongoing African cases, perhaps on sound legal grounds, it has been easy for the UNSC to pre-emptorily defer cases relating to any 'would-be' American national indictees of the ICC. This should, however, not be read as the US's demonstrated ability or willingness to conduct prosecutions at national level. The following discussion dismisses this kind of thinking.

On 14 December 1995, the leaders of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia signed a peace agreement.⁵⁵ This prompted the UNSC to adopt several resolutions aimed at settling the conflict in the region.⁵⁶ Key among these includes Resolution 1035 of 1995 establishing the United Nations International Police Task Force and a UN Civilian Office in Bosnia and Herzegovina (UN Mission in Bosnia and Herzegovina).⁵⁷ Resolution 1422 of 12 July 2002 is also remarkable in the sense that it was adopted immediately after the coming into force of the Rome Statute on 1 July 2002. This implied that members of the forces committing international crimes were likely to face prosecution before the ICC. The US sought to have its nationals exempted from prosecution at the ICC.⁵⁸ Initially this proposal was overwhelmingly opposed by states.⁵⁹ The US, however, threatened to veto the resolution and also to withhold its funding of the UN peace-keeping operations if its text was not adopted.⁶⁰ On 30 June 2002, the US actualised its first threat and vetoed the draft resolution following the UNSC's refusal to adopt its text.⁶¹ In fear of another US veto, the UNSC accepted the compromised version incorporating the US text that deferred all ICC investigations under article 16, to be automatically extended for 12 months, without limit. In its Resolution 1422 of 12 July 2002, the UNSC essentially gave immunity from prosecution to US nationals for their future acts and omissions amounting to international crimes in the UN Missions in Bosnia and Herzegovina. The resolution reads:

- 1 *Requests*, consistent with the provisions of article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the

55 Bosnia and Herzegovina – UNMIBH Mandate, <http://www.un.org/en/peace-keeping/missions/past/unmibh/mandate.html> (accessed 8 June 2017).

56 <http://www.un.org/Depts/DPKO/Missions/unmibh/unmibh Drs.htm> (accessed 8 June 2017).

57 Para 2, Resolution 1035 of 1995 adopted on 21 December 1995, S/RES/1035 (1995).

58 Amnesty International 'The International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' <https://www.google.com/#q=America+excludes+its+national+from+ICC+prosecution,+the+security+council+resolution+1422+of+12+July+2002> (accessed 8 June 2017).

59 Amnesty International 'The International criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' 8.

60 Amnesty International (n 59 above) 15.

61 Amnesty International 16.

Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

- 2 Expresses the intention to renew the request in paragraph 1 under the same conditions each July for further 12-month periods as may be necessary.

A deferral under article 16 was not applicable in this context. The ICC had not yet been seized of the matter. Despite heavy criticism and complaints against the discriminatory nature of this resolution,⁶² it was renewed in 2003.⁶³ Again, a similar resolution was adopted the same year with regard to the Security Council's Multinational Stabilisation force for Liberia.⁶⁴ UNSC Resolution 1970 which, *inter alia*, referred Libya to the ICC has attracted similar criticism, as Libya is not a member state of the Rome Statute.

While this seems a *prima facie* embrace of impunity, some scholars have adopted a much more liberal interpretation. They argue, for example, that the only problem with this provision is procedural – that the exemption is only limited to the jurisdiction of the ICC and not of other national states.⁶⁵ As such, it is argued that this resolution was well-founded under the UN Charter, as it does not rubberstamp impunity since it is not concerned with the question as to whether or not to have the individuals exempted from prosecution, but relates to where they should be prosecuted.⁶⁶

Such an interpretation is not only faulty but also ignores reality. Intuiting that this resolution allows the subjection of US nationals to national justice processes is pure fallacy. In fact, acting in anger over the rejection of the American proposal that a clause be inserted in the Rome Statute proclaiming that the Court will not have jurisdiction over American nationals, the US enacted domestic legislation called the American Service Members Protection Act 2002 (also known as the 'Hague Invasion Act'). According to this law, the US sought to cushion its nationals and citizens of 'allied countries' from the ICC and related national prosecutions including, where necessary, the use of

62 Security Council 4772 Meeting 12 June 2003, S/PV.4772, <http://www.iccnw.org/documents/UNSCpv1422debate12June03.pdf> (accessed 5 June 2014); N Jain 'A separate law for peacekeepers: The clash between the Security Council and the International Criminal Court' (2005) 16 *European Journal of International Law*, Jalloh et al (n 32 above) 18-20; Jallo et al (n 49 above) 8.

63 S/RES/1487 (2003).

64 S/RES/1497 (2003).

65 S Zappala 'The reaction of the US to the entry into force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and article 98 Agreements' (2003) 1 *Journal of International Criminal Justice* 116 121-122.

66 As above.

military force and other penal sanctions to member states of the Rome Statute who may attempt to carry out such prosecutions.⁶⁷ State parties to the North Atlantic Treaty organisation (NATO), however, are exempt from these penal sanctions.⁶⁸ Any objective interpretation of this type of legislation only works to fortify the concept of US *exceptionalism* from the ICC's processes. Of greater concern is the fact that neither the Court nor the UNSC condemned these acts. Notably, however, the Obama administration re-engaged the ICC albeit in a very cautious manner. During this era, the secretary of State, Hillary Clinton, publicly regretted that the US was not a member state to the Rome Statute,⁶⁹ despite the fact that they neither ratified the Statute nor did they reject the Bush administration's 'unsigned' of the Statute. In November 2009, for the first time, the US participated in the annual meeting of ICC member states, the Assembly of State Parties.⁷⁰ It subsequently sent a delegation to the ICC review conference in Kampala in 2010. It remains to be seen how subsequent administrations will take over this perceived 'non-party co-operation'.

Although the UN Charter affirms equality among all nations 'large and small',⁷¹ therefore abhorring any form of distinction, these unequal standards were further made explicit in the Darfur case. While seeking criminal accountability for atrocities committed in Darfur, UNSC Resolution 1593 referred the situation in Sudan to the ICC. Interestingly, while accountability seemed most imminent for Sudan, the same resolution sought to shield US nationals from similar accountability,⁷² perhaps in a bid to prevent a US veto. It is important to note that the existence of domestic prosecution of US nationals was neither a factor that was considered during the adoption of this resolution, nor did the US representative support the Court's jurisdiction over nationals of non-member states to the Rome

67 Coalition for the International Criminal Court 'US Congress passes Anti-ICC "Hague Invasion Act"' <http://www.iccnw.org/documents/07.26.02ASPAtHruCongress.pdf> (accessed 4 June 2014).

68 As above.

69 JB Bellinger 'A global court quandary for the president' *Global Policy Forum* 10 August 2009 <https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html> (accessed 9 June 2017).

70 B Evans-Pritchard & S Jennings 'US takes cautious steps towards ICC' *Global Policy Forum* 10 August 2009 <https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html> (accessed 9 June 2017).

71 Art 2(1) UN Charter.

72 S/PV.5158 (2005) <http://www.amicc.org/docs/SC%20Meeting%20Record%201593.pdf> (accessed 9 June 2014). During this meeting, the US ambassador to the UNSC, Mrs Patterson, states: 'The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute ... The language providing protection for the United States and other contributing states is precedent-setting, as it clearly acknowledges the concerns of states not party to the Rome Statute and recognizes that persons from those states should not be vulnerable to investigation or prosecution by the ICC, absent consent by those states or a referral by the Security Council.'

Statute.⁷³ If anything, the US abstained from voting on the resolution. Paragraph 6 of this resolution reads as follows:⁷⁴

[N]ationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to operations in Sudan ... unless such exclusive jurisdiction has been expressly waived by that contributing state.

The inclusion of this clause was profoundly criticised as discrimination on the basis of nationality.⁷⁵ Yet, the ICC accepted the Darfur referral without condemning its exclusiveness. More so, the Court has not made any pronouncements regarding the discriminative nature of these resolutions. Indeed, the UNSC's powers of referral and deferral have significantly affected the credibility and legitimacy of the Court.⁷⁶

The centrality of the interest of the 'big five' and, in particular, the US in the role of the UNSC is also manifesting with reference to the crime of aggression. Although it took until 2010 to get a definition of the crime incorporated in the Rome Statute, the ILC draft code already bestowed upon the UNSC the primary power to determine acts of aggression before any complaint relating to the crime is lodged under the Statute.⁷⁷ This reassured the US of its control of the Court in relation to the crime of aggression.⁷⁸ A similar provision was later incorporated under sub-articles 15*bis* (6) & (7) of the Rome Statute. Ultimately, the 'big five' have the monopoly to determine which acts amount to aggression before any probable investigations or prosecutions of the crime.

The UNSC is the entrusted ultimate custodian of political decisions on referral and deferral, especially regarding non-member states. Its permanent members – with veto powers – are not members to the Rome Statute. Its power of referral has only been exercised with regard to two African countries. How then does one strike a balance between the delicate reality of trusting UNSC custodianship of such powers and Africa's concern that the ICC is a stooge for the West? Perhaps what will ultimately mollify Africa's fears is 'a strong,

73 <http://www.un.org/press/en/2005/sc8351.doc.htm> (accessed 7 April 2016).

74 S/RES/1593 (2005), Resolution 1593 (2005) <http://www.icc-cpi.int/nr/rdonlyres/85feb1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf> (accessed 9 June 2014).

75 G Sluiter 'Obtaining co-operation from Sudan – Where is the law?' (2008) 6 *Journal of International Criminal Justice* 880-881.

76 L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' March 2012 <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 6 June 2017)

77 Art 23(2) Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court (n 14 above).

78 Schabas (n 16 above) 717-718.

independent and successful ICC'⁷⁹ devoid of 'cynical exercise of authority by great powers'.⁸⁰

3 Intercourse between the role of the United Nations Security Council and immunities for international crimes

Although the UNSC has the mandate to refer a situation to the Court, the decision on who to investigate or prosecute lies entirely with the Office of the Prosecutor (OTP). Yet, the UNSC plays a central role in the recognition and waiver of immunity for senior state officers, where the OTP chooses to proceed with investigations or prosecutions against such individuals. Thus, the role of the UNSC in relation to immunity for international crimes is well understood when analysed through its referral of situations in non-member states to the Rome Statute to the ICC, and the extent to which member states not expressly mentioned in the resolution are required to co-operate with the prosecuting mechanism, especially in light of the immunity enjoyed by non-member states.

Tladi agrees that 'the duty to co-operate under the ICC Statute cannot deprive non-state parties of their rights in respect of immunities under customary international law'.⁸¹ It follows that member states to the Rome Statute will be acting inconsistently with their obligations under international law if they were to arrest and surrender individuals from non-member states without the consent of such a state. However, it is my opinion that while high-ranking state officials of non-member states to the Rome Statute – but who are UN member states – enjoy immunity, the UNSC arguably has powers to waive this immunity by exercising its mandate under Chapter VII of the UN Charter.⁸² The Charter permits the UNSC to take all necessary measures to restore international peace and security where it determines a threat.⁸³ This malleable discretion includes referring officials from member states to the UN Charter to the ICC even if their

79 Jalloh et al (n 32 above) 12.

80 W Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 333.

81 D Tladi 'Immunities (article 46Abis)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 212.

82 The ICC has made similar observations. *The Prosecutor v Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir), ICC-02/05-01/09, 13 June 2015 para 6; *The Prosecutor v Al Bashir*, (Decision on the co-operation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09 9 April 2014 para 29.

83 Arts 39, 41 & 42 UN Charter.

respective states are not parties to the Rome Statute.⁸⁴ Essentially, the UNSC, in the spirit of preserving peace and security, can waive personal immunities applicable to state officials in both international and national courts.

Some scholars have argued that the wording of a resolution by the UNSC affects the extent to which states are bound, in the sense that the obligation to co-operate in such a case will be limited only to those states expressly mentioned, or directed to do so by the UNSC's resolution, thus relieving other member states of this obligation.⁸⁵ Resolution 1593, for example, reads as follows:⁸⁶

The Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.

Resolution 1593 seems to obligate only 'Sudan and all other parties to the conflict in Darfur' to co-operate with the Court, while it merely urges all other states and organisations to co-operate fully. Gaeta faults the requirement of this provision calling upon member states to the Rome Statute to co-operate in the arrest and surrender of Al Bashir. Gaeta distinguishes the question of 'whether the rules of customary international law bar the exercise of criminal jurisdiction by an international criminal court' from the question of 'whether states can lawfully disregard those rules in order to comply with a request for arrest and surrender'.⁸⁷ Gaeta argues that even though personal immunities are not applicable in international criminal courts, this does not also imply their inapplicability in the arrest and surrender by national authorities of other states.⁸⁸ Asking other states to arrest and surrender Al Bashir is tantamount to asking states to disregard the personal immunities he enjoys under customary international law.⁸⁹ As head of state, Al Bashir is protected by personal immunities, and calling upon member states to the Rome Statute to arrest and surrender him is a violation of customary international law principles.⁹⁰ Since the contracting parties consented to derogate from

84 Art 13(b) of the Rome Statute allows the ICC to exercise its jurisdiction on a referral by the Security Council under Chapter VII of the Charter of the United Nations.

85 D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 341.

86 Art 2 Security Council, Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting, 31 March 2005, S/RES/1593 (2005).

87 P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 325.

88 As above.

89 As above.

90 Gaeta (n 87 above) 319.

the rules of immunities, Gaeta contends that this derogation should only apply among the contracting parties.⁹¹

According to Gaeta, the ICC required a waiver by the government of Sudan of the immunities enjoyed by President Al Bashir before requesting his arrest and surrender.⁹² Indeed, article 98(1) of the Rome Statute provides:

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

A literal interpretation of this clause leads to Gaeta's conclusion. However, he fails to appreciate the role of the UNSC in the ICC processes. It is not true that a referral by the UNSC should have the effect of turning the ICC into a subsidiary of the UNSC for it to vest a request of the ICC with the binding force of a Security Council decision under Chapter VII of the UN Charter. Since a referral by the UNSC is anchored in Chapter VII of the UN Charter, it has the twin effect stated earlier, namely, waiving personal immunities and also subjecting the referred non-member states to the Rome Statute to its provisions as though they were contracting states. As such, the exception under article 98(1) does not apply.⁹³ Tladi, however, dismisses this reasoning and argues that the UNSC can only change the rules of international law expressly and not impliedly.⁹⁴ I find this reasoning flawed for two reasons. First, it was not possible for the UNSC to address the issue of immunity in Resolution 1593. This resolution merely referred the situation in Darfur to the Court and the OTP later made the decision to attack Al Bashir. Second, if the UNSC had not impliedly waived Al Bashir's immunity, then it would have heeded the AU's call to defer Al Bashir's prosecution on the basis of his immunities. The failure by the ICC Pre-trial Chamber to clarify the authority of the UNSC in the Court processes, particularly regarding the waiver of immunities, fortifies initial fears that the UNSC is the ICC's gatekeeper. For example, while denying Al Bashir immunities, the ICC has on different occasions contradicted its own legal reasoning. In its decision to seek the co-operation of Malawi and Chad, Pre-trial Chamber I applied the doctrine of implicit waiver of immunities by the UNSC.⁹⁵ Subsequently, Pre-Trial Chamber II

91 As above.

92 Gaeta (n 87 above) 329.

93 D Tladi 'The duty on South Africa to arrest and surrender President Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1041; Akande (n 85 above) 43.

94 Tladi (n 93 above) 1043.

95 Decision pursuant to art 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of Omar Al Bashir, paras 36-43; Decision pursuant to art 87(7) of the Rome Statute on the refusal of the Republic of Chad

rejected this approach while seeking the co-operation of the DRC. The Court upheld the applicability of article 98(1) of the Rome Statute and insisted on the removal of immunity as a prerequisite.⁹⁶ Yet, when seeking South Africa's co-operation, the Court revisited the waiver of immunities theory.⁹⁷ The forthcoming decision of Pre-Trial Chamber II on South Africa's non-compliance in the arrest and surrender of Al Bashir and the validity of its referral to the UNGA or UNSC is likely to provide much-needed guidance in this regard.

Tladi further argues that the exception under article 98(1) applies to a state and diplomat, but Al Bashir is neither a state nor a diplomat.⁹⁸ This interpretation is grossly defective. The notion of state immunity refers to functional immunity as this type of immunity accrues to the state and not the individual.⁹⁹ A state is barred from exercising its jurisdiction 'over foreign officials for acts carried out in the conduct of their official duties. Such acts are attributable to the state rather than the individual.'¹⁰⁰ Individual liability, therefore, does not arise.¹⁰¹ The individual is a mere agent of his or her state.¹⁰² Al Bashir falls perfectly under this category of immunities. Tladi, however, agrees that if the UNSC places an obligation on all states, which is the case with Resolution 1593, to arrest and surrender, then article 103 of the UN Charter 'trumps over other obligations'.¹⁰³

The UN Charter binds all its members 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'.¹⁰⁴ All member states to the UN, therefore, are bound by UNSC decisions. More so, a resolution adopted by the UNSC is subsidiary in rank to the UN Charter. Thus:¹⁰⁵

to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmed Al Bashir, para 13.

96 *The Prosecutor v Al Bashir* (Decision on the Democratic Republic of Congo regarding Omar al-Bashir's arrest and surrender to the Court) paras 26 & 27.

97 n 82 above, para 6.

98 As above.

99 *R v Bow Street Stipendiary Magistrate & Others, Ex Parte Pinochet (No 1)*; D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 638.

100 G Boas *Public international law: Contemporary principles and perspectives* (2012) 272.

101 A Cassese 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium* case' (2002) 13 *European Journal of International Law* 853 862; A Day 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v Congo* wrong' (2004) 22 *Berkeley Journal of International Law* 489.

102 DS Koller 'Immunities of foreign ministers: Paragraph 61 of the *Yerodia* judgment as it pertains to the Security Council and the International Criminal Court' (2004) 20 *American University International Law Review* 14. This becomes very important in order to protect a diplomat from having diplomatic functions lead to criminal liability.

103 Tladi (n 93 above) 1045.

104 Art 25 Charter of the United Nations.

105 Art 103 UN Charter.

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Agreed that if there is a conflict between the Rome Statute requirement of a waiver under article 98(1) and the UNSC decision emanating under Chapter VII of the UN Charter, the latter obligation prevails in accordance with article 103 of the UN Charter. Although Gaeta dismisses this kind of reasoning, his proposal is less convincing. It cannot be true that article 103 'involves the absence of any responsibility for the breach of bilateral or multilateral obligations existing outside the Charter'.¹⁰⁶ Thus, not only will state officials of non-parties to the Rome Statute be bound by the Rome Statute provisions on immunity as though they were parties, but all member states to the UN Charter will also be obliged to co-operate with the Court in their arrest and surrender. The requirement to co-operate is nonetheless also binding on all member states to the UN by virtue of articles 25 and 103 of the UN Charter. This explains the ICC's finding that both the DRC and South Africa were bound by this resolution¹⁰⁷ despite the fact that the resolution is not expressly directed at them.

UNSC decisions on referral and deferral are political in nature. The silence of the UN Charter and the Rome Statute on whether or not the UNSC can rely on immunity as the basis of a deferral does not imply that it cannot be a ground for consideration by the UNSC. Besides, although article 27 of the Rome Statute is explicit that immunity shall not be a ground for non-prosecution, it can be argued that a deferral does not bar future prosecution. It can be adopted merely as a temporary reprieve for as long as an individual occupies the relevant office. Thus, the UNSC's adoption of a deferral is neither equivalent to authorising the commission of international crimes nor a measure that results in the furtherance of these crimes.¹⁰⁸ If anything, the UNSC does not adopt a deferral without adequate measures to ensure the non-recurrence of these crimes. This thinking is not at all hypothetical. When seeking a deferral of the Kenyan cases before the ICC, the letter signed by AU member states broadly relied on the argument that such prosecution undermined 'the ongoing efforts in the promotion of peace, national healing and reconciliation'.¹⁰⁹

106 Gaeta (n 87 above) 327.

107 *The Prosecutor v Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir), ICC-02/05-01/09, 13 June 2015 paras 6-8; *The Prosecutor v Al Bashir* (Decision on the co-operation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09 9 April 2014 paras 28-31.

108 *Bosnia and Herzegovina v Yugoslavia* (Serbia and Montenegro), separate opinion (Judge *ad hoc* Hersch Lauterpacht), Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJReports (1993) 407 440 para 100.

109 S/2013/624, Enclosure 2, 4 http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/624 (accessed 29 July 2015).

Although the UNSC failed to adopt this resolution, the members who abstained neither explained their reasons as being the absolute bar of immunity under article 27, nor did those who voted in favour explain their reasons as a recognition of immunity.¹¹⁰ Until the UNSC makes such clarification, it may be argued that there is a likelihood that the UNSC can adopt the deferral of a case from the ICC on the basis that an accused person enjoys immunity until the end of their rule.

Ultimately, through the exercise of its referral and deferral powers, the UNSC can alter the order of immunity as a custom applicable to non-member states to the Rome Statute. Thus, although Sudan and Libya are members to the UN Charter, neither is party to the Rome Statute. However, Sudan and Libya are still bound by the Rome Statute as though they were members by virtue of UNSC Resolutions 1593 and 1970 adopted under Chapter VII of the UN Charter referring the case to the Court. Similarly, all member states to the UN not expressly mentioned in such resolution are required to co-operate with the prosecuting mechanism.

Notably, however, in the same way in which the Security Council has selectively bestowed immunity on the basis of article 16, it has also been criticised for its selectivity in waiving this immunity under Chapter VII of the UN Charter.

4 A critique of the African position

4.1 Africa's response to the United Nations Security Council's role and immunity for international crimes

Understandably, African states assert that their heads of state enjoy absolute immunity from prosecution. This has been asserted specifically with respect to attempts to prosecute Al Bashir and Uhuru Kenyatta of Kenya and, previously, Gaddafi. The AU has gone further and incorporated this position regarding heads of state immunity within the statute of the proposed African regional criminal court:¹¹¹

No charges shall be commenced or continued before the Court against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Africa seems to be on its way to developing a new norm on the issue of immunity for international crimes. However, the position adopted by the AU is problematic for several reasons. First, this provision assumes that the Malabo Protocol is the primary international treaty

¹¹⁰ Seven members to the UNSC voted in favour of the resolution while eight members abstained from voting. See Security Council Meeting coverage of 15 November 2013, <http://www.un.org/press/en/2013/sc11176.doc.htm> (accessed 29 July 2015).

¹¹¹ Art 46A*bis* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

on criminal law. What happens to African states that are likely to become parties to the Malabo Protocol and are also parties to the Rome Statute, which abhors any form of immunity, and the UN Charter? How does one reconcile a state's obligations under the different treaties?

Second, the Protocol does not distinguish clearly between immunity *ratione personae* and immunity *ratione materiae*, and is not clear on the nature of its immunity *ratione materiae*. Though vaguely phrased, I am convinced, along with Abraham, that this provision bestows personal immunity.¹¹² The wording 'during their tenure of office' implies personal immunity since this type of immunity attaches to the office and only exists during ones' tenure in office. Yet, the inclusion of 'other senior state officials based on their function' could naturally imply functional immunity. One could argue that the qualification on functional immunity is only applicable to senior state officers and not to all those officials listed earlier.

Another possible interpretation is that this provision applies to both types of immunities for all the listed state officials. However, this in itself is problematic. First, this provision can be taken as providing absolute personal immunity to a wide range of 'other senior state officials'. Given the nature of personal immunities, this implies that no senior AU state officer can be prosecuted for international crimes until such time as the official relinquishes power. Regarding immunities *ratione materiae*, the Protocol envisages the possibility of future prosecution after the officers involved leave office. The Protocol, however, does not seem to foresee the very real possibility that state officers who engage in the commission of international crimes may fail to relinquish power for fear of prosecution. Should such officers be allowed to continue with the atrocities until their tenure in office is over? What if they never leave office? Does this imply that the world should sit back and watch their citizens suffer? It is also not clear who is included under the phrase 'other senior state officials'. If all state officials enjoy absolute immunity *ratione personae*, for whom, then, is the chamber being created? What about the victims of serious violations? How does one reconcile these immunities with the duty to hold accountable the perpetrators of past crimes as an effective remedy to victims? In light of all these concerns, one needs no further analysis to see the probable confusion that is likely to hamper Africa in its fight against impunity, through this legal framework.

The Protocol, therefore, has rightfully raised eyebrows as some scholars refer to it as a rubber stamp to impunity.¹¹³ According to Abraham, for example, this amendment 'represents a major setback in the advance of international criminal justice; in fact, it can only be construed to be in the interest of those African leaders fearful of an

112 G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs Occasional Paper 209 (2015) 14.

113 Abraham (n 112 above) 15.

end to a culture of impunity'.¹¹⁴ Besides, Murungu observes that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.¹¹⁵ The effect of such a provision is that it not only denies justice to the victims but that it is also detrimental to the fight against impunity.¹¹⁶ It indicates retrogression in the war against impunity for international crimes. Seemingly, the need to recognise the immunity of heads of state and government and other state officials must have been a major drive in expanding the mandate of the African Court. It may also be argued that the reluctance to ratify the Malabo Protocol by African states is a possible indication that its adoption may have been a mere political threat and not an expression of genuine intention.

Even as the political elites within the AU insist on the recognition of immunity for state officials, some states, such as Botswana, have held differing opinions, especially where international crimes are alleged to have been committed.¹¹⁷ Yet, other African jurisdictions have adopted the contents of article 27 of the Rome Statute in their domestic legislation, thereby denying immunity to their own state officials for international crimes.¹¹⁸

For its part, the AU argues that the position adopted under the Malabo Protocol resonates with international customary law.¹¹⁹ Tladi faults the AU's reasoning on two grounds. First, he argues as follows:¹²⁰

The rationale for immunity of states and their officials, namely, the sovereign equality of states, does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states.

Tladi's argument is self-conflicting. Elsewhere in the article he argues that the practice of *ad hoc* tribunals is evidence of state practice in the denial of immunity for international crimes. When this position ceases to be palatable, he conveniently turns back and argues that the practice of international courts and tribunals cannot be deemed a

114 Abraham 14.

115 C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1063 1077.

116 JN Kariri 'Can the new African Court truly deliver justice for serious crimes?' *ISS Today* (2014) <http://www.issafrika.org> (accessed 10 March 2017).

117 M Kersten 'Backing the ICC: Why Botswana stands alone amongst the AU states' <http://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/> (accessed 10 March 2015); Voice of America 'Botswana supports International Criminal Court' <http://www.voanews.com/content/botswana-supports-international-criminal-court/1764960.html> (accessed 10 March 2015).

118 Art 50(2)(n) Constitution of Kenya 2010; sec 27(1) International Crimes Act of Kenya (2008); sec 4(2)(a) Implementation of the Rome Statute of the International Criminal Court Act of 27 of 2002 of South Africa; art 25(1) ICC Act of Uganda (2010); art 7 Burkina Faso, Loi 052-2009/AN of 3 December 2009.

119 Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1 October 2013 para 9.

120 Tladi (n 81 above) 212.

practice of the respective states since, though created by states, these courts and tribunals are not in themselves states. I nevertheless agree with Tladi that international institutions created by states are themselves independent of states in the sense that they are separate legal persons. However, the basis of negotiating international treaties establishing these courts is in itself reliant on the principle of the sovereign equality of states. Impliedly, states expect to be accorded a similar status under custom unless they expressly state otherwise in the negotiated legal instrument. This affirms the reasoning in the ICJ judgment that immunity *rationae materiae* is excluded through such an express provision contained in the establishing statutes of international criminal tribunals. In fact, the very lack of sovereign equality of states in the practice of the ICC is at the heart of African states' grievances.

Tladi is not alone. Gaeta has also previously argued that 'the very rationale for the rules of personal immunities is lacking when criminal jurisdiction is instead exercised by an international criminal court'.¹²¹ Supposing that Tladi and Gaeta are correct, does this imply that the exercise of international criminal justice has no impact whatsoever on the sovereign equality of states? Second, what about the need for consistency and certainty of legal norms in international criminal justice, especially in the fight against impunity? Akande has acknowledged the far-reaching consequences that the exercise of international criminal jurisdiction has for the sovereign equality of states and their international relations.¹²² It cannot be ignored that international criminal justice is fully dependent upon state co-operation in facilitating its investigations and prosecutions. Thus, divorcing national state practices and interstate doctrine of sovereign equality from the exercise of international criminal jurisdiction is tantamount to an artificial practice of international criminal jurisdiction.¹²³

Tladi further argues that 'while the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, extending this immunity to international courts and tribunals would require evidence of practice of states accepted as law to this effect', which state practice does not exist.¹²⁴ In this regard, Tladi refers to ICC decisions seeking to exclude international crimes from the application for immunities.¹²⁵ Although there may seem to be a trend of excluding immunity for international

121 Gaeta (n 87 above) 320.

122 D Akande 'International law immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 417.

123 P Wardle 'The survival of head of state immunity at the International Criminal Court' (2011) 18 *Australian International Law Journal* 183.

124 Tladi (n 81 above) 213.

125 Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Co-operation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011 para 23.

crimes, clearly this has been shrouded with inconsistency in the law of some key international treaties such as the Rome Statute. In fact, the fact that all the treaties establishing *ad hoc* tribunals had to expressly exclude immunity implies that failing to do so, immunity would have automatically attached under custom. The ICJ categorically observed that immunities as a custom would be exempt from application to international crimes where the establishing statute of an international criminal court expressly provided so.¹²⁶ Thus, contrary to Tladi's criticism, Africa's arguments cannot be entirely irrelevant. They are in fact squarely within the dictates of international custom.

In my opinion, African states are more interested in protecting the dignity of their state officials, especially heads of state, rather than combating for international crimes. Indeed, the AU has firmly reiterated its commitment to fighting impunity in the region as reflected in article 4(o) of the Constitutive Act of the AU.¹²⁷ Article 4 of the Constitutive Act underscores the principles of respect for human rights, the sanctity of life, the rejection of impunity and the need for member states to live in peace and security. In sum, these principles seek to protect civilian populations from violations of their human rights, particularly their right to life. In fact, where a government is persistently abusing these rights to the level of war crimes, crimes against humanity or genocide, articles 4(h) and (j) bestow upon the AU the right to intervene militarily in order to restore peace and security. Besides, the AU principle of non-indifference that translates into a traditional African saying that 'you do not fold your hands and just look on when your neighbour's house is on fire'¹²⁸ negates any tolerance for impunity. Therefore, it cannot be envisaged that the AU will sit back and watch its leaders commit these atrocities.

More so, the threats by African states to withdraw from the Rome Statute should not be interpreted as furthering impunity. Amidst its withdrawal from the Rome Statute, South Africa emphasised its commitment to the fight against impunity.¹²⁹ This implies that the acts of withdrawing or threats of withdrawal are not informed by the urge to embrace impunity. Rather, it is a statement confirming political and legal grievances against the ICC that remain unresolved. South Africa, Uganda and the DRC are some of the African states that

126 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3, (*Arrest Warrant case*) para 61.

127 Art 4(o) of the Constitutive Act of the AU provides that '[t]he Union shall function in accordance with the following principles ... respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities'. Paras 11-12 Preamble, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights; para 2 PSC/MIN/Comm(CXLII), Communiqué of the 142nd meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 21 July 2008.

128 B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 819-820.

129 Rome Statute of the ICC: South Africa: Withdrawal, <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf> (accessed 23 March 2017).

have loudly criticised the ICC, yet these are some of the states whose domestic practice demonstrates robust positive complementarity in prosecuting international crimes.¹³⁰ However, although the AU and its member states are vehemently opposed to impunity, it does little to combat the vice. A mere willingness to genuinely investigate and prosecute the perpetrators of these crimes at the national level automatically avoids an ICC process and is at the heart of the principle of complementarity. Yet, the AU has been protective of President Al Bashir of Sudan without any alternative mechanisms to hold him accountable for alleged war crimes, genocide and crimes against humanity,¹³¹ despite the existence of reasonable grounds to believe that he did commit these crimes.

I am, nevertheless, persuaded by scholars who persist in arguing the applicability of immunity as a norm of customary international law.¹³² However, I acknowledge that, unlike immunity *rationae personae* which is absolute, immunity *rationae materiae* can be ignored if the acts in question constitute international crimes or otherwise upon a waiver by the state concerned. This is because international crimes can never be deemed state functions. Yet, the Malabo Protocol is capable of multiple other interpretations of the notion of immunity. All these forms of interpretation have inherent limitations in so far as their effectiveness in the fight against impunity in the region is concerned. If one interprets the clause as according absolute personal immunity, this not only delays prosecution but, in some instances, there is also the possibility that those leaders who cling to power until their death may never be prosecuted. It is, therefore, not enough that the Protocol envisages the probability of future prosecution, once an officer is out of office. Again, such an approach is likely to be perceived as targeting opponents of the government. The AU, therefore, must reconsider its position on this clause. More so, in order to remove any obstacles to their accountability, African states should also adopt mechanisms that guarantee the removal from office of officials accused of international crimes to enable effective accountability measures to be taken against them, including possible prosecution.

Imposing criminal accountability through the prosecution of sitting heads of state has so far proven to be an act of futility. If the Sudanese and Kenyan experiences are anything to go by, such leaders will always frustrate prosecution efforts, either by exacerbating the volatile

130 OA Maunganidze & A du Plessis 'The ICC and the AU' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 72-76.

131 'ICC Case information sheet: Omar Hassan Ahmed Al Bashir' <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf> (accessed 9 June 2017).

132 S Papillon 'Has the United Nations Security Council implicitly removed El Bashir's immunity?' (2010) 10 *International Criminal Law Review* 275-288.

conflicts or by refusing to co-operate with the prosecuting mechanisms, thereby compromising any effective prosecution.¹³³ Given that international criminal mechanisms do not have a police force to effect their arrest warrants and must depend on individual states to arrest suspects, enforcing such warrants becomes nearly impossible. Any legal framework on prosecuting international crimes must be sensitive to these realities in order to avoid the current situation where the law seemingly exists in vain. As to whether introducing absolute immunities for sitting heads of state and all other state officials is the correct way for Africa to go remains the most controversial debate in international criminal law.

3.2 The ICC as a neo-colonial conspiracy

Arguably, the bias in the UNSC's role in the Court processes is a major reason informing the African perception of the ICC as a conduit of Western imperialism.¹³⁴ Both academic scholars and politicians share this philosophical rather than legal criticism against the ICC. Odero describes the ICC's operations in Africa as a 'neo-colonial conspiracy'.¹³⁵ He perceives the ICC as a continuation of the colonial philosophy by powerful states through the use of a criminal mechanism as a tool for controlling and dominating less powerful states.¹³⁶ Paul Kagame – the Rwandan President – shares this viewpoint. He has previously dismissed the ICC stating that 'Rwanda cannot be part of that colonialism, slavery and imperialism'.¹³⁷ Similarly, referring to the ICC arrest warrant against Al Bashir, the then AU Chairperson, Muammar Gaddafi, termed it an attempt by the West to re-colonise their former colonies.¹³⁸ The Organisation of Islamic

133 *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 (Notice of withdrawal of the charges against Uhuru Muigai Kenyatta) 5 December 2014. In the Kenyan case, the prosecutor of the ICC was forced to withdraw her case due to lack of sufficient evidence resulting from frustration of her witnesses. See http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx (accessed 4 August 2015) These can be compared with the historic indictment of Slobadan Milosevic by the ICTY while he was still the head of state of the Federal Republic of Yugoslavia, and that of Charles Taylor while he was still the President of Liberia. In both cases, the trials commenced after they had stepped down from power.

134 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity' Report of the AU Panel of the Wise (2013) 46 http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf (accessed 15 April 2016); Tladi (n 9 above) 29–61, citing Mr Abdul Sabdrat, Minister of Justice of the Republic of Sudan, at the Meeting of Ministers of Justice and Attorneys-General of the African Union on Legal Matters 3-4 November 2008.

135 S Odero 'Politics of international criminal justice: The ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator theory' in C Murungu C & J Biegon (eds) *Prosecuting international crimes in Africa* (2011).

136 As above.

137 Du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' (n 5 above) 1.

138 'Sudan leader in Qatar for summit' *BBC News* London 29 March 2009 <http://news.bbc.co.uk/2/hi/7970892.stm>, cited in K Ambos 'Expanding the focus of the

Conference (OIC) has also described Al Bashir's indictment as being 'selective and of double standards'.¹³⁹

Perhaps the fear of African countries that view international criminal law as a 'neo-colonial conspiracy' is well founded. According to Third World Approaches to International Law (TWAIL), international law as a concept provides the organic kernel through which 'dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised'.¹⁴⁰ Mahmood Mamdani, a respected African scholar who perceives the ICC as the 'new humanitarian order', echoes this.¹⁴¹ In the language of Mamdani's new humanitarian order, citizens are not bearers of their full range of rights.¹⁴² Rather, they are 'passive beneficiaries of an external responsibility to protect'¹⁴³ – recipients of charity. Accordingly, '[t]he emphasis on big powers as the protectors of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers of justice internationally'.¹⁴⁴ This renders the ICC a Western court designed to prosecute African crimes. He further points out the colonial powers as the genesis of this era, when they claimed 'to protect the vulnerable groups'.¹⁴⁵ Certainly, TWAIL scholars argue that the expansion of colonialism was essentially the key not only to the development of international law, but also accorded the character of universality of international law.¹⁴⁶

While Africa suffered under colonialism, scholars on TWAIL further claim that international law was at the time used 'to justify and legitimise the suppression of Third World peoples and was therefore instrumental in the shaping of the power and subordination presently inherent in the colonial order'.¹⁴⁷ In this historical context, one is compelled to listen to Africa's search for a more legitimate way out. In

African Criminal Court' in WA Schabas et al (eds) *The Ashgate research companion to international criminal law: Critical perspectives* (2013) 505.

- 139 'Final Communiqué of the Expanded Meeting of the Executive Committee of the OIC at the level of Permanent Representatives on the ICC's Moves Targeting HE The President of Sudan' New York 27 March 2009 para 3, as cited in Tladi (n 9 above) 62.
- 140 BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 15.
- 141 M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' *Pambazuka News* 17 September 2008 <http://www.pambazuka.org/en/category/features/50568> (accessed 20 June 2017).
- 142 As above.
- 143 As above.
- 144 As above.
- 145 As above.
- 146 A Anghie & BS Chimni 'Third World approaches to international law and individual responsibility in conflicts' (2003) 2 *Chinese Journal of International Law* 84-89; CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 496.
- 147 Anghie and Chimni (n 146 above) 88; Odero (n 135 above) 155; Jalloh (n 146 above) 496.

fact, impunity is not part of African values, as often reiterated by the AU and its inter-governmental bodies as well as individual African heads of state.¹⁴⁸

Advocates of the ICC as a neo-colonial conspiracy would, therefore, readily argue that the ICC – just like colonialism – is alienating Africa from its values while reinforcing Western values;¹⁴⁹ that Western values foster inequality where people from certain regions seem to be the prime targets of the Court; and that individualism is at the centre of ICC operations, which values are alien to Africa.¹⁵⁰ Accordingly, skin colour and material wealth seem to be central determinants of ICC indictees.¹⁵¹ On the contrary, African approaches to criminal justice underscore equality and togetherness as some of their traditional principles. This has prompted Africa to search for a self-executing solution within the sphere of international criminal justice. Eberichi further observes that the AU's resistance to the ICC is partly influenced by a general feeling that the ICC is being controlled by states that fan the rampant conflicts on the African continent by supplying weapons.¹⁵² As such, the international community that is complicit to conflicts in Africa lacks the moral authority to enforce accountability for international crimes resulting from such conflicts.¹⁵³

These differences in value systems, which have led to indictments against African heads of state, are key factors, according to some commentators, informing the adoption of the Malabo Protocol.¹⁵⁴ Perhaps this is an initiative geared towards a self-reliant Africa in prosecuting international crimes. Arguably, therefore, once this form of independence eventually is achieved, perhaps through the entry into force of the Malabo Protocol, it may appease the predominant fear among Africans that Africa is an experimental farm for the ICC,¹⁵⁵ or that the ICC is 'Europe's Guantanamo Bay' for Africans.¹⁵⁶ Yet it cannot be ignored that most post-independence African leaders have

148 AU Peace and Security Council PSC/MIN/Comm(CXLII) 'Communiqué of the 142nd meeting of the PSC Council' para 2 http://www.iccnw.org/documents/AU_142-communication-eng.pdf (accessed 30 May 2014).

149 T Major & TM Mulvihill 'Julius Nyerere (1922-1999), an African philosopher, re-visions teacher education to escape colonialism' (2009) 3 *Journal of Marxism and Interdisciplinary Inquiry* 15.

150 As above.

151 Major & Mulvihill (n 149 above). Similar arguments have been fronted against colonialism.

152 I Eberichi 'Armed conflicts in Africa and Western complicity: A disincentive for African Union's co-operation with the ICC' (2009) 3 *African Journal of Legal Studies* 55; O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: The way forward' (2015) 23 *African Journal of International and Comparative Law* 99.

153 As above.

154 Art 9 Malabo Protocol; C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067-1088.

155 Jalloh (n 1 above) 203.

156 D Hoile *The International Criminal Court, Europe's Guantamo Bay?* (2010).

ruled with high levels of autocracy and, in most cases, contributed to the commission of heinous violations of human rights.

5 Conclusion

The article set out to critically analyse the role of the UNSC in ICC processes. Other than laying down Africa's argument that the ICC lacks independence from the West, the article has further argued that the UNSC continues to be manipulated by the West to act in their interests. While it is a reality that international criminal justice operates in an environment instilled with politics, such politics seldom reflect Africa's interests. A judge of the ICC has since acknowledged that even though politics and state interests present a delicate balance with the rule of law, these continue to be an important obstacle to the effective operations of the Court.¹⁵⁷

Further, the article has demonstrated the way in which Africa perceives the role of the UNSC in the ICC as a continued perpetuation of neo-colonialism; a tool that the West clings to in order to ensure continuous control of their former colonies. According to African voices, this is the reason why the UNSC is eager to refer to the ICC African situations unlike other regions of the globe that equally engage in similar or worst atrocities. Indeed, the role of the UNSC in the ICC remains problematic. Nonetheless, prosecuting African heads of state or perpetrators of international crimes ought not to be one of these problems. The AU and its member states can do much within their national and regional frameworks to ensure effective accountability for international crimes.

157 HP Kaul 'The International Criminal Court: Current challenges and perspectives' (2007) 6 *Washington University Global Studies Law Review* 575.