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AFRICAN STATE WITHDRAWALS FROM THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

LEGAL-POLITICAL CONSIDERATIONS

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PART 1

1. Objectives of the Study

1. This report provides a summary and commentary on the issues related to both an African Union (AU) member states withdrawing from the Rome Statute for the International Criminal Court (ICC) as well as the implications of an AU withdrawal strategy according to prevailing trends in international law jurisprudence. The principal objectives are to:
    - Comment on the legal issues related to state withdrawals from the Rome Statute.
    - Locate the issues of ICC African state party withdrawals in the context of larger structures of inequality in Africa and beyond.
    - Comment on the issues related to collective withdrawals from the Rome Statute.
    - Comment on the range of constitutional inconsistencies and offer a preliminary mapping of the considerations for steps involved in a state by state withdrawal of African states from the Rome Statute for the ICC.

2. Scope and Methodology of the Study

2. The study has adopted an analytical approach with some member state statements of fact in the appendices. The authors relied on secondary sources of information. These sources include relevant provisions from national constitutions and, where possible, implementing legislation as well as other secondary documents.

3. The scope of the study was constrained by the lack of transparent documents on the treaty withdrawal procedures for Member States. Most of the national constitutions stipulate which organ within the state has the authority to enter into an international agreement and also to ratify it but many are silent on both the ratification as well as the withdrawal process.

3. The Context: Statement of the Problem

4. Can a coordinated, collective withdrawal from a treaty through the mass regional ratification of another international agreement providing jurisdiction to an alternative criminal adjudicative body challenge the accepted Customary International Law (CIL) rules for terminating, suspending, or withdrawing from treaty obligations contained in *the Vienna Convention on the Law of Treatie*s (VCLT)? Would it allow AU states to free themselves of the ICC Statute's notice requirement, and of their continued obligations to comply with ICC investigations and proceedings during the notice period by shifting CIL or creating a new CIL rule? This report begins with a consideration of these questions in the socio-political contexts in which they emerged and then focuses on available literature and jurisprudence for African states under the jurisdiction of the Rome Treaty as well as in relation to the legal implications of the collective withdrawal using two principal sources of international law: treaty

law and customary international law.

5. The key argument is that treaty law as set out in the *Vienna Convention on the Law of Treaties* (VCLT) (also considered customary international law) provides that state withdrawal from the ICC Statute should first and foremost occur in accordance with Article 127 of the Convention. By withdrawing in accordance with Article 127 of the ICC Statute, African states can present themselves as respectful of international law and legally withdraw from their obligations under the Convention. Attempts to withdraw from the ICC Statute that do not comply with the notice procedures and ongoing cooperation requirements set out in Article 127 will be viewed as a treaty breach for which individual states will be accountable even after the withdrawal is effective. Addressing the question of whether the collective withdrawal of AU states can permit them to disregard the foundational customary international law (CIL) requires that treaty law be seen through rule Article 26 of the VCLT. This rule is governed by the overarching norm of *pacta sunt servanda* and the importance of the notion of state consent. Thus, the key questions to ask is how African state withdrawals might affect well-established CIL principles of *pacta sunt servanda* and circumstances in which it is permitted to derogate from it (including rules for withdrawal) contained in the VCLT.

6. The problem the report highlights is that international law – customary and treaty law – does not currently recognize a right of "collective withdrawal" in the sense contemplated by the African Union. In considering examples of state cooperation at a regional level to challenge dominant norms, denunciation and withdrawals are recognized in international law as a distinctly unilateral act. However, the concept of "collective withdrawal" or "regional withdrawal" has not yet been recognized by international law. This remains a critical area for further exploration. This report suggests that further research on the idea of collective withdrawal is required in order to seek out additional guidance regarding the potential emergence of a new norm of customary international law.

3.1 Socio-Political and Historical Background

7. Since the preliminary documentation of the issues outlined in this study, various African states have pursued individual withdrawals from the ICC. The sudden announcement on 18 October 2016 of Burundi's withdrawal, followed by South Africa's withdrawal on 25 October 2016 and the notice of withdrawal from The Gambia have all reflected treaty withdrawal action that is in keeping with the provisions outlined in the Rome Statute and in keeping with international law – though at the time of this writing, there remain questions about some of the national procedures and their order (Such as for South Africa). All three states have cited various reasons for their decisions and they have been met with varying degrees of acceptability by their constituencies.

8. Burundi was the first state to formally announce that it will withdraw from the ICC with a decree from its parliament. President Pierre Nkurunziza's government began proceedings following the April 2016 opening of an ICC preliminary investigation of violence in Burundi. The violence unfolded following a

third term presidential bid by President Nkurunziza. This led to killings, imprisonment, and allegations of torture, rape and other forms of sexual violence and disappearances. Burundi's government did not welcome the United Nations (UN) report that accused named officials of orchestrating the torture and killing political opponents. The government called the report by the UN Independent Investigation on Burundi (UNIIB) biased and politically motivated and denied its allegations. The investigators said they had evidence of rape, disappearances, mass arrests as well as torture and murder and that there were probably many thousands of victims. Accordingly, the UNIIB found that "the large majority of victims have been identified as people who were opposed or perceived to be opposed to the third mandate of President Nkurunziza or of members of opposition parties." It continued: "There are worrying signs of a personality cult being built around the president."[1] It is with this backdrop that Burundi's parliament decided – through widespread agreement - to withdraw from the ICC.

9. Following the Burundi decision, South Africa declared its intentions to withdraw by publically announcing that the Rome Statute for the ICC's treaty obligations were inconsistent with customary international law, which offers diplomatic immunity to sitting heads of state. The formal letter of notification sent to the UN Secretary General outlined that "The Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court,"[2]. In explaining their withdrawal they have further stated that they would be committed to fighting impunity, stating "The Republic of South Africa is committed to fight impunity and to bring those who commit atrocities and international crimes to justice and, as a founding member of the African Union, promotes international human rights and the peaceful resolution of conflicts on the African continent,…..in complex and multi- faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive"[3]. The withdrawal decision of the South African government has been heavily criticized by various civil society organizations and members of parliament as it announced its withdrawal intentions before parliamentary approval. These domestic matters will need to be resolved in due course. However, it is worth noting that South Africa was a known champion of African state enthusiasm for the ICC and their current withdrawal intentions may pave the way for more African states to withdraw from the ICC. The Gambia's was the third country to communicate its intention to withdraw from the ICC. Gambia's announcement of withdrawal was made by its Minister of Information. The reason given for the withdrawal was centered on what was seen as the ICC's selectivity practices. As noted, the Minister announced that the ICC was being used for "the persecution of Africans and especially their leaders while ignoring crimes committed by the West....there are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted,"4.

10. These three withdrawals aptly capture the legal, political and emotive fervor central to African state withdrawals underway. Understanding these recent developments require an examination of the socio-political and historical background within which African states joined the Rome Statute for the

[1] http://mgafrica.com/article/2016-10-19-burundi-pierre-nkurunziza-signs-law-withdrawing-countrys-icc-membership
[2] C.N.786.2016.TREATIES-XVIII.10, "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court.
[3] *Ibid.*
[4] http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html

ICC and the deeper context of global inequality and political unrest in which African violence operates. It is to be noted that Sierra Leone, Ivory Coast, Zambia, Nigeria, Malawi, Senegal, and Botswana were among the African states that countered the October 2016 withdrawal notifications by South Africa, The Gambia and Burundi by pledging continued support of the ICC.

11. In the first decades of its formation, the ICC has been riddled with disagreement and struggles over its perceived legitimacy and institutional power. The thirty-four African states that ratified the Rome Statute in 1998 initially embraced the rule of law movement as an extension of their commitments to Africa's emancipatory future. The violence that unfolded in Africa in the 1980s and 1990s played an important role in compelling their moral conscience to act. It instigated feelings of indignity and anger that were tied to the inaction of the international community during the Rwandan genocide, the injustice of South African apartheid, and the results of the long anti-colonial struggles against European imperialism. With these realities in mind, the various leaders in these states initially saw the ICC as a beacon of emancipation—a solution for their continent's injustices.

12. However, since its inception in 2002 until August 2015, the ICC had pursued twenty-two cases in nine situations across several African states: the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), the Ivory Coast, Sudan, Uganda, Kenya, the Republic of Mali, and Libya. It issued indictments for thirty-six individuals, including twenty-seven warrants of arrest and nine summonses to appear before the court.[5] Four individuals were on trial and proceedings were concluded in twelve cases: two individuals had been convicted, one had been acquitted, four had the charges dismissed, two had had the charges withdrawn, one had been held inadmissible, and three individuals have died prior to trial.[6] From the cases of alleged African warlords to the indictments of African leaders— ranging from President Uhuru Kenyatta and Deputy President William Ruto of Kenya, Presidents Omar al-Bashir of Sudan and Laurent Ggabgo of the Ivory Coast—the predominance of African subjects of international criminal justice has created suspicion about prosecutorial justice. Growing numbers of African stakeholders have begun to see these patterns of only pursuing African cases being reflective of selectivity and inequality.

13. These accusations of selectivity have led to progressively worsening relationships between the ICC and the AU. A key tipping point was the March 2009 arrest warrants issued against the Sudanese President, Omar Al Bashir, and other members of the Khartoum government for international crimes

[5] Arrests warrants were issued for the following individuals: Joseph Kony, Raska Lukiya, Okot Ohiambo, Dominic Ongwen, Vincent Otti, Thomas Lubanga Dyilo, Bosco Ntaganda, Ahmed Haroun, Ali Kushayb, Germain Katanga, Mathieu Ngudjolo Chui, Jean-Pierre Bemba Gombo, Omar al-Bashir, Callixate Mbarushimana, Muammar Gaddafi, Saif al-Islam Gaddafi, Abdullan al-Senussi, Laurent Gbagbo, Charles Blé Goudé, Simone Gbagbo, Abdel Rahim Hussein, Sylvestre Mudacumura, Walter Barasa, Narcisse Arido, Jean - Jacques Kagongo, Aimé Kilolo Musamba, and Fidèle Wandu. Summons to appear were issued for Bahr Idriss Abu Garda, Abdallah Banda, Saleh Jerbo, Mohammed Ali, Uhuru Kenyatta, Henry Kosgey, Francis Muthaura, William Samoei Ruto, and Joshua Sang.

[6] Jean-Pierre Bemba Gombo, William Samoei Ruto, Joshua Sang, and Bosco Ntaganda are currently on trial. Thomas Luganga Dyilo and Germain Katanga were convicted and serving sentences of fourteen and twelve years, respectively. Mathieu Ngudjolo Chui was acquitted. Charges were dismissed against Bahr Abu Garda, Callixte Mbarushimana, Mohammed Ali, and Henry K osgey. Charges were withdrawn against Uhuru Kenyatta and Francis Muthaura. The case against Abdullah al-Senussi was declared inadmissible. Finally, proceedings against Raska Lukiya, Saleh Jerbo, and Muammar Gaddafi were terminated due to the death of the individuals.

allegedly committed in Darfur. The AU has expressed deep concern at the indictment of President Omar Al Bashir and has called on AU member states not to co-operate with the ICC over the arrest of the President[7]. Shortly thereafter, in December 2010, Kenya's President Uhuru Kenyatta and Deputy President William Ruto were named with four others by the prosecutor of the ICC as suspects in crimes against humanity. In response, Kenya formally requested that the ICC defer investigations and prosecutions to allow for a domestic mechanism to address the cases.[8] Despite this request, Kenyatta and Ruto were indicted in March 2011 and charges were confirmed against them (and Joshua arap Sang) in September 2011.

14. The matter was further complicated when in March 2013 presidential elections in Kenya resulted in victory for a Kenyatta–Ruto alliance, the two being declared president and deputy president, respectively. Kenyatta became the first serving head of state to appear before the ICC.[9] Then in June 2011 an arrest warrant was issued for Muammar Gaddafi, then president of Libya, his son Saif al-Islam Gaddafi, and his brother-in-law Abdullah al-Sanussi for the commission of crimes against humanity further added to the growing list of African leaders being pursued by the ICC.[10] At its July 2011
Summit, the AU Assembly held that the arrest warrants seriously complicated efforts aimed at finding a negotiated political solution to the crisis in Libya and decided 'that Member States shall not cooperate in the execution of the arrest warrant' against Gaddafi.[11]

15. Many arguments have been made regarding the systemic imbalance in international decision-making processes. The inherent politics of such processes result in unreliable application of the rule of law as described by P.S. Rao: "The decisions of the Security Council by design are manifestly political decisions. Accordingly, there is no guarantee that the decisions of the Security Council will reflect either the requirements of law or justice of the world at large. They are essentially reflective of the self-interests of its permanent members, as perceived by their governments, which may or may not coincide with the interests of the parties concerned. Decisions of the Security Council are often questioned for their selectivity and double standards."[12]

16. Furthermore, there is the contended issue of universality in international law. For prosecutions against African leaders to be considered legitimate, they are expected to follow the state equality principle. The consequences of not following this, are outlined by Otto Triffterer: "...we further have to take into consideration the fact that the validity of every criminal law and *ius puniendi* need to be confirmed by enforcement. For without permanent application and continuous execution, relevant consciousness of, or obedience to, the law can neither be expected nor can it

[7] Assembly/AU/Dec.245 (XIII), Para. 10
[8] *Ibid*. at 2
[9] For detailed discussion of the Sudan and Kenya cases, refer to the memo on peace and justice sequencing dated August 4, 2015.
[10] Abraham, Garth "Africa's Evolving Continental Court Structures: At the Crossroads?", Page 10
[11] Assembly/AU/Dec.366(XVII), Para 6
[12] Rao, Pemmaraju Sreenivasa "The Concept of International Community in International Law: Theory and Reality"

develop and continue to shape the enforcement."[13] In keeping with Marschik, "for the sake of coherence, the conventions forming the basis of the international legal system should be universal."[14] However, this is not the case, when one considers the African focus of indictments by the ICC.

17. Questions about which states are under the ICC's jurisdiction and the processes of selectivity of case as well as the role of the United Nations Security Council (UNSC) and its referral and deferral mechanism under Article 16 of the Rome Statute raise questions about perceived fairness of the international system. For under the United Nations Charter, the Security Council's primary responsibility is to uphold international security and peace.[15] Composed of 15 members, 10 rotating and 5 permanent including the United Kingdom, China, France, Russian Federation and the United States of America, the Security Council is responsible for determining the existence of a threat to peace and take the appropriate action, be it diplomatic or military based to control the conflict.[16] In addition, under Article 24 of the United Nations Charter, the Security Council is responsible to represent all members of the United Nations to "ensure prompt and effective action", while adhering to the Purposes and Principles of the United Nations and its Charter.[17] The United Nations Security Council while exercising their right to vote is also able to veto, because of their key role in the establishment of the United Nations.[18] They have been granted their special status of permanent members. However, no African countries are members of the UNSC.

18. On the other hand, the United Nations General Assembly is the, "main deliberative, policymaking and representative organ of the UN. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority. Decisions on other questions are by simple majority."[19] It is essentially the assemblage of member states to discuss and deliberate on policies, situations and other international matters.[20] There are a total of 193 members that make up the General Assembly. Each member is allowed one vote on "designated important issues — such as recommendations on peace and security, the election of Security Council and Economic and Social Council members, and budgetary questions."[21] The specific aforementioned issues currently require a favorable vote of 2/3 of the majority of the General Assembly whereas

[13] Ibid Chapter 29, Triffterer, Otto 'Irrelevance of Official Capacity' – Article 27 Rome Statute Undermined by Obligations under International Law or by Agreement (Article 98)?
[14] Supra note 2, Marschik
[15] United Nations Security Council. Frequently Asked Questions. United Nations Security Council. Accessed May 27, 2016. http://www.un.org/en/sc/about/faq.shtml.
[16] Ibid.
[17] Ibid.
[18] United Nations Security Council. "Voting System and Records." UN News Center. Accessed May 24, 2014. http://www.un.org/en/sc/meetings/voting.shtml.
19 "United Nations, Main Body, Main Organs, General Assembly." UN News Center. Accessed May 17, 2016. http://www.un.org/en/ga/about/index.shtml.
[20] "United Nations, Main Body, Main Organs, General Assembly." UN News Center. Accessed May 17, 2016. http://www.un.org/en/ga/about/background.shtml.
[21] "United Nations, Main Body, Main Organs, General Assembly." UN News Center. Accessed May 17, 2016. http://www.un.org/en/ga/about/background.shtml.

other issues and questions are decided on by a general majority voice.

19. In consideration of the systematic disadvantage African nations face when it comes to the decision of the UNSC, the effect of being legally bound by a decision of UNSC to a Statute that a country have not even ratified is not acceptable[22]. The case of Sudan, with the indictment of President Omar Al Bashir, has illustrated this seeming inequality. As a result of the selectivity of African cases before the ICC at subsequent HOSG summits, Assembly decisions continued to call for solidarity among AU member states in their opposition to the proceedings launched against Al Bashir, and to call on the UNSC to defer the ICC's prosecutions against Al Bashir, Kenyatta, and Ruto under Article 16 of the Rome Statute.[23]

3.2 Historical Context for Violence in Africa

20. The issues related to the selectivity of cases are adumbrated by a deeper more insidious history of structural violence in Africa. Contemporary International Law has implications for the way historical inequalities are playing out in the contemporary period. Such formations have emerged through the history of Western colonial states infringing on the self-determination rights of African, Latin American and Indigenous peoples. It is well documented that the various forms of violence, corruption, political instability and mass atrocities are directly related to the administration systems and institutions set up by the various colonial powers in the nineteenth century.

21. During the Scramble for Africa, western powers engaged with their colonies in Africa and Latin America through mineral and resource extraction. This had the effect of widening gaps between the state and various communities and weakening the governance systems that were in place. Such developments led to the imperial support of colonies with "strong ties to the former colonial power—such as Houphouet-Boigny's Côte d'Ivoire, Samuel Doe's Liberia, and Gnassingbé Eyadéma's Togo—[which] gave authoritarian leaders the power to exercise repressive means of control"[24]. These developments led to the creation and exacerbation of various tensions that led to the institutionalization of ethnic or religious-propelled patronage conflicts that persist today. These formations reflect the underpinnings of the instability and mass violence that we see in a range of contemporary cases being taken up by the ICC.[25]

22. With African independence movements throughout the continent, once imperial forms of colonial

[22] The International Criminal Court can assume Jurisdiction, if a case if referred to it by the United Nations Security Council (UNSC), as per Article 13 of the Rome Statute.

[23] Abraham, supra note 6 at 10.

[24] Marc, Alexandre, Neelam Verjee, and Stephen Mogaka. 2015. The Challenge of Stability and Security in West Africa. Africa Development Forum series. Washington, DC: World Bank. doi:10.1596/978-1-4648-0464-9. License: Creative Commons Attribution CC BY 3.0 IGO

[25] Heleta, Savo "Roots of Sudanese conflict are in the British colonial policies" Sudan Tribune: Plural News and Views on Sudan, 2008 http://www.sudantribune.com/spip.php?article25558

protectionism was withdrawn, leading to the chaos in governability across post-colonial Africa. The shift to independence led to the vulnerability of postcolonial state, what Luckham referred to as the resultant exposure of authoritarian states, leaving them "exposed, weakened, and stripped of their monopolies on violence (Luckham and others 2001). The result was their vulnerability to attacks from dissident groups. When conflicts in Africa erupted after the end of the Cold War, there was no remaining imperative for Western powers to intervene in defense of Western interests (N'Diaye 2011)."[26] In the absence of century-old institutions of colonial power, new domains of power emerged through – at times - the exercise of brutal force. The manifestation of these extreme forms of violence took shape in the brutal forms of power evident in dictatorships that which was witnessed in Hissein Habre's Chad.

23. It is no surprise that the 1980s to the present period were rife with the eruption of challenges over governance. Electoral violence in Kenya, The Ivory Coast, and Sudan, for example, led to mass violence in various African regions. Rather than procuring the development and rebuilding of social, political, economic and legal institutions, instead the rise of rule of law mechanisms established the basis by which law and human rights indexes became the barometer for the measure of progress in Africa. However, what the ongoing gaps between underdeveloped institutions and rule of law mechanisms that individualize mass atrocity violence highlights is that it is impossible to understand contemporary relations in the Global South without attending to the tumultuous impact that Western powers have had in Africa.

24. Yet, the contemporary period is one in which this political backdrop has been divorced from the rise of the rule of law movement in relation to international prosecution processes, like those of ICC. The separation between the two highlights the reality that issues of governance and histories of plunder and corruption are deeply bound up in histories of inequality and institutional destabilization. These realities shape the deeply political and historical nature of violence in Africa and point to the importance of recognizing that Africa's contemporary violence is deeply embedded in its histories of destabilization and plunder – a process that continues even today, in subtle form, but nonetheless damaging.

25. As a result of the violence that unfolded in the post 1980s and 1990s period, the violence that erupted after the ICC came into force became the subject of AU scrutiny. Yet many of the world's most powerful countries, ranging from the US, Russia, China, Japan, and India, are not under the jurisdiction of the ICC and heads of state and high ranking leaders from those regions are not being issued extradition warrants. Narratives prevail about the perceived double standards in which the United States has supported the work of the court in an effort to assist them to pursue various perpetrators (non-American) but it is not a state party to the Rome Treaty.

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[26] *Ibid*, at 3

26. For example, the inability of the ICC to indict former Prime Minister Tony Blair for violence in Afghanistan represents one of many examples of the perceived inequalities of international justice. This concerns the US-Afghanistan war following the September 11, 2001, attacks in which the United States invaded Afghanistan and was supported by various Northern countries, such as the United Kingdom. Under the leadership of Prime Minister Tony Blair, the alliance produced the 2001 US-UK launch of *Operation Enduring Freedom,* which led to an aerial bombing campaign targeting al-Qaeda and Taliban forces. In the end the violence led to the destruction of both Taliban and civilian casualties and led to the broad- based support by US and NATO allied forces. Classified as a "just war,"[27] the UK's engagement in Afghanistan was not seen as being legally actionable. Rather, the legal logic was that it was outside of the limits of the ICC's temporal jurisdiction. And overall, the US-Afghanistan war was deemed as being outside of the reach of the ICC.

27. At the October 2013 Summit in Addis Ababa, some AU member states called on all signatory African states to withdraw their membership of the Rome Statute.[28] The Assembly also formally decided that 'no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office[29]. These initiatives propelled both attempts to lobby reform of the ICC through the proposal of amendments of the Rome Statute, as well as the prioritization of the expansion of the ACHPR's mandate to try international crimes, leading to the adoption of the Malabo Protocol at the Malabo summit in June 2014.[30]

28. Through the introduction of amendments of the Rome Statute for the ICC through the ASP in November 2014, African States that are parties to the Rome Statute underscored the importance of undertaking reforms including Rome Statute amendments proposed by the African Union[31], especially relating to Article 16 and 27 of the Rome Statute. These amendments were seen as setting the groundwork by which African State Parties would refrain from withdrawing from the ICC[32]. These proposed reforms included amendments to Article 27 - Irrelevance of official capacity, ii) Preambular part of Rome Statute to allow for complementarity of regional judicial institutions, iii) Article 16 on the deferral of cases, iv) Article 70 – offences against administration of justice, and v) the reduction of the powers of the Prosecutor[33].

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[27] In Chicago, IL, on 22nd April 1999, in a speech before NATO, Tony Blair defined the 'new doctrine of international community' in reference to the British involvement in the conflict in Kosovo. At this time he described NATO's involvement in the bombing of Yugoslavia as a 'just war'. See Prime Minister's speech: Doctrine of International community at the Economic Club, Chicago 24 April 1999 available at: <http://www.number-10.gov.uk/output/Page1297.asp>.

[28] *Ibid*.

[29] Ext/Assembly/AU/Dec.1, para. 10

[30] *Ibid*.

31 EX.CL/952(XXVIII), Para. 52

32 Report of the Fourth meeting of the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court, Para. 18

[33] Ibid,

29. At the January 2016 Summit (Assembly/AU/Dec.590 (XXVI), the lack of progress with the amendments of the Rome Statute led to the request for the withdrawal strategy. The decision stated (Para. 10 (iv): "The Open-ended Ministerial Committee's mandate will include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision". Once the committee was established, they identified the relevant issues and set up a two-phase strategy. Once the committee was established, it considered proposals by the Office of the Legal Counsel of the African Union, as to what the withdrawal strategy would look like. The committee proposed multiple approaches, including the option of a collective withdrawal from the Rome Statute for the ICC, if particular reforms did not take place.

30. In proposing the various approaches, the Open-Ended Ministerial Committee outlined the: I) need for continental and country level ownership of the international criminal justice through the strengthening of national judicial systems and working toward the ratification of the African Court, II) importance of engaging with the UN Security Council and clearly communicating that no referrals of particular situations on the African continent should be made without deference to Assembly of the Union, and III) need for a robust strategy to enhance the ratification of the Malabo Protocol expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international crimes. And IV) because of the slow pace of possible ICC reforms, they also insisted on the need for timelines for withdrawals[34]. The ministerial committee insisted that the comprehensive strategy should be developed by the AU Commission as soon as possible. They emphasized the importance of soliciting input from various delegations and that a draft copy should be submitted to the Ambassadors for consideration at the June 2016 meeting.

4. The AU's Three Pronged Approach

31. Key to the AU strategy laid out by the Open-ended Ministerial Committee was the delivery of justice in a fair and equitable manner that allows for the regionalization of International Criminal Law to flourish in the continent. Echoing the mantra of African Solution for African problems, it advanced the objectives of the Union and the African members of the Rome Statute by proposing three steps to be undertaken: (1) Reform of Rome Statute, (2) Reform of the UNSC referral system and (3) the ratification of both the Protocol on the Statute of the African Court of Justice and Human Rights and Ratification of the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights by Member States of the African Union (Malabo Protocol). Though not binding, these steps were proposed as suggestions for consideration and were seen as necessary components for
forming the basis of the engagement of the committee with the UNSC.

[34] Ibid.

4.1 Reform of the Rome Statute: Proposed Amendments to the Rome Statute for ICC

32. African State parties to the ICC participated in the Rome Statute for the ICC with the expectation that if the statute was not serving them appropriately amendments would be possible, when needed. The resultant need for reform of the statute was made clear by African members of the Assembly of State Parties. The amendments were deemed necessary as it was felt that the Rome Statute needed to align with expectations of fair international judicial systems. The Rome Statute amendments being reviewed by the ASP were proposed by South Africa and Kenya and were subsequently endorsed by the African Union commission. In order to take effect, they must be considered by the ASP and approved. Among the proposals, the Article 16 proposed amendment was sponsored by South Africa and the proposed amendments for the preamble, Article 63, and Article 27, were sponsored by Kenya.

The following are the amendments with explanation for their submission.

Article 16

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

South Africa proposed the following two articles to be added:

1) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.
2) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.

The amendment was proposed after African states that were party to the Rome Statute held a meeting from 3-6 November 2009 in Addis Ababa chaired by South Africa, at which they decided to propose an amendment to the Rome Statute in respect of Article 16 of the Statute. The reason for the proposal was to address situations where the UNSC was unable to decide on a deferral request. In considering such situations, they discussed the possibility of the deferral to be transferred to the UN General Assembly for a decision. This was evidenced in the refusal of the UNSC to address or respond to the deferral request of the AU in relation to case against President of the Sudan.

The Republic of Kenya proposed the following submissions:

Preamble – Complementarity

The proposal on the preamble:
"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions"

The Preamble of the Rome Statute provides "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions," In accordance with African Union resolutions, the amendment was proposed to allow recognition of regional judicial mechanisms.

Article 63 - Trial in the Presence of the accused

The following three sub-Articles have been proposed as part of the amendment:

"**Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.**

(1) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(2) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial."

Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same. Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.

Article 27 - Irrelevance of official capacity

"[…] Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions."

While being a Head of State or Government, such will not exempt them from criminal liability for international crimes allegedly perpetuated, prosecution should not be instituted until the Head of State or Government or anyone entitled to act as such, has left office – in accordance with domestic and customary international law.

Article 70 - Offences against Administration of Justice

"The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally **by any person"**

This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. This article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when 2 such offences are committed.

Article 112 - Implementation of IOM

The Independent Oversight Mechanism (IOM) be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.

Article 112 (4) Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court , in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office. There is a conflict of powers between the OTP and the IOM that is continuously present in the ASP.

4.2 Reform of the UNSC

33. The Rome Statute, under Article 13 (2), states that, "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

The power vested in the security council is controversial as it confers power to countries to refer cases to the prosecutor that have not submitted to the jurisdiction of the Rome statute themselves.

34. The problem is further complicated when the referral is made for a sitting Head of State. This was the case in 2005, when under Resolution 1593 the UN Security Council referred the situation in Darfur to the Prosecutor of the ICC. The referral of President Omar Al-Bashir of Sudan, was rejected by the Khartoum government and through successive AU Assembly decisions, the AU had requested a deferral of the case.[35] However, the continuous refusal of the UNSC to defer the case involving President Al-Bashir has prompted the South African amendment for the United Nations General Assembly to entertain the request of deferral if the UNSC does not respond to a deferral request within six months of being notified of it, as per Resolution 377 (V), Para. 1 of 1950. The request not only asks for a reshaping of how the referral system works, but it calls for the UN system to play a role in addressing a structurally unequal problem.

4.3 Ratification of the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights

35. In parallel with the goal of amending the Rome Statute and reforming the UNSC, , member states of the African Union also emphasized the need to effect a speedy entry into force of the Court Protocol (Malabo). The strategy involves identifying regional champions that will work toward driving ratification by member states[36]. The expansion of the jurisdiction of the court as outlined in the Malabo Protocol would allow the crimes listed in Rome Statute to be prosecuted on the African continent. This also aligns with the amendment proposed by Kenya, which aims to have regional judicial mechanisms to complement the ICC.

36. The ratification of the Protocol and the subsequent operationalization of the court would open an alternative avenue for justice to be dispensed, echoing the motto of "African Solution to African Problems". To this effect, the Committee proposed the three areas of engagement in order to reach the objectives listed above.

[35] Assembly/AU/Dec.221 (XII), Para. 3; Assembly/AU/Dec.270 (XIV) Para. 10;

[36] Conclusions of the Meeting of the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court at the Level of Permanent Representatives

PART 2

5. Treaty Consent and Withdrawal from Treaties in International Law

5.1. General Rules Governing State Withdrawal from a Treaty: Unilateral and Collective

37. A treaty is an agreement under international law entered into by actors (such as international organizations and sovereign states) as willing parties give consent to assume obligations amongst themselves. The *Vienna Convention on the Law of Treaties*[37] (VCLT) is widely recognized as the principle and most authoritative source of law governing the creation, operation, and termination of, and withdrawal[38] from treaties, including the *Rome Statute of the International Criminal Court*[39] (ICC Statute).[40] Many of the VCLT's provisions codify and crystallize rules of customary international law[41] which are binding on all states regardless of whether they are parties the Convention.

38. The foundational principle of treaty law – and the law of withdrawal[42] – is that of *pacta sunt servanda.*[43] It is enshrined in Article 26 of the VCLT, which states, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'[44] The VCLT goes on to outline the limited circumstances – intended to be exhaustive[45] – in which it would be permitted for states to suspend, terminate, or withdraw from a treaty they have consented to be bound by.[46]

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[37] 23 May 1969, 1155 UNTS 331 (hereafter 'VCLT').
[38] As a preliminary note, 'withdrawal' and 'denunciation' are used interchangeably in international law and refer 'to a unilateral act by which a nation that is currently a party to a treaty ends its membership in that treaty' while the treaty – if multilateral – remains in force for the other states still party to it. This is in contrast to treaty *termination*, which ends all parties' obligations under the instrument: Laurence R. Helfer, 'Terminating Treaties' in Duncan Hollis, ed., *The Oxford Guide to Treaties* (Oxford University Press, 2012) 634 at 635 (hereafter 'Helfer, Terminating Treaties').
[39] (last amended January 2002), 17 July 1998, 2187 UNTS 90 (hereafter 'ICCSt').
[40] Yogesh Tyagi, 'The Denunciation of Human Rights Treaties' 79(1) *British Yearbook of International Law* (2008) 86 at 118 (hereafter 'Tyagi').
[41] E.g. in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, judgment of 25 September 1997, ICJ Reports (1997) 7 (hereafter '*Gabčíkovo-Nagymaros*'): The International Court of Justice (ICJ) at 38 stated 'it has several times had occasion to hold that some of the rules laid down in [the VCLT] might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties.'; See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971) 16 at 47: 'The rules laid down by the [VCLT] concerning termination of a treaty relationship on account of breach … may in many respects by considered a codification of existing customary law on the subject.'; See also Laurence R. Helfer, 'Exiting Custom' 21 *Duke Journal of Comparative & International Law* (2010) 65 at 77 (hereafter, 'Helfer, Exiting Custom').
[42] Tyagi, *supra* note at 153.
[43] *Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur*, UN Doc A/CN.4/107 (15 March 1957) § 6; International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' in *Yearbook of the International Law Commission, 1966*, vol. II at 211, available online: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; Laurence R. Helfer, 'Exiting Treaties' 91 *Virginia Law Review* (2005) 1579 at 1580 (hereafter 'Helfer, Exiting Treaties').
[44] VCLT, *supra* note, art. 26.
[45] Helfer, Terminating Treaties, *supra* note at 636.
[46] VCLT, *supra,* note, Art. 42(2) states: 'The termination of a treaty, its denunciation or the withdrawal of a party, may take place only

as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.'

39. An overarching principle governing the design and operation of all treaty exit clauses is state consent.[47] Because the creation of a treaty involves painstaking negotiation and reflects a compromise among states regarding the mutual obligations, the ratification of these instruments by a state represents their acceptance to be bound by 'any conditions or restrictions on termination, withdrawal, or denunciation that the treaty contains.'[48] This is reflected in Article 54(a) of the VCLT, which provides that the withdrawal of a party to a treaty should in the first place occur 'in conformity with the provisions of the treaty.'[49] As Lauterpacht put it:

> *The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties – just as, in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to the matter regulated by a treaty, it is natural that the parties should invoke that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question. … Within these limits – which may be substantial … – a treaty overrides international customary law and even general principles of law'.*[50]

40. Absent an express withdrawal clause in the treaty in question, states can denounce a treaty only through 'consent of all parties after consultation with the other contracting States'[51] or in accordance with Article 56 of the VCLT, which governs the withdrawal of states from treaties that do not contain an explicit denunciation clause.[52] This scheme is considered customary international law[53] and consolidated in paragraph 332 of the US Restatement (Third) of the Foreign Relations Law:

(1) The termination or denunciation of an international agreement, or the withdrawal of a party from an agreement, may take place only:
   a. In conformity with the agreement or b.
   By consent of all the parties.

(2) An agreement that does not provide for termination or denunciation or for the withdrawal of a party is not subject to such action unless the right to take such action is implied by the nature of the agreement or from other circumstances.[54]

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[47] Helfer, Terminating Treaties, *supra* note at 636.
[48] *Ibid*.
[49] VCLT, *supra,* note Art. 54.
[50] Elihu Lauterpacht, ed., *International Law: The Collected Papers of Hersch Lautperpacht* (Cambridge University Press, 1970) at 87.
[51] VCLT, *supra* note, art. 55
[52] *Ibid*, Art. 56 reads: '1. A treaty which contains no provision regarding its termination and which does not provide for denunciation and withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.'
[53] *General Comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, § 1 (hereafter '*General Comment 26*').
[54] *Restatement (Third) of the Foreign Relations Law of the United States*, Vol. 1 (St. Paul: American Law Institute, 1987) (hereafter 'US Third Restatement').

41. However, withdrawal will not release states from any *erga omnes* obligations to respect *jus cogens* norms that are codified in the denounced treaty. A *jus cogens* – or peremptory – norm is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[55] Moreover, Article 43 of the VCLT provides that withdrawing states will still be bound by international obligations which may have been codified in the treaty in question but also exist independently of the treaty (i.e. customary international law).[56]

42. The next section will focus on the legal norms surrounding a withdrawal from treaties containing withdrawal clauses like the ICC Statute, one case of the application of Article 56 is worthy of mention. In 1997, North Korea attempted to withdraw from the *International Covenant on Civil and Political Rights*[57] (ICCPR), which does not contain a withdrawal clause. Faced with the question of whether the ICCPR permitted denunciation or whether obligations contained therein were of indefinite duration, the United Nations Human Rights Committee (UNHRC) issued General Comment 26. In that document, the UNHRC concluded that 'the drafters of the Covenant deliberately intended to exclude the possibility of denunciation.'[58] Given that, together with the *International Covenant on Economic, Social and Cultural Rights* and the *Universal Declaration of Human Rights*, the ICCPR codifies rights that are universally applicable and thus not temporary in nature, the UNHRC found that 'it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation.'[59] The UN Secretary General took a different view of the denunciation, arguing that Article 54 of the VCLT precluded North Korea's denunciation of the ICCPR because the other parties to the Covenant had not consented to the withdrawal.[60]

43. Treaty withdrawal from the ICC Statute is governed by Article 127. Attempts to withdraw from the ICC Statute that do not comply with the notice procedures and ongoing cooperation requirements set out in Article 127 will be viewed as a treaty breach for which individual states will be accountable even after the withdrawal is effective. In contrast, by withdrawing in accordance with Article 127 of the ICC Statute, states can present themselves as respectful of international law and legally withdraw from their obligations under the Convention.

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[55] VCLT, *supra* note

[56] *Ibid*, art. 43. E.g. Despite denouncing the European Convention on Human Rights (ECHR), the First Protocol to the Convention, and the Statute of the Council of Europe in 1970, the Council of Europe urged the Greek military government to continue fulfilling its human rights obligations under those instruments: See Tyagi, *supra* note at 159; See also, however, Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom' 120 *Yale Law Journal* (2010) 202 (hereafter 'Bradley and Gulati'), in which Bradley and Gulati challenge the notion that nations never have a legal right to unilaterally withdraw from rules of customary international law; Helfer, Exiting Custom, *supra* note at 80, agrees that a categorical ban on customary international law withdrawals should be rejected.

[57] 16 December 1966, 999 UNTS 171.

[58] *General Comment 26*, *supra* note, § 2.

[59] *Ibid*, § 3.

[60] Helfer, Terminating Treaties, *supra* note at 640.

5.2 Rome Treaty Withdrawal – Article 121 and Article 127

44. State withdrawals from the Rome Statute follow the provisions of the Vienna Convention on the Law of Treaties, Article 42(2) which state that, "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty"[61]. The proposed AU withdrawal from the Rome Statute can be implemented on a state by state basis by using Article 127 of the Statue. The article deals exclusively with the terms of withdrawal and hence affirms the sovereign right of a state to withdraw from the Rome Treaty for the ICC. As with any other treaty, the terms still bind a state to its existing obligations under the ICC. The withdrawal from the ICC by African member states can be taken under the recognition that it has to be executed by individual member states according to their constitutional provisions. As varied as the states are, so are the legal requirements needed to make the withdrawal happen. The political decision taken notwithstanding, those member states with ICC investigations or cases underway would still be liable to fulfill their obligations under the treaty in relation to those cases or investigations.

45. The next section details the terms of an Article 127 withdrawal and also highlights the terms for withdrawal under Article 121.

Article 121

Amendments

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

[61] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 27 May 2016]

46. The above two articles in the Rome Statute address the issue of withdrawal for state parties. While Article 127 deals with withdrawal by a state party in a broader context, Article 121 (6) deals with withdrawal in a narrow set of circumstances in relation to treaty amendments. The withdrawal question raised by African member states would fall on Article 127, which is open ended in its execution.

47. Article 127(1) of the ICC Statute provides that 'A State Party may, by written notification addressed to the Secretary General of the United Nations, withdraw from this Statue. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.'62 Thus, a withdrawal evoked on the basis of Article 127 entails a waiting period of one year for the notification to take effect, unless a later date is specified. According to subsection (2), the obligations by state parties that commenced before the notification of withdrawal must be respected, even though a state party decides to withdraw and submits the notification of withdrawal. This includes matters that were instituted before the withdrawal became effective. The state would also be obligated to make payments on any accrued financial obligations. Furthermore, the duty to cooperate will not cease to apply, even after withdrawal for cases that started before the withdrawal. The obligation to cooperate with the court on cases that are under consideration by the court relates to all cases instituted by the ICC, even after a withdrawal notification has been submitted.

48. A withdrawal that is evoked on the basis of Article 121 (6), would have to be initiated by a state which does not accept an amendment that has been adopted under Article 121(4) and may withdraw from the Statute at any time within one year after entry force of such amendment. This provision is an exception from the general right to withdraw, under Article 127(1), which takes effect only after one year of the notification. Withdrawals under Article 121(6) take effect immediately. In the current situation faced by African member states, this clause is not likely to be considered. This is because there are no existing amendments that represent points of contention by African state parties.

49. **A Possible Waiver of the One-Year Notification Period in Article 127(1)?**

Article 127(1) of the ICC Statute provides that 'A State Party may, by written notification addressed to the Secretary General of the United Nations, withdraw from this Statue. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.'[63] Thus, one year following the provision of notification of withdrawal, Kenya would cease to be a State Party to the ICC Statute and be free of obligations under the treaty, subject to the limitations set out in Article 127(2). Before turning to Article 127(2), it must be mentioned that the ICC Statute contains an exception to the one-year notice period, contained in Article 121(6), which reads:

If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph

[62] (last amended January 2002), 17 July 1998, 2187 UNTS 90 art. 127 (hereafter 'ICCSt')
[63] (last amended January 2002), 17 July 1998, 2187 UNTS 90 art. 127 (hereafter 'ICCSt')

> *[121(4)], any State Party which has not accepted the amendment may withdraw form this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.*[64]

While Article 121(6) provides for the possibility of immediate withdrawal, waiving the one-year notification period requirement in Article 127(1), it applies to circumstances where an amendment has been *accepted* by a certain proportion of member states, allowing states who have not consented to the amendment to denounce the ICC Statute. Thus, the possibility of immediate withdrawal is not available in the circumstances at hand, as Kenya and AU states are seeking to withdraw if the ICC *fails* to adopt their proposed amendments to the ICC Statute.

Ongoing Obligations Under Article 127(2)

States Parties withdrawing from the ICC must abide not only by the one-year notification period, but also by the conditions for withdrawal set out in Article 127(2), which provides:

> *A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have been accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and were were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.*[65]

The first sentence of Article 127(2) 'sets out the general principle that obligations on the State that exist at the time of withdrawal remain in force, and are unaffected.'[66] However, Article 127(2) continues by setting out three specific types of obligations, which will be examined in turn in light of the Kenya cases.

Financial obligations which may have been accrued

According to Bill Schabas, the financial obligations in question 'will consist of regular assessments imposed upon States Parties by the Assembly of States Parties, in accordance with article 115(a)'.[67] As this portion of Article 127(2) does not bear upon the future of the Kenyatta and Ruto cases, it is unnecessary to delve further into its interpretation in light of the research question at hand.

Obligation to cooperate with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and were commenced prior to the date on which the withdrawal became effective

Schabas specifies that the obligations 'to which the withdrawing State had a duty to cooperate' are set

[64] *Ibid*, art. 121(6).
[65] *Ibid,* art. 127(2)
[66] Schabas, *supra* note at 1207.

[67] *Ibid*.

out in Part IX of the ICC Statute, which include: the general obligation to cooperate (art. 86-87); ensuring that national law enables cooperation (art. 88); obligations to arrest and surrender persons to the ICC (art. 89-92); and obligations to provide assistance in the course of investigations or prosecutions (art. 93[68]). The second requirement is that these obligations had to have commenced prior to the date the withdrawal becomes effective (i.e. one year following the provision of notice of withdrawal). The list of obligations is quite broad. They do not only refer to the prosecution of Kenyatta and Ruto, but also to cooperation with the Prosecution in the ongoing investigation of the situation of 2007 post-election violence in Kenya, and gathering of evidence that could lead to the cases being re-prosecuted.

Article 127(2) makes clear that this obligation applies to any investigations and proceedings that were *commenced* before the withdrawal takes effect. The Article makes no mention of existing obligations ceasing once a withdrawal is effective. Accordingly, Kenya's current obligations to cooperate with the investigations, and any proceedings relating to charges of obstruction of justice or non-cooperation are likely to continue beyond the one-year notification period should Kenya pursue withdrawal from the ICC Statute. The same would apply to any re-prosecution of Kenyatta and Ruto commenced at any point before the withdrawal takes effect. As stated by Schabas, Article 127(2) '[c]learly … covers obligations that arise after the State has formulated its declaration of withdrawal but before the declaration becomes effective.'[69]

No prejudice to continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective

The drafters of the ICC Statute chose broad language for this portion of Article 127(2). First, it applies to 'any matter', which Schabas presumes to refer to any 'situation or case.'[70] Second, the language is not restricted to matters already underway, but also those 'under consideration.' Finally, Schabas points out that an expansive interpretation of 'the Court' may also include the Prosecutor, meaning that 'it might be contended that "any matter" was before "the Court" simply because the Prosecutor was considering applying to the Pre-Trial Chamber for authorization to begin an investigation, in accordance with article 15.'[71]

[68] Article 93 of the ICCst, *supra* note 62 further specifies the forms of assistance and cooperation with respect to: (a) The identification and whereabouts of persons or the location of items; (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; (c) The questioning of any person being investigated or prosecuted; (d) The service of documents, including judicial documents; (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; (f) The temporary transfer of persons; (g) The examination of places or sites, including the exhumation and examination of grave sites; (h) The execution of searches and seizures; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) T he identification, tracing , and freezing or seizure of proceeds, property and assets and instrumentalities of crime for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court

[69] Schabas, *supra* note at 1207.

[70] *Ibid*.

[71] *Ibid*.

Thus, on its plain reading and under an expansive interpretation, Article 127(2) would seem to permit the continuation of prosecutions against Kenyatta and Ruto, and perhaps even new accused persons identified by the Prosecution in connection with the Situation of 2007 post-election violence in the Republic of Kenya, even after Kenya's withdrawal becomes effective. Indeed, there are examples of very expansive interpretations from other tribunals dealing with state withdrawal. For example, despite Jamaica's withdrawal from the *Optional Protocol to the International Covenant on Civil and Political Rights* and the *American Convention on Human Rights*, the United Nation Human Rights Committee (member Hipólito Solari Yrigoyen, dissenting) and the Inter-American Commission on Human Rights both took the position that they would retain jurisdiction over allegations made even after Jamaica's withdrawal became effective if the events associated with the allegations occurred before the denunciation became effective.[72]

It is worth noting that Schabas identifies other grey areas where the effect of Article 127(2) may be unclear: 'For example, it is uncertain what would happen to a prisoner serving a sentence in a State Party that withdraws from the *Statute*. Judges of the Court must be nationals of a State Party. Does withdrawal from the Court by a judge's State of nationality render him or her unable to sit?'[73] There are also questions about whether Kenya would remain obligated to cooperate with the ICC in future potential prosecutions of President Kenyatta and Deputy President Ruto, or other matters associated with the situation under consideration, namely the 2007 post-election violence? The questions have to do with whether or not an expansive interpretation would be applied in the context of the Kenyan cases which would require the ICC to consider Article 127(2) in light of the clause's context and object and purpose (which can be gathered from the sub-section the article is found in as well as the wider wording and aims of the ICC Statute as set out in its preamble and general tenor).[74] Making these determinations would require extensive and in-depth exercise in treaty interpretation on the basis of robust submissions from both sides of the issue. However, there are some factors that may be taken into consideration. These considerations are by no means exhaustive.

Object and purpose and Context

In the ICC's decision to vacate the charges against Deputy President Ruto, Judge Eboe-Osuji, in *obiter dicta,* recalled that the Appeal Chamber's has held that 'the preamble of the Rome Statute must be consulted for the object and purpose of the Statute. It must inform a proper construction of the meaning to be given to the phrase [in question]', especially where there are incongruities or absurdities that may arise in its interpretation.[75]

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[72] *Communication No. 800/1998*, UN Doc CCPR/C/65/D/800/1998 (26 May 1999) § 6.4, available online: https://www1.umn.edu/humanrts/undocs/session65/view800.htm; *Balkisoon Roodal v. Trinidad and Tobago,* Case 12.147, Report No. 89/01, OEA/SerL/V/II/114 Doc. 5 rev. at 300 (2001), § 23, available online: https://www1.umn.edu/humanrts/cases/89-01.html.
[73] Schabas, *supra* note at 1207.
[74] See footnote 10.
[75] *Ruto supra* note §438.

The preamble to the ICC Statute emphasizes the connection between peace and justice, and that the ICC was created to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'. The preamble also stresses the States Parties' determination to end impunity for perpetrators of these most grave crimes and to prevent their future occurrences. The preamble also emphasizes complementarity as an underlying principle of the ICC Statute.

Withdrawal clauses are constructed to 'restrict States from using exit to avoid accountability for past violations of international law.'[76] To the extent that Kenya's withdrawal is perceived to be an attempt to shield perpetrators of serious international crimes from accountability, it is likely that the ICC would consider such a withdrawal to be an attempt at non-cooperation and obstruction of justice inconsistent with the object and purpose of the ICC Statute. Judge Eboe-Osuji's lengthy repudiation of Kenya's conduct in the context of the Ruto case indicates that at least some of the Court is likely to view withdrawal as an attempt to skirt justice and adopt an expansive interpretation of Article 127.

On the other hand, the drafters of the ICC Statute included an explicit withdrawal provision in Article 127, an affirmation that the obligations under the Statute are grounded in state sovereignty and consent and are not necessarily indefinite and absolute. The amendment provisions in Article 121 support this notion. Michael Scharf and Patrick Dowd have explained that Article 121(6) 'affirms a state's sovereign right not to be bound involuntarily to new treaty obligations while holding that state accountable for those obligations already in place.'[77] It would run against the fundamental international law principles of *pacta sunt servanda* and state sovereignty to interpret Article 127(2) so expansively that state obligations continue indefinitely. Perhaps, however, the line could be drawn at the situation at hand – the 2007 post-election violence – with other situations of serious international crimes falling outside of the ICC's jurisdiction.

50. However, there are also some broader potential negative implications of an overly expansive interpretation of Article 127 that highlight a myriad of potential political implications of a withdrawal, even if it is legal. On the positive side, hegemonic states or groups of states may succeed in shifting the law or sway other states to change the rules to more favorably serve their interests. On the negative side, states may risk reputational losses, become sanctioned, or isolate themselves from the rest of the international community.

51. Adopting an overly expansive interpretation of Article 127(2), enforcing ongoing obligations far beyond the effective withdrawal of a State Party to the ICC, may have a deterrent effect on non-

[76] Laurence R. Helfer, 'Terminating Treaties' in Duncan Hollis, ed., *The Oxford Guide to Treaties* (Oxford University Press, 2012) 634 at 641 (hereafter 'Helfer').
[77] Michael P. Scharf and Patrick Dowd, 'No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts' 9:2 Chicago Journal of International Law 573 (2009) at 587.

States Parties from joining the ICC in the future. Interpreting Article 127(2) will require the ICC to strike a balance between seeking justice and ending impunity for perpetrators, ensuring trial fairness, and recognizing that the ICC is an institution built on the fundamental principles of state sovereignty and consent to its jurisdiction.

6. Consequences of Treaty Denunciation

6.1 Failure to Comply with the Terms of Withdrawal Contained in the Treaty Result Not in Denunciation but in Breach of International Law

52. Attempts to withdraw from a treaty that do not comply with the conditions for denunciation set out in that treaty are not deemed valid in international legal circles. Circumventing an explicit withdrawal clause in a treaty will result not in withdrawal but will instead put the state in breach of its treaty obligations.[78] This rule has materialized in the cases of Latin American states attempting to withdraw from the *American Convention on Human Rights*[79] (ACHR), described in more detail below. States that did not follow the procedures for withdrawal set out in Article 78 of the ACHR[80] - Peru and the Dominican Republic – were not recognized as having validly withdrawn from the convention, whereas Venezuela, who abided by the withdrawal clause by providing notice and remaining under the Inter- American Court of Human Rights' (IACtHR) jurisdiction for the duration of the one-year notice period, successfully denounced the ACHR. The following examples highlight the developments in this area.

6.1.1 Peru

53. In addition to Trinidad and Tobago's withdrawal from the ACHR in 1998, Peru attempted to withdraw its declaration consenting to the jurisdiction of the IACtHR in 1999. The move was a response to the court's ruling in *Castillo Petruzzi et. al. v. Peru*[81] that Peru had violated the claimants' rights and order that, *inter alia*, Peru provide a new trial. Peru refused to implement the judgment, and instead decided to withdraw from the IACtHR by notifying the General Secretariat of the Organization of American States (OAS) that it 'withdraws it declaration of recognition of the elective clause submitting to the contentious jurisdiction of the Inter-American Court of Human Rights. [This withdrawal] shall
go into effect immediately and shall apply to all cases in which Peru has not responded to a petition

[78] VCLT, *supra* note, art. 54(a); Helfer, Terminating Treaties, *supra* note at 636. For a detailed discussion of the difference between withdrawal and breach, see Helfer, Exiting Treaties, *supra* note at 1613-1629.

[79] *American Convention on Human Rights, 'Pact of San Jose'*, *Costa Rica*, 22 November 1969.

[80] Article 78 of the ACHR, *ibid*, reads: '1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties. 2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.'

[81] Judgment of 30 May 1999 (Merits, Reparations and Costs) available online: http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf.

filed before the Court.'[82]

54. The IACtHR considered the validity of Peru's withdrawal of its declaration in the case of *Ivcher Bronstein v. Peru* (*Ivcher Bronstein*).[83] The court held that Peru's denunciation was invalid, stating that:

> *Since '[t]here is no provision in the [ACHR] that expressly permits the States Parties to withdraw their declaration of recognition of the Court's binding jurisdiction … a State Party … can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates. In [the case of the ACHR], the only avenue the State has to disengage itself from the Court's binding contentious jurisdiction is to denounce the Convention as a whole … [T]he denunciation will only have effect if done in accordance with Article 78, which requires one year's advance notice.*[84]

6.1.2 Venezuela

55. On 10 September 2012, Venezuela notified the Secretary General of the OAS that it would denounce the ACHR, following longstanding complaints that the Inter-American Commission for Human Rights (IACmHR) and the IACtHR were biased against the de facto government that took power during a coup d'état in April 2001 that put Hugo Chávez into power. Since the coup, the IACmHR and IACtHR have issued a number of reports, decisions, and judgments focusing on the poor protection and promotion of human rights in Venezuela, focusing on, *inter alia*, substandard conditions in Venezuelan prisons, attacks on the independence of the judiciary, suppression and harassment of journalists and non-state media outlets, politically-motivated prosecution and disqualification of opposition politicians, and extrajudicial killings by the police.[85]

56. Venezuela took special objection to the IACtHR's ruling in the case of *Díaz Peña v. Venezuela*.[86] Díaz Peña had been accused of participating in the 2003 bombings of the Spanish Embassy and Colombian consulate in Caracas. The IACtHR found that Venezuela had violated Díaz Peña's human rights by failing to provide him with adequate medical care while detained and awaiting trial. President Chávez accused the court of 'supporting terrorism' through its decision.[87] In its communication to the Secretary General to the Organization of American States providing notification of and grounds for Venezuela's withdrawal from the ACHR, Venezuela charged the court and Commission of 'blatantly
fail[ing] to comply with the norms on which those organs are based, shamefully violating the

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[82] *1999 Annual Report of Inter-American Court of Human Rights* (2000) OEA/SerL/V/III.47, doc. 6, available online: https://www1.umn.edu/humanrts/iachr/Annuals/annual-99.html.
[83] Judgment of 24 September 1999 (Competence) available online: http://corteidh.or.cr/docs/casos/articulos/seriec_54_ing.pdf (hereafter '*Ivcher Bronstein*').
[84] *Ibid*, §§ 39-40.
[85] International Justice Resource Centre, 'Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform' 19 September 2012, available online: http://www.ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights- as-iachr-faces-reform/ (hereafter 'International Justice Resource Centre').
[86] Judgment of 26 June 2012 (Preliminary objection, merits, reparations, and costs) available online: http://www.corteidh.or.cr/docs/casos/articulos/seriec_244_ing.pdf.
[87] International Justice Resource Centre, *supra* note 85.

principles of subsidiarity and complementarity of the inter-American human rights system set forth in the preamble to the Convention.'[88]

57. In its denunciation letter, Venezuela provided a detailed justification for its withdrawal, and stressed continued respect for and ability to protect and promote human rights domestically. Venezuela stated that the IACmHR and IACtHR:

> *have become a political weapon aimed at undermining the stability of specific governments, especially [Venezuela], by adopting lines of action that interfere in the internal affairs of our government, violating and ignoring the basic, essential principles widely recognized in international law, such as the principle of respect for state sovereignty and the principle of self-determination of peoples, and even overlooking … rules that, in accordance with the Convention, would govern the activities of the [IACmHR and IACtHR], such as necessary exhaustion of domestic remedies of the state party to the Convention, which indicates ignorance of the internal institutional and legal order of each of the states parties to that international treaty and also therefore another failure to respect their sovereignty[.]*[89]

58. Venezuela accused the Commission and court of singling it out for political reasons and undermining domestic processes by hearing cases before all domestic options have been exhausted.[90] Despite denouncing the ACHR, Venezuela took great pains to reiterate its continued commitment to increasing cooperation at the UN Human Rights Council and UNHRC through their reporting mechanisms,[91] complying with 'the elements contained in the OAS Charter and in other instruments validly ratified by the Republic in the framework of this hemispheric organization',[92] promoting
'respect for the most sacred principles of international law, such as independence, noninterference in internal affairs, sovereignty, and the self-determination of peoples', and 'respecting and complying with the provisions of the other mechanisms for integration and international cooperation.'[93]

59. The legal effect of Venezuela's withdrawal from the ACHR was that Venezuelans can no longer avail themselves of the IACtHR as a mechanism to remedy human rights violations. While expressing deep concern over Venezuela's actions, the IACmHR accepted them as legal, and effective a year from the receipt of notice – 10 September 2013. However, the Commission stressed that Venezuela's

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[88] Venezuela Communication to the Secretary General of the OAS denouncing the ACHR, 6 September 2012, available online: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf (hereafter 'Venezuela denunciation letter').
[89] *Ibid* at 3
[90] *Ibid* at 5. Note that Venezuela is not alone in feeling singled out by the inter-American system. As *The Economist* has reported, 'the IACHR has trained much of its fire on the autocratic members of the Bolivarian Alliance for the Americas (ALBA), a mainly leftist group of countries led by Venezuela that includes Ecuador and Bolivia.' While Ecuador and Bolivia have not yet signaled an intention to denounce the ACHR, their criticisms of the inter-American system and the precedent set by Venezuela may sway them in that direction of the Commission does not adopt changes favorable to the interests of this block of states: see 'Chipping at the foundations' *The Economist*, 9 June 2012, available online: http://www.economist.com/node/21556599; See also International Justice Resource Centre, *supra* note 85.
[91] Venezuela denunciation letter, *supra* note 88 at 4.
[92] *Ibid* at 12.
[93] *Ibid*.

denunciation of the ACHR (and consequently the IACtHR) would not affect the IACmHR's ability to hear complaints of violations of the *American Declaration on the Rights and Duties of Man* through handle petitions, cases, and precautionary measures against Venezuela since the country remained a state party to the OAS.[94] The Commission also stated that human rights violations that took place before the date that the denunciation became effective on September 10th 2013 and would continue to fall under the jurisdiction of the IACtHR.[95]

60. Venezuela's decision to withdraw from the ACHR has been widely decried, including by the UN High Commissioner for Human Rights, Navi Pillay, who noted that 'the decision runs directly counter to the resolutions adopted by the UN Human Rights Council – to which Venezuela became a party in 2012 – aiming to enhance cooperation and dialogue between international and regional human rights mechanisms'.[96] The OAS Secretary General also urged Venezuela to reconsider its withdrawal,[97] as has the UN Committee on the Elimination of Racial Discrimination (CERD).[98] A further 700 civil society organizations across the Inter-American System as well as former heads of State have signed a declaration in support of the IACmHR's authority and independence.[99]

6.1.3 Dominican Republic

61. In 1999, the IACmHR issued a report on Dominican Republic, criticizing the country's treatment of Haitians on its territory, including massive expulsions, and poor working and living conditions on sugar cane plantations (*bateyes*).[100] Following that report, the IACtHR issued a motion of provisional measures to prevent further expulsions of Haitians and Dominicans of Haitian descent.[101] Years of discussion ensued, leading to the Dominican Republic signing an agreement with the IACmHR, committing to *inter alia*, adopting necessary measures to protect the life and physical integrity of the petitioners and witnesses, prevent the deportation or expulsion of three petitioners, submitting detailed information about the situation of people living on *bateyes*, and creating a mechanism to

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[94] Inter-American Commission on Human Rights, 'IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention' 10 September 2013, available online: http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp (hereafter 'IACHR Deeply Concerned over Venezuela's Denunciation').

[95] *Ibid*. Article 78(2) of the ACHR states that a withdrawal 'shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation; See also Diego Germán Mejía-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights' 17(1) *ASIL Insights*, available online: https://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights.

[96] IACHR Deeply Concerned over Venezuela's Denunciation, *supra* note 94.

[97] *Ibid*.

[98] Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of the Bolivarian Republic of Venezuela, adopted by the Committee at its eighty-third session (12-30 August 2013)*, UN Doc CERD/C/VEN/CO/19-21, 23 September 2013, § 23.

[99] International Justice Resource Centre, *supra* note 85.

[100] *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104 Doc. 49 rev. 1, 7 October 1999, available online: http://www.cidh.org/countryrep/DominicanRep99/Table.htm.

[101] Petition 12.271 Benito Tide Méndez, Antonio Sensión, Andrea Alezi, Janty Fils-Aime, William Medina Ferreras, Rafaelito Pérez Charles, Berson Gelim *et al.*, Report Nº 68/05 13 de October de 2005 (Admissibility), available online: http://cidh.org/annualrep/2005eng/DominicanRep.12271eng.htm.

coordinate and supervise the implementation of the agreement.[102]

62. Nevertheless, in 2013, the Dominican Republic's Constitutional court ruled to strip citizenship from tens of thousands of Dominicans of migrant descent (mostly Haitian), followed by a ruling in November 2014 declaring the government's 1999 accession to the jurisdiction of the IACtHR unconstitutional,[103] amounting to a *de facto* denunciation of the ACHR.[104] However, the international community has rejected the validity of this withdrawal, which was not undertaken in accordance with the denunciation clause set out in the ACHR. The IACmHR, for instance, stated that 'judgment TC/0256/14 of the Constitutional Court … has no basis in the norms and principles of international law and is therefore without present and future legal effects in the international realm.'[105] The Commission added that 'rulings such as [this] undermine the added protection that international organs for the protection of human rights afford to all persons subject to the jurisdiction of the Dominican State and also create legal uncertainty, institutional instability, and mistrust on the part of the international community.'[106] Amnesty International called the judgment 'appalling' and stated that it 'shows the Dominican Republic's complete lack of care for its international human rights obligations', and the judiciary's lack of independence and impartiality, 'proving it to be politically biased by defending narrow interests.'[107]

6.1.4 Reservations by Ecuador, Colombia, and El Salvador

63. Three other states – Ecuador, Colombia, and El Salvador – have reserved the right at the outset to withdraw from the jurisdiction of the IACtHR 'whenever [they] deem it advisable to do so.'[108] A reservation at the outset differs from an after-the fact withdrawal because in the former, a state refrains from consenting to be bound by a treaty term whereas in the latter, a state attempts to denounce an obligation it has freely entered into. Reservations to treaty provisions are permitted in international law so long as they are not incompatible with the object and purpose of the treaty.[109]
However, consider the following observation by the IACtHR in *Ivcher Bronstein*:

> *[a]ny interpretation of the Convention that allows a State Party to withdraw its recognition of the Court's binding jurisdiction … would imply suppression of the exercise of the rights and freedoms*

[102] 'Dominican Government Formalizes Agreement According to its International Obligations' available online: http://www.nchr.org/nchr/hrp/dr/iachr_agreement.htm.
[103] Sentencia TC/0256/14, available online: https://www.tribunalconstitucional.gob.do/sites/default/files//documentos/Sentencia%20TC%200256-14%20%20%20%20C.pdf.
[104] Human Rights Watch, 'Dominican Republic: Events of 2015' available online: https://www.hrw.org/world-report/2016/country-chapters/dominican-republic.
[105] Inter-American Commission on Human Rights, *Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II, Doc. 45/15, 31 December 2015 § 143 available online: http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf.
[106] *Ibid*.
[107] Amnesty International, 'Dominican Republic: Withdrawal from top regional human rights court would put rights at risk' 6 November 2014, available online: http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf
[108] Organization of American States, 'Basic Documents in the Inter-American System - American Convention on Human Rights' available online: http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp.
[109] *Advisory Opinion on Reservations, supra* note.

recognized in the Convention, would be contrary to its object and purpose as a human rights treaty, and would deprive all the Convention's beneficiaries of the additional guarantee of protection of their human rights that the Convention's jurisdictional body affords.[110]

64. Pasqualucci predicted that given the IACtHR's position in *Ivcher Bronstein*, it would be unlikely that the court would recognize as valid a subsequent withdrawal of Ecuador, Colombia, or El Salvador from its jurisdiction.[111] However, the example of Venezuela indicates that a withdrawal carried out in accordance with the procedures set out in the ACHR will be recognized as valid. The Dominican Republic case seems to confirm this conclusion, as the attempted withdrawal by the country's judiciary has been widely rejected and strongly repudiated by the international community. However, regardless of whether a withdrawal is undertaken legally in accordance with the provisions of a treaty, a denunciation of a foundational human right instrument like the ACHR will carry significant political and reputational consequences, as evidenced by the public and international outcry against Venezuela's withdrawal.

7. Latin American pushback on the international investment regime

65. Latin American states have also been retreating from international institutions for the government of investment disputes. Starting in the late 2000s, a number of Latin American states have grown disgruntled of the international investment regime, charging that its despite resolution mechanism – the International Centre for Settlement of Investment Disputes (ICSID) – 'is not transparent, … does not account for the disparity in economic situation of regime members, that arbitrators' decisions infringe on the legitimate exercise of sovereignty by host countries, and that participation in the arbitral process is extremely costly for developing countries.'[112] For all these reasons, Bolivia denounced the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[113] (ICSID Convention) in May 2007, followed closely by Ecuador's denunciation of the ICSID Convention and the jurisdiction of the ICSID in July 2009, and Venezuela in January 2012.[114]

66. All the denunciations were carried out by notice in accordance with the terms for withdrawal set out in the ICSID Convention. Article 71 of the ICSID Convention provides that 'Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation

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[110] *Ivcher Bronstein*, *supra* note 83, § 41.
[111] See also Jo M. Pasqualucci, 'Preliminary objections: legitimate issues and illegitimate tactics' in Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003) 83 at 116-117.
[112] Jeswald W. Salacuse, 'The Emerging Global Regime for Investment' 51(2) Harvard International Law Journal (2010) 427 at 469
[113] 18 March 1965, 575 UNTS 159, available online: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (hereafter 'ICSID Convention').
[114] Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited' 25 *Leiden Journal of International Law* (2012) 909 at 926 (hereafter 'Binder'); See also Elisabeth Eljuri and Clovis Trevino, 'Energy Investment Disputes in Latin America: The Pursuit of Stability' 33(2) Berkley Journal of International Law (2015) 306 at 329 (hereafter 'Eljuri and Trevino'); See also Antonius R. Hippolyte, 'ICSID's Neoliberal Approach to Environmental Regulation in Developing Countries: Lessons from Latin America' (2015) at 22-23 available online, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672080 (hereafter 'Hippolyte').

shall take effect six months after receipt of such notice.'[115] Article 71 further provides that such notice 'shall not affect the rights or obligations … of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.'[116]

67. However, Article 25 of the ICSID Convention also provides that all parties to a dispute – including the state party, must consent to bring a particular dispute before the ICSID's jurisdiction. Consent can be given in a variety of forms, for example, in a clause of an investment agreement, in a *compromis* regarding a dispute that has already arisen, in national legislation, or across several instruments.[117]
The interplay between the withdrawal provisions, preserving existing rights and obligations of states and investors, and instruments of consent, which often exist as independent contractual agreements, has given rise to debate about whether and which disputes remain under the jurisdiction of the ICSID during the six months after notice of withdrawal, and after the denunciation becomes effective.[118] For example, despite having denounced the ICSID Convention in 2009, the ICSID awarded $1.7 billion against Ecuador in a dispute with Occidental Petroleum in 2012.[119]

68. The denunciations have been one of a series of measures used by Latin American states to push back against an investment regime they perceive as unfair, including the termination, re-negotiation, or non-renewal of bilateral investment treaties (BITs), the adoption of domestic legislation against international arbitration, excluding the ICSID from new BITs,[120] contractual waivers of international arbitration, and proposals for an alternative regional arbitration centre to replace ICSID.[121]

69. Bolivia's president Evo Morales explained that the denunciation was to 'guarantee the sovereign right of countries to regulate foreign investment in their national territories.'[122] And President Rafael Correa declared that Ecuador's withdrawal the the ICSID Convention was necessary for 'the liberation of our countries because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank.'[123] These states are advocating for a 'Bolivarian alternative to free trade'[124] through the establishment of a regional body to regulate international

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[115] ICSID Convention, *supra* note 113, art. 71.
[116] *Ibid*, art. 72.
[117] International Centre for Settlement of Investment Disputes, 'Jurisdiction of the Centre' available online: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section05.htm.
[118] Eljuri and Trevino, *supra* note 114 at 330; See also Katia Fach Gómez, 'Latin America and ICSID: David versus Goliath?' (2010) available online, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325 at 22-25 (hereafter 'Gómez').
[119] See Aldo Orellana López, 'ICSID orders Ecuador to pay $1.7 billion to Occidental Petroleum – Interview with the Ecuador Decide Network' (October 2012) available online, Network for Justice in Global Investment: http://justinvestment.org/2012/10/icsid-orders- ecuador-to-pay-1-7-billion-to-occidental-petroleum-interview-with-the-ecuador-decide-network/.
[120] E.g. Subsequent to its withdrawal from the ICSID Convention, Venezuela entered into BITs with Cuba, Iran, Belarus, and Russia which included dispute resolution provisions that exclude the ICSID as a dispute resolution option and include instead arbitration under UNCITRAL Rules: See Eljuri and Trevino, *supra* note 114 at 333.
[121] *Ibid* at 327.
[122] Gómez , *supra* note 117 at 21.
[123] As cited in Hippolyte, *supra* note 114 at 23.
[124] Helfer, Terminating Treaties, *supra* note at 645, footnote 71.

investment: the Bolivarian Alliance for the Americas (ALBA).[125] ALBA '[s]eeks to establish a judicial arm capable of resolving inter-investor-State disputes without subscribing to conventional Western mediums.'[126] The creation of a new arbitration centre was proposed at ALBA's seventh Summit in 2009, along with an expert group to develop a comprehensive proposal. According to Bolivia's Minister of Legal Affairs, 'this new mechanism is an alternative to the financial aggression – and aggressions of every conceivable kind – perpetrated under cover of development aid that only lead to political intrusion.' Until the institution is formed, ALBA's Energy Treaty promotes 'direct negotiation between Parties, using diplomatic channels' to resolve disputes.[127]

70. During ALBA's fifth Presidential Summit held in April 2007, Bolivia, Venezuela, and Nicaragua issued a declaration of intent to withdraw from the ICSID Convention. Bolivia and Venezuela followed this declaration with official denunciations over the following years.[128] On 14 April 2008, Nicaragua also announced that it was considering denouncing the ICSID Convention[129] but to date has not followed through. A draft bill introduced in Argentina in March 2012, as well as public statements by Argentina's Chief Legal Officer to the Treasury, also led to speculations about a possible ICSID Convention withdrawal,[130] but so far Argentina has not made moves to denounce the Convention

8. North Atlantic Pro-Whaling States

71. Another example resembling a collective withdrawal is the denunciation by North Atlantic states of the *International Convention for the Regulation of Whaling* (ICRW), and establishing an alternative to the International Whaling Commission (IWC) through an entirely new treaty regime giving rise to a different international regulatory body, the North Atlantic Marine Mammal Commission (NAMMCO).

72. The IWC was established in 1946 to 'promote and maintain whale fishery stocks.'[131] However, by the 1970s whale populations became endangered, leading to a division between states parties to the ICRW favouring the conservation and protection of whales, and states that had a strong interest in preserving their whaling rights. States parties interested in protecting whale populations prevailed at the IWC, and the organization adopted a moratorium on whale harvesting for its members, beginning in 1986.[132] The pro-whaling states, most notably Iceland, Japan, and Norway accused the IWC of imposing the moratorium on the basis of 'political and emotional factors, rather than upon scientific

[125] Eljuri and Trevino, *supra* note 114 at 329; See also Hippolyte, *supra* note 114 at 21; ALBA comprises the following member states: Venezuela, Cuba, Bolivia, Nicaragua, Dominican Republic, Ecuador, Antigua and Barbuda, Saint Vincent and the Grenadines, Saint Lucia, Grenada, Saint Kitts and Nevis: ALBA Info, 'What is the ALBA?' available online: https://albainfo.org/what-is-the-alba/.
[126] Hippolyte, *supra* note 114 at 23.
[127] *Ibid* at 23.
[128] *Ibid* at 21.
[129] Gómez, *supra* note 122 at 21.
[130] Eljuri and Trevino, *supra* note 114 at 329; See also Nicolas Boeglin, 'ICSID and Latin America: Criticisms, withdrawals and regional alternatives' (25 June 2013) available online: http://www.bilaterals.org/?icsid-and-latin-america-criticisms.
[131] David Caron, 'The International Whaling Commission and the North Atlantic Marine Mamal Commission: The Institutional Risks of Coercion in Consensual Structures' 89(1) *American Journal of International Law* (1995) 154 at 154 (hereafter 'Caron').
[132] *Ibid* at 156 and footnote 4: Brazil, Iceland, Japan, Norway, Peru, South Korea, and the USSR voted against the moratorium.

knowledge', contrary to its mandate.[133] The pro-whaling states contended that scientific findings that whale stocks were plentiful enough to resume harvesting were distorted or ignored by the IWC in order to prevent all whaling in the interests of states favouring protection.[134]

73. David Caron observed that '[t]he IWC presents an example of an organization in which a majority of the membership seeks to use the organization to bring about normative change with which the remaining members fundamentally disagree' and which may run contrary to the very purpose the IWC was established (at least, in the opinion of the pro-whaling states).[135]

74. In 1992, Iceland withdrew from the ICRW, and Japan and Norway also threatened to denounce the treaty and leave the IWC. In addition, Norway announced that it would resume commercial whaling in 1993, contrary to the moratorium in place. Since Norway had initially opted out of the moratorium's obligations, it argued that its action 'was on solid legal ground.'[136]

75. Beginning in 1988 (shortly after the moratorium was first imposed), a parallel process was underway through meetings sponsored by Norway, Iceland, and other pro-whaling states in the North Atlantic. These meetings culminated in 1992 with the signing of the *Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic* by the Faroe Islands, Greenland, Iceland, and Norway, establishing the NAMMCO.[137] While Iceland had denounced the ICRW, other states remained both party to that treaty as well as the new agreement establishing the NAMMCO, and Iceland re-acceded to the *ICRW* in 2002.[138] The two organizations continue to coexist in complementarity to each other, although Caron notes that '[i]n developing its own data case of marine mammal populations in the North Atlantic, NAMMCO [challenges] the legitimacy of the IWC's decision making by contradicting the science and expertise that is the foundation of such legitimacy.'[139]

76. In response to the actions of the pro-whaling states, the United States enacted domestic legislation to authorize unilateral trade sanctions or restrict fishing rights of states engaging in commercial whaling contrary to the IWC's moratorium.[140] However, despite over a dozen threats of withdrawal by pro

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[133] As cited in *Ibid* at 159.
[134] *Ibid* at 159-160.
[135] *Ibid* at 155.
[136] *Ibid* at 160-161.
[137] *Ibid* at 163-164.
[138] Helfer, Terminating Treaties, *supra* note.
[139] Caron, *supra* note 131 at 165.
[140] The *1971 Pelly Amendment to the 1967 Fishermen's Protective Act* states that if 'the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations [to include whaling] in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program [including the International Convention for the Regulation of Whaling, or the ICRW], the Secretary of Commerce shall certify such fact to the President' who, upon receipt of such certification, 'may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products of the offending country for such duration as he determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tarrifs and Trade.' See Scott Barrett, 'Transnational Cooperation Dilemmas' in

whaling states from the *ICRW*, Helfer notes that the president has not used his discretion to impose sanctions under the legislation, attributing this fact to 'the harm sanctions would cause to American interests, and to more consequential geopolitical and economic relationships that the United States maintains with pro-whaling nations such as Russia and Japan.[141]

9. Collective withdrawal in a unilateral world

77. Collective withdrawal 'by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.'[142] States can sometimes band together to challenge international legal rules they perceive as unfair and objurgate international institutions that enforce those rules. The collectiveness of the action has the potential to 'radically reconfigure existing forms of international cooperation.'[143] Withdrawal from a treaty "can give a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minder states.'[144]

78. However, the examples above support Helfer's conclusion that '[d]enunciation and withdrawal are … fundamentally unilateral acts.'[145] And even where states have banded together to propose different legal alternatives to the dominant regimes, they have done so unilaterally by invoking the notice procedures established in the various treaties they were denouncing. Moreover, courts and other adjudicative bodies continued to hear cases and disputes, and holding denouncing states to their treaty obligations during the requisite notice periods – and sometimes even beyond. Finally, individual consequences of withdrawal are just as much political as they are legal.

79. Further research on the idea of collective withdrawal, a concept that has not yet been recognized by international law, is required in order to seek out additional guidance regarding the potential emergence of a new norm of customary international law.

Environment and Statecraft: The Strategy of Environmental Treaty-Making (Oxford Scholarship Online, 2006) available online: http://www.oxfordscholarship.com/view/10.1093/0199286094.001.0001/acprof-9780199286096-chapter-3?print=pdf.

[141] Helfer, Exiting Treaties, *supra* note at 1620.

[142] Helfer, Exiting Treaties, *supra* note at 1646.

[143] Helfer, Terminating Treaties, *supra* note at 645.

[144] Helfer, Exiting Treaties, *supra* note at 1588.

[145] *Ibid* at 1582.

PART 3

10. Customary International Law and the Implications of an AU Withdrawal

10.1 Definition of Customary International Law

80. In addition to international conventions, customary international law (CIL) constitutes one of the principal sources of international law.[146] The International Law Association (ILA) defines CIL as a rule 'which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.'[147] CIL results 'from a general and consistent practice of States followed by them from a sense of legal obligation.'[148] The ILA distinguishes between 'general' and 'particular'[149] CIL, stating that if 'a sufficiently extensive and representative number of States participate in … a practice in a consistent manner, the resulting rule is one of "general [CIL]" [which] is binding on all States.'[150] Once a general rule of CIL is established, states will be bound by it regardless of whether they consent to it,[151] with the exception of states that "exclude themselves from the ambit of a general rule by means of persistent objection'.[152]

81. It is now conventional wisdom that CIL comprises two key elements, *opinio juris* and state practice.[153] As the ICJ stated in stated in the *North Sea Continental Shelf Cases*:

> *Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitates. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.*[154]

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[146] In addition to general principles of law and and complemented by judicial decisions and teachings of publicists: *Statute of the International Court of Justice*, 18 April 1946, art. 38; See also Samantha Bessom, 'Theorizing the Sources of International Law' In Samantha Bessom and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 163 at 164 (hereafter 'Bessom').

[147] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (London Conference, 2000) at 8 (hereafter 'ILA Statement on CIL').

[148] US Third Restatement, *supra* note, § 102(2).

[149] In other circumstances also referred to as 'special' or 'regional' CIL: see below.

[150] ILA Statement on CIL, *supra* note at 8.

[151] *Ibid* at 8, 24.

[152] *Ibid* at 10.

[153] *Ibid* at 6-7; Andrew T. Guzman, 'Saving Customary International Law' 27 *Michigan Journal of International Law* 115 at 123 (hereafter 'Guzman').

[154] *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Reports (1969) 3, § 77 (hereafter '*North Sea Continental Shelf*').

82. In practice, it is often very difficult or impossible to separate *opinio juris* from state practice when examining the formation of a CIL rule,[155] and there is considerable debate and disagreement among publicists as to what form state practice must take, how long it will last, and what standards are required to establish *opinio juris*.[156] The ICJ has applied inconsistent approaches when determining whether a CIL rule exists in a particular case. For example, in the *North Sea Continental Shelf Cases*, the ICJ rejected evidence of a large number of states using the equidistance principle in maritime boundary limitations as insufficient to form state practice, while in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua Case*) it identified a customary rule on the basis of scant and contradictory state practice.[157] As Guzman observes, 'CIL has no coherent or agreed upon theory to justify its role or explain its doctrine.'[158]

10.1.1 State Practice

83. State practice has variably been considered to include: statements[159] as well as public acts[160] and omissions.[161] Silence may be viewed as as a state's acquiescence to a particular rule.[162] In order to form CIL, state practice must be extensive,[163] widespread,[164] and uniform.[165] However, a rule does not need to be universally accepted in order to form CIL.[166] The ICJ has suggested that 'a very widespread and *representative* participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.'[167]

84. On uniformity of state action (referring to the consistency of an individual state's behavior), the ICJ noted that 'too much importance need not be attached to [a] few uncertainties or contradictions' in light of changing circumstances and over a long period of time.[168] States do not need to show 'rigorous conformity to a rule' but rather must, 'in general,' act consistently with the rule.

[155] ILA Statement on CIL, *supra* note at 7-8.
[156] Bradley and Gulati, *supra* note at 243.
[157] See generally, Anthony D'Amato, 'Trashing Customary International Law' 81(1) *American Journal of International Law* (1987) 101 (hereafter D'Amato')
[158] Guzman, *supra* note at 117, 124.
[159] E.g. ILA Statement on CIL, *supra* note at 14: 'Diplomatic statements (including protests), policy statements, press releases, official manuals … instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt'. See also US Third Restatement, *supra* note § 102 for additional examples of state practice, including: diplomatic acts, public measures and other governmental acts, official statements of policy, cooperation with international organizations, inaction, acquiescence, universal adherence to international conventions, national laws, claims, correspondences, statements, omissions, and high levels of treaty participation.
[160] Must be communicated to at least one other state. Internal memoranda and confidential opinions of legal Government legal advisers do not qualify as state practice: ILA Statement on CIL, *supra* note at 15.
[161] E.g. 'if a State were to announce its intention to prosecute a foreign diplomat and then, following a protest, abstained from doing so.': ILA Statement on CIL, *supra* note at 15-16;
[162] *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, ICJ Reports (1951) 116 at 136-138 (hereafter '*Fisheries Case*').
[163] US Third Restatement, *supra* note § 102.
[164] ILA Statement on CIL, *supra* note at 20.
[165] ILA Statement on CIL, *supra* note at 21-23.
[166] *North Sea Continental Shelf, supra* note; ILA Statement on CIL, *supra* note at 24.
[167] *North Sea Continental Shelf*, *supra* note, § 74 (emphasis added).
[168] *Fisheries Case, supra* note 162 at 138.

Inconsistencies should 'generally … be treated as breaches of that rule, not as indication of the recognition of a new rule.'[169]

85. Further, there must be sufficient uniformity in state practice *among* states in order for a general CIL rule to form.[170] In the *Asylum Case*, the ICJ commented that 'there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule'.[171]

86. While state practice needs to widespread, there is no specific threshold for the number of states in the world that must adhere to a particular rule before it becomes custom: 'Provided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent.'[172]

10.2.2 *Opinio Juris*

87. *Opinio juris* requires that states behave according to a particular rule because they feel they are legally bound by it.[173] How to establish *opinio juris* to form a rule of CIL is a highly controversial topic in international law.[174] According to the ILA, 'it is not always, and probably not even usually, *necessary* to prove the existence of any sort of subjective element in addition to the objective element, but (a) where it is *present*, that may be *sufficient* to establish the existence of a customary rule binding on the State(s) in question'.[175] Kiris adds:

> *On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an opinio juris so long as it is not negated by evidence of non- normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinio juris is required. At the other end of the scale a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.*[176]

88. For instance, in the *Nicaragua case*, the ICJ 'demanded very little evidence of actual practice in the face of what it apparently considered to be clear-cut proof of the *opinio juris* of the international community embodied in such instruments as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of

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[169] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Judgment of 27 June 1986, ICJ Reports (1986) 14 § 186 (hereafter '*Nicaragua Case*').
[170] *Fisheries Case*, *supra* note 162 at 131; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, ICJ Reports (1985) 13 § 34.
[171] *Asylum Case (Colombia/Peru)*, Judgment of 20 November 1950, ICJ Reports (1950) 266 at 277 (hereafter '*Asylum Case*').
[172] ILA Statement on CIL, *supra* note at 25.
[173] *North Sea Continental Shelf*, *supra* note § 77.
[174] ILA Statement on CIL, *supra* note at 29.
[175] *Ibid* at 31-32.
[176] Frederic L. Kirgis, 'Custom on a Sliding Scale' 81 *American Journal of International Law* (1987) 77 at 149.

the United Nations.'[177] In establishing *opinio juris*, one must find evidence of a specific legal motivation for a state practice. As the *Nicaragua Case* demonstrates, the attitudes of states towards soft law documents like General Assembly Resolutions, although not binding in and of themselves, can form evidence of *opinio juris*.[178] And Bradley and Gulati propose that 'widespread ratification of a treaty can itself constitute the state practice and *opinio juris* needed to generate CIL'.[179]

10.3.3 Implications of an AU Withdrawal

1. *Is Article 27 of the ICC Statute Customary International Law?*

Article 27 of the ICC Statute provides:

> *1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
>
> *2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

89. While 'recent experience has shown that this immunity … has been lifted in most international instruments dealing with the prosecution of war crimes, genocide or crimes against humanity' which may indicate the formation of a rule of CIL, the ICJ has stated that:

> *'[i]t has been unable to deduce … that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.'*[180]

90. State practice in African nations, as evidenced for instance, in their constitutions, is consistent with the ICJ's finding in the *Arrest Warrant Case*.[181] The ICJ left open the possibility that immunity could be waived under certain circumstances, including criminal prosecution in the accused's own

[177] ILA Statement on CIL, *supra* note at 41.
[178] *Nicaragua Case*, *supra* note § 188. See also *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, ICJ Reports (1996) 226 § 70: 'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.'
[179] Bradley and Gulati, *supra* note at 252.
[180] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports (2002) 3 § 58.
[181] Lee Stone and Max du Plessis, *The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries* at 6.

country, after the term of office has expired (as occurred in the case of *Pinochet*[182]), or prosecution before international courts and tribunals that exempt serious crimes from immunity (e.g. the Charles Taylor case before the Special Court of Sierra Leone[183]). Thus, it appears that the question of the scope and force of the doctrine of sovereign immunity continues to be contested. Consequently, the collective action of AU states may provide sufficient force in shaping the CIL rule through evidence of their state practice and *opinio juris*.

10.4.4 Pacta sunt servanda

91. More challenging is the question of whether the collective withdrawal of AU states can permit the AU and African states to disregard the foundational CIL treaty law rule of *pacta sunt servanda* crystallized in Article 26 of the VCLT. The VCLT sets out the conditions under which states parties can unilaterally withdraw from treaties (as set out in Part I of this memorandum) and under which treaty obligations can be suspended and terminated. Articles 61 and 62 (the *rebus sic stantibus* rule) of the VCLT allows for withdrawal from a treaty in cases of supervening impossibility of performance or where there has been fundamental change of circumstances. These articles permit derogation from treaty obligations only in the strictest of circumstances.[184]

92. Supervening impossibility of performance under Article 61 of the VCLT has yet to be successfully invoked before an international court.[185] To demonstrate a fundamental change of circumstances under Article 62 of the VCLT, a state must show that 'the change of circumstances was not foreseen by the parties; that the circumstances constituted an essential basis for the parties' consent to be bound by the treaty; and that the obligations still to be performed have been radically transformed by the change.'[186] In addition, changes in circumstances cannot not be used as a basis to denounce a treaty when '[t]he existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty.' Further, fundamental changes in circumstances cannot be invoked '[i]f the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.'[187]

93. In most cases, states have been unsuccessful in invoking the *rebus sic stantibus* doctrine before the

[182] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, [1998] UKHL 41, available online: https://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3E92D23CF3AFA4E5C125775700375771/CASE_TEXT/Ex%20Parte%20Pinochet%20-%20Decision%20of%20%2024%20March%201999.pdf.

[183] Judgment, *Prosecutor v. Charles Ghankay Taylor*, Trial Chamber II (SCSL-03-01-T) 18 May 2012.

[184] In addition, Articles 23 (*force majeure*) and 25 (necessity) of the International Law Commission's 2001 *Articles on State Responsibility* provide for *temporary* derogation from treaty obligations in extraordinary situations of unforeseen events beyond the control of the state or situations of grave and imminent peril threatening essential interests. *Force majeure* and necessity are almost never recognized by international tribunals: See Binder, *supra* note 114 at 910, 916-921.

[185] See Binder, *supra* note 114 at 914.

[186] *Ibid* at 912.

[187] VCLT, *supra* note art. 62.

courts.[188] In fact, Binder points out that fundamental change of circumstances were only accepted once before an international tribunal. In *Racke GmbH & Co. v. Hauptzollamt Mainz,* the Court of Justice of the European Communities justified the suspension of a contract with the former Yugoslavia because of the war that had erupted there.[189] As an example of state practice, the Netherlands relied on the doctrine to suspect cooperation with Surname because of human rights violations following a *coup d'état*.[190]

94. Although Bradley and Gulati suggest that in many circumstances, international law does not bar states from unilaterally withdrawing from a CIL rule, '[i]t probably also makes sense to treat certain structural or background principles as mandatory. In the treaty area, for example, there is no right to opt-out of the *pacta sunt servanda* principle, whereby nations are required to comply with treaty obligations in good faith (subject to whatever withdrawal rights are available under the treaty).'[191]
Binder adds that since derogation from treaty obligations has to be balanced against the requirement of treaty stability and the *pacta sunt servanda rule*, '[a]ny non-performance is … to be kept to a strict minimum; it has to allow for legal certainty and predictability and as far as possible protect the legitimate expectations of the treaty partners … The focus on treaty stability likewise implies that the changes have to amount to a certain degree of seriousness for derogation to be permissible.'[192]

95. Can the fact of coordinated, collective withdrawal from a treaty through the mass regional ratification of another international agreement providing jurisdiction to an alternative criminal adjudicative body challenge the accepted CIL rules for terminating, suspending, or withdrawing from treaty obligations contained in the VCLT? Would it allow AU states to free themselves of the ICC Statute's notice requirement, and of their continued obligations to comply with ICC investigations and proceedings during the notice period by shifting CIL or creating a new CIL rule? This question will be examined in more depth in the remaining section below in light of available literature and jurisprudence.

11. The Doctrine of Persistent Objection is Not Available to AU States

96. The canonical view that states cannot withdraw from a CIL rule once it is formed has been strongly disputed in subsequent jurisprudence and literature.[193] In the *North Sea Continental Shelf* cases, the

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[188] E.g., the ICJ rejected both Iceland and Hungary's reliance on the doctrine in the *Fisheries Jurisdiction Case (United Kingdom or Great Britain and Northern Ireland v. Iceland)*, Judgment of 25 July 1974, ICJ Reports (1974) 3 and *Gabčíkovo-Nagymaros, supra* note cases, respectively.
[189] Case 162/96 [1998J ECRI-3655.
[190] Binder, *supra* note 114 at 913.
[191] Bradley and Gulati, *supra* note at 274.
[192] Binder, *supra* note 114 at 911.
[193] ILA Statement on CIL, *supra* note at 44; See, e.g. Bradley and Gulati, *supra* note at 205: 'It is not obvious … why it should be easier to exit from treaties than from CIL, especially given the significant regulatory overlap that exist today between treaties and CIL. Moreover, modern claims about the content of CIL often rely heavily on the content of treaties, especially multilateral treaties, even though many of these same treaties contain withdrawal clauses. There are also functional reasons to doubt the desirability of a mandatory conception of CIL, at least when applied across the board to all CIL issues. In addition, the Mandatory View is intention
with other aspects of CIL doctrine. In particular, if unilateral withdrawal from a CIL rule is so problematic, why are individual nations allowed to opt out of the rule, before it becomes established, through persistent objection? Conversely, if the persistent objector

ICJ stated that unilateral reservations were not possible 'in cases of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject if any right of unilateral exclusion exercisable at will by any one of them in its own favour.'[194]

97. A recognized exception to the view that states cannot withdraw from established rules of CIL is if the state 'persistently objects' to the rule prior to its formation.[195] The objection must be expressed through 'affirmative international communications, nor mere silence or adherence to contrary laws or practices'.[196] However, as the ILA explains,

> *There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is the the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who exist at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no 'subsequent objector' rule. The rule, if it exists, is available only [to] those who object before the rule has fully emerged.*[197]

98. It is unlikely that the AU can rely on the doctrine of persistent objection to free its members of the principles they have freely consented to be bound by in the ICC Statute. This also applies to the waiver on sovereign immunity contained in Article 27 (to the extent we assume it constitutes CIL).

99. This view of the rule of persistent objection has received a fair amount of criticism for its conclusion that newly-independent states (e.g. African states) have found themselves bound by CIL without having had an opportunity to persistently object to a rule. Bradley and Gulati point to a shift in international law theory from a default view of CIL which at least sometimes permitted unilateral withdrawal, to a mandatory view in the late nineteenth and early twentieth centuries, suggesting this shift 'may have evolved as part of an effort to bind new nations and former colonies to international law rules that have already been worked out by a handful of powerful states.'[198]

12. Changing Customary International Law by violating it?

100. Once a general rule of CIL is established, continued *opinio juris* and state practice is seen as necessary to preserve it. As articulated by D'Amato, '[c]ustomary rules … are not static. They change in content depending upon the amplitude of new vectors (state interests).'[199] The fact that a CIL rule

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doctrine is needed in order to ensure that CIL is consensual, why does that consent rationale not also require the allowance of opt-out through subsequent objection?'

[194] *North Sea Continental Shelf, supra* note § 63.

[195] *Fisheries Case, supra* note 162 § 131.

[196] Bradley and Gulati, *supra* note at 211.

[197] ILA Statement on CIL, *supra* note at 27 (emphasis added); See also Bradley and Gulati, *supra* note at 236-238 for a survey of views disputing this restricted view of persistent objection.

[198] *Ibid* at 206, 225-233.

[199] D'Amato, *supra* note at 104.

has been formed does not 'freeze' it for all time.[200] As noted by the ILA, 'conforming practice after the rule has emerged helps to strengthen [a CIL rule] (and is therefore both constitutive of the rule and declaratory – evidence – of it), whilst contrary practice can undermine and, if sufficiently constant and widespread, destroy an existing customary rule.'[201]

101. Existing jurisprudence on customary international law brings about the uneasy question of whether state conduct that runs contrary to an existing rule, or reliance by states on a new principle, signifies the emergence of a new CIL norm, or whether it constitutes a breach of an existing rule.[202] The ILA acknowledges that contrary state practice to which other states acquiesce can lead to changes in CIL rules.[203] As a result, it is possible that a collective withdrawal by the AU from the ICC Statute without following the procedures for withdrawal set out in the ICC Statute and the broader CIL framework for ending treaty obligations set out in the VCLT could lead to a shift in those rules.

102. However, until that conduct and its associated acquiescence becomes sufficiently widespread to form a new CIL rule, it will likely continue to be seen as a violation of existing international law.[204] The AU runs the danger that 'a small group of nations can threaten to object vocally to, and thereby derail, [its] attempts … to deviate from existing CIL rules.'[205] It is unclear 'precisely what fraction of states need to explicitly object in order to prevent a new rule of CIL from forming' but commentary suggests that 'the fraction of nations that needs to object to bar the formation of a new CIL rule is significantly less than a majority, but greater than a handful.'[206]

103. Bradley and Gulati suggest that another accepted way to override an existing CIL rule is through the signing of a later-in-time treaty. D'Amato holds a similar view that '[u]nder the rules of interpretation of international treaties, the subsequent practice of states can modify and change the meaning of the original treaty provisions.'[207] However, this only overrides the CIL rule as between the parties to the new treaty. The old CIL rule 'continues to bind nonparty states as well as parties in their relations with nonparty states.'[208]

104. The fact that the AU is going through an extensive consulting and negotiating process to take into full consideration the interests of its members and the international law implications of a collective withdrawal lends legitimacy to the emergence of a potential new CIL norm. Bessom notes that transparency in process leads to legitimacy in law, stating 'the difference between a mere breach of customary law and a legal change of customary law must lie in the way in which the coordination

[200] *Ibid* at 104.
[201] ILA Statement on CIL, *supra* note at 9, footnote 21.
[202] *Nicaragua Case, supra* note § 186.
[203] ILA Statement on CIL, *supra* note at 24-25.
[204] Bradley and Gulati, *supra* note at 212.
[205] *Ibid* at 250.
[206] *Ibid* at 249, footnote 202.
[207] D'Amato, *supra* note at 105.
[208] Bradley and Gulati, *supra* note at 211.

around the new customary norm is signaled and hence in the way the new practice that will give rise to the new norm is organized.'[209] And Bradley and Gulati point out the potentially legitimacy- generating aspects of CIL withdrawal:

> *a nation seeking to exit from a CIL rule would need to announce not only the fact of exit, but also the rule from which it was exiting. In doing so, nations would clarify their views about the content of CIL and probably also the reasons why they did not want to continue operating under the particular rule. Such clarification might be particularly useful given the many uncertainties that surround the process of CIL formation.*[210]

13. Instant Custom

105. Can a collective withdrawal of AU member states create a new CIL to overcome the procedural withdrawal requirements in the ICC Statute and the VCLT rules for terminating or suspending treaty obligations? Can it release states from their obligations of *pacta sunt servanda* such that the one-year notification period for withdrawal no longer applies?

106. There is no specific time requirement for the manifestation of a CIL rule, so long as a state practice is uniform, extensive, and representative.[211] As stated by the ICJ,

> *Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.*[212]

107. The ILA has noted that 'the existence of … international organizations, multilateral treaty- making conferences and their products' has caused CIL 'to develop more rapidly than was the case in the past.'[213] Indeed, some CIL rules, such as sovereignty over air space, emerged almost instantly to respond to novel circumstances.[214] However, some academics are uneasy with the suggestion that customary international law can form instantly, without the passage of any time whatsoever, since "acceptance of instant custom requires that one discard the requirement of a general practice.'[215]
However, Guzman takes the position that '[i]f one accepts that *opinio juris* is sufficient to establish a rule of CIL, it follows that such rules can develop or change as easily and as quickly as *opinio juris*. It is possible, therefore, for a rule to develop in a very short period or even instantly.'[216] Therefore, to the

[209] Bessom, *supra* note at 179
[210] Bradley and Gulati, *supra* note at 271-272.
[211] ILA Statement on CIL, *supra* note at 20.
[212] *North Sea Continental Shelf*, *supra* note, § 74.
[213] ILA Statement on CIL, *supra* note at 3.
[214] *Ibid* at 20; See also Bin Cheng, 'Custom: The Future of General State Practice in a Divided World', in R. St. J. MacDonald and Douglas M. Johnston, eds.,) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* 513 (1983).
[215] See Guzman, *supra* note at 158.
[216] *Ibid* at 159.

extent that AU states no longer consider themselves legally bound by the withdrawal rules set out in the ICC Statute, but *do* consider themselves bound by law to comply with the AU, there is some support in international law literature that this may constitute *opinio juris* to develop new CIL or shift away from other CIL rules.

14. Regional Custom

108. It is possible for rules of CIL to form over a smaller group of states at a regional level – known as 'regional,' 'special,' 'local,' or 'particular' – as opposed to general – CIL.[217] The number of states required to form a local custom can be as little as two.[218] In the *Fisheries Case*, the ICJ found that because the UK nor the international community had challenged Norway's use of straight baselines to create exclusive fishing rights on its coast 'consistently and uninterruptedly', the practice formed a regional CIL rule.[219] A common thread in the ICJ jurisprudence on regional custom is that the practice is undertaken over a significant period of time: in the *Right of Passage Case*, the ICJ noted that Portugal had been enjoying free passage over the Indian territory in question for at least a century;[220]
In the fisheries case, the ICJ was persuaded by the fact that Norway's practice of delimitation had gone unchallenged 'from 1869 until the time when the dispute arose.'[221] To the extent that it is required that state practice occur over long periods of time for a regional CIL rule to be recognized, it seems unlikely that through a collective withdrawal the AU would be seen as forming a regional custom – especially given the emergence of objectors to that trend.

109. Unlike in the *Right of Passage* and *Fisheries Case* and general CIL, the ICJ held in the *Asylum Case* that mere silence or inaction by a state in the face of practice by other states in the region will signal objection to that custom, not acquiescence to it.[222] This is consistent with D'Amato's view that
'[s]pecial custom does indeed require stringent proof of consent or recognition of a practice on the part of the defendant state.'[223] This may have implications on the validity and applicability of the AU's bid for the establishment of a regional custom since we have also seen the emergence of African state supportive of the ICC treaty. States such as Tanzania, Burundi, Botswana, Burkina Faso, Senegal, and Eritrea have registered overt support and, to date, the majority of African states have not registered a
formal public opinion on withdrawal.[224]

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[217] *Ibid* at 159.
[218] E.g. in *Case Concerning Right of Passage over Indian Territory*, Judgment of 12 April 1960, ICJ Reports (1960) 6 at 37 (hereafter, '*Right of Passage Case*'). In that case, Portugal claimed that it had enjoyed, for at least a century, a right of free passage over Indian territory between various enclaves under Portuguese sovereignty. The Indian government suspended this right of passage in 1954 as a security measure in the face of civil unrest over the continuing Portuguese presence on the Indian peninsula. Portugal maintained that the suspension violated a rule of regional CIL. The ICJ upheld the regional CIL since free passage was allowed for over a century for private persons, civil officials and goods in general, with limited restrictions.
[219] *Fisheries Case*, *supra* note 162 at 138.
[220] *Right of Passage Case*, *supra* note
[221] *Fisheries Case*, *supra* note 162.
[222] *Asylum Case*, *supra* note at 138.
[223] As cited in Guzman, *supra* note at 161.
[224] See Emily Calmeyer, 'Mass African Withdrawal from the ICC: Far from Reality' 31 October 2013, available online: http://iccforum.com/forum/permalink/91/3965.

15. AU States Must Continue to Comply with *Jus Cogens* Norms

110. There are some principles of international law that are not seen as being open to derogation. These are known as *jus cogens* norms, which the VCLT defines as norms 'accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[225] While there is a great deal of debate as to which norms definitively have *jus cogens* status, norms that have been said to include *erga omnes* obligations to prevent: the use of force; genocide; slavery; apartheid; racial discrimination; torture; self-determination; and other gross human rights violations.[226] Given that the ICC Statute is seen as containing 'the most serious crimes of concern to the international community as a whole' that 'must not go unpunished',[227] there is a great deal of support that the Statute is a codification of *jus cogens* norms. To the extent they do, AU states will be bound by these norms regardless of whether they withdraw from the ICC Statute.

111. However, withdrawal from the ICC Statute is not necessarily incompatible with the fulfillment of *erga omnes* obligations and will not necessarily lead to a breach of *jus cogens* norms. In the Concept Note prepared for the preparatory meeting of Ministers on the ICC Statute in November 2009, it was stated that:

> *'[t]here is now broad agreement in Africa that impunity for international crimes should not be tolerated. This view, which finds expression in Article 4(h) of the Constitutive Act of the African Union, has been reaffirmed by organs of the Union on several occasions … More recently, the African Union Panel on Darfur has stated that: "It is self-evident that the objectives of peace, justice and reconciliation in Darfur are interconnected, mutually interdependent and equally desirable … This means that even as the peace negotiations are taking place, action should be undertaken to investigate the serious crimes that have been committed in Darfur, and to put in place measures to prevent the commission of fresh crimes."'*[228]

112. In Decision 590, the AU reiterated '[t]he commitment of the African Union and its Member States to the fight against impunity in accordance with the Constitutive Act of the African Union'.[229] Of course, some would argue that the AU's position on sovereign immunity may undermine *jus cogens* norms by shielding sitting heads of state accused of perpetrating international crimes from accountability, this "enabling impunity". To the extent that the AU maintains this commitment through its newly constituted alternative mechanism, the African

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[225] VCLT, *supra* note, art. 53; See also Bradley and Gulati, *supra* note at 211-212.

[226] US Third Restatement, *supra* note, §§ 702(a)-(f), (n)-(o); International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) at 112-113. available online: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* Judgment of 5 February 1970, ICJ Reports (1970) 3 § 34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004) 136 § 155.

[227] preamble, ICCSt, *supra* note

[228] 'Concept Note for the Preparatory Meeting of Ministers on the Rome Statute of the International Criminal Court (ICC)', MinICC/Legal2 (II), § 12.

[229] Decision on the International Criminal Court, Assembly/AU/Dec.590(XXVI).

Court of Justice and Human Rights by bringing to justice perpetrators of international crimes, its withdrawal from the ICC Statute should not be considered as permitting the violation of *jus cogens* norms.

Concluding Thoughts

113. Both the place of politics and the relevance of international law have emerged to shape the issues at hand. It is worth paying attention to the calls by African states for reform of not only the Rome Statute for the ICC but the UN system in general. The proposed amendments to the ICC treaty should be seen as setting the groundwork by which African state parties could refrain from withdrawing from the ICC.[230] The failure to adopt various amendments has lead to threats, and now letters of intent—the first official step—to formally withdrawing from the Court.

114. As we are seeing, these acts of withdrawal, public statements, declarations, and refusals to comply with extraditions reflect the mutually co-constituted workings of international law and politics in a deeply unequal world. Various African states are in the process of making new declarations and announcing their withdrawal intentions in an attempt to set new terms for international justice. In addition to protecting the terms within which the management of violence is addressed, many are also articulating dissent with inequalities in the global order. These various public positions reflect the existence of particular political imbalances that are sustained by legality. This study extends that conversation to point to the consequences of those decisions – the reality that various African leaders are engaged in reconstituting their scope of engagement through aspirations to re-shape a new set of regional norms. Through these processes they should be seen as attempting to address the long histories of structural inequalities and violence in the region and providing new possibilities for those who have been victimized by them.

[230] Report of the Fourth meeting of the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court, Para. 18

Appendix I

WITHDRAWAL PROCEDURES OF AFRICAN UNION MEMBER STATES[231]

The following are the dates of African State ratification of the Rome Statute.

Senegal, 02 February 1999
Ghana, 20 December 1999
Mali, 16 August 2000
Lesotho, 06 September 2000
Botswana, 08 September 2000
Sierra Leone, 15 September 2000;
Gabon, 20 September 2000;
South Africa, 27 November 2000;
Nigeria, 27 September 2001;
Central African Republic, 03 October 2001;
Benin, 22 January 2002;
Mauritius, 05 March 2002;
Democratic Republic of the Congo, 11 April 2002;
Niger, 11 April 2002;
Uganda, 14 June 2002;
Namibia, 25 June 2002;
Gambia, 28 June 2002;
United Republic of Tanzania, 20 August 2002;
Malawi, 19 September 2002;
Djibouti, 05 November 2002;
Zambia, 13 November 2002;
Guinea, 14 July 2003;
Burkina Faso, 16 April 2004;
Congo, 03 May 2004;
Burundi, 21 September 2004;
Liberia, 22 September 2004;
Kenya, 15 March 2005;
Comoros, 01 November 2006;
Chad, 01 January 2007;
Madagascar, 14 March 2008;
Seychelles, 10 August 2010;
Tunisia, 24 June 2011;
Cabo Verde, 10 October 2011; and
Côte d'Ivoire, 15 February 2013.

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In response to the question about the legal implications and constraints, procedures and possibilities of member states withdrawing from the ICC if there is lack of reform in the ICC, below are the ICC member states constitutional considerations in relation to the possibility of withdrawing from the Rome Statute.

BENIN

The Republic of Benin ratified the Rome Statute of the International Criminal Court on 22 January 2002. The National Assembly of the Republic of Benin, along with the President, officially internalized the Rome Statute as part of municipal law in 2001 (*Loi N° 2001-26)*, rendering the crimes delineated in the Statute enforceable by domestic courts.
The President is the designated authority to negotiate and enter into international treaties.[232] Nonetheless, accordingly with Article 145, the ratification of any treaty "relating to international organization" or "which modify the internal laws of the State" must also be approved by Parliament through the enactment of municipal law.[233] Article 147 of the Constitution supplies that international treaties, upon ratification, hold authority above that of municipal laws, regardless of the application of other State parties;[234] therefore, despite other States' failure to comply with the demands of the ICC's Rome Statute, these States' inertia have no legal impact on Benin's ability to withdraw from its treaty obligations.

BOTSWANA

The Republic of Botswana signed and ratified the Rome Statute of the International Criminal Court on the 8 September 2000. Botswana is one of the few states that have publically stated that they will continue to support the ICC. They submitted to the ICC in 2011 a domestication implementation plan. However, within their submission document to the Assembly of States, they recognized that one of the barriers to implementation was the possibility of heads of states being held judicially accountable.

As a dualist state, Botswana only recognizes international law when it has been implemented at the national level.[235] Currently, Botswana does not have an implementation legislation and requires one for the Rome Statute to function.[236] Botswana differentiates between signing a treaty and ratifying it, the two processes involve two different acts. Thus,

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[232] ***Article 144: "****The President of the Republic shall negotiate and ratify treaties and international agreements."*

Article 41:*"The President of the Republic shall be the Chief of State. He shall be elected by the Nation and shall embody the national unity. He shall be the guarantor of national independence, of territorial integrity, and of respect for the Constitution, treaties and international agreements."*

[233] ***Article 145:****"Peace treaties, treaties or agreements relating to international organization, those which involve the finances of the State, those which modify the internal laws of the State, those which allow transfer, exchange or addition of territory may be ratified only in accordance with a law.*

No transfer, no exchange, nor addition of territory shall be valid without the consent of the interested populations. "

[234] ***Article 147:*** *"Treaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party."*

[235]Dinokopila, Bonolo Ramadi. The Prosecution and Punishment of International Crimes in Botswana
J Int Criminal Justice (2009) 7 (5): 1077-1085 http://jicj.oxfordjournals.org/content/7/5/1077.full.pdf p.1078

[236] Stone, Lee. UNABLE OR UNWILLING? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries.
https://www.issafrica.org/chapter-4-country-study-i-botswana-lee-stone

being a signatory to a treaty does not signify that Botswana adheres to the treaty itself. What is important to note is that the signature date is not the ratification date.[237]

The constitution does not include references to international law, agreements or such language. According to ratification processes for Trade agreements, a treaty is not ratified unless there is approval of the national parliament. Once there is an agreement, there is need for national legislation to domesticate measures. It is difficult to state the possibility of a withdrawal and what kind of effect it will have. This is because the constitution and other documents do not reflect international law. There are very few mentions of international law within the constitution and the penal code. Additionally, due to the lack of an implementation strategy, Botswana may require a constitutional amendment.

BURKINA FASO

The Republic of Burkina Faso, signed the Rome Statute on 30 November 1998, and ratified the Rome Statute of the International Criminal Court on 16 April 2004. The ratification process is procedurally governed by Articles 148, 149 and 150 of the Burkina Faso Constitution written in 1991[238].The President has the power to negotiate, sign and ratify the international treaties and agreements. In Article 149, peace, commerce, finance of the State treaties and those that modify the provisions of the legislative nature can only be ratified by virtue of law. They can only take effect once being ratified or approved.[239]

Burkina Faso also signed the Agreement on Privileges and Immunities on 7 May 2004 and ratified it on 10 October 2005. Burkina Faso signed a Bilateral Immunity Agreement on 25 May 2004. Burkina Faso is reported to have started drafting implementing legislation on July 2006.[240] In its constitutional provisions, under Article 151, it is provided that treaties and agreements regularly ratified or approved have, at their publication, higher authority than the one of legislations, provided that the other party applies them. Notably the constitution does not include any provisions on the steps to withdraw from a treaty.

BURUNDI

The Republic of Burundi signed and ratified the Rome Statute of the International Criminal Court on 21 September 2004. As Burundi is a Monist state, the state does not automatically recognize international human rights law and treaties that the international community agrees to sign. The steps taken for treaty ratification are listed in the constitution in Article 289, 290 and 296[241].

Article 290 states that treaties of peace, commerce, those relating to international organizations, treaties engaging in finances of the state, and treaties that modify the provisions of a legislative nature, may not be ratified except by virtue

[237] MinJustice/Legal/3 (II) Rev.1, A Study on the procedures for Ratification of Treaties in member states of the African Union

[238] The Constitution was amended in 1997 and 2000.

[239] Ruchi Jefri. "Burkina Faso's Constitution of 1991 with Amendments through 2012." Constitute Project.org April 18 2016. https://www.constituteproject.org/constitution/Burkina_Faso_2012.pdf pp 28

[240] https://www.issafrica.org/cdromestatute/pages/document.pdf , pp10

[241] Article 289 - The President of the republic has the high direction of the international negotiations. He signs and ratifies the international treaties and agreements; Article 290- The treaties of peace and the treaties of commerce, the treaties relates to the international organization, the treaties that engage the finances of the state, those that modify the provisions of a legislative nature as well as those relative to the status of persons may not be ratified except by virtue of a law.

of law. Treaties other than those specifically domesticated by the constitution require ratification and domestication. The ratification power of the executive is further limited with respect to treaties that have the effect of engaging state resources, in which case, specific legislation is required.[242]

CAPE VERDE

The Republic of Cape Verde signed the Rome Statute on 28 December 2000 and ratified it on 10 October 2011. As a dualist system, treaty ratification processes in Cape Verde require that Article 148 of the 1999 Constitution should be implemented. Article 148 states that the President of the Republic of Cape Verde has the authority to ratify treaties and international agreements. This is preceded by Article 178, which permits the National Assembly to approve prior to the ratification of a treaty, issues that fall under the following categories of treaties including the country's participation in international organizations, agreements of friendships, alliances, peace, defense and those meant for establishing military facilities.
Cape Verde has no implementing legislation for the Rome Statute and also did not sign the Agreement on Privileges and Immunities. However, Cape Verde has signed a Bilateral Immunity Agreement.[243]

CENTRAL AFRICAN REPUBLIC (no access to latest constitution. This section is based on the past constitution)

The Central African Republic signed the Rome Statute on 12 December 1999 and ratified it on 3 October 2011. The Central African Republic successfully domesticated the crimes enumerated in the Rome Statute into the Central African Penal Code (Loi N°10.001)[244], although the principle of cooperation with the Rome Statute of the International Court remains in draft legislation.[245]

The Central African Republic has recently implemented a new constitution modeled on French canon-law. This occurred following its successful constitutional referendum in December 2015 – its sixth constitution since its independence from France in 1960. Therefore, it does not have a legislative precedent or custom on which to rely with respect to the ratification of international treaties. As per Article 32 and 95 of the Transitional Constitution of the Central African Republic, the Head of State of the Transition exercised the right to ratify treaties and international agreements and to promulgate laws.[246]

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[242] Bizimana, Syldie. "The Burundi Legal System and Research." Hauser Global Law School Program. November 2007. http://www.nyulawglobal.org/globalex/Burundi.html#_4._Status_of

[243] Rome Statute Implementation. https://www.issafrica.org/cdromestatute/pages/document.pdf

[244] Accessible at the International Criminal Court Legal Tools.

[245] Stone, Lee and Max du Plessis. 2016. The Implementation Of The Rome Statute Of The International Criminal Court In African Countries. Ebook. 1st ed. Institute of Security Studies Africa."

[246] Article 32 - The Prime Minister's appointment, the exercise of the right to pardon after advice of the Supreme Judicial Council, the granting of honours of the Republic, appointments within the services of the Head of State of the Transition, in accordance with a pre-established organization chart and the organization of those services, the promulgation of laws, the ratification of Treaties and International Agreements are exercised by the Head of State of the Transition without the Prime Minister's countersignature."

Article 95 - The Head of State of the Transition negotiates, approves and ratifies Treaties and international Agreements.

The Head of State of the Transition delegates to the Prime Minister and relevant Ministers the negotiation and approval of cooperation Agreements, loan Agreements, financing covenants and international Agreements in matters of economic development."

Further, Article 22 and Article 69 of the former Constitution included the role of the President of the Republic, by which the president is the guarantor of "respect for the agreements and treaties," as well as the negotiation, signature, ratification, and revocation of international agreements.[247] This latter power (of revocation), provided in Article 69, is the only explicit mention of treaty withdrawal in all the State constitutions, and allocates such authority to the President.[248]

Nonetheless, it is stipulated in the same article that the ratification and revocation of treaties "which modify the provisions of a legislative nature" also require the approval of Parliament. Additionally, Article 72 of the Constitution provides that the municipal laws of the Central African Republic, under a dualist system, are subordinate to the laws of international treaties and agreements.[249]'

The time frame for a treaty withdrawal in the Central African Republic is uncertain due to the newness of their Constitution. However, assuming that the new Constitution is analogous with the 2004 Constitution of the Central African Republic with amendments through 2010 in its obligation for parliamentary assent for treaty withdrawal, the addition of a Senate chamber in the new Constitution will inevitably result in a lengthier legislative process for treaty withdrawal than the procedure that previously applied to the transitional government.

CHAD

The Republic of Chad, Central African Republic signed the Rome Statute on 20 October 1999 and ratified it on the 1 November 2006.

COMOROS

The Union of Comoros, signed the Rome Statute on 22 September 2000 and ratified it on 18 August 2006. Article 10 of the constitution deals with ratification of treaties.[250] Comoros has currently put in place an implementation strategy for

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[247] *Article 22*

"The President of the Republic is the Head of State.

…He is the guarantor of the national independence, of the integrity of the territory, [and] of respect for the agreements and treaties.

…He negotiates and ratifies international treaties and agreements."

[248] Article 69 - "The President of the Republic negotiates, signs, ratifies and revokes the international treaties and agreements.

The ratification or the revocation may only intervene after the authorization of the Parliament, notably in that which concerns the peace treaties, the defense treaties, the commercial treaties, the treaties concerning the environment and the natural resources or agreements concerning international organization, those which engage the finances of the State, those which modify the provisions of a legislative nature, those which concern the status of persons and the rights of Man, [and] those which involve cession, exchange or addition of territory…"

[249] Article 72 - "The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, under reserve, for each agreement or treaty, of its application by the other party."

[250] Article 10 - Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.
They shall not take effect until such ratification or approval has been secured.
If the Constitutional Court, upon referral by the President of the Union, by the President of the Assembly of the Union or by the Heads of the island executives has held that an international undertaking contains a clause contrary to the Constitution,

the Rome Statue that was approved by its parliament in 2011. The document includes the crimes listed, the cooperation methods and the acceptance of ICC jurisdiction.

There is a possibility that Comoros can withdraw from the ICC if they are able to review and amend their implementation strategy. There is currently no generic provision for treaty withdrawals but there might be the possibility of amending the implementation document.

As there is no withdrawal procedure, the process of withdrawal may include amending the implementation document in order to allow for a withdrawal. This would enable the Union of Comoros to have the ability to create a framework for withdrawing from a treaty which aligns within their constitution. This may be an easier process rather than working to change a law within a state, which may require the National Assembly to consider the amendment or referendum to be conducted. The constitution states that the National Assembly has the ability to amend institutional acts. However, does not indicate how that would be undertaken. It refers it to the Rules of Procedure of the Assembly of the Union.

CONGO

The Republic of Congo, signed the Rome Statute on 17 July 1998, and ratified it on 03 May 2004. Article 178 of the constitution deals with the ratification of treaties.[251] The President is responsible for the negotiation, signatory and ratification process of international treaties. Followed by the Parliament, which authorizes the domestication of treaties before they become domesticated into the domestic law of the state of the Republic of the Congo, as treaties are considered to be self-executing. However, if a treaty is ratified and a clause of the treaty contradicts the constitution of the state, then the constitution is revised in order to accommodate the treaty into domestic law.

Currently the rules of procedure outlining the steps to be taken in accordance to the withdrawal of international treaties is yet to be created. As the specific legislation for the basis of withdrawal does not currently exist, the bodies that responsible for the negation, ratification and domestication of international treaties would need to work together in order to create such legislation. In particular, the President, Parliament and the Constitutional Court would be responsible for such legislation and amendments to the constitution in order to accommodate international treaty withdrawal procedures.

CÔTE D'I VOIRE

The Republic of Côte D'ivoire, signed the Rome Statute on 30 November 1998, and ratified the Rome Statute of the International Criminal Court on 15 February 2013. Cote d'Ivoire does not have implementation legislation for the Statute, however, steps have been taken toward the development of the domestic implementation of the Rome Statute.

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authorization to ratify or approve the international undertaking involved *may* be given only after amending the Constitution. Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of the Union or the islands, subject, with respect to each agreement or treaty, to its application by the other party.

[251] Article 178 - "The President of the Republic negotiates, signs and ratifies the international treaties and agreements."
"The ratification may only intervene after the authorization of the Parliament notably in that which concerns the treaties relative to the natural resources or the agreements relative to international organization, those which engage the finances of the State, those which modify the provisions of a legislative nature, those which are relative to the status of persons, and those that include cession, exchange or adjunction of the territory".

Constitutionally, the President of the Republic is identified as the actor empowered to negotiate and ratify international treaties and accords. Peace treaties, treaties, and accords concerning international organizations that modify the domestic laws of the State can only be ratified by law. If the Constitutional Council, seized by the President of the Republic, the President of the National assembly, or by at least one quarter of the Chamber of Deputies declare that a clause of an international agreement contradicts the Constitution, ratification of this clause will only occur after revision of the Constitution. Regularly ratified treaties, once published, have a superior authority over national laws.[252] Treaties must be published at the national level in order to be domesticated. Ivorian judges have previously denied the applicability of ratified treaties for lack of publication.[253]

Although the ICC has tried former Ivorian President Laurent Gbagbo and ally Charles Ble Goude, Ivorian President Allasane Ouattara indicated he would not send any more people to The Hague. Instead, he has committed to empowering the country to establish its own operational judicial system.254 There are no laws that exist that might serve as guides to Côte D'ivoire's withdrawal of a treaty.

DEMOCRATIC REPUBLIC OF THE CONGO

The Democratic Republic of the Congo (DRC), signed the Rome Statute on 08 September 2000, and ratified the Rome Statute of the International Criminal Court on 11 April 2002. The DRC's constitution requires the president of the country to negotiate and ratify international treaties and agreements255. The Council of Ministers are obliged to let the National Assembly and the Senate know of their decision regarding treaty ratification and or withdrawal.[256] As supported by the International Criminal Court, the government of the Democratic Republic of Congo (DRC) adopted a draft implementing legislation including both cooperation and complementarity provisions.[257] In June 2015, the National Assembly of the Democratic Republic of Congo unanimously voted on the adoption of a bill to incorporate the Rome Statute into domestic law which enables Congolese courts to prosecute, investigate and adjudicate war crimes including crimes against humanity and genocide committed by citizens of the Democratic Republic of Congo (DRC).[258] The bill however has yet to be adopted by the Senate of the Democratic Republic of Congo (DRC).[259] Although the Democratic Republic of Congo (DRC) under Article 214 of its constitution follows a monist approach, when it comes to international agreements being ratified into national law it is unclear whether the DRC will continue to comply with the terms of the Rome Statute.[260]

For an international treaty to be ratified under Congolese law, it must first be compatible with the national constitution.[261] If not, and for ratification to take place, the Constitutional Court is expected to be consulted by the President, Prime Minister, President of the National Assembly and President of the Senate so that the Constitution can

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[252] Cote d'Ivoire Constitution.
[253] *Ibid.*, p.6.
[254] "#GlobalJusticeWeekly – No ICC Withdrawal at African Summit," Coalition for the ICC, 9 February 2016, https://ciccglobaljustice.wordpress.com/2016/02/09/globaljustice-weekly-no-icc-withdrawal-at-african-union-summit/.
[255] Democratic Republic of Congo Constitution, Article 213 under *Title VI: Of the International Treaties and Agreement*
[256] Ibid.
[257] Coalition for the International Criminal Court. "Democratic Republic of the Congo (Kinshasa)." Coalition for the International Criminal Court. Accessed June 16, 2016. http://www.iccnow.org/?mod=country.
[258] #globalJUSTICE. "New DRC Law Criminalizes ICC Crimes, Strengthens Cooperation with Court." #globalJUSTICE. June 24, 2015. Accessed June 16, 2016. https://ciccglobaljustice.wordpress.com/2015/06/24/new-drc-law-criminalizes-icc-crimes-strengthens-cooperation-with-court/.
[259] Ibid.
[260] Moffett, Luke. *Justice for Victims Before the International Criminal Court*. New York City, NY: Routledge, 2014.
[261] Ibid.

be amended.[262] Article 217 of the Constitution also states that the republic may conclude treaties or agreements which involve "partial relinquishment of sovereignty with a view to promote African unity".[263]

Article 217 of the Constitution allows the country to leave agreements that may threaten their sovereignty.[264] Nonetheless, the Democratic Republic of Congo (DRC) has yet to implement the Rome Statute into their domestic law. Although the process of implementation is underway, final approval from the Parliament has yet to be achieved.[265]
Moreover, Article 214 and 216 of the Constitution limit the operation of Article 215 which binds DRC to international regulations by requiring domesticating legislation for certain types of international treaties.[266] Therefore, the Democratic Republic of Congo can as per Article 127 of the Rome Statute. And there is no Congolese legislation outlining temporal issues concerning the withdrawal from an international treaty / agreement.

DJIBOUTI

The Republic of Djibouti, signed the Rome Statute on 07 October 1998, and ratified the Rome Statute of the International Criminal Court on 05 November 2002. As per the constitution the president negotiates and approves the treaties and international conventions.[267] The Government of Djibouti has been reportedly working on various provisions in order to create an implementing strategy and amendments to the penal codes. However, it has submitted to the Assembly of States that the required changes and creation of implementing legislation will require capacity support. Djibouti has indicated that due to lack of economic and political resources they do not have the capacity to implement the relevant provisions of the Rome Statute.[268]

The Constitution does not refer to any processes and requirements of the President to the National Assembly in order to withdrawal from the treaty. The Constitution allows the President to sign treaties, while the process of ratification is based upon the National Assembly. However, the constitution also states that the President determines policy and is the regulator of such policy. Additionally, only when an agreement has been ratified does it become law, and can only be invoked if the constitution is in line with the new law. If there need to be revisions within the constitution, then the law can only be invoked once the revision happens. As there has not been any implementation strategy, there is a high chance that it would require a vote or discussion within the National Assembly in order to withdraw from the Rome Statue.

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[262] Ibid.

[263] Ibid.

[264] Democratic Republic of Congo Constitution

[265] ICCNow. "Rome Statute Update 2013." Rome Statute Update 2013. Accessed June 16, 2016. http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

[266] Zongwe, Dunia P., François Butedi, and Phebe Mavungu Clément. "UPDATE: The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research." Hauser Global Law School Program. Accessed June 16, 2016. http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html.

[267] *Article. 70. The President of the Republic negotiates and approves the treaties and international conventions, which are submitted to the ratification of the National Assembly.*
The treaties or agreements regularly ratified have, on their publication, an authority superior to that of the laws under res erve, for each agreement or treaty, to its application by the other party and of its conformity with the relevant provisions of the law of treaties.
Without prejudice to the previous paragraph, the ratification or the approval of an international engagement containing a clause contrary to the relevant provisions of the Constitution may intervene only after the revision of it.

[268] This comes due to the failure of Djibouti to arrest allowed President Omar Al-Bashir to enter the country even under the obligations of the Rome Statute.

Djibouti is dualist state, however it does recognize that international law is higher than domestic law. In order to be implemented into the state's constitution, it requires an implementing strategy. According to various sources Djibouti has not implemented or drafted any documents related to the process[269]. Constitutionally, once a treaty has been ratified it becomes superior to laws of the state. In relation to the ratification of the Rome Statute, an implementation strategy has not been created. Article 62 states[270] that a treaty will only be in effect if the constitution has been amended.

GABON

The Gabonese Republic signed the Rome Statute on 22 December 1998, and ratified the Rome Statute of the International Criminal Court on 20 September 2000. Constitutionally, the president is in charge of negotiating and ratifying international treaties and agreements after a bill of authorization is voted by the parliament.[271] The treaty is expected to be constitutionally verified by Gabon's Constitution Court.[272] The president and the speakers of the houses of Parliament (the National Assembly and the Senate) need to be informed of any negotiation regarding an international agreement that is not subject to ratification[273].

As supported by the International Criminal Court, the government of Gabon adopted a draft implementing legislation, including both cooperation and complementarity provisions.[274] A draft law has been introduced to reform Gabon's penal code in March 2003, however it only covers some aspects of criminal law.[275] Although Gabon follows a monist view, when it comes to international agreements, where international agreements are ratified into national law, it does not always ensure that the country will comply with the Rome Statute.

In Article 114, Title X: International Treaties and Accords, international treaties only take effect after having been regularly ratified and published.276 Therefore, since Gabon's implementation legislation has been stalled, and although the Rome Treaty has been ratified within the country, Gabon does not need to amend its constitution to allow for its withdrawal from the International Criminal Court.

Gabon has yet to implement legislation that binds the Rome Statute to its Constitution. Therefore, as the Rome Statute is not a part of the law of Gabon, and the country does not need to amend their constitution to allow them to withdraw

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[269] Stone Lee and Max du Plessis. *The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries Compiled.* Institute for Security Studies. https://www.issafrica.org/cdromestatute/pages/document.pdf

[270] *Article 62. The peace treaties, the commercial treaties, the treaties or agreements concerning international organizations, the which treaties engage the finances of the State, those which concern the status of persons, and those which involve cession, exchange or acquisition of territory may only be ratified or approved by virtue of a law.*
The ratification or the approval of an international engagement containing a clause contrary to the provisions of this Constitution may intervene only after the revision of it.
No cession, no acquisition of territory is valid without the consent of the people who decide by means of referendum.

[271] Gabon Constitution, Articles 113 and 114 (*Title X: International Treaties and Accords*)

[272] Ibid.

[273] Ibid.

[274] ICCNow. "Rome Statute Update 2013." Rome Statute Update 2013. Accessed June 16, 2016. http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

[275] Ibid.

[276] Gabon Constitution -

from the Statute.[277] Therefore, Gabon can, as per Article 127 of the Rome Statute, write to the UN Secretary notifying him of their intention to withdraw from the Statute, which would take one year to process / be completed.[278]

GAMBIA

The Islamic Republic of the Gambia, signed the Rome Statute on 04 December 1998, and ratified the Rome Statute of the International Criminal Court on 28 June 2002. As per the Gambian Constitution, the president is responsible for the negotiation of international treaties.[279] The President's ability to conclude treaties, nevertheless, is subject to ratification by the National Assembly, that may establish mechanisms for the ratification of treaties as imparted in Article 79(3).[280]

Similarly, as outlined in Article 100(1), Article 100(5), and Article 106(1) of the Constitution of the Republic of The Gambia, laws are not authorized until they are passed by both a majority in the National Assembly as well as through the approval of the president.[281] The Gambia ratified the Rome Statute however it never drafted or enacted implementation legislation. Therefore, withdrawing from the International Criminal Court would not require municipal legislative amendments as it would for those with implementing legislation.

GHANA

The Republic Ghana, signed the Rome Statute on 18 July 1998, and ratified the Rome Statute of the International Criminal Court on 20 December 1999. Article 75 of Ghana's Constitution outlines the procedure for the execution of treaties. The President is empowered to negotiate and sign treaties. The President has the authority to execute or cause to be executed treaties, agreements or conventions in the name of Ghana. Since Ghana is a dualist State, treaties are not

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[277] Folefack, Ernest. "The Gabonese Legal System and Legal Research - GlobaLex." The Gabonese Legal System and Legal Research - GlobaLex. Accessed June 16, 2016. http://www.nyulawglobal.org/globalex/Gabon.html.

[278] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 16 June 2016]

[279] *Article 79 - 1) The President shall be responsible for:*

(a) the conduct of relations with other states and international organizations;

(b) the reception of envoys accredited to The Gambia and the appointment of the principal representatives of The Gambia abroad;

(c) the negotiation and, subject to ratification by the National Assembly, the conclusion of treaties and other international agreements;

(d) subject to the prior approval of the National assembly, the declaration of war and the making of peace.

[280] *(3) The National Assembly may, by resolution establish procedures for the ratification of treaties and other international agreements."*

[281] ***Article 100***

"(1) The legislative power of The Gambia shall be exercised by Bills passed by the National Assembly and assented to by the President.

(5) A Bill which has been duly passed by the National Assembly and assented to by the President shall become law as an Act of the National Assembly and the words of enactment shall be: "Enacted by the President and the National Assembly".

Article 106

(1) Except as otherwise provided in this Constitution, any matter proposed for decision in the National assembly shall be determined by a majority of votes of the members present and voting.

self-executing. The Republic ratifies treaties internationally and then ratifies treaties domestically in accordance with the Constitution. The procedure for ratification is found in the Republic of Ghana's Treaty Manual.[282] Following an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament, Parliament holds the power to ratify any treaty, agreement, or convention executed by or under the authority of the President.[283]

The treaty manual traces the procedures for treaty ratification. Advice must first be sought from the Attorney-General and the Minister for Justice in accordance with Article 88 of the Constitution. Article 88 (1) identifies the Attorney- General as the Minister of State and principal legal adviser to the government, and Article 88 (2) stipulates that "the Attorney-General shall discharge such other duties of a legal nature as may be referred or assigned to him by the President, or imposed on him by this Constitution or any other law."[284] The Attorney-General shall determine the legal obligations of the Republic of Ghana under the treaty, agreement or convention, and if the treaty, agreement or convention conflicts with domestic legislation.[285]

The relevant ministry, in accordance with the Cabinet Memorandum Manual[286] would be expected to prepare a Cabinet Memorandum that would be approved by the Cabinet for the treaty, agreement, or convention for which ratification by Act of Parliament or Resolution of Parliament is being sought. The said memorandum should explain the contents of the treaty, agreement, or convention and contain background information.[287] The memorandum should indicate the benefits to the Republic of Ghana if the treaty, agreement or convention is signed or ratified.[288] This memorandum should "further spell out the obligation of government, that is the financial and legal impact, if the treaty, agreement or convention is ratified and must state that the Attorney-General and Minister for Justice has been consulted."[289] The memorandum should specify required amendments to legislation, whether a new law is needed, whether there is a need for Ghana to make any reservations, and any other relevant information to the decision of the Cabinet.[290] This memorandum would be submitted to the Cabinet Secretariat with copies of the treaty, agreement, or convention that is requiring ratification. Of the contents required for inclusion in the Cabinet Memorandum, there is no mention of a withdrawal mechanism.

GUINEA

The Republic Ghana, signed the Rome Statute on 07 September 2000, and ratified the Rome Statute of the International Criminal Court on 14 July 2013. The president of the Republic negotiates and ratifies international agreements.[291] As a

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[282] Inter-Ministerial Committee, *Republic of Ghana Treaty Manual*, 2009, http://legal.un.org/avl/documents/scans/GhanaTreatyManual2009.pdf?teil=II&j.

[283] Ghana Constitution, art. 75 sec. 2.

[284] *Ibid*., art. 88 sec. 2.

[285] *Ibid.*

[286] The Ghana Cabinet Memorandum Manual outlines the following elements as instructions to be clearly specified in the drafting of a Bill: http://www.cabinetgovernment.net/docs/addis-ababa/4e-ghana-cabinet-memorandum-manual.pdf., art. 63.

[287] *Ibid.*, Art. 2.

[288] *Ibid.*

[289] *Ibid.*

[290] *Ibid.*

[291] *Article 149 - The President of the Republic negotiates and ratifies the international engagements. The peace treaties, the tr eaties of commerce, the treaties or agreements relative to the international organization, those that engage the finance of the Stat e, those that modify the provisions of a legislative nature, those that are relative to the status [l'état] of persons, thos e that include cession, exchange or adjunction of territory, may only be ratified or approved by a law.*

dualist state, the approval or ratification of a treaty makes the treaty self-executing. Thus, once a treaty is ratified by the national assembly and is in line within the constitution, it becomes the law of the state.[292]

Noting the above, it seems unlikely that Guinea can withdraw from the Rome Statute rapidly. The process will be lengthy, as it requires a constitutional amendment, which is outline in Article 152[293]. The constitutional amendment is required as Article 151 outlines that ratified treaties are laws, laws superior to those of the nation.

KENYA

The Republic Kenya signed the Rome Statute on 11 August 1999, and ratified the Rome Statute of the International Criminal Court on 15 March 2005. Article 2 of the Kenyan constitution indicates that the any law incontinent to the constitution is void.[294] Even though Kenya has signed and ratified the Rome Statue, the county has publicly rejected a Bilateral Immunity Agreement with the United States. Kenya drafted the International Crimes Bill in 2005.[295]

According to the standing Orders, the Departmental Committee that deals with treaty law is the Defence and Foreign Relations. It deals with subjects related to: East African Community matters, Pan-African Parliament, regional and international relations, agreements, treaties and conventions. This means that it is likely that this Departmental Committee may be responsible for dealing with treaty withdrawal matters.

According to the current ratification processes in use,[296] the following "reversal" mechanisms can be inferred for a case of withdrawal from a multilateral treaty: In practice the Executive currently undertakes denunciation/abrogation of treaties following their approval by the Cabinet. The power to denounce/withdraw from treaties might be delegated to the Minister of Foreign Affairs, and in turn, to the Head of Delegation or Kenyan Ambassador.

No cession, no exchange, no adjunction of territory may take place without the consent by way [voie] of referendum of the concerned populations.

[292] *Article 151 - The treaties or agreements regularly approved or ratified have, from their publication, an authority superior to that of the laws, under reserve of reciprocity.*

[293] *Article 152 - The initiative of the revision of the Constitution belongs concurrently to the President of the Republic and to the Deputies. To be taken into consideration, the bill or the proposal of revision is adopted by the National Assembly by the simple majority of its members. It does not become definitive until after having been approved by referendum.*
Nevertheless, the bill of revision is not presented to referendum when the President of the Republic decides to submit it to the National Assembly alone. In this case, the bill of revision is approved by a majority of two-thirds of the members composing the National Assembly. It is the same for the proposal of revision that would have to obtain the approval of the President of the Republic.

[294] Article 2 - Supremacy of this Constitution
(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
(5) The general rules of international law shall form part of the law of Kenya.
(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

295 Ibid. at 40 – (The pertinent provisions of the International Crimes Bill are the following: Article 4 criminalizes the crimes of genocide, crimes against humanity, and war crimes. Article 5 obliges the Kenyan government to cooperate with the ICC, while Article 6 formally adopts the definitions of the ICC statute on genocide, crimes against humanity and war crimes and Article 8 restricts the jurisdiction of the Kenyan courts to acts committed within Kenyan territory, against Kenyan nationals or by Kenyan citizens or employees. Article 7 adopts the general principles of international law provided under the ICC Statute including Article 29, which excludes the applicability of statute of limitation on ICC crimes, and Article 28 relating to the responsibility of commanders and other superiors)

[296] "African Union Project On Ratification and Harmonization Procedures Of OAU/AU Treaties" Study on Ratification Procedures- EN - Rev 2- Clean (003) copy.docx, Para 60 -64

Following the abrogation, the Minister(s) would prepare a joint Cabinet memorandum seeking the Cabinet's approval for Kenya to ratify the treaty. The memorandum, inter alia, informs the cabinet of the nature of the treaty, the obligations contained therein, the benefits if any and the financial implications. If approval is granted, a suitable Instrument of Ratification is prepared and executed by the Minister for Foreign Affairs and thereafter it is deposited with the designated depositary.

After the conclusion of this process, the withdrawal is would be then presented before the Attorney General. In the event that changes in legislation are desired so as to fulfill the requirements of the withdrawal of the treaty, the Attorney General would be expected to prepare the necessary amendments to existing laws or they would be expected to prepare a fresh Act of Parliament to withdrawal from its treaty requirement.

LESOTHO

The Kingdom of Lesotho signed the Rome Statute on 30 November 1998, and ratified the Rome Statute of the International Criminal Court on 06 September 2000. The president is in charge of negotiating and ratifying international treaties and agreements after a bill of authorization is voted by the parliament.[297] After ratifying the Rome Statute, being supported by the International Criminal Court, the government of Lesotho adopted a draft implementing legislation on complementarity provisions.[298] This draft implementation bill is in the possession of the Cabinet of Lesotho, but has yet to become public.[299] No progress has been made to implement the legislation.[300]

Lesotho follows a dualist system whereby the country has to domesticate international laws by implementing legislation in Parliament for them to have force in the law of Lesotho. Since the country has yet to do this for the Rome Statute, it can be inferred that the Rome Statute does not hold any substance within the borders of Lesotho.[301]

Lesotho has yet to implement legislation that binds the Rome Statute to its Constitution. Therefore, the Rome Statute is not part of the law of Lesotho, and the country does not need to amend their constitution to allow them to withdraw from the Statute.[302] Lesotho can as per Article 127 of the Rome Statute write to the UN Secretary notifying him of their intention to withdraw from the Statute, which would take one year to process be completed.[303]

LIBERIA

The Republic of Liberia signed the Rome Statute on 17 July 1998, and ratified the Rome Statute of the International Criminal Court on 22 September 2004. The president of the county has the power to conclude treaties, conventions and

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[297] Lesotho Constitution

[298] ICCNow. "Rome Statute Update 2013." Rome Statute Update 2013. Accessed June 16, 2016. http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

[299] Ibid.

[300] Ibid.

[301] http://www.nyulawglobal.org/globalex/Sierra_Leone1.html

[302] http://www.nyulawglobal.org/globalex/Sierra_Leone1.html

[303] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 16 June 2016]

similar international agreements.[304] Liberia's acceded to the Agreement on the Privileges and Immunities of the Court (APIC) was on September 16, 2005.[305] The country has also signed a Bilateral Immunity Agreement with the United States Department of State on 8 October 2003 which granted a waiver to US nationals. Liberia has neither drafted nor enacted implementing legislation."[306]

According to the current ratification processes in use,[307] the withdrawal mechanisms can be inferred from a multilateral treaty: The president shall have the power to conduct the foreign affairs of the Republic, and in that connection he is empowered to withdraw treaties, conventions and similar international agreements with the concurrence of a majority of each House of the Legislature.

MADAGASCAR

The Republic of Madagascar signed the Rome Statute on 18 July 1998, and ratified the Rome Statute of the International Criminal Court on 14 March 2008. . There is no evidence of using a self-executing mechanism to deal with an international treaty. The current Malagasy legal system was inherited from both the pre-colonial legal regime and the civil law traditions. Even after independence, the existing legal system still reflects these previous legal regimes. Madagascar signed the Agreement on Privileges and Immunities of the court (APIC) on 12 September 2002 but has yet to accede to it.

LIBERIA

The Republic of Liberia signed the Rome Statute on 17 July 1998, and ratified the Rome Statute of the International Criminal Court on22 September 2004.Liberia's acceded to the Agreement on the Privileges and Immunities of the Court (APIC) on September 16, 2005[308], while a Bilateral Immunity Agreement was signed on 8 October 2003, with the US Department of State granting a waiver on 29 November 2004. Liberia has neither drafted nor enacted implementing legislation."[309]

MALAWI

The Republic of Malawi signed the Rome Statute on 02 March 1999. It ratified the Rome Statute on 19 September 2002. The president of Malawi is responsible for the negotiation and signing of international treaties.[310] There are the two bodies responsible for the handling of international legislative matters. One body is controlled by the president or a Minister delegated by the president. Other than the president, the Law Commission of Malawi can be bestowed with power of handling international legislative matters.[311]

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[304] *Article 57 - The President shall have the power to conduct the foreign affairs of the Republic and in that connection he is empowered to conclude treaties, conventions and similar international agreements with the concurrence of a majority of each House of the Legislature.*

[305] Ratification and Signature of the Agreement on the Privileges and Immunities of the Court (APIC), by region - CICC, http://www.iccnow.org/documents/APIC_EN_chart_updated_25_September_2012.pdf

[306] Supra at 40, Page. 13

[307] Supra at 67, Para. 91

[308] Ratification and Signature of the Agreement on the Privileges and Immunities of the Court (APIC), by region - CICC, http://www.iccnow.org/documents/APIC_EN_chart_updated_25_September_2012.pdf

[309] The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries , page 13 https://www.issafrica.org/cdromestatute/pages/document.pdf

[310] Constitution of Malawi. Article 89(F)

[311] Constitution of Malawi. *Article 135. A - "The Law Commission shall have the powers to:*

In the event of withdrawal of a treaty, the executive branch would first have to make the initiation for withdrawal. This would then be followed by an approval from Parliament. If Parliament were to approve a bid for withdrawal, the state could begin the process of treaty withdrawal.

MALI

The Republic of Mali signed the Rome Statute on 17 July March 1998, and ratified the Rome Statute of the International Criminal Court on 16 August 2000. Mali has enacted legislation implementing only complementarity obligations of the Rome Statute in Law No. 01-079 of 20 August 2001 on the Penal Code. 312 Parliamentarians for Global Action also indicates that the national laws of Mali "[incorporate] in a satisfactory manner the definitions and principles of the Rome Statute."[313] There is no withdrawal mechanism provided within this legislation.

The Constitution of the Republic of Mali, which dictates that "the President of the Republic shall negotiate and ratify the treaties, outlines that the president shall be informed of any negotiation leading to the conclusion of an international accord that has not been submitted for ratification."[314]

The Mali Constitution states that in order to ratify a treaty, "the Minister of Foreign Affairs submits to the Council of Ministers a draft law authorizing ratification of or accession to the treaty, an explanatory memorandum presenting the motivation for ratification, and a succinct summary of the treaty in question, as well as the financial implications of implementing the treaty."[315] Once the Council of Ministers adopts the draft law, the text is expected to be submitted by the National Assembly for approval.[316] Once the National Assembly receives Parliamentary approval, the law "is submitted to the President for promulgation, and the President signs the Instrument of Ratification prepared by the Ministry of Foreign Affairs for deposit with the treaty depositary."[317]

There are certain treaties, however, that may only be ratified by law, as articulated under Article 115 of the Constitution. These are "treaties of peace and commerce, treaties or accords related to international organizations, treaties involving the finances of the State, treaties relating to the condition of individuals, treaties involving surrender, [and] exchange or addition of territory," and they will only come into effect after ratification.[318] Furthermore, surrenders of, exchanges of,
and additions to territory require the consent of the people.[319]

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a. *to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law".*

[312] Secretary General of Mali, *Code Penal: LOI N° 01-079 DU 20 AOUT 2001*, Journal officiel de la Republique de Mali, 1 February 2002, http://www.droit-afrique.com/upload/doc/mali/Mali-Code-2001-penal.pdf.
[313] "Status of legislation implementing the provisions of the Rome Statute of the International Criminal Court (ICC) in the African Indian Ocean countries & Djibouti, the DRC and Tanzania," *Parliamentarians for Global Action,* 25-26 February 2010, http://www.pgaction.org/pdf/pre/Background%20Doc%20PGA%20ICC%20Conf%20Comoros%202010_EN.pdf.
[314] Mali Constitution
[315] Supra at 67.
[316] *Ibid.*
[317] *Ibid.*
[318] *Ibid.,* art. 115.
[319] *Ibid.,* art. 115.

In order to make law in Mali, bills are passed by the Assembly and assented to by the President.[320] The President must not withhold assent in the case of a bill which makes provision for any of the purposes specified under section 54. Nor can the president withhold assent to a bill which amends a constitutional provision and which is certified by the speaker as having complied with the requirements of section 47.[321] Once the president assents to the submitted nill in accordance with the Malian constitution, the bill becomes law and "the President shall cause it to be published in the Gazette as a law."[322] Laws made by parliament may only come into operation following publication in the Gazette. But parliament "may postpone the coming into operation of any such law and may make laws with retrospective effect."[323]
Properly ratified treaties and accords, when published, have superior authority over the laws of the State, as stipulated under Article 116.[324]

MAURITIUS

The Republic of Mauritius signed the Rome Statute on 11 November 1998, and ratified the Rome Statute of the International Criminal Court on 05 March 2002. Mauritius incorporated cooperation and complementarity provisions in 2011.[325] This implementation legislation is found in The International Criminal Court Act, 27 of 2011.[326] It does not contain mechanisms for withdrawal.

There are no treaty withdrawal provisions found in the Mauritian constitution. The constitution does clarify the power to amend and revoke instruments, stipulating that when any power is provided conferred under the constitution to make any order, regulation, or rule, or to give any order, the power shall be construed as including the power, exercisable in like manner, to amend or revoke any such order, regulation, rule or direction.[327] This may implicate that whoever has the power within Mauritius to invoke a treaty provision may also revoke it. Furthermore, Article 2 of the Constitution indicates that the constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."[328] Therefore, if Mauritius implemented a new law negating the jurisdiction of the ICC, perhaps pertaining to the sole jurisdiction of African continental courts, then the Rome statute, as entirely inconsistent international law, may potentially be voided. The power to make laws "for the peace, order and good government of Mauritius" is held by the Parliament.[329]

NAMIBIA

The Republic of Namibia signed the Rome Statute on 27 October 1998, and ratified the Rome Statute of the International Criminal Court on 25 June 2002. The president has the power to negotiate and sign international agreements.[330] Namibia has already stated that they are willing and will withdraw from the ICC[331]. However, Namibia is

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[320] *Ibid.*, art. 46 sec. 1.
[321] *Ibid.,* art. 46 sec. 2 para (a) (i-ii)
[322] *Ibid.,* art. 46 sec. 3.
[323] *Ibid.,* art. 46 sec. 4.
[324] *Ibid.,* art. 116.
[325] Coalition for the International Criminal Court, "Mauritius," *ICC Now,* http://www.iccnow.org/?mod=country&iduct=112.
[326] ICC Act No. 27 of 2011, http://www.iccnow.org/documents/ICCact2711.pdf.
[327] Mauritius Constitution, Art. 120.
[328] *Ibid.*, Art. 2.
[329] *Ibid.*, art. 45.
[330] Namibian Constitution, *Article 32: Functions, Powers and Duties (of the President):*
e. negotiates and sign international agreements, and to delegate such power;

a monist state as shown in Article 144[332] of the constitution in regards to international law. Thus, once they sign and ratify international treaties, they are bound by the 'general principles of law,' which according to the Vienna Treaty on Treaties, requires them to adhere to the Statute. To understand Namibia's obligations would require an analysis of what general principles the Namibian constitution recognizes. It may recognize customary international law only and not the requirements listed in treaties and agreements. This assessment must be understood in order to determine how to proceed.[333]

The reality is that it may be difficult for Namibia to withdraw from the Rome Statute since once it signs international treaties, its constitution allows for a self-executing treaty system in which the terms of the treaty are automatically incorporated into the national constitution. Thus a self-executing treaty is a treaty that may be enforced in national courts without implementing legislation. Therefore, a withdrawal from the Rome Statute would require the presentation of a motion/discussion in the National Assembly.

The process of Namibia withdrawing from a statute may take longer than most other African states because of its status as a monist state. As noted, it would require substantial changes to the constitution,[334] specifically Article 144. Changes to the constitution require a referendum, which may involve a lengthy process. Even though the state government seems to have an antagonistic relationship against the ICC, it is not clear what the general public sentiments are toward the ICC. If Namibia does not change Article 144, they would be required to pass a law or declaration through parliament in order for the Rome Statute to be either viewed as unconstitutional or not in line with the legislative.

NIGER

The Republic of Niger signed the Rome Statute on 17 July 1998, and ratified the Rome Statute of the International Criminal Court on 11 April 2002. Constitutionally the president of Niger is responsible for the negotiation and ratification of international treaties and agreements, and as there is no explicitly prescribed mechanism for treaty revocation. Thus, it may be reasonably inferred that the President is also tasked with treaty withdrawal.[335]

However, Article 169 that "the treaties of defense and peace, the treaties and agreements relative to the international organizations, those which modify the internal laws of the State and those which involve a financial engagement from the State, may only be ratified following a law authorizing their ratification."[336] As the Rome Statute, which modifies

[331] *Namibia clarifies withdrawal from ICC, saying it no longer needs its services.* Times Live. http://www.timeslive.co.za/africa/2016/03/14/Namibia-clarifies-withdrawal-from-ICC-saying-it-no-longer-needs-its-services. 14 March 2016

[332] *Article 144: International Law : Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*

[333] Tshosa, Onkemetse. *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy.* Namibia Law Journal. 2010. http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf p.13

[334] *Article 132: Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.*

[335] *Article 168 : "The President of the Republic negotiates and ratifies the international treaties and agreements."*

[336] *Article 169: "The treaties of defense and peace, the treaties and agreements relative to the international organizations, those which modify the internal laws of the State and those which involve a financial engagement from the State, may only be ratified following a law authorizing their ratification."*

municipal laws, is included in these enumerated conditions and accordingly requires the enactment of domestic law in order for ratification, such legislation must be examined in order to determine whether or not legislative amendments are necessary to withdraw from the Statute.

With regard to the Rome Statute, Niger has partially implemented the complementarity principle through the domestication of certain substantive crimes in its Penal Code,[337] though it has not enacted cooperation legislation.[338] As such, legislation internalizes only punishable international crimes and does not explicitly prescribe State obligations to the ICC. Depending on the wording of the document, it may not be necessary to strike down such legislation. This course of action could be undertaken through Niger's national assembly, which is charged with the creation and amendment of laws.[339]

The wording in Article 171 of the Constitution of Niger is also worth noting. The emphasized phrase, "subject to… its application by the other party" implies that international agreements which have already been ratified may lose their authority in the case of the failure of another party state to implement the treaty provisions.[340] Though this is already recognized by international customary law, it is nonetheless noteworthy as it is the only constitution which explicitly prescribes such a limitation. Like many of Rome Statute signatories and ratifying states which have not domesticated the statute's enumerated crimes and principles, Niger has not and, therefore, it could be deduced that it is not obligated to carry out any treaty obligations. Based on the interpretation that the failure of other state parties to apply treaty provisions will result in the weakening effect of the authority of the statute within Nigerien law.

NIGERIA

The Republic of Nigeria signed the Rome Statute on 01 June 2000, and ratified the Rome Statute of the International Criminal Court on 27 September 2001. Nigeria, in accordance with Article 12 of the constitution, has implemented draft legislation for the internalization of the Rome Statute in "The Rome Statute of the International Criminal Court (Ratification & Jurisdiction) Bill 2001. This bill annexes the entirety of the Rome statute, though it fails to address the pertinent principles of complementarity and cooperation.[341]

With respect to treaty ratification in Nigeria, Article 12 of the Constitution of the Federal Republic of Nigeria explicitly delineates that provision that no international treaty "shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly."[342] Therefore, as a dualist state in which treaty law is notably

[337] *Gazibo, Mamoudou. 2005. "Foreign Aid And Democratization: Benin And Niger Compared". African Studies Review 48 (3): 67-87. doi:10.1353/arw.2006.0015.*

[338] *"Loi N° 2001-26 portant autorisation de ratification du statut de Rome du 17 juillet 1998 portant création de la Cour Pénale Internationale.*

[339] *Article 90 - "The National Assembly votes the law and consents to taxes. It controls the action of the government."*

[340] *Article 171*

"The treaties or agreements regularly ratified have, from their publication, an authority superior to that of the laws, subject to, for each agreement or treaty of its application by the other party."

[341] *"OECD Statistics". 2016. Organization For Economic Co-Operation And Development. http://stats.oecd.org/.*

[342] *Article 12 - "1. No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.*

perceived distinctly from and subordinately to municipal law, international agreements, which are not self-legislating and must be domesticated through the legislative process, are not enforceable by municipal courts unless and until they are domesticated into national law. The legislative procedure necessary to enforce the Rome Statute in the Republic of Nigeria requires a simple majority in both chambers of the bicameral National Assembly[343], in addition to presidential assent.[344] Currently, there are preliminary investigations being conducted by the International Criminal Court concerning the armed conflict between Boko Haram and Nigerian security forces.[345] With the Court currently examining the case's admissibility to its jurisdiction, the decision to prosecute crimes in Nigeria would seriously delay Nigeria's ability to withdraw from the Rome Statute.

SENEGAL

The Republic of Senegal signed the Rome Statute on 18 July 1998, and ratified the Rome Statute of the International Criminal Court on 2 February 1999. Senegal is the first country to ratify the Rome Statute and signed the Agreement on Privileges and Immunities on 19 September 2002 and signed a Bilateral Immunity Agreement on 21 June 2003. On 12 February 2007 Senegal adopted the "Loi 2007 05 du 12 fevrier 2007 modifying le Code de Procedure penale' 55 into national legislation when it was published in the Gazette.

This legislation implements both complementarity and cooperation obligations. In this way, by recognizing that

2. The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

3. A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation."

[343] *Article 56 - "1. Except as otherwise provided by this Constitution any question proposed for decision in the Senate or the House of Representatives shall be determined by the required majority or the members present and voting; and the person presiding shall cast a vote whenever necessary y to avoid an equality of votes but shall not vote in any other case.*

2. Except as otherwise provided by this Constitution, the required majority for the purpose of determining any question shall be a simple majority."

[344] ***Article 58-*** *"1. The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.*

2. A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.

3. Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it.

4. Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.

5. Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required."

[345] "Situations and Cases". 2016. *International Criminal Court*. https://www.icc-cpi.int.

implementing legislation is both necessary and desirable Senegal has traversed the 'monist' configuration. The Senegalese government has conceded that the Senegalese criminal code needs to be reviewed in order to accommodate the crimes defined by the Rome Statute, including genocide, crimes against humanity and war crimes.

Moreover, Senegal will need to set up procedures enabling it to co-operate with the ICC including procedures for the arrest and surrender of persons to the Court and the gathering of evidence. In addition, the presidential and parliamentary immunities should not be a barrier to the exercise of jurisdiction. Most recently, with the conviction of Hissene Habre—the first African suspect to be prosecuted under universal jurisdiction— Senegal's Criminal Code of Procedure was showcased for its international legal legitimacy.[34]

In the event that a withdrawal is to be pursued by the judiciary, the Constitutional Council would be needed to decide on cases of refusal of enforcement ordinances or execution formula to be opposed on judgment of the African Human Rights Court.

SEYCHELLES

The Republic of Seychelles signed the Rome Statute on 28 December 2000, and ratified the Rome Statute of the International Criminal Court on 10 August 2010. After ratifying the Rome Statute, Seychelles has not produced any implementation legislation.[347] In Seychelles. the president is responsible for the execution of binding treaties, agreements, or Conventions in the name of the Republic.[348] If such a treaty, agreement, or convention, concerns international relations-related issues, the treaty must be ratified by an Act or a resolution passed by the votes of a majority of the members of the National Assembly. This is the case unless a written law is used to confer upon the president the authority to execute or authorize the execution of any treaty, agreement or convention.[349] In October 2015 Seychelles attended a high-level ICC seminar in Botswana on "cooperation with the ICC."[350] This attendance could signal an effort on behalf of Seychelles to strengthen its relationship to and/or more clearly define a commitment to complementarity with the ICC.

SIERRA LEONE

The Republic of Sierra Leone signed the Rome Statute on 17 October 1998, and ratified the Rome Statute of the International Criminal Court on 15 September 2000. In Sierra Leone, the president is responsible for ensuring the respect for all treaties and international agreements are signed.[351] Moreover, the president is also responsible for the execution of treaties, agreements or conventions in the name of Sierra Leone.[352] However, if a treaty, in any way, alters the laws of Sierra Leone or relates to any matter within the legislative competence of the parliament, the parliament,

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[346] https://www.hrw.org/news/2016/06/10/what-conviction-chads-former-dictator-means-african-human-rights

[347] Coalition for the International Criminal Court, "Seychelles," *ICC Now,* http://www.iccnow.org/?mod=country&iduct=154.

[348] Seychelles Constitution, art. 64 (3).

[349] *Ibid.*

[350] "Memorandum to African State Parties of the International Criminal Court for the Assembly of States Parties 14th Session," *Human Rights Watch,* 17 November 2015, https://www.hrw.org/news/2015/11/17/memorandum-african-states-parties-international-criminal-court-assembly-states.

[351] Sierra Leone Constitution, Art. 40

[352] I*bid.*

supported by no less than half of its members will need to discuss and choose if they want to ratify the agreement.[353]

As supported by the International Criminal Court, the government of Sierra Leone adopted a draft implementing legislation including both cooperation and complementarity provisions.[354] Although President Koroma stated in April of 2008 that the Rome Statute would be implemented into the domestic law of Sierra Leone, the progress has been stalled.[355] Even though the Minister of Justice has been working on a draft bill, which is not yet public, it is important to note that at the time of this writing, the draft bill has neither been approved by the Cabinet, nor has it been reviewed by the parliament.[356] Sierra Leone follows a dualist system whereby the country has to domesticate international laws by implementing legislation in Parliament for them to have force in the law of Sierra Leone. Since the country has yet to do this for the Rome Statute, it can be inferred that the Rome Statute does not hold any legal substance within the borders of Sierra Leone.[357] Thus, Sierra Leone has yet to implement legislation which binds the Rome Statute to its constitution. Therefore, the Rome Statute is not a part of the law of Sierra Leone, and the country does not need to amend their constitution to allow them to withdraw from the Statute.[358] Therefore, Sierra Leone can, as per Article 127 of the Rome Statute, write to the UN Secretary notifying him of their intention to withdraw from the Statute, which would take 1 year to process / be completed.[359]

SOUTH AFRICA

The Republic of South Africa signed the Rome Statute on 17 July 1998, and ratified the Rome Statute of the International Criminal Court on 27 November 2000. The South African constitution states that the negotiating and signing of all treaties is the responsibility of the national executive (i.e. the president of the state).[360] Moreover, an international treaty becomes binding in South African law only after it has been approved by the National Assembly and the National Council of Provinces (the two houses of Parliament).[361] However, it is important to note that an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, becomes binding without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.[362]

As supported by the International Criminal Court, the government of South Africa adopted an implementing legislation including both cooperation and complementarity provisions.[363] Known as Act No. 27 of 2002: Implementation of the Rome Statute of the International Criminal Court Act, 2002, this act covers complementarity and cooperation provisions

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[353] *Ibid.*
[354] ICCNow. "Rome Statute Update 2013." Rome Statute Update 2013. Accessed June 16, 2016. http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.
[355] *Ibid.*
[356] *Ibid.*
[357] http://www.nyulawglobal.org/globalex/Sierra_Leone1.html
[358] http://www.nyulawglobal.org/globalex/Sierra_Leone1.html
[359] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 16 June 2016]
[360] South Africa Constitution, Section 231
361 Ibid.
362 Ibid.
363 ICCNow. "Rome Statute Update 2013." Rome Statute Update 2013. Accessed June 16, 2016. http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

set out by the Rome Statute.[364] This Act is extremely important in South African law because it incorporates the definitions of crimes against humanity, war crimes and genocide while excluding any type of immunity as noted in the Rome Statute.[365] Moreover, this act allows for the South African government to amend domestic laws such as the Criminal Procedure Act, No 52 of 1977 and the Military Discipline Supplementary Measures Act No. 16 of 1999 in order to ensure that the acts conform and are in keeping with the Rome Statute.[366] Finally, the Act mentions cooperation measures (ie. arrest and surrender) in accordance with the terms of the Rome Statute.[367]

South Africa follows a dualist system whereby the country has to domesticate international laws by implementing legislation in Parliament for them to have force in the law of South Africa. Since the country has done this for the Rome Statute, it can be inferred that the Rome Statute holds substance within the borders of South Africa.[368] Under Chapter 14: General Provisions, Part A: International Law, of the South African constitution, any international legislation becomes law in the Republic when it is enacted into law by national legislation.[369] Since the South African government introduced an implementing legislation (Act No. 27 of 2002: Implementation of the Rome Statute of the International Criminal Court Act, 2002) in support of the Rome Statute in 2002, it can be inferred that the South Africa government has accepted the Statute as domestic law. Therefore, for South Africa to withdraw from the Rome Statute, it needs to amend its constitution and revoke the bill to allow for its legal withdrawal from the International Criminal Court. Then, can as per Article 127 of the Rome Statute, South Africa can write to the UN Secretary notifying him of their intention to withdraw from the Statute, which would take 1 year to process / be completed.[370]

TUNISIA

The Republic of Tunisia signed and ratified the Rome Statute of the International Criminal Court on 24 June 2011. In accordance with Article 20 of the Constitution of Tunisia: "International agreement approved and ratified by the Assembly of Representatives of the People have a status superior to that of laws and inferior to that of the Constitution."[371] Thus deeming Tunisia as a monist state meaning the state "considers the rule of national law as being in the same sphere with that of international law, and existing in supra / subordination, depending on the variant adopted. This theory considers that national law is derived from international law."[372] Essentially, this entails that the state considers international laws and treaties to be effective into Tunisian domestic law upon ratification thus making international agreements and treaties are self-executing upon ratification.

In terms of the decisions pertaining to the ratification of international treaties, Article 67 states that "commercial treaties and treaties related to international organizations, to borders of the state, to financial obligations of the state to the status of individuals or to dispositions of a legislative character shall be submitted to the Assembly of the

364 Ibid.
365 Ibid.
366 Ibid.
367 Ibid.
368 Kabbah, Hanatu. "UPDATE: Sierra Leone Legal System and Legal Research - GlobaLex." UPDATE: SierraLeone Legal System and Legal Research - GlobaLex. Accessed June 16, 2016. http://www.nyulawglobal.org/globalex/Sierra_Leone1.html.
369 South Africa Constitution
370 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 16 June 2016]
371 Constitution of Tunisia Article 20
372 Ciogaru, Emilian, PhD. "The Monistic and the Dualistic Theory in European Law." Universitatea George Bacovia Bacau - Drumul Tau in Viata Incepe Aici. Accessed June 01, 2016. http://ugb.ro/.

Representatives of the People for ratification. Treaties enter into force only upon their ratification."[373] Currently the rules of procedure outlining the steps to be taken in accordance to the withdrawal of international treaties has yet to be created. As the specific legislation for the basis of withdrawal does not currently exist, the bodies that are responsible for the negation, ratification and domestication of international treaties would need to work cooperatively together in order to create such legislation.

In the case of the state of Tunisia, the bodies responsible for executing the legislation and rules of procedure in accordance with international treaties and laws would be the Head of the Government[374] and the Assembly of the Representatives of the People.

UGANDA

The Republic of Uganda signed the Rome Statute on 17 March 1999, and ratified the Rome Statute of the International Criminal Court on 14 June 20002. Uganda signed the Agreement on the Privileges and Immunities of the Court (APIC) was on April 7, 2004, it was ratified on January 21, 2009.375 Uganda has drafted the International Criminal Court Bill 2004. This draft implementation legislation draws from the definition of crimes provided under the statute and provides for the jurisdiction of national courts over ICC crimes. Therefore, a prosecution must, according to Article 17, be carried out with the consent of the prosecutor.

The legislation also provides for the irrelevance of the official capacity of the suspect.376 Article 18 further provides for universal jurisdiction when the accused is either present within Uganda or an employee of the Ugandan government. The ICC Bill obliges the government to cooperate with the ICC and to prosecute in deserving cases. In 2003, the Ugandan government requested the ICC to investigate the commission of crimes against humanity in the context of the crisis in northern Uganda377. The investigations of the ICC prosecutor led to indictments of the leaders of the Lord's Resistance Army (LRA) in December 2005.

The Ugandan constitution does not directly limit the president's powers in treaty-making. However it states that parliament legislates the ratification of treaties and international agreements.

UNITED REPUBLIC OF TANZANIA

The United Republic of Tanzania signed the Rome Statute on 29 December 2000, and ratified the Rome Statute of the International Criminal Court on 20 August 2002. The national assembly is a representative body of each ministry within Tanzania and may; "deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification."[378] The Legal Affairs Unit of the Ministry of Foreign Affairs functions as; "the Ministry's advisory arm on legal matters and international law in particular. It furnishes legal advice to the Ministry,

[373] Supra at 141 . Article 67.

[374] Constitution of Tunisia, Article 62.

[375] Ratification and Signature of the Agreement on the Privileges and Immunities of the Court (APIC), by region - CICC, http://www.iccnow.org/documents/APIC_EN_chart_updated_25_September_2012.pdf

[376] Amnesty International, "Uganda: Concerns About the International Criminal Court Bill 2004" available online at http://web.amnesty.org/library/Index/ENGAFR590052004?open&of=ENGUGA.

[377] Amnesty International, Amnesty International 2005 Report, available online on Amnesty International Website, http://web.amnesty.org/report2005/uga-summary-eng

[378] The deliberation of treaties is decided by Parliament therefor they should consult with the Minister of Foreign Affairs

Diplomatic and Consular missions abroad with respect to all legal problems which may arise in the course of conducting Tanzania's relations with other countries and international organizations, whether they involve issues of domestic or international law."[379]

Presently, the legislation for the basis of withdrawal from treaties is yet to be created and implemented into current state legislation. Currently, international treaties and agreements are deliberated on in the national assembly. Given that the legal affairs unit of the ministry of foreign affairs is responsible for the advisory to the head minister of foreign affairs, who is the representative for the ministry of foreign affairs in the national assembly, and that the national assembly is the assembly in which treaties and agreements are deliberated on it seems that the minister of foreign affairs and the head of legal affairs unit would be responsible for the deliberation and refining for the legislation for the basis of treaty withdrawal. As Tanzania is a dualist state, international law is not immediately domesticated thus the process of deliberation is vitally important for the implementation and creation of legislation.

ZAMBIA

The Republic of Tanzania signed the Rome Statute on 17 July 1998, and ratified the Rome Statute of the International Criminal Court on 13 November 2002. In accordance with Article 92 (c) of the constitution the president is to; "negotiate and sign international agreements and treaties and subject to the approval of the National Assembly ratify or accede to international agreements and treaties."[380] Also the Cabinet is to "recommend the accession and ratification of international agreements and treaties to the National Assembly."[381] The Cabinet consists of the President, Vice President, Ministers and the Attorney General. "The attorney general is the chief legal adviser to the government,"[382] who's responsibilities include giving advice 'on an agreement, treaty or convention to which Government intends to become a party or in respect of which the Government has an interest before they are concluded, except where the National Assembly otherwise directs, and subjects to conditions as prescribed"[383].

Currently the rules of procedure outlining the steps to be taken in accordance to the withdrawal of international treaties have not yet been created. As the specific legislation for the basis of withdrawal does not currently exist, it is presumed that the bodies that are responsible for the negation, ratification and domestication of international treaties would work cooperatively together in order to create such legislation.

Given that the cabinet is responsible in collaboration for the accession and ratification of international agreements and treaties to the national assembly, the cabinet would be responsible for the regulation of legislation of international treaties with the guided advice of the attorney general.[384]

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[379] "Legal Affairs Unit." Foreign.go.tz. Accessed May 31, 2016.

[380] Constitution of Zambia. Article 92 (c)

[381] *Ibid.* Article 114 (d)

[382] *Ibid.* Article 179 (5)

[383] *Ibid.* Article 179 (5d)

[384] "The Attorney general may 'give advice on an agreement treaty or convention to which Government intends to become a part or in respect of which the government has an interest before they are concluded except where the National Assembly otherwise directs, and subjects to conditions as prescribed…" (Article 177 (4e)).

Appendix II

COMPILATION OF AU DECISION REGARDING ICC (2009 - 2016)

DECISION ON THE APPLICATION BY THE INTERNATIONAL CRIMINAL COURT (ICC) PROSECUTOR FOR THE INDICTMENT OF THE PRESIDENT OF THE REPUBLIC OF THE SUDAN

Assembly/AU/Dec.221(XII)

The Assembly:

1. **EXPRESSES ITS DEEP CONCERN** at the indictment made by the Prosecutor of the International Criminal Court (ICC) against the President of the Republic of The Sudan, H.E. Mr. Omar Hassan Ahmed El Bashir;

2. **CAUTIONS** that, in view of the delicate nature of the peace processes underway in The Sudan, approval of this application would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

3. **ENDORSES** the Communiqué issued by the Peace and Security Council (PSC) of the African Union (AU) at its 142nd meeting, held on 21 July 2008, and **URGES** the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, and as requested by the PSC at its above- mentioned meeting, to defer the process initiated by the ICC.

4. **REQUESTS** the Commission to implement this Decision by sending a high-level delegation from the African Union for necessary contacts with the UN Security Council;

5. **FURTHER REQUESTS** the Commission to convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements;

6. **REITERATES** AU's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire Continent, in conformity with its Constitutive Act;

7. **CONDEMNS** the gross violations of human rights in Darfur, and **URGES** that the perpetrators be apprehended and brought to justice, and **SUPPORTS** the decision by the PSC to establish a High-Level Panel of Eminent Personalities under the chairmanship of former President of the Republic of South Africa, H.E. Mr. Thabo Mbeki, to examine the situation in depth, and to submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed;

8. **NOTES** the steps taken by the Republic of The Sudan to address human rights violations in Darfur, and **REITERATES** the call by various AU Organs for the Government of The Sudan to take immediate and concrete steps to investigate and bring the perpetrators to justice, and to take advantage of the availability of qualified lawyers to be seconded by the AU and the League of Arab States, and in this regard **CALLS UPON** all parties to scrupulously respect the values and principles of human rights.

DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Doc. Assembly/AU/13(XIII)

The Assembly,

1. **TAKES NOTE** of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);

2. **EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;

3. **NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

4. **REITERATES** the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union;

5. **REQUESTS** the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;

6. **ENCOURAGES** Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies;

7. **FURTHER TAKES NOTE** that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

8. **REQUESTS** the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues:

   i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;
   ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
   iii.) Procedures of the ICC;
   iv.) Clarification on the Immunities of officials whose States are not party to the Statute;
   v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of

the Rome Statute;

vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and

vii.) Any other areas of concern to African States Parties.

9. **DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

10. **DECIDES** that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan * ;

EXPRESSES CONCERN OVER the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia,* guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

11. **UNDERSCORES** that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;

* Reservation entered by Chad

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

DECISION ON THE REPORT OF THE SECOND MEETING OF STATES PARTIES TO THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT (ICC)
DOC. Assembly/AU/8(XIV)

The Assembly,

1. **TAKES NOTE** of the Report of the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) held in Addis Ababa, Ethiopia on 6 November 2009 in conformity with Decision Assembly/AU/Dec.245(XIII) adopted in Sirte, Great Libyan Arab Jamahiraya, in July 2009, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010;

2. **ENDORSES** the recommendations contained therein, and in particular the following:

   I) Proposal for amendment to Article 16 of the Rome Statute;
   II) Proposal for retention of Article 13 as is;
   III) Procedural issues: Guidelines for the exercise of prosecutorial discretion by the ICC Prosecutor;
   IV) Immunities of Officials whose States are not parties to the Rome Statute: the relationship between articles 27 and 98; and
   V) Proposals regarding the crime of aggression.

3. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

4. **ALSO TAKES NOTE** of the Report of the Commission on the 8th Assembly of States Parties of the ICC (ASP) held in The Hague, Netherlands from 16 to 26 November 2009 and the outcome of the ASP meeting.

5. **WELCOMES** the submission by the Republic of South Africa, on behalf of the African States Parties to the Rome Statute of the ICC of a proposal which consisted of an amendment to Article 16 of the Rome Statute in order to allow the United Nations (UN) General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time frame.

6. **UNDERSCORES** the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded;

7. **WELCOMES** Resolution ICC-ASP/8/Res.6 on the Review Conference that establishes a Working Group of the ASP for the purpose of considering, as from its Ninth Session, amendments to the Rome Statute including among others the proposal for amendment to Article 16 of the Rome Statute together with the proposals from other States Parties or group of States Parties;

8. **TAKES NOTE** of the fact that the other proposals made by the Second Meeting of the African States Parties to the Rome Statute will not be considered during the Review Conference and **REQUESTS** accordingly, the African States Parties to raise the issue of the immunities of Officials whose States are not parties to the Rome Statute (the relationship between articles 27 and 98 under the topic "Cooperation" at the level of the Working Group of New York of the Bureau of ASP as well as during the stocktaking exercise of the Review Conference;

9. **ALSO TAKES NOTE** of the fact that there was no debate on the crime of aggression during the 8th ASP;

10. **DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council;

11. **URGES** the African States Parties to the Rome Statute to follow-up on the concerns raised by Member States;

12. **TAKES NOTE** of the Review Conference of States Parties to the International Criminal Court scheduled to be held in Kampala, Uganda from 31 May to 11 June 2010, and **CALLS UPON** African Member States Parties to attend and effectively participate in the Conference;

13. **REQUESTS** the African Group in New York and the African Members of the Bureau of ASP, to follow-up on the implementation of this Decision in collaboration with the Commission and to ensure that the concerns raised by the Assembly of the Union and its Member States are properly addressed through consultations with other Regional Groups with a view to finding a durable solution and to report to the Assembly through the Commission on actions taken;

14. **ALSO REQUESTS** the Commission to follow-up on the implementation of this Decision and to report to the next Ordinary Session of the Assembly through the Executive Council in July 2010.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF DECISION ASSEMBLY/AU/DEC.270(XIV) ON THE SECOND MINISTERIAL MEETING ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) Doc. Assembly/AU/10(XV)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) adopted by the Fourteenth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) and all comments and observations made by Member States and **ENDORSES** the recommendations contained therein;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **RECALLS** the African Union (AU) position expressed through the DecisionAssembly/AU/Dec.270(XIV);

4. **EXPRESSES** its disappointment that the United Nations Security Council (UNSC) has not acted upon the request by the African Union to defer the proceedings initiated against President Omar Hassan El-Bashir of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC which allows the UNSC to defer cases for one (1) year and **REITERATES** its request in this regard;

5. **REITERATES** its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan;

6. **REQUESTS** Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC;

7. **URGES** all Member States to speak with one voice to ensure that the proposed amendment to Article 16 of the Rome Statute which would allow the UN General Assembly to take over the power of the UNSC to defer cases for one (1) year in cases where the UNSC has failed to take a decision within a specified timeframe;

8. **DECIDES** to reject for now, the request by ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia and **REQUESTS** the Commission to inform the ICC accordingly;

9. **EXPRESSES CONCERN** over the conduct of the ICC prosecutor, Mr. Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El- Bashir of The Sudan and other situations in Africa;

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda

DECISION ON THE IMPLEMENTATION OF THE DECISIONS ON THE INTERNATIONAL CRIMINAL COURT Doc. EX.CL/639(XVIII)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.296 (XV) adopted in Kampala, Uganda on 27 July 2010;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **DEEPLY REGRETS** that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan, in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council; and **REQUESTS** the African members of the UN Security Council to place the matter on its agenda of the Council;

4. **ALSO DEEPLY REGRETS** the Decisions no.: ICC-02/05-01 of the Pre-trial Chamber I of the ICC dated 27 August 2010 informing the UN Security Council and the Assembly of the States Parties to the Rome Statute (ASP) about the visit of President Omar El-Bashir of the Sudan to the Republic of Chad and the Republic of Kenya on 21st July and 27th August 2010 respectively;

5. **DECIDES** that by receiving President Bashir, the Republic of Chad and the Republic of Kenya were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions;

6. **SUPPORTS AND ENDORSES** Kenya's request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post election violence under Article 16 of the Rome Statute to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity, and in this regard **REQUESTS** the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and **REQUESTS** the African members of the UN Security Council to place the matter on the agenda of the Council;

7. **TAKES NOTE** of the outcome of the Ninth Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) regarding the consideration of the proposed amendment to Article 16 of the Rome Statute;

8. **ALSO TAKES NOTE** of the Decision of the Ninth ASP-ICC to hold informal consultations on the proposed amendments to the Rome Statute in the context of a Working Group before its Tenth Session scheduled in December 2011 and **CALLS UPON** all African States Parties to the Rome Statute of the ICC that have not yet done so to co-sponsor the proposal for the amendment to Article 16 of the Rome Statute and indicate such willingness to the UN Secretary General, the Depositary of the Rome Statute, with copy to the AU Commission;

9. **UNDERSCORES** the need for African States Parties to the Rome Statute of the ICC to speak with one voice during the forthcoming negotiations at the level of the New York and The Hague Working Groups respectively and **REQUESTS** the Group of African States Parties in New York to ensure that the proposal for amendment to Article 16 of the Rome Statute is properly addressed during the forthcoming negotiations and to report to the Assembly through the Commission. In addition, they should ensure that the position of the ICC Prosecutor goes to an African during the forthcoming elections for Prosecutor scheduled for December 2011;

10. **REQUESTS** the Commission to follow-up on this matter and to report regularly on the implementation of the various Assembly decisions on ICC.

DECISION ON THE IMPLEMENTATION OF THE ASSEMBLY DECISIONS ON THE INTERNATIONAL CRIMINAL COURT Doc. EX.CL/670(XIX)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.296 (XV) adopted by the Fifteenth Ordinary Session of the Assembly in Kampala, Uganda on 31 July 2010;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **STRESSES** the need to pursue all efforts and explore ways and means of ensuring that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan, in accordance with Article 16 of the Rome Statute of International Criminal Court (ICC) on deferral of cases by the UN Security Council, be acted upon, and in this regard, **REITERATES** its request to the UN Security Council; and **REQUESTS** the African members of the UN Security Council to place the matter on the agenda of the Council;

4. **ALSO STRESSES** the need to pursue all efforts in ensuring that the request by the AU to the UN Security Council to defer the investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute be acted upon to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity;

5. **REAFFIRMS** that by receiving President Bashir, the Republic of Chad, Kenya, and Djibouti were discharging their obligations under Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions;

6. **EXPRESSES DEEP CONCERN** at the manner in which the ICC Prosecutor handles the situation in Libya which was referred to the ICC by the UN Security Council through Resolution 1970 (2011). The Assembly **NOTES** that the warrant of arrest issued by the Pre-Trial Chamber concerning Colonel Qadhafi, seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation. In this regard, the Assembly **DECIDES** that Member States shall not cooperate in the execution of the arrest warrant, and **REQUESTS** the UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country;

7. **REQUESTS** the Group of African States Parties in New York and in the Hague as well as the African Members of the UN Security Council to closely follow-up on the implementation of the Assembly‟s Decisions on ICC;

8. **ALSO REQUESTS** the Commission in collaboration with the Permanent Representatives‟ Committee to reflect on how best Africa‟s interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly‟s Decisions on the African Court of Justice and Human and Peoples‟ Rights being empowered to try serious international crimes committed on African soil;

9. **REQUESTS** the Commission to follow-up on this matter and to report regularly on the implementation of the various Assembly decisions on ICC.

DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF THE ASSEMBLY DECISIONS ON THE INTERNATIONAL CRIMINAL COURT (ICC) Doc. EX.CL/710(XX)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the implementation of Assembly Decisions on the International Criminal Court (ICC);

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) and (o) of the Constitutive Act of the African Union;

3. **STRESSES** the need to explore ways and means to ensure that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, be acted upon and, in this regard, **REITERATES** its request to the UN Security Council and **REQUESTS** African members of the UN Security Council to place the matter on the agenda of the Council;

4. **RECOGNISES** the efforts by African Members of the UN Security Council to initiate dialogue and discussions on the issue of placing AU's request for deferral under Article 16 of the Rome Statute, both with regard to The Sudan and Kenya on the UN Security Council agenda and **ENCOURAGES** African non-Permanent Members of the UN Security Council to pursue their efforts in this regard;

5. **REQUESTS** the Group of African States Parties to the Rome Statute in New York and in the Hague as well as African Members of the United Nations Security Council to scrupulously follow-up on the implementation of Assembly Decisions on the ICC in collaboration with the Commission to ensure that African proposals and concerns are properly considered by the UN Security Council and the Assembly of States Parties to the Rome Statute;

6. **REAFFIRMS** its understanding that Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98;

7. **ALSO REAFFIRMS** that by receiving President Bashir, the Republic of Malawi, like Djibouti, Chad and Kenya before her, were implementing various AU Assembly Decisions on non-cooperation with the ICC on the arrest and surrender of President Omar Hassan Al Bashir of The Sudan;

8. **URGES** all Member States to comply with Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23(2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC;

9. **REGRETS** that the AU's endorsement of two (2) persons as sole African candidates for the post of judge of the ICC was not respected by some Member States and **REQUESTS** that this situation, as it repeats itself in several other instances, be considered by the Commission together with the Permanent Representatives' Committee with a view to identifying ways and means of addressing it, in order to find a durable solution that will

strengthen the African Common Positions and endorsements, and make appropriate recommendations to the Executive Council;

10. **REQUESTS** the Commission to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of State Officials under international law;

11. **ALSO REQUESTS** the Commission to place the Progress Report of the Commission on the implementation of Assembly Decisions on the ICC on the agenda of the forthcoming Meeting of Ministers of Justice and Attorneys General for additional input;

12. **FURTHER REQUESTS** the Commission to report on regular basis on the implementation of this Decision to the Executive Council.

DECISION ON THE IMPLEMENTATION OF THE DECISIONS ON THE INTERNATIONAL CRIMINAL COURT (ICC)
Doc. EX.CL/731(XXI)

The Assembly,

1. **TAKES NOTE** of the Report of the meeting of Ministers of Justice and/or Attorneys General held in Addis Ababa, Ethiopia on 14 and 15 May 2012 and the recommendations contained therein;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) and 4 (o) of the Constitutive Act of the African Union and **UNDERSCORES** the importance of putting the interests of victims at the centre of all actions in sustaining the fight against impunity;

3. **ENDORSES** the recommendation of the Meeting of Ministers of Justice/Attorneys General to approach the International Court of Justice (ICJ), through the United Nations General Assembly (UNAG), for seeking an advisory opinion on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC and this regard**, REQUESTS** the Commission to undertake further study on the advisability and implications of seeking such advisory opinion from ICJ and to report thereon to the Executive Council;

4. **REITERATES** its request to the United Nations Security Council (UNSC) for deferral of the proceedings against President Omar al Bashir of the Sudan and those issued in the Kenyan situation;

5. **URGES** African State Parties to the Rome Statute to implement Decision Assembly/ AU/Dec. 296 (XV) adopted by the Fifteenth Ordinary Session in Kampala, Uganda in July 2010 which requested Member States to balance, where applicable, their obligations to the African Union (AU) with their obligations to ICC;

6. **ENDORSES** Libya's request to put on trial in Libya its own citizens charged with committing international crimes;

7. **ENCOURAGES**, for effective reliance on Article 98 of the Rome Statute, African State Parties to the Rome Statute of ICC and African non-State Parties to consider concluding bilateral agreements on the immunities of their Senior State officials;

8. **URGES** African States Parties to the Rome Statute to enhance African representation on the Bench of the ICC in order to ensure that Africa contributes optimally to the evolution of the Court's jurisprudence and in this context, Member States shall in the future respect the decisions of the AU endorsing candidatures to international institutions;

9. **REQUESTS** the AU Chairperson, the Permanent Representatives Committee (PRC) and the African Groups in New York and in The Hague to promote and support the African common position on ICC;

10. **ALSO REQUESTS** the Commission, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to publicize, within the continent, what it has done towards the protection of civilians in situations where international crimes have been perpetrated;

11. **WELCOMES** the steps taken by the Commission to follow up on various Assembly Decisions on the Abuse of

the principle of Universal Jurisdiction by some non-African States, in particular the elaboration of a Model National Law on Universal Jurisdiction over International Crimes and **ENCOURAGES** Member States to fully take advantage of this Model National Law in order to expeditiously enact or strengthen their National Laws in this area;

12. **REQUESTS** the Commission to follow-up on this matter and to report regularly on the implementation of the various Assembly decisions on ICC.

DECISION ON INTERNATIONAL JURISDICTION, JUSTICE AND THE INTERNATIONAL CRIMINAL COURT (ICC)[385]
Doc. Assembly/AU/13(XXI)

The Assembly,

1. **TAKES NOTE** of the presentation made by the Republic of Uganda, on behalf of the Eastern African Region, on International Jurisdiction, International Justice and the International Criminal Court, as well as the recommendations made by the Executive Council;

2. **REITERATES** the African Union‟s unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act;

3. **DEEPLY REGRETS** that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Omar Al Bashir of The Sudan and Senior State Official of Kenya, in accordance with Article 16 of the Rome Statute of the International Criminal Court (ICC) on deferral of cases by the UN Security Council, has not been acted upon; **REAFFIRMS** that Member States such as the Republic of Chad that had welcomed President Omar Al Bashir of The Sudan did so in conformity with the decisions of the Assembly and therefore, should not be penalized;

4. **FURTHER REAFFIRMS** its previous Decisions on the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012 respectively, in which it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace and reiterated AU‟s concern with the misuse of indictments against African leaders;

5. **STRESSES** the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with the principles of international law, and **EXPRESSES CONCERN** at the threat that the indictment of H.E Uhuru Muigai Kenyatta and H.E William Samoei Ruto, the President and Deputy-President of the Republic of Kenya respectively, may pose to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region;

6. **RECALLS** that, pursuant to the principle of complementarity enshrined in the Rome Statute of the ICC, Kenya has primary jurisdiction over the investigations and prosecutions of crimes in relation to the 2007 post- election violence, in this regard, **DEEPLY REGRETS** the Decisions of the Pre-trial Chamber II and the appeals Chamber of the ICC on the admissibility of the cases dated 30 May and 30 August 2011 respectively, which denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence;

7. **SUPPORTS AND ENDORSES** the Eastern Africa Region‟s request for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in support of the on- going peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya;

[385] Reservation entered by the Republic of Botswana on the entire decision

8. **REQUESTS** the African Union Commission, in collaboration with the African Union Commission on International Law (AUCIL), to organize, with the participation of Member States, all the relevant Organs of the African Union and other relevant Stakeholders, a brainstorming session, as part of the 50th Anniversary discussion on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa, in order not only to inform the ICC process, but also to seek ways of strengthening African mechanisms to deal with African challenges and problems;

9. **ALSO REQUESTS** the African Union Commission to follow-up on this matter and to report regularly on the implementation of the various Assembly decisions on the ICC.

DECISION ON AFRICA 'S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT (ICC)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.482 (XXI) on the International Jurisdiction, International Justice and the International Criminal Court (ICC) and the Presentation made by the Republic of Kenya as well as the recommendations of the Executive Council thereon;

2. **REITERATES,** in accordance with the Constitutive Act of the African Union (AU), the AU 's unflinching commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance in the continent;

3. **REAFFIRMS** its previous Decisions on the abuse of the principles of Universal Jurisdiction adopted in Sharm El Sheikh in July 2008 as well as the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012, and May 2013 wherein it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace;

4. **REITERATES** AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country;

5. **UNDERSCORES** that this is the first time that a sitting Head of State and his deputy are being tried in an international court and **STRESSES** the gravity of this situation which could undermine the sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions;

6. **RECOGNIZES** that Kenya is a frontline state in the fight against terrorism at regional, continental and international levels and, in this regard, **STRESSES** the threat that this menace poses to the region in particular and the continent in general, and the proceedings initiated against the President and the Deputy President of the Republic of Kenya will distract and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs;

7. **RECALLS** that following the 2007 Post Election Violence (PEV), the mediation process in Kenya was initiated by AU which led to the enactment of the National Accord and Reconciliation Act and the Agreement establishing the coalition government, and **EXPRESSES** concern that the ongoing process before the ICC may pose a threat to the full implementation of the National Accord of 2008 and prevent the process of addressing the challenges leading to the post-election violence;

8. **EXPRESSES** its deep appreciation for the full cooperation that the President and Deputy President of Kenya have demonstrated to the ICC process and **CALLS UPON** the ICC to show the same level of cooperation in the process;

9. **REAFFIRMS** the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office;

10. **NOW DECIDES**:

(i) That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;

(ii) That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;

(iii) To set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013;

(iv) To fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes;

(v) That the Commission expedites the process of expansion of AfCHPR to deal with international crimes in accordance with the relevant decision of the Policy Organs and **INVITES** Member States to support this process;

(vi) That African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;

(vii) To request African States Parties to the Rome Statute of the ICC, in particular the Members of the Bureau of the Assembly of States Parties to inscribe on the agenda of the forthcoming sessions of the ASP the issue of indictment of African sitting Heads of State and Government by the ICC and its consequences on peace, stability and reconciliation in African Union Member States;

(viii) That any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union;

(ix) That Kenya should send a letter to the United Nations Security Council requesting for deferral, in conformity with Article 16 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya that would be endorsed by all African States Parties;

(x) Pursuant to this Decision, to request the ICC to postpone the trial of President Uhuru Kenyatta, scheduled for 12 November 2013 and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request by Kenya, supported by the AU, for deferral;

(xi) That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC;

(xii) To convene, an Extraordinary Session, towards the end of November 2013, to review the progress made in the implementation of this Decision of the AU Assembly (Ext/Assembly/AU/Dec.1(Oct.2013)).

11. **FINALLY REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly in January 2014.

DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF THE DECISIONS ON
THE INTERNATIONAL CRIMINAL COURT
Doc. Assembly/AU/13(XXII)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the implementation of the Assembly Decisions on the International Criminal Court (ICC) and **ENDORSES** the recommendations contained therein;

2. **REITERATES** the unflinching commitment of the African Union and its Member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the African Union;

3. **COMMENDS** Member States which are parties to the Rome Statute of ICC for the unity of action demonstrated at the last Assembly of States Parties in the Hague in November 2013;

4. **THANKS** the Member State of the United Nations Security Council that supported the request of Kenya and the African Union to defer the proceedings initiated by the ICC against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC;

5. **ALSO THANKS** members of the Contact Group and the African Group in New York for their action in support of the African request;

6. **EXPRESSES** its deep disappointment that the request by Kenya supported by AU, to the United Nations (UN) Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not yield the positive result expected;

7. **ALSO EXPRESSES** its deep disappointment that the request by the African Union to the UN Security Council to defer the proceedings initiated against the President of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon to date;

8. **STRESSES** the need for the UN Security Council to reserve a timely and appropriate response to requests made by the AU on deferral in accordance with Article 16 of the Rome Statute under Chapter VII of the UN Charter so as to avoid the sense of lack of consideration of a whole continent;

9. **DECIDES** that the African Union and its Member States, in particular the African States Parties to the Rome Statute, reserve the right to take any further decisions or measures that may be necessary in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent;

10. **TAKES NOTE** of the outcome of the 12th Session of the Assembly of States Parties (ASP) of the Rome Statute to the ICC and **WELCOMES** the inclusion on its agenda of a Special Segment on " Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation" and the amendments to Rule 134 of the Rules of Procedure and Evidence of the ICC;

11. **ALSO TAKES NOTE** of the Decision of the 12th ASP inviting its Working Group on amendments to continue its consideration of amendments to the Rome Statute submitted prior to the Review Conference and those submitted following the decision by the Extraordinary Summit of the African Union held on 12 October 2013 and **CALLS UPON** all African States Parties to support the proposed amendment to Articles 16 and 27 of the Rome Statute;

12. **DECIDES that:**

(i) African States Parties should comply with African Union Decisions on ICC and continue to speak with one voice to ensure that the African proposals for amendments to Articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP working Group on amendments as well as by the forthcoming sessions of the Assembly of States Parties (ASP) to the Rome Statute;

(ii) There is an imperative need for all Member States to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the Constitutive Act of the African Union;

(iii) The Group of African States Parties in New York and the African Members of the Bureau of ASP should follow-up on the implementation of various Decisions of the Assembly on ICC, in collaboration with the Commission and ensure that the African proposals and concerns are properly considered/addressed by the ASP and report to the Assembly through the Commission on actions taken regularly;

13. **RECALLS** its decision aimed at extending the jurisdiction of the African Court of Justice and Human Rights to hear international crimes in the Continent and **REQUESTS** the Commission in collaboration with all stakeholders to speed up the process with a view to reporting thereon to the Assembly in June 2014;

14. **REQUESTS** the Commission to present a report on new developments in the issue, which is important to Africa, at its 24th Ordinary Session in January 2015.

DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF PREVIOUS DECISIONS ON THE INTERNATIONAL CRIMINAL COURT (ICC)
Doc. Assembly/AU/18(XXIV)

The Assembly,

1. **TAKES NOTE** of the Report of the Commission on the progress made in the implementation of Decisions on the International Criminal Court (ICC);

2. **REITERATES**, the commitment of the African Union and its Member States to fight impunity in accordance with the Constitutive Act;

3. **ALSO REITERATES** its previous decisions for the deferral of the proceedings initiated by the ICC against the President of the Sudan and the Deputy President of Kenya in accordance with Article 16 of the Rome Statute which allows the UNSC to defer cases for one year;

4. **EXPRESSES**

   a) its deep concern following the summoning of President Uhuru Kenyatta through a decision of the Trial Chamber V (b) of the ICC which did not take cognizance whatsoever of the amendments of the Rules of Procedure and Evidence of the ICC adopted by the 12th Ordinary Session of the Assembly of States Parties to the Rome Statute held in the Hague, the Netherlands in November 2013;

   b) its deep concern regarding the conduct of the Office of the Prosecutor and the Court and the wisdom of the continued prosecution against African Leaders.

5. **COMMENDS** President Uhuru Kenyatta for the leadership demonstrated and the unprecedented act of appointing the Acting President so as to respect the Court Summons and protect the Sovereignty of Kenya;

6. **REITERATES** the imperative need for all African States Parties (ASP) to ensure that they adhere and articulate commonly agreed positions at the African Union in line with their obligations under the constitutive Act of the Union;

7. **REAFFIRMS** the principles deriving from national and International Customary Law by which sitting Heads of State and other senior officials are granted immunities during their tenure in office;

8. **WELCOMES** the decision made by the Prosecutor of the International Criminal Court on 5 December, 2014 to withdraw the charges against President Uhuru Kenyatta while regretting the period it took the Office of the Prosecutor to arrive at the decision and the continued prosecution through disclosure of alleged evidence available to the ICC against him;

9. **NOTES WITH CONCERN** that the case against the Deputy President William Samoei Ruto is still proceeding before the International Criminal Court and **REITERATES** to the ICC the imperative need to terminate its prosecution against the Deputy President as per the previous decisions;

10. **RECALLS** its decision Ext/Assembly/AU/Dec.1 particularly 12(i) that African States Parties should comply with African Union decision on ICC and continue to speak with one voice to ensure that African proposals to the amendments to articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP Working Group on amendments as well as by the forthcoming sessions of the Assembly of States Parties to the Rome Statute;

11. **EXPRESSES** its concern on the failure by the ASP to consider the concerns and proposals for amendments by African Union of the Rome Statute of the ICC during the 13th Session of the ASP held in New York from 8 to 17 December, 2014,

12. **THANKS** Member States, African Group in New York and at the Hague ,the Contact Group and other like- minded States Parties to the Rome Statute for their work and continued support in fast-tracking the consideration of African concerns and amendment proposals to the Rome Statute;

13. **REGRETS** that the AU's endorsement of one person as a sole candidate for the post of judge of the ICC was not respected by some African States Parties;

14. **RECALLS** its decision Assembly/AU/Dec.529(XXIII) during the 23rd Ordinary Session of the Assembly held in Malabo, Equatorial Guinea in June, 2014 adopting the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights to try international crimes;

15. **UNDERSCORES** the need to expeditiously operationalize the exercise of the jurisdiction of the African Court of Justice and Human Rights to try international crimes through signing and ratification of both the Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights by Member States of the African Union and **UNDERLINE** the need to ensure predictable and sustainable funding;

16. **REITERATES** its commitment to fund all AU Organs and Institutions including the African Court of Justice and Human Rights;

17. **DECIDES** as follows:

a) to request all concerned to fast track consideration by the ASP Working Group on amendments and by Assembly of States Parties of the African proposals for amendments of the Rome Statute of the ICC;

b) to operationalize the exercise of jurisdiction of the African Court of Justice and Human Rights to try international crimes by signing and ratifying the requisite protocols; and in this respect**,** to establish a Special Fund and convene a resource mobilization conference to raise funds to initiate and sustain the activities of the African Court on Human and Peoples Rights' proposed Chambers of the International Criminal Law Section as envisaged in Article 19 *bis* of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights;

c) in accordance with its decisions particularly the African States Parties to the Rome Statute reserves the right to take any measures in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent;

d) pursuant to this decision and its previous decisions, to request the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statute of the ICC are considered;

e) in the same vein to request the suspension of proceedings against President Omar Al Bashir and to urge the UN Security Council to withdraw the referral case of the Sudan.

18. **COMMENDS** the Democratic Republic of Congo for complying with AU Decision for non-cooperation for the arrest and surrender of President Omar Al Bashir of the Republic of Sudan;

19. **UNDERSCORES** the need for all Member States to comply with the position of the Assembly of the Union regarding the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC;

20. **REQUESTS** the Commission to present a progress report on the implementation of this decision at its 26th Ordinary Session in January 2016.

DECISION ON THE UPDATE OF THE COMMISSION ON THE IMPLEMENTATION OF PREVIOUS DECISIONS ON THE INTERNATIONAL CRIMICAL COURT

The Assembly,

1. **TAKES NOTE** of the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court;

2. **RECALLS** Decision Assembly/AU/Dec.547 (XXIV) and in particular paragraphs;

   i) 17. (d) that requested the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statute of the ICC are considered; and

   ii) 17 (e) that requested the suspension of proceedings against President Omar Al Bashir and to urge the UN Security Council to withdraw the referral case in the Sudan;

3. **COMMENDS** efforts of the African Union Commission in the implementation of the Decision Assembly/AU/Dec.547(XXIV);

4. **RECOMMENDS** the formation of an open-ended Ministerial Committee of Ministers of Foreign Affairs;

5. **REQUESTS** the African Union Commission to continue implementing the Decision and in particular to write to the United Nations Security Council:

   i) Informing of the African Union Heads of State and Government Decision of January 2015 and also requesting that decision be implemented;

   ii) Informing that the Committee of Ministers of Foreign Affairs intends to meet the UNSC to discuss and follow up on the matter.

6. **REQUESTS** that the African Union Commission join in the Application under Rule 68 by the Prosecutor of ICC against the Deputy President of the Republic of Kenya as an interested party for purposes of placing before the Court all the relevant material arising out of the negotiations;

7. **RECOMMENDS** that adequate financial resources be provided to the Commission and the open-ended Ministerial Committee to enable follow up activities for the implementation of this Decision.

DECISION ON THE INTERNATIONAL CRIMINAL COURT Doc. EX.CL/952(XXVIII)

The Assembly,

1. **TAKES NOTE** of the recommendations of the Executive Council on the implementation of the Decisions on the International Criminal Court (ICC);

2. **REITERATES** the following:

   i) The commitment of the African Union and its Member States to the fight against impunity in accordance with the Constitutive Act of the African Union;

   ii) Its previous Decision Assembly/AU/Dec.547(XXIV) on the progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) adopted by the Twenty- Fourth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, in January 2015, and in particular paragraph 17 (d) that requested the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statutes of the ICC are considered; and

   iii) Paragraph 17(e) that requested the suspension of proceedings against President Omar Al Bashir of The Sudan and **URGES** the United Nations (UN) Security Council to withdraw the referral case in The Sudan.

   iv) Its requests to the Peace and Security Council (PSC) to examine the Draft ICC Action Plan on Arrest Strategies that is currently under consideration by the ICC and make appropriate recommendations thereon to the next ordinary session of the Assembly, through the Executive Council, in July 2016 to enable adoption of a Common African Position on same.

3. **COMMENDS** the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan and **DECIDES** that by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law;

4. **REITERATES** its decision on the need for all Member States to comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Al Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act of the African Union and Article 98 of the Rome Statute of the ICC;

5. **EXPRESSES ITS DEEP CONCERN** regarding the wisdom of the continued prosecution of the case of Deputy President William Ruto of the Republic of Kenya and **CALLS ON** the ICC to terminate the case without further delay as any continued prosecution is without foundation given the unambiguous absence of any incriminatory evidence capable of belief;

6. **COMMENDS** the Members of the Open ended Committee of Foreign Ministers ("*Open ended Ministerial Committee*") under the chairpersonship of H.E. Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia for the work done and **REITERATES** its previous decision that the Open Ended Ministerial Committee should meet with the United Nations Security Council (UNSC) to engage on all issues that have been consistently raised by the African Union;

7. **TAKES NOTE** of the conclusions of the 14th Assembly of the States Parties of the ICC (ASP) in which the ASP

reaffirmed its understanding on the non-retroactive application of Rule 68 to situations commenced before November 2013 (with regard to the Kenyan agenda) and expressed its "*willingness to consider, within the framework of the appropriate subsidiary body of the Assembly, proposals to develop procedures for the implementation of Articles 97, 27 and 98*" with regard to the issues raised by South Africa in its statements during the 28th Ordinary Session of the Executive Council and the 26th Ordinary Session of the Assembly respectively in Addis Ababa, Ethiopia in January 2016 and **EXPRESSES ITS APPRECIATION** to the President of ASP, H.E. Sidiki Kaba from Senegal for ensuring that in spite of perceived resistance by some State Parties, the issues and concerns of the AU and its member states were allowed to be articulated at the

14th

ASP;

8. **EXPRESSES** its deep grieve at the failure of the UNSC to respond to the requests of the AU for deferral of The Sudan and Kenyan cases for the past five (5) years;

9. **TAKES NOTE WITH CONCERN** of:

i) The obstinacy of the ICC by the so-called "*Principals of the Court*" comprising the Prosecutor, the Registrar and the President of the ICC, which continues to privilege the views of civil society over clearly held positions of African Member States parties to the Rome Statute;

ii) The disturbing public dismissive disregard of the decisions of the 14th ASP by the Prosecution in relation to the pending Rule 68 Appeal against Kenya‟s Deputy President;

10. **DECIDES** as follows:

i) The Bureau of the Open-Ended Ministerial Committee be expanded to ensure equitable regional representation **AND REQUESTS** the Overall Dean and the Regional Deans in Addis Ababa, Ethiopia to urgently undertake consultations with a view to submitting their respective representatives to serve on the Bureau;

ii) The Permanent Representatives‟ Committee (PRC) be mandated to approve and provide the adequate resources to the Commission, through the Office of the Legal Counsel, to support the work of the Open ended Ministerial Committee in pursuing all political, legal, and strategic avenues in addressing AU‟s concerns before the United Nations, the ICC and the International Court of Justice (ICJ);

iii) The Open-ended Ministerial Committee will review the ICC‟s interpretation of its power pursuant to Article 93 of the Rome Statute that allows the latter to oblige State Parties to forcibly compel unwilling witnesses to testify before the ICC, with a view to rejecting witness compulsion *in toto* and inform the ICC and the next ASP accordingly;

iv) The Open-ended Ministerial Committee‟s mandate will include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision;

v) The Commission will continue to engage with relevant stakeholders within the ICC on issues raised in the various Decisions of the AU Policy Organs on the ICC;

vi) The Commission, through the AU Mission in Brussels, Belgium, will serve as the secretariat to the Open- ended Ministerial Committee and provide institutional support to the African Group in The Hague, Netherlands to ensure effective coordination of its activities;

11. **REITERATES**:

i) The imperative need for all African States Parties to the Rome Statute of the ICC to continue to ensure that they adhere and articulate common agreed positions in line with their obligations under the Constitutive Act of the African Union;

ii) Its call on all AU Member States to sign and ratify, as soon as possible, the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples‟Rights;

12. **REQUESTS** the Commission in collaboration with all stakeholders to follow-up on this matter to ensure that the African proposals and concerns are addressed and to report to the ordinary session of the Assembly through the Executive Council scheduled for January 2017.