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Ghost of the Malabo Protocol: Political conditions influencing African countries' refusals to extradite International Criminal Court suspects

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Summary: *For strategic constituencies, the Rome Statute of the International Criminal Court facilitates the pursuit of international criminal justice's instrumental goals. Such impacts on a post-conflict country include restoring peace and security. Significantly, the International Criminal Court is constrained to pursue international criminal justice while respecting complementarity. A rational approach, therefore, measures the degree to which the ICC must not merely satisfy deontological retributive goals posited by the Assembly of State Parties, but also appease domestic publics. In March 2023, arising from Russia invading Ukraine, the ICC issued arrest warrants against President Vladimir Putin and in 2024 against another two Russians. State parties to the Rome Statute are obligated to extradite them to face atrocity charges. Consequently, to avoid detention, Putin avoided attending a South African BRICS summit, since no safe haven would be available there. Comparing South African and Kenyan extradition laws, this article evaluates the international obligation to extradite or prosecute atrocity*

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fugitives. It evaluates political influences on the international mutual legal assistance obligation reminiscent of the Malabo Protocol's immunity provision. Unless fugitives voluntarily surrender for trial, the ICC triggers arrest warrants in requested countries. Yet previously, despite warrants against then Sudanese President Al-Bashir, some states, including Kenya and South Africa, hosted him. By refusing to extradite him, both declined cooperation. Nonetheless, his further travel was inhibited by looming apprehension prompted by civil society-initiated court injunctions. Refusals to surrender fugitive suspects indicates ambivalence towards the justice cascade. Ineffective regional instruments on surrendering fugitives include the 1994 ECOWAS, 2002 SADC and 2009 IGAD extradition treaties. A new alternative is the 2023 UN Hague Convention on International Cooperation in the Investigation and Prosecution of International Crimes. Ratifications which would facilitate combating atrocity crimes.

Key words: *Al-Bashir; complementarity; cooperation; International Criminal Court; justice cascade; mutual legal assistance; Putin; Rome Statute*

1 Introduction

Late twentieth century genocides in Rwanda and Bosnia precipitated the Rome Statute's passage, establishing the International Criminal Court (ICC).[1] The ICC provides a complementary institution for prosecuting individuals found most responsible for grave crimes of international concern.[2] Paradoxically, it simultaneously operates in opposition to state interests, while stubbornly protecting state interests.[3] Member states submit to the Court's jurisdiction in respect of genocide, crimes against humanity, war crimes and the crime of aggression.[4] Jurisdictionally, accused persons may be held accountable either when they are citizens of a state party, or commit

1 T Murithi 'The African Union and the International Criminal Court: An embattled relationship?' Policy Brief 10 Institute for Justice and Reconciliation (2013), http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20 Miruthi.pdf (accessed 11 June 2024); see also D Bosco *Rough justice: The International Criminal Court in a world of power politics* (2014).

2 Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (accessed 11 June 2024) (Rome Statute).

3 M Drumbl 'Collective responsibility and post-conflict justice' in T Isaacs & R Vernon (eds) *Accountability for collective wrongdoing* (2011) 63.

4 The ICC gained jurisdiction over the crime of aggression on 17 July 2018, when the amendment defining the crime was adopted and its prosecutorial powers were only extended to parties that ratified the amendment.

an offence on a state party's territory.[5] Moreover, not only may the United Nations (UN) Security Council refer cases to the Office of the Prosecutor (OTP), but equally, states that are not a party to the Rome Statute may recognise the ICC's jurisdiction.[6] Pivoted on the complementarity principle,[7] the ICC supplements national legal systems. Whenever domestic authorities are unable or unwilling to genuinely investigate or prosecute, cases become admissible before the ICC.[8] Correspondingly, state parties are committed to fully cooperate with the Court's responses to atrocity crimes. This cooperation entails surrendering fugitives of international justice, together with supporting materials upon the ICC's request.[9] Clearly, lacking police of its own creates dependence on full cooperation from state parties to either enforce justice within their territories or to extradite suspects.

Yet, in 2009 and 2010, despite the ICC issuing arrest warrants against then Sudanese President Omar Al-Bashir, Kenya and South Africa, among other African countries, hosted him. They alleged the ICC's bias as a hegemonic tool of Western powers, targeting only the continent.[10] Thus, the intensity of international pressures in criminal trials of heads of state varies from minimal to strong. For example, the international community not only created judicial tribunals to prosecute Charles Taylor and Slobodan Milošević, but also pressured the harbouring states for their surrender.[11] Changes in international and domestic willingness to hold former heads of state accountable motivates a justice-power nexus. This is evidenced by domestic judges reversing amnesties accorded for atrocities perpetrated by leaders.[12] Similarly, political considerations impact on states' decisions and willingness to cooperate with or defy the ICC. Yet, judicial independence and impartiality requirements motivated the ICC's establishment. Indeed, the Rome Statute's ratification continues to provide a reference point in eligibility for developmental aid.[13] This article revisits the politicised decisions by Kenya and South Africa in the *Al-Bashir* case, and their implications for the Court's effectiveness.

5 Arts 6-9 Rome Statute (n 2).
6 Rome Statute (n 2) Part 2 on jurisdiction.
7 Art 18(2) Rome Statute.
8 RS Lee *Introduction in the International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (2002).
9 Arts 86-89 Rome Statute.
10 C Fehl *Growing up rough: The changing politics of justice at the International Criminal Court* PRIF Report 127, 2014.
11 EL Lutz & C Reiger 'Introduction' in EL Lutz & C Reiger (eds) *Prosecuting heads of state* (2009) 21.
12 EL Lutz & C Reiger 'Conclusion' in Lutz & Reiger (n 11) 275.
13 Lutz & Reiger (n 12) 276.

Are there indicators to facilitate a prediction on whether African countries are likely to extradite atrocity suspects in future?

In 2023 the ICC issued arrest warrants against Russian President Vladimir Putin and its Commissioner for Children's Rights, Maria Alekseyevna Lvova-Belova.[14] Global public opinion has since split into two ideologies aligning with North Atlantic Treaty Organisation (NATO) or Brazil, Russia, India, China, South Africa (BRICS) countries.[15] Based on the possibilities of different legal realities, this article evaluates the political considerations, potentially compromising the ICC's effectiveness in enforcing justice and accountability against Putin. The objective is to determine the extent to which political considerations encompassing hegemony, geopolitical interests and sovereignty affect state willingness to cooperate with the ICC in delivering justice.

Theoretically, effective courts apply the law 'objectively, dispassionately, and impartially'.[16] From a legal perspective, evaluating a court's effectiveness entails assessing the extent to which its judgments reflect legal merits using methods of statutory interpretation or following binding and persuasive precedents. However, deploying such interpretive methods to measure court performance is problematic for three reasons. First, because judges themselves are unlikely to disclose their own ideological or strategic considerations that may drive their decision making.[17] The ICC's legitimacy is increasingly important, since a majority of ICC judges have recently been accused of 'perverting the concept of jurisdiction for the sake of advancing their own political interests'.[18] In lieu of the relevant empirical evidence, most scholars use certain proxy indicators such as judicial independence, judgment-compliance or institutional design[19] to infer effectiveness. We have elsewhere shown some limitations of these proxies.[20] Here, I go beyond the

14 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova in ICC' 17 March 2023, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 4 June 2024).

15 LA Júnior & GD Branco 'BRICS countries and the Russia-Ukraine conflict' (2022) 17 *Rev Carta Inter, Belo Horizonte* 1-25.

16 CJ Carrubba & MJ Gabel *International courts and the performance of international agreements: A general theory with evidence from the European Union* (2005) 87, citing JA Segal & HJ Spaeth *The Supreme Court and the attitudinal model revisited* (2002) 33.

17 As above.

18 R Morav 'The ICC's dangerous decision and its possible implication for Ethiopia' *The Reporter* 20 February 2021, https://www.thereporterethiopia.com/article/iccs-dangerous-decision-and-its-possible-implication-ethiopia (accessed 20 October 2023).

19 Carrubba & Gabel (n 16) 14-15.

20 L Juma & CA Khamala 'A dynamic approach to assess the International Criminal Court's performance in the Kenya cases' (2017) 25 *Lesotho Law Journal* 39-73.

goal-based approach,[21] to measure the extent to which the ICC achieves its prescribed goals as an evaluation of its effectiveness. A second problem arises because all courts, more so international courts, have multiple goals, some ultimate, others idiosyncratic.[22] Invariably, each stakeholder places weight on aspects that advance its own interests. Consequently, stakeholder choices of methods and, ultimately, assessments of the ICC's effectiveness vary. Comparisons can be made of perspectives ranging from international criminal law scholars (process orientation) to the Assembly of States Parties (ASP) (the mandate providers), as well as third parties, particularly key stakeholders from within situation countries (the strategic constituencies). That goal-based interpretation facilitates a refined assessment of the ICC's effectiveness in the Kenya cases.

The article proceeds as follows: Contextual problems stated in part 2 arise from the tension between the process-oriented perspective proffered by international criminal law scholars who emphasise the ICC's *intrinsic* goal of vindicating the rule of law, on the one hand, and the mandate providers' perspective, evinced by the ASP's *retributivist* goal of punishing mass atrocity perpetrators, on the other.[23] As part 3 illustrates, the article's purpose is to develop a normative standard against which to assess the social impact of the ICC's decisions. Its findings should evaluate the extent to which the ICC's intervention balances its *intrinsic*, *retributive* and *instrumental* goals. The priority varies depending on the perspective of a particular stakeholder evaluating the situation. Part 4 works within Carrubba and Gabel's rational theory hypotheses to fill a gap in the manner in which political dynamics influence states' non-cooperation with the ICC. Part 5 claims that in the *Al-Bashir* case, the Kenyan and South African executives' respective assessments of the ICC's performance reflect international criminal law's *instrumental* goals. Invariably, non-cooperation is rationalised by the discordant goals pursued by different stakeholders: international criminal law scholars (*intrinsic*), the ASP (*retributive*) and domestic executive authorities (*instrumentalist*). The point is that international criminal procedure recognises *instrumentalist* goals as prioritised by certain domestic authorities. Part 6 considers the groundswell that gave rise to the 2014 Protocol on Amendments to the Protocol on the Statute of the African Charter Court of Justice and Human Rights (Malabo Protocol) and concludes that a dynamic interpretation of the ICC's performance in the *Al-Bashir* case facilitates a refined understanding of various

21 Y Shany *Assessing the effectiveness of international courts* (2014).
22 As above.
23 JD Ohlin 'Meta-theory of international criminal procedure: Vindicating the rule of law' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77-120.

conflicting positions of political constituencies in African countries in response to the ICC's Putin warrants. The diplomatic decision by the Russian President to skip the August 2023 BRICS Nations Summit at Johannesburg preempted another (non)-cooperation decision by his South African counterpart, the dilemma of whether to belligerently disobey orders from the domestic judiciary to detain him during his planned visitation.

2 Problems with relying on legal merits to evaluate international courts

Has international criminal justice been attained with respect to Kenya's post-2007 conflicts? To most liberals, justice implies neutrality.[24] Therefore, as between victims and suspects, justice is construed from the perspective of disinterested third parties, who should respond by applying the rules to the facts. However, contexts, conditions and contingencies influence legal decisions. For example, rejecting the Nuremberg criminalisation of the Holocaust, Mamdani recommends 'rethinking of the political community for all survivors – victims, perpetrators, bystanders, beneficiaries – based on common residence and the commitment to build a common future without the permanent political identities of settler and native'.[25]

Lutz and Sikkink demonstrated a broad norms shift in Latin America in the latter quarter of the twentieth century, indicating increased regional consensus in prosecuting human rights abusers.[26] However, considering the role of international engagement and intervention in decision making about the trial of leaders, Lutz and Reiger acknowledge that although such judicial proceedings are entirely different processes from power plays dressed up in legal garments, nevertheless their didactic function invites accusations of being show trials. Consequently, they suggest that it is premature to declare that the justice cascade 'is today a consolidated global phenomenon'.[27] To what extent is the normative human rights framework 'thinning' at the international level? Within prosecutorial processes, Carrubba and Gabel observe how three factors intervene, interfere with or influence the legal merits of international trials. First,

24 Carrubba & Gabel (n 16); see also T Krevor 'Unveiling (and veiling) politics in international criminal trials' in C Schwöbel (ed) *Critical approaches to international criminal law: An introduction* (2015) 123.
25 M Mamdani *Neither settler nor native: The making and unmaking of permanent minorities* (2020).
26 EL Lutz & K Sikkink 'The justice cascade: The evolution and impact of foreign human rights trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1-34.
27 Lutz & Reiger (n 12) 277.

like domestic judiciaries, so also international judges are tempted to decide cases according to their personal or political ideologies, rather than according to established legal principles. Yet, their written judgments rarely expressly disclose such political biases. Hence, it is necessary for scholars to deduce the influence or impact which extra-judicial factors, actors or institutions may have on formal judgments.[28] Second, domestic states are expected to voluntarily adopt and implement decisions by international courts. This is because the international legal system lacks any hierarchic sovereign to enforce its decisions. Moreover, countries may refuse to comply with international judgments, thus rendering them ineffective. Third, the mandate providers may threaten to override unpopular judgments by either budgetary constraints or even by amending the treaty that creates the international court and establishes obligations that bind state parties.[29]

Consequently, Lutz and Reiger posit two hypotheses motivating governmental prosecution of former leaders for committing atrocities under their watch. First, transforming from authoritarian to democratic rule inspires progressive leaders to try senior political or military leaders of the previous repressive regime. Judicial condemnation of totalitarian predecessors may convince domestic constituencies that they are making a 'clean break' from the past. Second, international factors, such as indicating the state's worthiness to join the community of democratic nations, may attract foreign aid from Western countries that impose adherence to human rights, the rule of law, democracy and accountability as conditionalities for donor funding.[30]

3 Justification for invoking the International Criminal Court's complementarity jurisdiction

The international criminal law regime prescribes norms, including an 'anti-impunity norm'.[31] Among 123 other countries, Kenya endorsed this norm upon signature of the Rome Statute in 2002 and by ratifying it in 2005.[32] Nonetheless, in 2007 to 2008 mass atrocities were

28 Carrubba & Gabel (n 16).
29 A Schwarz 'The legacy of the Kenyatta case: Trials *in absentia* at the International Criminal Court and their compatibility with human rights' (2016) 16 *African Human Rights Law Journal* 99-116.
30 Lutz & Reiger (n 12) 287-288.
31 Ohlin (n 23).
32 Coalition for the International Criminal Court, http://www.iccnow.org/?mod=kenya (accessed 6 November 2023).

perpetrated in the wake of post-election violence.[33] The subsequent failure by domestic authorities to prosecute 'the most serious crimes of concern to the international community as a whole' triggered the ICC's intervention.[34] However, in 2014 the cases against President Uhuru Kenyatta and ambassador Francis Muthaura were withdrawn, before they could even commence. In September 2016 the *Kenyatta* case was eventually referred to the ASP to determine whether Kenya should be sanctioned for non-cooperation with the OTP.[35] In April 2016, due to 'intolerable interference and political meddling', the cases against then Deputy President William Ruto and journalist Joshua Arap Sang were discontinued.[36] However, until November 2023 when the OTP formally closed all investigations, it remained open to bringing fresh charges in future.[37] Meanwhile, Kenya not only applied for review of the OTP's investigations in both cases, but also threatened to withdraw from the Rome Statute altogether.[38] As a result, the Kenya cases severely tested the principles of both complementarity and cooperation. Contemporaneously, two African countries, The Gambia and Burundi, withdrew in 2016, followed by Russia that same year and the Philippines in 2019. Others, including South Africa and Namibia, contemplated exit.[39] Therefore, the ICC's critics contend that its hegemonic performance has resulted in decreased public confidence in its ability to achieve its *retributive* goals. Nonetheless, proponents praise its counter

33 The Waki Report *Commission of inquiry into post-election violence* (2008), http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 9 November 2023).

34 Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May, 2011 *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Situation in the Republic of Kenya, https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF (accessed 9 November 2023).

35 ICC Trial Chamber V(B) refers non-cooperation of the Kenyan government to the Assembly of States Parties to the Rome Statute, *The Prosecutor v Uhuru Muigai Kenyatta*, https://www.icc-cpi.int/pages/item.aspx?name=pr1239 (accessed 6 November 2023).

36 Decision on defence applications for judgments of acquittal, 5 April 2016 Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red (accessed 9 November 2023).

37 'ICC formally closes cases against President Ruto, Joshua Arap Sang' *Capital News* 28 November 2023, https://www.capitalfm.co.ke/news/2023/11/icc-formally-closes-cases-against-president-ruto-joshua-arap-sang/ (accessed 19 February 2024).

38 J Wanga 'Kenya issues threat to pull out of ICC' *Daily Nation* 22 November 2015, http://www.nation.co.ke/news/politics/Kenya-issues-threat-to-pull-out-of-ICC/1064-2966586-iok8k7z/index.html (accessed 6 November 2023).

39 'Russia withdraws from International Criminal Court treaty' *BBC* 16 November 2016, https://www.bbc.com/news/world-europe-38005282; see also 'Gambia joins South Africa and Burundi in exodus from International Criminal Court' *The Independent* 26 October 2016, http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html (accessed 6 November 2023).

hegemonic performance which procure *instrumentalist* goals.[40] Amid ambivalence, this article argues that it is opportune to revisit and rethink the ICC's philosophical foundations, offences or procedures in relation to political factors influencing state (non)-cooperation.

Membership in multilateral agreements signals a state's commitment to their international values.[41] However, the unfolding neo-authoritarian, geo-political global developments suggest that some state parties no longer believe that membership of the Rome Statute is in their interests. Have such states ceased to abhor the perpetration of gross human rights violations? Do they condone impunity? In their defence, African states that were contemplating withdrawal complained against the ICC's selectivity of intervening in situations – considering that since its inception, by 2017, nine out of its ten investigations were opened in Africa. Georgia was the exception. That was so, notwithstanding that similar or worse human rights violations were arguably perpetrated in Syria, Palestine or even by Western countries – such as the United States (US) and the United Kingdom (UK). Clearly, controversy shrouds the ICC's non-adherence to the liberal ideal adjudicative standard of 'neutrality, objectivity and impartiality'. The Kenya cases gained particular notoriety for significantly polarising legal and political opinions, domestically as well as globally. Therefore, it would be interesting and useful to apply more refined criteria to evaluate the ICC's performance in the Kenya cases. From the outset, an understanding the Court's unique jurisdictional basis is useful.

The ICC's structural assets comprise its inputs which are factors of production for manufacturing its decisions. There are three categories of inputs: first, the judges themselves, whose competence is ensured by appointment criteria and secure tenure of office;[42] second, accused persons, victims and witnesses as well as interested third parties who file *amicus* briefs;[43] they supply raw materials in the form of testimonies, exhibits and documents; third, the procedural rules that govern trial operations.[44] Substantive rules circumscribe its jurisdictional scope. For example, the ICC can only entertain incidents pertaining to the specific subject matter that falls within its defined crimes (*ratione materiae*).[45] It cannot consider atrocities

40 F Jeßberger, L Steinl & K Mehta *International criminal law: A counter-hegemonic project?* (2023).
41 AJ Bellamy *Massacres and morality: Mass atrocities in an age of civilian immunity* (2012).
42 Art 40 Rome Statute (n 2).
43 Rule 103(1) of the Rules of Procedure and Evidence, an instrument for the application of the Rome Statute (n 2).
44 Rome Statute (n 2).
45 Arts 12(2)(a) & (b) Rome Statute.

pre-dating the 2002 Statute's entry into force (*ratione temporis*).[46] Furthermore, it must limit itself to the situation in the country in which the incidents transpired (*ratione loci*).[47] Finally, it must target persons for the most serious crimes of international concern (*ratione personae*).[48] Moreover, its admissibility rules require that domestic authorities must be either unwilling or unable to genuinely investigate or prosecute (complementarity).[49] This article is justified by the need to comprehend the manner in which political dynamics affect state cooperation with the ICC. The aim is to uncover the patterns of political interference or influence that impacts a state's willingness to cooperate with the Court, compromising its pursuit of impartial justice. Such examination is crucial for identifying challenges revolving around the states' and ICC's interaction, and proposing reforms that might be effective in addressing the challenges and contributing to the broader discussion on the interplay of politics and international criminal justice.

4 Rational theory for assessing performance

Various authors have endorsed using a dynamic interpretive approach to assess the effectiveness of international courts.[50] Carrubba and Gabel propose a formal or rational approach for judicial impact assessment based on game theory. As realists,[51] they construe the international community as being anarchic. In a repeat prisoner's dilemma, members of multilateral treaties refrain from defaulting on their commitments in order to avoid punishment by other members who may retaliate in future.[52] Thus, in furtherance of mutual long-term interests, all member countries are motivated to cooperate to further *collective action*.[53] Defecting from commitments may satisfy short-term benefits at the cost of acquiring a bad reputation that encourages other states to retaliate in due course. Instead, to achieve mutual self-interest, states not only form a common regulatory regime, but also create a court.[54] In order to avoid punishment, it is optimum for states to keep their promises. Thus, courts are institutions that aid norm clarification and assist state parties to abide by their agreed obligations. Two metaphors are illustrative.

46 Art 11 Rome Statute.
47 Art 26 Rome Statute.
48 Arts 6-8 Rome Statute.
49 Art 17 Rome Statute.
50 A Grabert *A dynamic interpretation in international criminal law: Striking a balance between stability and change* (2014); see also G Letsas *A theory of interpretation of the European Convention on Human Rights* (2007).
51 Carrubba & Gabel (n 16) 5.
52 Carrubba & Gabel (n 16) 7.
53 Carrubba & Gabel (n 16) 27.
54 Carrubba & Gabel (n 16) 29-31.

One, litigants who lodge and defend cases, as well as third parties who may file *amicus* briefs, make the Court act as a *fire alarm*. Two, the Court is a venue for making arguments. Therefore, it is also an *information clearinghouse*.[55]

In Carrubba and Gabel's model, two hypotheses are instructive. First, the 'political sensitivity' hypothesis.[56] They argue that the Court is likely to be influenced by the preponderance of third party states which file *amicus* briefs, whether on behalf of defendants or plaintiffs (prosecutors). Applying this criterion to the context of the ICC Kenya cases, it is relevant that between 2011 and 2015, Kenya undertook protracted international political campaigns: one before the UN, seeking deferral of the cases by one year; another before the African Union (AU), seeking referral of the ICC cases for determination and disposal by Kenyan courts.[57] According to the 'political sensitivity' hypothesis, obtaining such political support from third parties would necessarily influence the ICC's decision-making processes. Eventually, in the *Ruto and Sang* case, the Trial Chamber majority decried the Kenyan government's 'political meddling and intolerable interference'.[58] Consequently, the judges terminated it midway due to the negatively politicised atmosphere that intimidated and discouraged witnesses from testifying. Due to such new intervening factors, scores of prosecution witnesses recanted their prior-recorded statements, while others were declared hostile or disappeared altogether.

Second, Carrubba and Gabel's 'conditional effectiveness'[59] hypothesis argues that states are likely to comply with international court judgments, if a preponderance of third party briefs are filed recommending judgment compliance, rather than defection. In the Kenya cases, the state itself was not a party to the proceedings. Nonetheless, it lobbied numerous third party states to file 'interested party' briefs.[60] It even instigated a mass withdrawal resolution by the AU. That show of third party solidarity for the Kenyan defendants suggested that a significant number of states favoured Kenya's non-compliance with the ICC's orders. Consequently, the ICC's decision

55 Carrubba & Gabel (n 16) 31-32.
56 Carrubba & Gabel (n 16) 125.
57 Muriithi (n 1).
58 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-1 (accessed 9 November 2023) (*Ruto*).
59 Carrubba & Gabel (n 16) 47, 156.
60 *The Prosecutor v Uhuru Muigai Kenyatta*, Request for leave to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/09-02/11, 29 April 2015, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04206.PDF (accessed 28 October 2024) (*Kenyatta*).

discontinuing the *Ruto and Sang* case may be seen as having been effectively conditioned by these political protests. On its part, Kenya continued to formally advance legal claims asserting compliance with its Rome Statute obligations. For example, it insisted that the OTP's demands for certain information in Kenyatta's case[61] were vague and, therefore, amounted to outsourcing its investigative functions.[62] Nonetheless, the Kenyatta Trial Chamber referred Kenya's alleged non-compliance to the ASP at its November 2017 General Meeting.

Carrubba and Gabel distinguish *direct* from *indirect* judgment-compliance factors. *Direct* influence flows from a ruling by an international court that is automatically binding and therefore obeyed by domestic courts.[63] Constitutionally, '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya'.[64] This is monism, under which the legal relationship between national law and international law, each is part of a unified system that binds both the state and the individual.[65] However, in practice such *direct* influence does not happen. Rather, Kenya's International Crimes Act[66] specifies intricate modalities that operationalise international criminal law domestically, evincing dualism, two separate legal systems, one binding on the individual, the other binding the state.[67] For instance, in 2011 the High Court injuncted key police and administrative witnesses from recording statements about post-election violence. The state did not appeal.[68] Conversely, during the later stages of the Kenya cases, the High Court permitted the extradition of journalist Walter Barasa for trial on charges of obstructing international justice.[69] Moreover, the Court of Appeal affirmed that extradition order.[70] Nonetheless, a delay in state cooperation enabled the 'coalition of the accused' to ascend to state power from where coercive political influence by strategic constituencies polluted the juridical atmosphere.

61 *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, https://www.icc-cpi.int/kenya/kenyatta (accessed 9 November 2023).
62 Kenyans for Peace with Truth and Justice & Africa Centre for Open Governance *All bark no bite? State cooperation and the International Criminal Court* (2014).
63 Carrubba & Gabel (n 16) 10.
64 Art 2(6) Constitution of Kenya (2010).
65 WR Slomanson *Fundamental perspectives on international law* (2000) 611.
66 Act 16 of 2008.
67 Slomanson (n 65) 609.
68 O Mathenge 'Kenya: ICC will not get police statements' *The Star* 12 June 2013, https://allafrica.com/stories/201306131023.html (accessed 28 October 2024).
69 *The Prosecutor v Walter Osapiri Barasa* ICC-01/09-01/13-1-Red2, 26 September 2013, https://www.icc-cpi.int/court-record/icc-01/09-01/13-1-red2 (accessed 7 November 2023).
70 S Muhindi 'Journalist Barasa loses ICC extradition appeal' *The Star* 29 August 2019, https://www.the-star.co.ke/news/2019-08-29-journalist-barasa-loses-icc-extradition-appeal/ (accessed 6 November 2023).

An international prosecutor's decision to prosecute, derived from a state being either unwilling or unable to genuinely investigate or prosecute, has been interpreted as being subject to domestic relinquishment. This was held when the Kenyan High Court rejected the ICC's extradition warrants seeking to prosecute persons for alleged interference with the administration of international justice. In 2017 the High Court prohibited the Internal Security Minister and the Director of Public Prosecutions from facilitating extradition of two Kenyan lawyers, Paul Gicheru and Phillip Bett, to face offences alleging interfering with the administration of international justice. The indictments consisted of corruptly influencing witnesses regarding cases from the situation in Kenya.[71] Applying article 17 of the Rome Statute, the High Court faulted the ICC Pre-Trial Chamber for usurping Kenya's primary jurisdiction to try alleged violators of international criminal law. Judge Kimaru (as he then was) ruled that prior to obtaining *ex parte* warrants, the ICC Prosecutor ought to have consulted Kenyan authorities regarding the purported unwillingness or inability to prosecute. ICC Chief Prosecutor Fatou Bensouda did not do so. Hence, the High Court concluded that the Pre-Trial Chamber was wrong to speculate that 'national prosecution is unlikely in the present case'. Consequently, the ICC's issuance of arrest warrants against Gicheru and Bett violated the suspects' fair hearing rights and was prohibited as being unconstitutional. In the context of rising sovereignty, such complementarity jurisprudence protects against abuse of process by international institutions. Nonetheless, deference to the international criminal justice system prompted one of the fugitives to subsequently seek to clear his name.

In 2020 Gicheru surrendered to the ICC, and in 2021, in *Prosecutor v Paul Gicheru*,[72] he was granted interim release to Kenya on bail conditions imposed by the Trial Chamber.[73] Remarkably, he was a Kenyan citizen, a country that lobbied for withdrawal from the ICC in events leading up to the Malabo Protocol. Eventually, his witness-tampering case closed after the Chamber had heard eight prosecution witnesses. However, no verdict was rendered. Upon receiving respective closing submissions, but without any evidence from the defence, judgment day was awaited. However, in October 2022 the ICC terminated proceedings against Gicheru following his sudden demise.[74] Bett remains at large.

71 *Republic (through Cabinet Secretary, Ministry of Interior and Coordination of National Government) v Paul Gicheru & Another* [2017] eKLR.
72 *Gicheru* case (Icc-cpi.int, 2021), https://www.icc-cpi.int/kenya/gicheru (accessed 3 October 2024).
73 As above.
74 'ICC terminates proceedings against Paul Gicheru' 14 October 2022, https://www.icc-cpi.int/news/icc-terminates-proceedings-against-paul-gicheru

Meanwhile, in August 2022, Ruto won the presidency. Unsurprisingly, in 2023, the ICC closed its investigations into the situation in Kenya. Carrubba and Gabel note that diffuse or *indirect* influence may emanate from domestic public support for the ICC decisions or processes, irrespective of whether the public agrees with a specific decision.[75] This is because the domestic public, particularly civil society, is capable of understanding that their duly-elected government may pursue certain agendas that are contrary to the public interest. More intriguingly, it is even possible for domestic publics to disagree with a specific ICC decision, while nonetheless insisting that the executive should comply with it for the greater good of political society.

5 Determining the ICC's effectiveness in the *Al-Bashir* case

5.1 The politics of non-cooperation

This article's major proposition is that the ICC's effectiveness is influenced by global political dynamics that change state behaviour. The claim is that although the OTP accused Kenya of *indirect* interference in the *Ruto and Sang* case, which was discontinued in 2016, and, furthermore, notwithstanding Kenya's alleged non-cooperation in the *Kenyatta* case as decided by the Kenyatta Trial Chamber in September 2016, nonetheless, from Carrubba and Gabel's rational theory of assessing performance, the ASP may have been justified in evaluating the OTP's performance as being less than satisfactory, since its retributive mandate was frustrated and, hence, the ICC, was ineffective. The minor proposition is that states with stronger national sovereignty concerns, as the Kenya cases showed, are more likely to be instrumentalist and non-cooperative with the ICC. It is concluded that the decision about whether to find that Kenya was in breach of its Rome Statute cooperation obligations with the ICC depends on perspectives of third parties to the case. These include the domestic stakeholders, namely, not only the executive, but also the judiciary, opposition as well as civil society or the victims, and external stakeholders, the state parties to the Rome Statute, and even international criminal law scholars (including those who filed *amicus* briefs). Because state non-cooperation negatively affects the ICC's ability to investigate and effectively prosecute international crimes, therefore comparing critical perspectives of

(accessed 28 October 2024).
75 Carrubba & Gabel (n 16) 214-215.

diverse stakeholders, in particular situation countries, may facilitate a more refined assessment of the ICC's performance in the *Al-Bashir* arrest warrant case and also provide valuable lessons for the *Putin* and others arrest warrant case.

5.2 *Al-Bashir* case

Senior officials and heads of state are most likely to be the masterminds or beneficiaries of international crimes.[76] However, states may shield powerful officials from prosecution for crimes of which they are suspected. A good example is Sudan's former President Omar Al-Bashir, who was indicted by the ICC for numerous atrocity crimes he allegedly committed as President. In 2009 and 2010, ICC arrest warrants were issued against Al-Bashir for five counts of crimes against humanity, comprising murder, extermination, forcible transfer, torture and rape, as well as two counts of war crimes, inlcuding, intentionally directing attacks against a civilian population, among many other crimes. Similar charges are preferred in the case of *Prosecutor v Omar Hassan Ahmad Al-Bashir*.[77] Following the arrest warrants, the ICC has been attempting to obtain Al-Bashir's extradition for several years. Whenever he would visit a country, the ICC would call on such a host to prosecute or extradite him.

Eventually in 2019, he was ousted by a *coup d'état*. Sudan's non-assent to the Rome Statute proved insufficient to bar the ICC from having jurisdiction over Sudan's head of state.[78] In 2020 Sudan's ruling council agreed to cooperate by handing over ICC indictees.[79] Currently, the ICC is seeking his surrender so that he can be prosecuted for atrocity crimes.[80] Such commitment to cooperation indicates a wind of change in Africa, problematising the norm requirements under the Malabo Protocol. Suppose that the Malabo Protocol was active and its proposed court was operational? With its infamous immunity provision, if Al-Bashir was still in power, he would continue to be shielded, notwithstanding how much harm he may have committed. This is because, despite the UN Security Council's referral and his ouster from power, on Carrubba and Gabel's 'political

76 Lutz & Reiger (n 11).
77 *Al Bashir* case (Icc-cpi.int, 2021), https://www.icc-cpi.int/darfur/albashir/Pages/default.aspx (accessed 6 June 2024).
78 M al Attar 'Subverting Eurocentic epistemology: The value of nonsense when designing' in I Venzke & K Heller (eds) *Contingency in international law: On the possibility of different legal histories* (2021) 148.
79 'Sudan agrees to transfer "those indicted by the ICC" to The Hague' *France 24* 2021, https://www.france24.com/en/20200211-sudan-agrees-to-transfer-ex-president-bashir-to-icc-for-war-crimes (accessed 6 June 2024).
80 As above.

sensitivity' and 'conditional effectiveness' hypotheses, the Protocol's *indirect* political influence precludes his surrender from the continent to the Court. Indeed, both Kenya's and South Africa's judiciaries decried their respective executive's non-cooperation to execute the ICC arrest warrants.

5.3 Al-Bashir in Kenya

In 2010 Kenya was instructed to arrest Al-Bashir while he attended the 27 August Constitution's promulgation ceremony in Nairobi. It did not. In the case of *Kenya Section of the International Commission of Jurists v Attorney General & Another*,[81] Ombija J issued an arrest warrant against Al-Bashir and stated that '[i]t is common ground that Kenya is a state party to the Rome Statute. That state parties are under a duty to prosecute or extradite the perpetrators of international crimes to the ICC for prosecution.'[82] On appeal, in *Attorney General & 2 Others v Kenya Section of International Commission of Jurists*,[83] Musinga J, Ouko J (as he then was) and Murgor JJA explained that as 'a matter of general customary international law it is no longer in doubt that a Head of State will personally be liable if there is sufficient evidence that he authorised or perpetrated those internationally recognised serious crimes'. Therefore, the Court concluded:[84]

> [W]e have delineated the obligation of the Government of Kenya as regards the warrants issued by the ICC and suggested that, unless they are rescinded by the ICC, the warrants remain outstanding and can still be executed by Kenya. We have also declared that the Government's failure to effect the arrest of President Al Bashir breached relevant international instruments, our own Constitution and legislation. Those are important perspectives.

5.4 Al-Bashir in South Africa

South Africa is another country where the Court of Appeal and Supreme Court in 2016 stated that the South African government had breached its international obligation by failing to arrest Al-Bashir who was wanted by the ICC.[85] Yet, Akande insists that South Africa

81 *Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011] eKLR.
82 As above.
83 *Attorney General & 2 Others v Kenya Section of International Commission of Jurists* [2018] eKLR.
84 As above.
85 D Akande 'The Bashir case: Has the South African Supreme Court abolished immunity for all heads of states'? Ejiltalk.org (2021), https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/ (accessed 10 June 2024).

would act in breach of international law if it were to allow arrest (other than in cases where it was fulfilling an ICC cooperation request) and prosecution of heads of state. This is because only where there is no dedicated treaty governing the exercise of jurisdiction is it governed by 'an opinion of law or necessity'[86] under customary international law. For Akande, this shows that these countries' domestic courts uphold the principle that heads of state should be accountable for atrocity crimes, notwithstanding being in office. South Africa signed the Rome Statute in 1998 and adopted an Implementation Act.[87] Notably, as in the Kenya incident, the South African executive also posed a non-cooperation challenge. Both executives were aiders and abettors of immunity. By failing to arrest Al-Bashir when he was at an AU meeting in Johannesburg in 2015, the domestic court held that South Africa violated its Rome Statute obligations.[88] The High Court rejected arguments that South Africa was, by a host agreement under section 5(3) of the Diplomatic Immunities Act 37 of 2001, expected under section 4(1) to grant immunities to AU Commission delegates.[89]

Considering article 87(7) of the ICC Statute, the ICC OTP conceded that customary international law does not exclude the immunity of heads of state from arrest and extradition. Nonetheless, articles 27(2) and 98(1) duties do not exempt state parties from cooperating and arresting him. However, in July 2017 the ICC judges declined to refer South Africa to the ASP or UN Security Council. This was because domestic courts had already censured the government for breaching its 2002 Implementation Act obligation in Al-Bashir's case. Thus, referring it to the mandate providers would likely have little effect.[90]

86 *Opinio juris sive necessitates*, https://en.wikipedia.org/wiki/Opinio_juris_sive_necessitatis (accessed 6 June 2024).
87 Act 27 of 2002.
88 W Nortje 'South Africa's refusal to arrest Omar Al-Bashir' *FICHL Policy Brief Series* 85 (2017) 1-4, https://www.toaep.org/pbs-pdf/85-nortje/ (accessed 28 October 2024).
89 N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations, and the visit by Sudan's President Omar Al Bashir' (2017) 26 *Washington International Law Journal* 563-564.
90 T Sterling 'ICC declines to refer S Africa to UN for not arresting Sudan's Bashir' *Reuters* 6 July 2017, https://www.reuters.com/article/warcrimes-sudan-safrica-idAFA5N1GS00P (accessed 6 June 2024).

6 Ghost of the Malabo Protocol: The Rome Statute in its application to the Russia-Ukraine war

6.1 Immunity or impunity?

Before the adoption of the Malabo Protocol, Africa was rebelling against the ICC, based on the notion that the ICC was biased against Africans. As explained above, at that time both Kenya's President and Deputy President, Kenyatta and Ruto, were facing ICC indictments.[91] Although they voluntarily participated in the Hague trials, besides contesting the legal charges in Court, they simultaneously pursued political strategies, among others, through which the Malabo Protocol was adopted by the AU in 2014. The Protocol establishes a regional criminal court to try international and transnational crimes. However, this multilateral instrument that came as a saviour for persecuted African leaders, has some provisions that – from a sceptical viewpoint, may be construed as promoting African tyranny, typical of traditional chiefdoms or perhaps colonial command governance systems – are being sneaked in through the back door.

One such highly criticised provision is article 46A*bis* of the Protocol, which provides as follows: '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.'[92] This controversial provision seeks to shield heads of state or senior officials from being charged for atrocity offences while in office. Conversely, article 143(4) of the Kenyan Constitution provides that '[t]he immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.[93] Clearly, the Constitution's drafters intended to confer no domestic immunity for Rome Statute crimes. Therefore, if the Malabo Protocol actually enters into force, then it is bound to conflict with the spirit and letter of municipal laws. If the domestic courts find that indeed a head of state can be liable for international crimes, yet the Malabo Protocol contemplates shielding the same

91 CA Khamala *Crimes against humanity in Kenya's post-2007 conflicts: A jurisprudential approach* (2018).

92 Art 46A *bis* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed 6 June 2024).

93 Art 143(4) Constitution (n 66).

leaders, will this not instigate normative conflict? Such concern has been expressed in that 'the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa'.[94] The motive behind the article 46A*bis* provision conferring immunity on AU heads of state and senior government officials attracts criticism from international criminal law scholars for promoting, instead of fighting, impunity.[95]

The international criminal justice environment has vastly transformed since the Protocol was drafted. Atrocity crimes are no longer the preserve of Africa as was the case in 2014, when the Malabo Protocol was adopted. Moreover, nowadays many African countries are cooperating with, rather than rebelling against, the ICC. Therefore, Jalloh criticises the tendency of Europe to issue arrest warrants against African leaders in the name of universal jurisdiction.[96] For example, in the *Arrest Warrant* case,[97] when Belgium issued an arrest warrant against the Democratic Republic of the Congo (DRC) foreign minister for crimes against humanity and war crimes, the International Court of Justice agreed that Belgium misused the universal jurisdiction principle.[98] Issuing warrants did not remove immunity from arrest that foreign ministers possess. Rather, under customary international law, serving and former ministers have immunity from criminal prosecution in respect of all official acts (*ratione materiae*) committed while in office. Undeterred, in June 2022, a Belgian court ordered the arrest of five former high-level Guatemalan government officials for the disappearance and murder of three Belgian missionaries in Guatemala in the 1980s.[99] Hence, Mutua, in trying to define the tenets of Third World Approaches to International Law (TWAIL) theory, asserts:[100]

94 JN Kariri 'Can the new African Court truly deliver justice for serious crimes'? *ISS Today* 8 July 2014, www.issafrica.org (accessed 6 June 2024).

95 International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights Statute' 2014, www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-inamendment-to-African-court-of-justice-and-human-rights-statute/ (accessed 6 June 2024); see also D Tladi 'Article 46A *bis* beyond the rhetoric' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 850-865.

96 CC Jalloh *The place of the African Court of Justice and Human and Peoples' Rights in the prosecution of serious crimes in Africa* (2019).

97 As above.

98 *Democratic Republic of Congo v Belgium* (14 February 2002) Judgment *ICJ Rep* 2002.

99 S Weber 'Universal jurisdiction: What can Belgian justice bring for Guatemalan victims'? justiceinfo.net 8 July 2022, https://www.justiceinfo.net/en/103279-universal-jurisdiction-belgian-justice-guatemalan-victims.html#:~:text=In%20the%20early%201980s%2C%20three,government%20officials%20for%20these%20crimes (accessed 6 June 2024).

100 MW Mutua 'What is TWAIL'? (2000) 94 Proceedings of the ASIL Annual Meeting 31, https://digitalcommons.law.buffalo.edu/articles/560 (accessed 11 June

> The regime of international law is illegitimate. It is a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalisation of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination … The broad dialectic of opposition to international law is defined and referred to here as … TWAIL.

Departing from the Court's trend of perceived partiality, in May 2024, ICC arrest warrants were issued not only for Hamas military commander Mohammed Deif, but also Israeli Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant, for war crimes and crimes against humanity amid the Gaza Strip war.[101] Presumably, similar questions regarding the likelihood of enforcement of extradition of such fugitives through invoking cooperation obligations incumbent on ICC member states parties may be posed were they to visit member countries.

6.2 To provide a safe haven for or to extradite Russian fugitives?

If Russia is victorious in its war against Ukraine, the Malabo Protocol as a product of a rebellion might once again fit the emerging authoritarian global times. This shows that when it comes to a majority of international crimes in Russia, some leaders and senior officials are indicted as masterminds. As shown above, the Malabo Protocol expressly seeks to provide immunity from prosecution to AU leaders and senior government officials for atrocity crimes while they hold office. Indeed, some scholars have even suggested that immunity serves to reduce escalating conflicts by inducing incumbents to relinquish power or relent from conflicts without fearing reprisals or repercussions. This article highlights some of the issues that the Malabo Protocol debate implies and its spirit, thus, may be persuasive regarding the issue of immunity of indicted Russian leaders in the post-Russo-Ukraine war scenario.

2024).

101 'Situation in the state of Palestine: ICC Pre-Trial Chamber I rejects the state of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges (accessed 23 December 2024).

Although numerous world leaders and international organisations were outraged at Russian forces illegally seizing Crimea in 2014, neither Putin nor any senior Russian officials were indicted by the ICC for the crime of aggression. Emboldened by the international community's inaction, on 24 February 2022 Putin invaded Ukraine. In October 2022 Russia annexed four regions over which Putin's military seized control. Yet, the purposes of the UN are '[t]o maintain international peace and security'.[102] Thus, these illegal actions not only threaten Ukraine, but also the UN principles of sovereignty and territorial integrity on which peaceful coexistence of nations is based.[103]

Russia is not a member of the Rome Statute. Nonetheless, since criminal trials cannot take place in Ukraine for legal reasons, the ICC in March 2024 indicted Russian Generals Sergei Kobylash and Viktor Sokolov to answer for systematic damage to Ukraine's power generation and transmission facilities.[104] By mid-2023, Kyiv had already convicted 10 people over crimes committed during Russia's invasion. Furthermore, Ukraine had already indicted 186 people, mostly *in absentia*, and filed court papers for another 45. The Ukrainian prosecutor insists that '[a]ll of the hits of every missile, every drone, every damage of civil infrastructure, every Ukrainian who was killed or wounded by these missile attacks, all of them are documented and criminal proceedings were opened'.[105] Subsequently, Karim Khan, the ICC Chief Prosecutor, opened investigations into the situation in Ukraine. Besides Russian air strikes, described by Western leaders as war crimes, the UN Independent International Commission of Inquiry on Ukraine has further detected torture, rape and the deportation of Ukrainian children.[106]

102 Art 1 Charter of the United Nations, 26 June 1945, 59 Statute 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945, http://hrlibrary.umn.edu/peace/docs/aunchart.htm (accessed 28 October 2024).

103 A Speri 'The mother crime: Will Putin face prosecution for the crime of aggression in Ukraine'? *The Intercept* October 2022, https://theintercept.com/2022/10/08/russia-putin-ukraine-war-crimes-accountability/ (accessed 10 June 2024).

104 AFP 'Ukraine could extradite Russians to ICC: Prosecutor' *France 24* 13 October 2022, https://www.france24.com/en/live-news/20221013-ukraine-could-extradite-russians-to-icc-prosecutor (accessed 10 June 2024); see also 'Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov', https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and (accessed 23 December 2024).

105 AFP (n 104).

106 'Commission of inquiry finds further evidence of war crimes in Ukraine' *UN News* 20 October 2023, https://news.un.org/en/story/2023/10/1142617 (accessed 8 November 2023).

Will Russia once again escape accountability for the war crimes it has committed in the Ukraine war?[107] Arrest warrants have been issued for Putin's perpetration of two war crimes of unlawful deportation of population, and of children and of their transfer.[108] Consequently, in May 2023 the South African opposition party Democratic Alliance sued its government to arrest Putin if he were to attend a planned BRICS Summit in the country in August 2023.[109] In July 2023, in compliance with the ICC's directive, the High Court ordered the government to arrest Putin, if he ever sets foot in the country.[110] He skipped the event 'by mutual agreement'.[111] Nonetheless, as argued in the next sub-part, the entire international security architecture will bear contrary consequences upon a Russian victory. For if Russia prevails, it is unlikely that extraditing Russians suspected of atrocity crimes will be in the interests of Third World countries who would prefer not only to steer clear of the burden of war crimes prosecutions in their own criminal justice systems, but also to avoid antagonising a superpower, the burden on Ukraine's national judicial system, or ICC's cooperation requirements notwithstanding. If annexed, Ukrainian territory shall form part of Russia, as does Crimea. Thus, on Carrubba and Gabel's 'political sensitivity' and 'conditional effectiveness' hypotheses, the Malabo Protocol's immunity provision – expressed under Van den Wyngaert's rationales underpinning the political offence exception – are worth extrapolating to interstate conflicts. Her three arguments against extradition are[112] (i) the *political argument* that states should remain neutral in relation to political conflicts in other states and that, therefore, extradition on political opponents is to be *a priori* refused; (ii) the *moral argument*, based on the premise that resistance to oppression is legitimate and that political crimes can therefore be justified; and (iii) the *humanitarian*

107 M Venneri 'War crimes in Ukraine: Failure to prosecute Russia will damage international security for years to come' *Mei@75* 22 November 2022, https://www.mei.edu/publications/war-crimes-ukraine-failure-prosecute-russia-will-damage-international-security-years (accessed 10 June 2024).

108 'Situation in Ukraine' (n 14).

109 'South Africa says Putin will come for BRICS Summit, despite ICC arrest warrant' *Aljazeera* 30 May 2023, https://www.aljazeera.com/news/2023/5/30/opposition-sues-south-africa-government-to-force-putin-arrest (accessed 14 February 2024).

110 C Krishnasai 'South African High Court orders government to arrest Vladimir Putin on arrival for war crimes' *WION* 21 July 2023, https://www.wionews.com/world/south-african-government-ordered-to-arrest-vladimir-putin-618206 (accessed 22 February 2024).

111 AFP 'Putin to skip Brics Summit in South Africa amid ICC arrest warrant' *The East African* 19 July 2023, https://www.theeastafrican.co.ke/tea/news/rest-of-africa/putin-to-skip-brics-summit-in-s-africa-under-arrest-threat-4308740 (accessed 22 February 2024).

112 CV den Wyngaert 'The political offence exception to extradition: How to plug the "terrorists' loophole" without departing from fundamental human rights' (1989) 19 *Israel Yearbook on Human Rights* 298.

argument, whereby a political offender should not be extradited to a state in which he risks an unfair trial.

Putin justifies attacking Ukraine as an act of self-defence against 'Ukrainian neo-Nazis'.[113] Invoking the maxim that today's terrorist is often tomorrow's leader, thus, political offence exceptions have been exploited by those seeking political asylum. This is because democrats in liberal countries are much more sensitive to war outcomes than autocrats.[114] Yet, the big problem with democratising overseas continues to lie with 'we the people'. In most cases, 'we seem to prefer that foreign nations do what *we want*, not what *they* want'.[115] Thus, to Krevor, 'if we wish to have a transformative effect on (asymmetrical) power relations' that are constituted and reproduced and through legalistic procedures then we should 'focus attention on the ideological role of international criminal trials and not retreat into the comfortable but ultimately obfuscatory terrain of a narrowly conceived (liberal) politics'.[116]

6.3 No consensus about political offences

There arguably is a well-established correlation between democracy and the rule of law, on the one hand, and the state's willingness to prosecute delinquent leaders for mass atrocity crimes, on the other. According to Lutz and Reiger, these two variables are directly proportional, so that the more consolidated democratic norms are, so also the more consolidated the justice norm is likely to be.[117] Fukuyama is of the view that 'two very different futures present themselves. If Putin is successful in undermining Ukrainian independence and democracy, the world will return to an era of aggressive and intolerant nationalism reminiscent of the early twentieth century.' This is because other democracies will not be immune to this trend as populists aspire to replicate Putin's authoritarian ways. 'On the other hand, if Putin leads Russia into a debacle of military and economic failure, the chance remains to relearn the liberal lesson that power unconstrained by law leads to national disaster and to revive the ideals of a free and democratic world.'[118]

113 'Putin justifies Ukraine invasion as a "special military operation"' *npr* 24 February 2022, https://www.npr.org/2022/02/24/1082736110/putin-justifies-ukraine-invasion-as-a-special-military-operation (accessed 23 December 2024).
114 BB de Mesquita & A Smith *The dictator's handbook: Why bad behaviour is almost always good politics* (2011) 288.
115 De Mesquita & Smith (n 114) 296 (emphasis in original).
116 Krevor (n 25) 131.
117 Lutz & Reiger (n 12) 289.
118 F Fukuyama 'A country of their own: Liberalism needs a nation' (2022) 101 *Foreign Affairs* 91.

De Mesquita and Smith contend that in democracies, leaders who fail to deliver policies their constituents want are deposed.[119] Democrats might say that they care about the rights of people overseas to determine their own future, and they might actually care too. However, if they want to keep their jobs, they will deliver the policies that their people want. Nonetheless, autocrats are less likely to engage in actions that promote the international community's interests and ideals such as promoting the production of public peace through international criminal law.[120] It follows that in the post-Ukraine-Russia war period, if Ukraine wins, liberal democratic values are likely to flourish. That would include extraditing war criminals to face trial at The Hague. Conversely, if Russia annexes Ukrainian territory, then autocratic values shall predominate. In the latter situation, perpetrators of atrocity crimes during that war will be less likely to be extradited to face international criminal justice. As a 'politically sensitive' *clearing-house* weighing the preponderance of information supporting prosecution or defence in *amicus* briefs, the ICC's effectiveness in attaining victim justice is thus conditioned by geopolitical hegemonic influences.

State parties to the Rome Statute are more likely to prosecute leaders for human rights abuses in their domestic courts or extradite them to The Hague. This inference follows not merely from the positive legal obligation incumbent on them upon ratification, but also from their broader commitment to accountability. Generally, a myriad of reasons for trying senior officials seem to be operating simultaneously among different governmental actors, whether the executive, legislature or judiciary. Moreover, numerous motivations exist for changing perspectives over time.[121] Predicting whether African countries are likely to extradite or not to extradite is not entirely principled, but may be a pragmatic decision, depending on the concerned stakeholder. For example, 'whereas the basis of Chile's interest in prosecuting Pinochet probably shifted from instrumental to normative, the rationale for trying Hussein in Iraq probably began as normative and shifted to a mix of less wholesome reasons'.[122] Yet, the liberal perspective insists that 'charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state', for torture and hostage taking 'are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does

119 De Mesquita & Smith (n 114) 296.
120 'South Africa says Putin will come for BRICS Summit, despite ICC arrest warrant' *Kyiv Post* 15 July 2023, https://www.kyivpost.com/post/19475 (accessed 15 February 2024).
121 Lutz & Reiger (n 12) 289.
122 Lutz & Reiger (n 12) 290.

to everyone else; the contrary conclusion would make a mockery of international law.'[123] Such compelling laws comprise peremptory norms of general international law or *jus cogens*. These *erga omnes* obligations cannot be set aside by any treaty.[124]

6.4 Regional and international instruments on mutual legal assistance

In 2006 former Liberian President Charles Taylor, wanted for war crimes by the Special Court for Sierra Leone, was arrested in Northern Nigeria on the Cameroonian border. He was deported to Monrovia and transferred to UN custody in Sierra Leone. The day before his arrest, on learning that Nigerian President Olusegun Obasanjo was ready to hand him over to the new Liberian authorities,[125] he disappeared from South-Eastern Nigeria, where he hid in exile since 2003, as part of an arrangement brokered by the AU, the Economic Community of West African States (ECOWAS) and other key international actors including the US, to end Liberia's 14-year civil war.[126] In 2012 Taylor became the first former head of state since Nuremberg to be convicted for war crimes and crimes against humanity by an international or hybrid tribunal. His offences comprised providing arms, financial and moral support to the Sierra Leonean Revolutionary United Front and the Armed Forces Revolutionary Council rebel forces. He did so with the motive of destabilising the country and gaining access to Sierra Leonean natural resources. During the military actions, civilians were killed, beaten, terrorised, raped and abducted. Children were also abducted and involved in the military actions. He was sentenced to 50 years' imprisonment.[127]

Horizontal agreements may mitigate imperialistic tendencies of a vertical international criminal justice system. Most countries tend to provide a legal framework for international cooperation by way of mutual legal assistance. These frameworks provide for effective international and transnational criminal justice, balanced with

123 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

124 https://www.merriam-webster.com/legal/jus%20cogens (accessed 24 December 2024).

125 C Boisbouvier 'Liberia: 15 years later, we remember the long hunt for Charles Taylor' *The Africa Report* 29 March 2021, https://www.theafricareport.com/73802/liberia-15-years-later-we-remember-the-long-hunt-for-charles-taylor/ (accessed 12 October 2024).

126 N Ray 'Charles Taylor's arrest: A message to the continent' *IDSA Comment* 4 April 2006, https://idsa.in/idsastrategiccomments/CharlesTaylorsArrest_NRay_040406 (accessed 12 October 2024).

127 'ICD-Taylor-Asser Institute' (Internationalcrimesdatabase.org, 2021), http://www.internationalcrimesdatabase.org/Case/1107 (accessed 12 October 2024).

respect to state sovereignty and territorial integrity. Every sovereign state has control over its own territories. Within a state, no other state can exercise governmental powers and functions.[128] Therefore, no state should interfere with another's domestic affairs, lest an internationally wrongful act be attributable to it for violating the sovereign equality principle.[129] Intervention in the internal affairs of a sovereign state violates not only the UN Charter, but also customary international law norms.

In 2023 the East African region recorded the highest levels of organised criminality in Africa, trailed by West and Central Africa, respectively.[130] This trend of terrorism and transnational organised crimes plaguing the Horn and Nile Valley regions has persisted since 2019.[131] Yet, so far only Djibouti and Ethiopia have ratified the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters. It is unclear why other Horn of Africa states, Eritrea, Kenya, Somalia, South Sudan, Sudan and Uganda, have not.[132] One reason for IGAD's poor track record in securing support for mutual legal assistance is that the extradition instrument is not focused on priority threats common to all member states. Instead, bilateral extradition or mutual legal assistance instruments exist between neighbouring countries, such as Kenya and Uganda (1967), Ethiopia and Sudan (2014), Uganda and South Sudan (2016), and Ethiopia and Djibouti (2020). Neither the Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters (2002), nor the ECOWAS Conventions on Extradition (1994) or Mutual Legal Assistance (1992) has entered into force.[133]

The question arises as to whether African countries prefer to support the May 2023 UN Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes. Mirroring the Rome Statute, it addresses the 'most serious

128 H Strydom & L Juma 'The fundamental principles of the international legal order' in H Strydom and others (eds) *International law* (2016) 108.
129 Art 2(1) UN Charter (n 104).
130 S Galal 'Organised crime index in Africa 2023, by region 26 March 2024', https://www.statista.com/statistics/1223862/criminality-according-to-the-organized-crime-index-in-africa-by-region/#:~:text=In%202023%2C%20East%20Africa%20had,West%20and%20Central%20Africa%2C%20respectively (accessed 14 August 2024).
131 TS Metekia 'East Africa could achieve better cooperation on criminal matters' *ISS Today* 31 August 2022, https://issafrica.org/iss-today/east-africa-could-achieve-better-cooperation-on-criminal-matters (accessed 14 August 2024).
132 As above.
133 As above.

crimes of concern to the international community as a whole'.[134] It thus purposes to help deliver justice to victims of genocide, crimes against humanity, war crimes and other international crimes.[135] Reflecting the Rome Statute complementarity principle, under the MLA Convention, states have the primary responsibility to investigate international crimes. It requires states to designate central authorities responsible for communicating in writing with other states. The 2023 MLA Convention provides rules about deposing witnesses, conducting hearings by video conference, transferring detained individuals, and establishing joint investigation teams.[136] The MLA Treaty requires ratifying states to do three things:[137] (i) criminalise war crimes, crimes against humanity, and genocide (as defined in the ICC Statute and reproduced in article 5 of the MLAT); (ii) exercise jurisdiction over offenders accused of such crimes (article 8 of the MLAT); and (iii) provide mutual legal assistance regarding the extradition, judicial proceedings, and enforcement of penal sanctions with respect to offenders.

6.5 Politicisation of extradition for international crimes

In principle, 'it can no longer be doubted that as a matter of customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated'[138] international criminal conduct. Yet, given the African continent's backlash against the ICC upon establishing the Malabo Protocol a decade ago, the question of whether governmental absorption of a cascading justice norm is motivating the conduct of African governments is unclear. Earlier episodes of international political pressure, involving the atrocity crimes and

134 The Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes adopted at the MLA Diplomatic Conference Ljubljana, Slovenia, 15-26 May 2023, 26 May 2023, https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf (accessed 13 August 2024).

135 BO Biazatti & E Amani 'The Ljubljana – The Hague Convention on Mutual Legal Assistance: Was the gap closed?' *Ejiltalk* 12 June 2023, https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/ (accessed 14 August 2024).

136 AJ Shanes, H Sweeney & OB Hoff 'An assessment of the Ljubljana – The Hague Convention on Mutual Legal Assistance' *Lawfare* 1 September 2023, https://www.lawfaremedia.org/article/an-assessment-of-the-ljubljana-the-hague-convention-on-mutual-legal-assistance (accessed 13 August 2024).

137 LN Sadat 'Understanding the New Convention on Mutual Legal Assistance for International Atrocity Crimes' (2023) 12 *American Society of International Law* 27, https://www.asil.org/insights/volume/27/issue/12 (accessed 13 August 2024).

138 A Jones & A Doobay *On extradition and mutual assistance* (2004) 114.

grand corruption trials of Taylor[139] and Chiluba,[140] were blatant. In others, the rationale informing decisions to prosecute leaders seems to be partially instrumental. In post-conflict contexts, reformists may prosecute purely to placate their populace by being seen as making a 'fresh start'. Lackeys may prefer to 'lock in' international justice as a strategy for attracting financial assistance from Western donors.[141] For example, before a brokered peace-for-justice swap between the UK, the US, the AU, Liberia and Nigeria, Taylor enjoyed Nigeria's protection for nearly 1 000 days. Then, external coercive pressure compelled his host to eject him to Liberia for onward prosecution in Sierra Leone.[142] Although Kenya and South Africa are Rome Statute signatories, it seemed as if their governments' initial resentment and rebellion against the ICC had dwindled. This was buttressed by their courts ordering cooperation with the ICC by directing Al-Bashir's arrest. Crawford would contend that the executives' refusals to arrest Al-Bashir need not have been rationalised by customary international law. Rather, they may be justified by 'empiricism and adherence to national policies'.[143] Moreover, multiple national and international principles intervene in practice. Hence, states' refusals to extradite may not rely exclusively on a single jurisdictional principle.[144] Specifically, South African courts directed not only Al-Bashir's, but even President Putin's arrest. This trend follows in the activist trail blazed by Belgian courts that continue exercising universal jurisdiction, despite the ICJ's decision in the *Arrest Warrant* case finding that the mere issuance of an arrest warrant would be a breach of international law. The key question is whether Africa should strive to fight impunity on the continent while simultaneously striving to have a regional capacity to handle international and transnational crimes.[145]

Ostensibly, the Rome Statute and Malabo Protocol provide conflicting obligations. Although Benyera insists that African countries possess universal jurisdiction to prosecute perpetrators of atrocity crimes, there are both instances of cooperation and non-cooperation with international prosecutions. As numerous judicial decisions regarding Al-Bashir confirmed, if requested to cooperate

139 A Tejan-Cole 'A big man in a small cell: Charles Taylor and the Special Court for Sierra Leone' in Lutz & Reiger (n 11) 205-232.
140 P Lewis 'Shifting legitimacy: The trials of Frederick Chiluba' in Lutz & Reiger (n 11) 130-150.
141 Lutz & Reiger (n 12) 289.
142 Lutz & Reiger (n 12) 291-292.
143 J Crawford *Brownlie's principles of international law* (2012) 457, cited in C Gevers & P Vrancken 'Jurisdiction of states' in Strydom and others (n 128) 238.
144 Crawford (n 143) 477.
145 E Benyera 'Is the International Criminal Court unfairly targeting Africa? Lessons for Latin America and the Caribbean states' (2018) *Unisa Press* 37, https://upjournals.co.za/index.php/Politeia (accessed 6 June 2024).

with the ICC, African countries are obligated under the Rome Statute to either extradite or prosecute. The former requirement entails surrendering ICC fugitives to The Hague to face international criminal prosecution.

Nonetheless, Carrubba and Gabel's *fire-alarm* metaphor not only explains realism undercurrents of the Malabo Protocol that influenced Kenya's domestic non-cooperation policies resulting in premature discontinuation of the *Kenyatta* and *Ruto* cases. Their *information clearinghouse* metaphor also identifies the determinative factor as being third party *amicus* briefs that influenced the orientation of ICC processes to terminate Ruto's case. Such intervening factors explain Kenya's and South African executives' non-cooperation with the ICC regarding Al-Bashir, despite judicial orders directing them to do so. Thus, according to Gevers and Vrancken, the unlawfulness of an act under international law hardly is the sole consideration by states in their choice to exercise or not to exercise jurisdiction. They may exercise self-restraint based on domestic requirements or policy concerns (comity considerations).[146] This is because international law merely *permits* every state to apply its jurisdiction against its own, or even foreign, citizens. Ultimately, concerns of a domestic or political nature obfuscate the distinction between – a state's refusal to extend its jurisdiction based on the belief that international law does not permit it – and its refusal to do so based on domestic law.[147] Non-cooperation thus is effected politically, with the executive's tacit acquiescence, *indirectly* circumventing the formal, judicial extradition mechanisms. A preponderance of 'politically sensitive' *amicus* briefs lodged before the UN and AU influences the ICC's 'conditional effectiveness'. Carrubba and Gabel's rational theory explains why a domestic brief to enforce Putin's detention and extradition to face prosecution for atrocity crimes in Ukraine at The Hague prompted 'mutual agreement' with the South African government, thus informally influencing him to skip the 2023 BRICS Summit to evade ICC arrest warrants. While the opposition Democratic Party prevailed domestically, Ukraine won the diplomatic battle internationally. Accordingly, only if Ukraine wins the war, and democracy prevails around the globe, including in Africa, shall 'justice cascade'.[148] The continent may then be less likely to provide a safe haven for war crimes fugitives from international criminal justice. Therefore, Sadat concludes that 'the MLA Treaty will undoubtedly prove useful to states wishing to deepen their cooperation with other states on core

146 Gevers & Vrancken (n 143) 238.
147 Gevers & Vrancken (n 143) 239.
148 K Sikkink *The justice cascade: How human rights prosecutions are changing world politics* (2011).

crimes, which do not yet have either MLA treaties or extradition agreements otherwise allowing them to do so'.[149] Nonetheless, '[d]espite these positive trends, politics can still trump legal process'.[150] The longstanding tradition that heads of state will find safe havens in exile remains prevalent. Indeed, in September, 2024, notwithstanding Mongolia's Rome Statute obligations, Putin toured there untouched. His defiant visit echoes 'the broader political factors often weighing against ICC mandates, highlighting the limits of the Court's enforcement regarding powerful state actors' reminiscent of Al-Bashir's escapades around Africa.[151]

On the one hand, former Philippine President Rodrigo Duterte is due to become Asia's first former head of state to be charged before the ICC. On 11 March 2025, Ferdinand 'Bongbong' Marcos Jr enforced an ICC arrest warrant alleging Duterte's crimes of murder as a crime against humanity.[152] On the other hand, given Rome's close ties to Tripoli as well as Italian energy interests in Libya, the ICC's 18 January 2025 arrest warrant for Ossama Al-Masri[153] created a dilemma. Initially, on 19 January 2025, Italian police arrested Al-Masri, also known as Anjiem, *en route* from Germany to watch a Turin football match. However, rather than Rome extraditing him to the ICC, they put him aboard an Italian military aircraft and deposited him in Libya, which is not a Rome Statute member. How did Italy officially explain to the ICC its freeing of a Libyan fugitive facing torture, murder and rape charges?[154]

Italian Interior Minister Piantedosi claimed that Al-Masri was expelled as a 'national security risk'.[155] However, Justice Minister Nordio submitted to Parliament that Al-Masri's detention warrant was plagued with 'inaccuracies, omissions, discrepancies and

149 Sadat (n 137).
150 Lutz & Reiger (n 12) 291.
151 J Joldoshev 'A critical examination of individual criminal responsibility and head-of-state immunity' *fedbarblog* 12 November 2024, https://www.fedbar.org/blog/breaking-legal-barriers-the-icc-arrest-warrant-for-vladimir-putin/ (accessed 23 December 2024).
152 R Picheta 'Former Philippine President Duterte in ICC custody over anti-drugs crackdown' *CNN* 12 March 2025, https://edition.cnn.com/2025/03/11/asia/rodrigo-duterte-philippine-arrest-icc-hague-plane-intl/index.html (accessed 13 March 2025).
153 'Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes', https://www.icc-cpi.int/news/situation-libya-icc-arrest-warrant-against-osama-elmasry-njeem-alleged-crimes-against-humanity (accessed 19 February 2025).
154 'ICC opens inquiry into Italy over release of Libyan warlord' *Associated Press* 10 February 2025, https://www.voanews.com/a/icc-opens-inquiry-into-italy-over-release-of-libyan-warlord/7969989.html (accessed 19 February 2025).
155 D Ghiglione 'Libyan war crimes suspect freed because of errors in warrant, Italy says' *BBC* 5 February 2025, https://www.bbc.com/news/articles/cx2p6d48ywjo (accessed 19 February 2025).

contradictory conclusions' precluding the Libyan from being jailed. Therefore, decrying the fact that Al-Masri's ICC warrant initially bypassed the justice ministry, the Italian Court of Appeals ordered his release. Besides severely harming Italy's reliability, non-compliance with its Rome Statute's article 89 cooperation obligations in the *Al-Masri* case, endorsed by the domestic judiciary, risks eroding the ICC's credibility.[156]

Hence, this article takes cognisance of political conditions influencing African countries' refusals to extradite ICC suspects. Consider the second Russia-Africa Summit at Saint Petersburg in 2023, renewing Moscow's effort to consolidate diplomatic relations with the continent. Notably, Africa, the UN's largest voting bloc's 54 nations appeared divided over the Russo-Ukraine war. Consequently, heads of state attendance declined from 43 who attended the first Summit in 2019[157] to only 17 in 2023, despite the latter's 'multipolar world' banner. Low turnout occurred because Westerners encouraged African leaders to boycott in protest of the Kremlin's invasion of Ukraine. Putin posed rhetorically: 'Why do you ask us to pause fire? We can't pause fire while we're being attacked.'[158] Strategically, he offered '"total support" for Africa, including in the struggle against terrorism and extremism'.[159]

7 Conclusion

The issue of head of state immunity, which is deemed impermissible for *jus cogens* norms, is increasingly being politicised. Divergence between state practice and *opinio juris* is problematic. In practice, when deciding whether to exercise prescriptive or criminal jurisdiction to prosecute a suspect, executives consider both domestic and international law. Customary international law prohibits interference in the domestic affairs of sovereign states. It is within a host state's discretion to refrain from prosecuting or extraditing a suspect to a requesting state. International law merely permits

156 'Comment on Italy's failure to execute ICC arrest warrant (the *Almasri* case)' (2025) *Italian Yearbook of Human Rights*, https://unipd-centrodirittiumani.it/en/news/comment-on-italys-failure-to-execute-icc-arrest-warrant-the-almasri-case (accessed 19 February 2025).

157 'Putin woos African leaders at a summit in Russia with promises of expanding trade and other ties' *AP* 29 July 2023, https://apnews.com/article/russia-africa-summit-putin-food-grain-00408e40403c3c30f89371a474bb4f9d (accessed 12 March 2025).

158 'African leaders leave Russia summit without grain deal or path to peace in Ukraine' *Associated Press* 29 July 2023, https://www.npr.org/2023/07/30/1190968770/african-leaders-leave-russia-summit-without-grain-deal-or-path-to-peace-in-ukrai (accessed 13 March 2025).

159 'Putin offers African countries Russia's "total support"' *BBC* 10 November 2024, https://www.bbc.com/news/articles/ce9grpyejg1o (accessed 14 March 2025).

extradition. However, cooperation is not mandatory. A requested state's considerations are not based purely on legal factors, such as sufficiency of evidence or even the violation of *jus cogens* or peremptory norms. Rather, policy and self-interest influence such decisions (*opinio necessitatis*). Historically, some states have not responded favourably to extradition requests, whether based on universal jurisdiction claims by other states or even arrest warrants issued by the ICC. Such exercise of extra-judicial choices may be construed as unlawful from the perspective of international criminal law scholars. However, the international system exhibits realism. The fact that countries have ratified the Rome Statute and MLA and, hence, domesticated their provisions as part of municipal law is hardly helpful. Rather, the Malabo Protocol shows, cooperation remains fettered by dualism. Thus, in the past, executives in countries such as Kenya and South Africa chose not to extradite Al-Bashir, despite being notified of his visits to their territories. Conversely, judiciaries interpreted their ratification obligations as imposing a duty to arrest. Such obligations would manifest a 'justice cascade', whereby the norm of holding leaders accountable for serious human rights violations is becoming increasingly pervasive. The article relies on Carrubba and Gabel's 'political sensitivity' hypothesis, expounded by *fire alarm* and *information clearinghouse* metaphors. According to the former, the ICC's arrest warrants serve as a *fire alarm*, pressurising states to prosecute or extradite. The latter describes third party *amicus* briefs. In the Kenya cases before the ICC, Kenya deployed a twin strategy of both challenging the admissibility of the cases as well as objecting to jurisdiction through political campaigns before the ASP, the AU and the UN. Although the *Kenyatta* and *Ruto* cases were admitted, external coercive political pressure resulted in their withdrawal and termination. The article's importance lies in facilitating predictions about whether African or indeed other countries are likely to extradite Russian President Putin and others pursuant to the ICC's arrest warrants of 2023 to 2024. Extradition is unlikely, if Russia defeats Ukraine and authoritarianism prevails. *Opinio juris*, expressed by international criminal law scholars, insists that international criminal trials are untarnished by vagaries of power relations and purified of politics. Instead, this article illustrates how political contingencies from the Malabo Protocol's ghost haunts the enforcement of ICC's arrest warrants, even in Africa. Politicisation seriously undermines the ASP's search for retributive justice regarding grave crimes and confounds the ICC's calls on all countries to join the fight against impunity. For this reason, it is opportune for the MLA Treaty to reinforce the Rome Statute's cooperation provisions.