Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa

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Abstract

In these remarks, the author considers the most recent challenge to the application of international criminal justice in Africa: Kenya's controversial November 2013 proposal to amend the Rome Statute of the International Criminal Court to temporarily exempt from prosecution sitting presidents accused of involvement with international crimes. He examines several legal and practical reasons why such a proposal is untenable. Instead, citing the principle of complementarity and urging the principled use of judicial and prosecutorial discretion, he contends that much of the African Union's current concerns about the Kenya Situation can be addressed within the confines of existing Rome Law. This is important because, even if it is possible for African countries to secure amendments to the ICC Rules of Procedure and Evidence, African States Parties are unlikely able to secure the global consensus required to effect substantive amendments to the 1998 ICC treaty. On the other hand, the author suggests that the International Criminal Court officials, especially the judges and the chief prosecutor, can help bridge the apparent gap between the Court and its African supporters. Towards that end, they should consider taking a more flexible and more nuanced approach to their interpretations and application of several important provisions contained in their founding statute. Eschewing a one-size fits all approach, it is submitted that each African situation is unique – both in the scope of the problem, and in the solution required in the necessary fight against impunity in Africa.

Keywords

Africa – International Criminal Court – Assembly of States Parties – African Union – immunity of sitting Heads of States – amendments to the Rome Statute – amendments to Rules of Procedure and Evidence – William Ruto – Uhuru Kenyatta – justice and reconciliation in Africa

I am grateful to H.R.H. Prince Zeid Ra'ad al Hussein, the Ambassador of Jordan to the United Nations, who is serving as moderator of this special session, for his generous introduction.

I am also indebted to the Assembly of States Parties (“ASP” or “Assembly”) of the International Criminal Court (“ICC”), in particular its current President H.E. Tina Intelmann, Ambassador of Estonia to the United Nations, for honoring me with an invitation to participate in this historic panel. As you all know, the interactive debate we are having here today comes at a crucial juncture for the ICC and its relationship with its African States Parties, all of which are also members of the African Union. I am therefore thankful to the African State members of the Bureau of the Assembly; I gather that they proposed me as an independent academic expert to share objective views for your consideration.¹ In this regard, I hope that they will forgive me for singling out for special mention my gratitude to the South African delegation, especially Mr. Dire Tladi.

As someone who has been a close observer of the ICC, and its dynamic relationship with African States since at least 2007, I am pleased to share my humble perspective on today's topic: the indictment of sitting heads of state and government and its consequences for peace and stability and reconciliation especially in Africa. This perspective draws principally on my work as a professor of international criminal law who has done extensive research in this area. But it is not just the stereotypical academic perspective. It is also a practical one. For I also draw upon my prior experience as a practicing attorney in the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice, the Office of the Principal Defender in the Special Court for Sierra Leone (“SCSL”), and Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR).

1 See International Criminal Court, *Decisions of the Bureau of the Assembly, Sixteenth Meeting, 21 November 2013*, para. 2, available online at http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ASP-2013-Bureau16-21Nov2013.pdf? (accessed 10 December 2013).

For me, the starting point of this conversation is the wider context. The international community, if we leave aside the experience with the immediate post World War II trials at Nuremberg and Tokyo, has had about two decades of practice with the application of international criminal justice. This of course began with the United Nations Security Council's fateful decision to establish the International Criminal Tribunals for the Former Yugoslavia ("ICTY") in 1993 and the one for Rwanda, ICTR, in 1994.² By around mid-1998, when the Rome Statute³ establishing the permanent ICC was adopted, the international community had gained more knowledge about some of the main limitations of the ad hoc international penal courts. This gave rise to the so-called second generation hybrid tribunal model such as the SCSL.⁴ That model attempted to absorb and reflect the lessons learned from the ICTY and ICTR: what we could do better in terms of the pace, cost, location, and ultimately, the efficiency as well as legitimacy of internationally supported trials.⁵

In all these tribunals, whether international or hybrid, a key principle, which actually predated but was advanced substantially by the Nuremberg Tribunal was taken for granted by states and the international community: that is, that the law shall apply equally to all persons without any distinction based on official capacity. In particular, official functions as a head of state or government or a responsible public official shall in no case exempt a person from criminal responsibility under the law, nor shall it, in and of itself, constitute a ground for the reduction of sentence should the suspect be found guilty.

2 UN Doc. S/RES/808 (1993) by which the Security Council decided to establish the ICTY to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 and Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 and UN Doc. S/RES/955 (1994) (establishing the *ad hoc* tribunal to prosecute serious violations of international humanitarian law committed in Rwanda between 1 January and 31 December 1994).

3 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (adopted 17 July 1998; entered into force 1 July 2002).

4 For an excellent overview of these tribunals, see W.A. Schabas, *The UN International Criminal Tribunals: Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, 2006); C. Romano, A. Nollkaemper and J. Kleffner (Eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004).

5 See C.C. Jalloh (Ed.) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, Cambridge, 2014).

This rule, which was initially formulated as Article 7 of the IMT Charter,⁶ was subsequently unanimously endorsed by the United Nations General Assembly in 1946 in Resolution 95(I) and by the International Law Commission as Principle III in 1950.⁷ It was reflected, respectively, as Article 7(2) and Article 6(2) of the ICTY and ICTR Statutes. In the ICC, this rule was naturally incorporated in a “more complete”⁸ form into the Rome Statute at Article 27, gaining widespread support from all regions of the world. This included the African States present during the negotiations and adoption.

However, the application of what must by now be a general principle of international (criminal) law has neither been easy nor satisfying. As there have been varied reactions to the indictments of sitting presidents and heads of governments, mostly of a political nature. In a way, this outcome ought not to be surprising. After all, when powerful personalities are alleged to be involved with the commission of atrocity crimes that would – or *should* – get our attention. Yet, the limited number of cases coupled with the divergent contexts in which the indictments of sitting heads of state have taken place cautions against drawing up simplistic one-size fits all formulae for managing such situations. Nevertheless, considering that the ICTR and the SCSL were established to specifically address serious international crimes that occurred in Africa, we can learn from their experiences, and indeed from those of the ICTY, to inform the work of the permanent ICC in this challenging and highly politicized area.

In the limited time that I have, permit me to offer five preliminary observations that you may wish to factor into consideration of the African States Parties’ proposal for amendments to the Rome Statute. By way of overview, the first three observations speak generally to the broader Africa-ICC relation-

6 Article 7 states that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279.

7 See UN Doc. A/RES/1/95 (11 December 1946) (affirming the principles of international law recognized by the *Charter of the Nurnberg Tribunal* and the judgment of the Tribunal); Res. 177 (II) (21 November 1947) (entrusting the formulation of the principles to the International Law Commission); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, vol. II, para. 97, available online at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (accessed 10 December 2013).

8 A. Cassese, UN Audiovisual Library of International Law, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, available online at http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf (accessed 10 December 2013).

ship. Here, I seek to clarify matters that often appear ambiguous and to place my concern about some of the proposed statutory amendments in context. Whereas, in my last two observations, I focus directly on the propriety of the indictment of sitting presidents and whether Article 27 should be amended to exempt such individuals from prosecution when holding office, as Kenya has proposed.⁹

The first general observation I would offer to this distinguished assembly is that the AU is fully committed to the fight against impunity for international crimes. There is certainly no doubt today that, unlike its predecessor Organization of African Unity, African leaders now take the view that accountability, not impunity, should reign supreme on the world's second largest continent. That much is clear from the Constitutive Act of the AU adopted in July 2000.¹⁰ Article 4(h) of that instrument was the first to invoke the responsibility to protect civilians to furnish a sound legal basis that could even be used to trump the sovereignty of member states to intervene in internal affairs in respect of "grave circumstances".¹¹ Such circumstances are defined as situations wherein war crimes, genocide, and crimes against humanity, notably all Rome Statute offenses, are being committed.¹² This principled commitment is self-evident from the numerous other AU instruments such as the 2003 Peace and Security Protocol which further gave effect to that right of intervention.¹³

9 Kenya's proposals included five substantive amendments to several provisions of the Rome Statute. That regarding modification of substantive Article 27 would introduce a sub-paragraph that would read: "Notwithstanding paragraph 1 and 2 above, serving Heads of State may be exempt from prosecution during their current term of office. Such an exemption maybe renewed by the Court under the same conditions". See Kenya's Proposed Amendments, available online at <http://scribd.com/doc/183221222/Kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties> (accessed 20 November 2013).

10 See *Constitutive Act of the African Union*, Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, Lomé, Togo, 11 July 2000, available online at http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm (accessed 20 November 2013). For an excellent analysis of the scope and implications of this right, for regional and international peace and security, see A.A. Yusuf, "The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?" 1 *African Yearbook of International Law* (2003), 3–21.

11 Constitutive Act, *Ibid*.

12 *Ibid*.

13 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, South Africa, 9 July 2002, available online at http://au.int/en/sites/default/files/Protocol_peace_and_security.pdf (accessed 20 November 2013).

It is also apparent from the numerous decisions of the Assembly of Heads of State and Government, the AU's highest policymaking organ, which has repeatedly emphasized that justice for those who perpetrate international offenses should take its natural course. I need not get into but could mention in passing the vote of confidence that the ICC has received from African States, 34 of whom are currently parties. Quite a few others, a total of nine states, are on the path to full membership as signatories. Another set of African countries, starting with Uganda, have infamously voluntarily triggered the Court's jurisdiction through the so-called "self-referrals". These and other similar actions affirm and put beyond doubt that African States see the ICC as part of the solution to the myriad accountability problems facing their conflict-ridden continent.

The second observation I would like to offer is that the AU has been both clear and consistent, from the precipitous moment when the UN Security Council decided to refer the Sudan situation to the ICC Prosecutor in March 2005, and the subsequent decision of the ICC Prosecutor to seek an arrest warrant for President Omar Al Bashir of Sudan, that it is not as primarily a regional human security body opposed to the prosecution of anyone – whether leaders or foot soldiers – but that it is concerned with the *timing* of such investigations and prosecutions. The tendency, as far as one can discern from international criminal law circles, is that the AU position has largely been misunderstood. People generally assume that this is yet another instance of African despots seeking to protect one of their own. Yet, when approached with an open mind it becomes self-evident that when the continent's leaders are engaged upon peace processes and other initiatives in an attempt to forge solutions to complex humanitarian and other crises, the filing of an indictment – especially against crucial partners necessary for the AU processes to succeed – has the potential to jeopardize or even unravel some of those processes. While in some situations some of these concerns appear in retrospect to have been exaggerated, for example the doomsday warnings that we received after the first arrest warrants were issued in the Sudan Situation, it remains the case that there should be more serious consideration and discussion – than we have so far had – between the Court and its African States Parties. This first interactive debate here in the ASP, while certainly welcome, is long overdue. It should certainly not be a one off. Rather than being antagonistic towards each other, there could be greater sensitivity to the complex realities on the ground by ICC organs such as the Office of the Prosecutor. Each African situation is unique, both in the problem, and in the appropriate solution. The AU view is that justice and peace are complementarity. Both can vigorously be pursued, provided that the right policy decisions about timing and other practicalities are attended to in a spirit of mutual trust and good faith cooperation.

Your Excellencies, my third general observation is that much of the African government concern about the work of the ICC can probably be addressed within the confines of existing international law. This for our purposes is primarily the Rome Statute, but also secondarily, the Charter of the United Nations. Eleven years into the life of the Court, it seems fair to conclude that many opportunities for creative resolution of simmering tensions between the ICC and African States Parties have arisen. Sadly, many of these same opportunities have been missed. Three significant examples arising from the Court's statutory powers and how they have been rigidly if not over rigidly applied will suffice to illustrate the point.

Firstly, although Article 17¹⁴ of the Rome Statute provided for States Parties to assume the first responsibility to prosecute crimes falling within the Court's jurisdiction, some of the judges have taken a rather strict and static approach to their interpretation of the complementarity requirements.¹⁵ The threshold for a finding of inaction, unwillingness, and inability is such that the chambers have arguably transformed complementarity into primacy.¹⁶ With the adoption of the same person and substantially same conduct test, in the Kenyan Situation, the Court missed a historic opportunity to generate meaningful reforms in that country's national justice system.¹⁷ Yet, although generally thought of as tribunals founded on the opposite primacy rather than complementarity principles, the ICTY and ICTR achieved seemingly greater positive complementarity under difficult circumstances through their creative transfer decisions under Rule 11 *bis*.¹⁸ It is thus noteworthy that the Court for the first

14 The primary responsibility to prosecute the Rome Statute crimes falls within the jurisdiction of the States Parties. Under the complementarity principle, it is only when the concerned state is inactive, or unwilling and or unable to do so, that the ICC's jurisdiction will be triggered. See, in this regard, Rome Statute, *supra* note 3, at Article 17.

15 See, for example, the majority position in Prosecutor v. Ruto, Kosgey & Sang, ICC-01/09-01/11 OA, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (30 August 2011), available online at <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>. There was only one exception which led to an important dissent. See, in the same case, the Dissenting Opinion of Judge Anita Ušacka (Sept. 20, 2011), available online at <http://www.icccpi.int/iccdocs/doc/doc1234872.pdf>.

16 C.C. Jalloh, 'Kenya vs. ICC Prosecutor', 53 *Harvard International Law Journal* (2012), 227–243, at p. 235.

17 *Ibid.*, p. 243.

18 Under Rule 11 *bis* of the ICTR Rules, for example, if an indictment has been confirmed, whether or not the accused is in the custody of the Rwanda Tribunal, a Trial Chamber

time, just recently in the Libya case involving Abdullah Al-Senussi, applied a more flexible reading of the complementarity threshold under Article 17.¹⁹ It is unclear whether in the political circumstances of Libya the suspect will be transferred to the Court and there is a legitimate concern about the prospective fairness of the trial in the domestic system. But, as a matter of general principle, this is a welcome development that refocuses the ICC towards its mandate as a court of last resort. It should be encouraged.

Secondly, the framers of the Rome Statute included a number of useful escape clauses that should make the ICC's work flexible and nimble. For instance, States Parties recognized the need for the Court and its Prosecutor to retain some discretion when making decisions about prospective investigations and prosecutions. This is all the more so considering that the ICC, in sharp contrast to the ICTY and the ICTR as well as the SCSL, was always likely going to be seized with highly fluid and constantly evolving situations. While those other ad hoc tribunals operated largely in contexts where the guns had fallen silent, the ICC has the additional complication of having to operate in environments where it has to contend with a, or rather multiple, moving targets in the context of ongoing hostilities. One such provision is Article 53, which at the investigative stages, provides the common sense rule for the Prosecutor to decide, taking all the circumstances including the gravity of the crimes and the interests of the victims into account that a prosecution is not in the interests of justice.²⁰ Under Article 53(4), we have an even more permis-

could determine whether the case should be referred to the authorities of a State: (1) in whose territory the crime was committed; or (2) in which the accused was arrested; or (3) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. The Office of the Prosecutor of the ICTR wished to transfer several such cases to Rwanda for trial. Rwanda wished to secure the cases. About five consecutive applications were denied by separate trial chambers due to concern that various aspects of the right to fair trial did not appear possible in that country at the time. But Rwanda, in a bid to secure the cases, worked with the ICTR Prosecutor to address each of those concerns. Upon changed circumstances being shown, in June 2011, the Tribunal finally transferred its first case to Rwanda. See, for the seminal decision, *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-Rubis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011. For thoughtful commentary on Rule 11 bis, see A. Obote-Odora, 'Transfer of cases from the International Criminal Tribunal for Rwanda to Domestic Jurisdictions', 5 *African Journal of Legal Studies* (2012), 147–180.

19 *Prosecutor v. Saif al Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11–01/11, Pre-Trial Chamber, 'Decision on the admissibility of the case against Abdullah Al-Senussi', 11 October 2013.

20 See Rome Statute, *supra* note 3, at Article 53.

sive norm empowering the Prosecutor to reconsider, at any time, a decision to initiate an investigation or prosecution based on new facts or information. The problem is that the prosecutorial organ has taken, in its policy papers, a narrow conception when defining what the *interests of justice* does and does not entail. Under this rather legalistic view, the interests of justice are apparently not wide enough to factor in the broader interests of peace and stability, which was felt to be a separate responsibility for external entities other than the ICC Prosecutor.²¹ The experience the Court has had with the African States since the Sudan referral suggests that it is time to rethink that policy paper. After over a decade in the back pocket of the Prosecutor, a similar discretionary statutory prosecutorial power, contained in Article 61(4),²² was finally invoked in the Muthaura matter in the Kenya Situation just this year. In the March 2013 notification of the withdrawal of charges to the Chambers, and accompanying press statement, the Prosecutor was emphatic that her review does not apply to any other Kenyan suspects before the Court especially – by implication – Mr. Kenyatta.²³ Given the myriad and often unanticipated difficulties that arise in complex war crimes cases, including evidentiary ones, it might have been wiser for the ICC Prosecutor to leave the door of discretion open instead of battenning it down.

Besides reliance on the proper exercise of prosecutorial discretion, such as is possible under Articles 53 and 61 of the Rome Statute, there are other flexibilities built into the statute that do not compromise the mandate of the Court but that could go a long way, if perhaps not all the way, to addressing the AU concerns arising from the Kenyan Situation. I am thinking here of the recent decisions from Trial Chamber V, which consistent with the plain language of Article 63 of the Rome Statute, exercised reasonable discretion to recognize the admittedly unusual situation whereby two individuals against whom crimes against humanity charges had been confirmed were elected President and Vice President respectively. The Chamber granted, on the basis of exceptional circumstances, some conditional absences from trial which

21 ICC Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, available online at <http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf> (accessed 19 November 2013), pp. 1, 7–9.

22 That provision allows the Prosecutor to either amend or to withdraw charges against an accused. See Rome Statute, *supra* note 3, at Article 61.

23 See Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura, 11 March 2013 and Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11, 'Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura,' 11 March 2013, available online at <http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf> (accessed 19 November 2013).

recognized the unique responsibilities of the accused persons.²⁴ It did so consistent with the Rome Statute and without prejudicing the interests of victims, the Prosecutor, and the Court. As this Assembly is likely aware, to the chagrin of many African States, academic, and other observers, the Appeals Chamber recently reversed the decision in the Ruto Case.²⁵ This despite several African government amicus briefs urging judicial restraint.²⁶ The likely unhappy result has been to set the stage for a showdown between the Court and a member state that is crucial to its work and legitimacy.

Clearly, examining the recent statements of the current members of the UN Security Council, and perhaps more importantly those of ICC States Parties at this ASP yesterday, it appears that at a political level most countries recognize the need for the Rome Statute system to adapt itself to this unprecedented situation.²⁷ So long as this does not compromise the bedrock constituting the Court's *raison d'être*. It is thus encouraging to see the solidarity with which many Western states, such as Great Britain, an ICC State Party and permanent Security Council member, has shown by even proposing an amendment permitting presence through video-linked trials under the ICC Rules of Procedure and Evidence.²⁸ Such a proposal, if adopted, would enable the Court to execute its mandate in Kenya while accepting the practical necessities of performance

24 See Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Trial Chamber V(A), 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 18 June 2013 para. 3 and Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Trial Chamber V(A), 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial', 18 October 2013 paras 3–6.

25 The Appeals Chamber agreed with the Trial Chamber that an accused person can be excused from the presence during a trial. However, it found that the trial judges had improperly exercised their discretion in the context of the Ruto case by too broadly construing their discretion, granting a blanket excusal under which the exception of absences had swallowed the presence rule, and for failing to first explore and exhaust other reasonable alternatives on a case-by-case basis. See Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-01/11 OA5, Appeals Chamber, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, para. 63.

26 Although the Appeals Chamber granted Burundi, Eritrea, Tanzania, Rwanda and Uganda standing to intervene as *amici* before the Court, in order that they may submit observations on the issues regarding presence before the Appeals Chamber, the similar applications by Ethiopia and Nigeria were rejected as potentially "repetitive". See *Ibid.*, at para. 13.

27 See, for instance, the statements of the representatives of the countries that voted in favor of Kenya's deferral request. United Nations Security Council, 7060th meeting (UN Doc S/PV.7060), 15 November 2013.

28 See the statement by Sir Mark Lyall Grant, on behalf of the United Kingdom, *Ibid.* at p. 6.

of the functions of heads of government by Messer's Kenyatta and Ruto.²⁹ Both men, it should be noted, have so far cooperated with the Court. Both seem willing to defend their good names without having to be physically present in The Hague for every single day of the trial. This makes sense. Furthermore, it is consistent with the right to a fair trial under the statute and international human rights law. After all, both leaders are still presumed innocent until proved guilty by the Prosecutor, as per Article 66 of the Rome Statute, not guilty until proven innocent.

A third example of other clauses that enable the Court scope to be more flexible while remaining principled in the exercise of its statutory mandate is more political. This power is less within the ICC's control so encouragement of its use should necessarily be limited to exceptional situations. I here mention the role of the UN Security Council in the ICC's work under Articles 13 and 16 regarding referral and deferral. These powers have arguably been of help, and at the same time, some hindrance for the Court especially in Africa.³⁰ The elephant in the room, of course, is the manner in which the Council's practice – which is highly political – has influenced the situations that it has referred (in March 2005, for Sudan; and February 2012 for Libya). The initial inconsistent referral practice has fueled the African government argument about double standards.³¹ The Security Council unanimously referred Libya, but has failed to refer the more troublesome Syria situation. This despite the explicit request for such a measure by the majority of UN member states in the General Assembly. Lacking transparent criteria guiding selection of the situations to be referred, and those that would not be, New York has compounded the ICC's problems by abjectly refusing to pay for its referrals. In a puzzling and counter-intuitive practice, the Court has acquiesced into receiving and acting on referrals that are inconsistent with the plain text of the Rome Statute at Article 15(b) and Articles 2, 13 and 17 of the Negotiated Relationship Agreement between the

29 The United Kingdom proposal, to amend the rules to enable presence through video technology, was in fact one of five amendments adopted by the close of the Assembly of States Parties Twelfth Session. See Resolution ICC-ASP/12/Res.7, *Amendments to the Rules of Procedure and Evidence*, adopted at the 12th plenary meeting, on 27 November 2013, by consensus, available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 19 November 2013).

30 For an evaluation of the Article 16 problem, see C.C. Jalloh, D. Akande and M. du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 4 *African Journal of Legal Studies* (2011) 5–50.

31 Jalloh et al., *supra* note 30, at pp. 16–21.

Court and the United Nations.³² The ICC seems happy to receive the Sudan and Libya referrals, even without the cheques that should, by fiat of the Rome Statute, accompany them.

Equally, if not more problematic from an AU perspective, has been the Council's practice with respect to the deferral of situations under Article 16.³³ The concern arises both when the power has been used (as it was a few years ago at the behest of the United States) and when it has failed to be used (as occurred with respect to the repeated Sudan and Kenya deferral requests). The Sudan deferral request was not formally considered, despite repeated AU calls to that effect. The Kenyan authorities, with the AU's support, tried to make a strong case, citing the important role that the country plays as a security stabilizer and a counter to terrorist threats in the East Africa region.³⁴ The request was not successful. It is arguable that the recent November 2013 decisions rejecting the AU supported deferral request was the correct one, especially given that deferrals can only legally be authorized where there is an explicit trigger of a threat to the maintenance of international peace and security under Chapter VII of the UN Charter. At the same time, from a more distant observer perspective, it would appear that the Sudan Situation deferral request several years ago should have received greater consideration in the Council. For, on the face of it, the AU request appeared to have greater merit in light of the conditions in Darfur at the time. In the end, because Kenya managed to muster more support in securing eight votes, the take away for Africa is that legal criteria aside, such decisions are highly political rather than legal in nature.

In other words, and put more simply, the admittedly still emerging Security Council practice is generating a lot of negative feedback for the Court in Africa. While this is largely not of the Court's making, which is why I would urge all ICC member states present here to call on the Council to exercise its powers in the not so "business as usual" real politick manner reminiscent of the Cold War. It is also why, if I were a Court official like the Prosecutor, I would prefer to act using my statutorily conferred power over transferring the discretionary

32 Under Article 115(b) of the Rome Statute, the Court is clearly anticipated to be provided with funds provided by the United Nations "in relation to the expenses incurred due to the referrals by the Security Council". See *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, available online at http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3resi_english.pdf (accessed 20 November 2013).

33 See Jalloh et al., *supra* note 30.

34 See records of the Security Council debate on the Kenyan draft deferral resolution, *supra* note 27.

decision to a quintessentially political body such as the UNSC over which I can have no control. In any event the ICC is not left completely powerless either. It could, for example, insist on respect for the terms of its statute, which is in fact a core principle accepted by both the UN and the ICC in Article 2 of their October 2004 relationship agreement. Of course, recognizing that there are several African concerns about ICC justice arising from the heat generated for The Hague by faraway New York, ICC States Parties, such as Guatemala (when it held the rotating Council presidency), have started to play a crucial leadership role during its tenure as non-permanent member of the Council. The expectation is to help put the Council onto the right path to complement, rather than impede, the noble fight for some justice for the victims of atrocity crimes.³⁵ This is an important conversation to continue to have in order to inform the decisions adopted by New York, especially when they could negatively impact the Court. ICC States Parties, especially those that hold rotating seats in the Council, should continue to raise the issue and to engage that conversation, both within the Council itself but also in other fora such as the General Assembly. After all, the latter also has a secondary responsibility for international peace and security under the UN Charter.

Your Excellencies, the foregoing are the three general observations that I have about the broader Africa-ICC relationship. Permit me to make two last and more specific observations concerning the amendments that you will be weighing over the next few days. My two key points focus on the Kenyan proposals regarding the indictment of sitting heads of state. The first of these concerns Kenya's proposed amendments in respect of the *preamble* to the Rome Statute. There is, it would seem, nothing that should preclude the States Parties present from amending the preamble of the statute to refer to complementarity and its application to regional jurisdictions. With the current draft statute for an African court of justice that would likely have an international criminal chamber having been approved at the Minister of Justice level, it appears inevitable that the AU will eventually forge ahead to create a regional court

35 See, in this regard, Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General, and annexed Concept Note, U.N. Doc. S/2012/731 (1 October 2012), *The Council and the Court*, 28, available online at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_731.pdf (accessed 20 November 2013). See also D. Kaye, B. Hance, M. Hanna, S. Hwang, E. Levin, G. Lo, E. Yoo and X. Zhang, *The Council and the Court: Improving Security Council Support of the International Criminal Court* (University of California at Irvine, Irvine, CA, 2013).

to prosecute what I have elsewhere called “Rome Statute Plus”³⁶ crimes. The issue for the ICC then is whether to acknowledge this reality and figure out ways to encourage and possibly complement that effort. Or to make the Court a bystander to an entity that, if created, could potentially affect the discharge of its mandate at least in some way. The permissibility of positive complementarity, vis-à-vis states parties as well as regional bodies, is implicit in the status quo of Article 17 but could be made more explicit. Conversely, given the general silence of the draft African court statute on its prospective relationship with the ICC, it is hoped that Kenya and the other African States Parties here would spearhead efforts to add such a provision clarifying how the two institutions would potentially work in complementarity with each other. That said, I note in passing that if complementarity is to be a genuine object, it may prove necessary to perhaps also revisit the language of substantive Article 17 of the Rome Statute and possibly Articles 18 and 19 as well. The African draft protocol might also have to develop similar provisions.

I turn now to the fifth, final and perhaps most important observation. This regards the substantive Kenyan amendment to Article 27 of the Rome Statute. As I understand it, based on public instead of official documents, the proposal aims to confer an exception based on official status as a head of government to exempt a suspect from prosecution before the ICC during the time the person occupies office. This proposal seems difficult to accept, and well beyond Africa, could create great problems for the Court because it appears to be inconsistent with international law. I am also of the view that it would in any event be hard for African States Parties to secure the high level of ICC State Party support necessary for this amendment to pass. Experience with the Slobodan Milosevic, Jean Kambanda and most recently the Charles Taylor trials from the ICTY, ICTR and the SCSL respectively, does demonstrate a key relevant lesson; that is, while it is procedurally easy to indict a sitting president, it is harder to secure their arrests and transfer to the relevant tribunal. This seems true also for the ICC in relation to the Bashir and Gbagbo matters. That said, another lesson from the ad hocs is that, once no longer in power, such persons are more

36 C.C. Jalloh, *Rome Statute Plus or Minus? Assessing the Proposal for An African Regional Court to Prosecute International Crimes*, Yale Council on African Studies, 14 September 2012, available online at <http://www.internationaljusticeproject.com/2012/10/01/yale-invites-professors-to-debate-aus-proposal-to-create-new-african-criminal-court>; Supranational Lecture Series, TMC Asser Institute, 11 February 2013, available online at <http://www.asser.nl/events.aspx?id=349>; and Thematic Debate on International Criminal Justice, United Nations General Assembly, 10 April 2013, available online at <http://www.un.org/News/Press/docs/2013/ga1355.doc.htm>.

vulnerable to arrest or surrender to an international tribunal. The ugly specter of politics in law is generally frowned upon. But, in such highly volatile situations and in international law, we as lawyers would be naïve not to at least acknowledge if not confront and address its impact.³⁷

On the other hand, experience also suggests that it is almost inevitable that there will be a measure of political controversy whenever a sitting head of state is indicted by an international criminal tribunal. Indeed, it should instead be surprising if it were otherwise given the considerable power that such persons often wield. To be sure, the ICTY's indictment of then Yugoslav President Slobodan Milosevic in May 1999 was controversial. So was the ICTR's indictment of former Rwandese Prime Minister Jean Kambanda. And, in the SCSL, of then Liberia President Charles Taylor. The ICC's experience, regarding the first of such head of state cases involved President Omar Al Bashir of Sudan, followed by that of President Muammar Gadhafi, and more recently, former President Laurent Gbagbo of Ivory Coast has confirmed similar issues. What is substantially different about the Kenya Cases, involving President Uhuru Kenyatta and Vice President William Ruto, is that unlike all these prior precedents, they were suspects before the ICC who then subsequently assumed power. They were not power holders that were indicted while in office and then lost power. Or former power holders that were all of a sudden prosecutable because they had been forced to step down or to no longer occupy the ultimate political office in any given country. In historical terms, international penal courts have seen many scenarios. But Kenya's challenge is a first for the history of international criminal courts. It requires a principled but creative resolution.

Returning to the proposal, if as the AU states mentioned in their October 2013 resolutions their primary concern is with the constitutional order and stability of African countries, we can readily acknowledge the destabilizing nature of such situations. There are certainly many questions of national dignity and national sovereignty and Pan-African solidarity that will also arise. These ought not to be minimized. But it does not follow that there should be an absolute bar to the *initiation*, or more aptly *continuation* of an investigation or *prosecution* of a person who assumed head of state or government status long after ICC indictment. The problems with the proposition are numerous, and as Nigerian Judge Chile Eboe-Osuji of Trial Chamber V hearing the Kenyan cases rightly put it in his separate 18 October 2013 opinion in the Kenyatta Case,

37 See, for instance, D. Howden, 'US Prosecutor Condemns Hague Trial of Kenyan Leaders', *The Guardian*, 18 October 2013.

it is inconsistent with the rule of law as well as international law.³⁸ For our purposes, given time constraints, let me highlight four key concerns with the proposal.

Firstly, such a decision contradicts the plain letter of Article 27 of the Rome Statute as well as customary international law, as expounded by the International Court of Justice in the *Arrest Warrant Case* (2000).³⁹ On these accounts alone, that is the undoing of the gains first made at Nuremberg after WW II that the official status of a person should not bar his or her prosecution for alleged international crimes by an international criminal tribunal, the proposal will likely fail. Indeed, accepting the Kenyan proposal could kill Nuremberg Principle III, which as noted earlier, was unanimously endorsed by the UN General Assembly as far back as December 1946. The same norm, albeit expressed in slightly different ways, has become a consistent theme in the statutes of ad hoc international and hybrid courts. By accepting the AU proposal, we would be admitting of an exception to an important international law principle that is clearly not only treaty based, for the purposes of the ICC, but also customary in nature. It would be a shameful retreat in the global fight against impunity.

Secondly, and in any event, it seems unnecessary to craft a new rule. The legitimate African government concern that leaders on trial who somehow assume power continue to be able to exercise their constitutional responsibilities can be, as was already argued earlier, largely accommodated using existing legal tools. There is no mischief for which a new tool is required from the ICC toolbox. Of course, here, I assume that a flexible judicial interpretation to the presence in a court requirement under Article 63 of the Rome Statute will prevail over the apparently inflexible tendency among some to treat unlike ICC cases alike. To be clear, mine is not an argument against other proposed amendments that States Parties might make to the Rules of Procedure and Evidence to mandate a flexible interpretation of Article 63 by the Court's appeal as well as trial judges. From the AU perspective, this will certainly be a meaningful solution only if such amendments are applicable retroactively, to cover the Kenyan President and Vice President.

Thirdly, the moment we concede a substantive amendment as has been proposed to Article 27 by Kenya, we would not only reverse the course of international law and democracy in Africa. But we will likely also create, or rather

38 See Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Trial Chamber V(A), 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial', 18 October 2013, Separate Opinion of Judge Chile Eboe-Osuji, para. 30.

39 *Ibid.*, at para. 32.

reinforce, a zero sum winner takes all mentality in highly volatile political contexts. The problem will come both from the front and back ends of the battle against impunity. From the front end, it would incentivize African suspects to secure power as a way to avoid initiation of proceedings, or if already initiated, their continuation by the ICC Prosecutor. Some will seek power through democratic means. Others, especially considering the continent's history, would do so through brute military force. The risk is that Africa will return to the dark days of military strongmen and coup d'états, which partly squandered the promising dividends of independence for post-colonial African peoples. On the back end, for those already in power, whether before they are indicted or after they are indicted, there will be no incentive to respect constitutional term limits or to concede power to the opposition. With an indictment hanging like the Sword of Damocles over their heads, hanging onto power becomes the only real bulwark against prospective jail time in The Hague. Surely, this is not a likely result that even the AU would wish for. This is especially considering the AU's proposed criminalization of the crime of unconstitutional change of government. This is not to mention the numerous other collective African government efforts to stabilize Africa's fledgling democracies such as the charter on democracy and freedom.

Fourth and finally, it is a cliché, but no less true, that justice delayed is justice denied. So, as Judge Eboe-Osuji concluded in his October opinion in the Kenyatta case, granting such suspensions of trials and investigations would imply that the alleged victims of the crimes are effectively being told that they have to wait for 5 if not 10 or perhaps even 15 years for some measure of justice.⁴⁰ That is simply unworkable. In my opinion, considering the rights of the alleged victims under the Rome Statute and its jurisprudence, the international community would potentially not only be violating their rights but also demeaning and debasing the suffering that they have endured. Thus, they would be caught in the infamous Russian roulette, coming so close to justice within their reach only to be denied a timeous measure of the little of it that the criminal law can dispense.

Your Excellencies, distinguished colleagues, ladies and gentlemen, the foregoing concludes my two specific and three general observations that I hope will be borne in mind as you all deliberate on the proposed amendments during the rest of the ASP in the next week. I thank you for your kind attention.

40 See Separate Opinion of Judge Chile Eboe-Osuji, *supra* note 38, at para. 41.