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NAVIGATING BETWEEN SCYLLA AND CHARYBDIS: HOW THE INTERNATIONAL CRIMINAL COURT TURNED RESTRAINT INTO POWER PLAY^{†♦}

INTRODUCTION: MOVING BEYOND EXISTENTIAL CHALLENGES TO CONFRONT THE INTERNATIONAL CRIMINAL COURT'S CONTEMPORARY DILEMMAS

Across nearly two decades since its establishment, volumes have been written and feature films produced devoted to recounting the embattled origin story of the International Criminal Court (ICC or the Court).¹ Despite hand-wringing by perennial skeptics;² opposition of persistent objectors, notably including the United States;³ and second-guessing from disenchanted former proponents,⁴ the ICC is now, in the words of its current chief prosecutor, “a fact of life.”⁵ And yet, despite having been a half-century in the making,⁶ “construction [on the Court] continues.”⁷

[†] The title of this Comment is drawn from Odysseus's fictional triumphant helmsmanship of his vessel through the modern-day Strait of Sicily between two mythical sea monsters. HOMER, *THE ODYSSEY* (c. 725 B.C.E.). The International Criminal Court (ICC) decision at issue in this Comment is Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (July 6, 2017) [hereinafter Al-Bashir South Africa Non-Compliance Decision], https://www.icc-pi.int/CourtRecords/CR2017_04402.PDF.

[♦] This Comment received the 2018 Emory International Law Review Founder's Award for Excellence in Legal Research and Writing.

¹ See, e.g., BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (2008); MICHAEL J. STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY* (2008); *THE COURT* (Michele Gentile & Marcus Vetter prods., 2013); *THE RECKONING: THE BATTLE FOR THE INTERNATIONAL CRIMINAL COURT* (Skylight Pictures 2008).

² Such as Alan Dershowitz and Eric Posner; See Shawn Macomber, *Alan Dershowitz Should Expand His Case Against the ICC*, FRONTIERS OF FREEDOM (Feb. 1, 2015), <https://www.ff.org/alan-dershowitz-icc-lawfare/>; Eric Posner, *The Absurd Criminal Court*, WALL. ST. J. (June 10, 2012), <https://www.wsj.com/articles/SB10001424052702303753904577452122153205162>; See generally JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 1–14 (2015) (critiquing prominent detractors of international law, including Jack Goldsmith, Eric Posner, and John Yoo).

³ See, e.g., David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999); Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528 (2011).

⁴ Including several African states and the African Union (AU) itself; See, e.g., Rowland J. V. Cole, *Africa's Relationship with the International Criminal Court: More Political than Legal*, 14 MELBOURNE J. INT'L L. 670 (2013); Max Du Plessis & Christopher Gevers, *Balancing Competing Obligations: The Rome Statute and AU Decisions*, INST. FOR SECURITY STUD. PAPER 225 (Oct. 2011).

⁵ H.E. Fatou Bensouda, Statement at the Africa Legal Aid Conference: Africa and the ICC: One Decade On (Sept. 11, 2014), <http://www.africalegalaid.com/africa-and-the-icc-one-decade-on-africa-and-the-icc-lessons-learned-and-synergies-ahead/>; see also Judge Chile Eboe-Osuji, President, Int'l Crim. Ct., Opening Remarks at the High-Level Regional Seminar, The International Criminal Court and South America: Opportunities for Cooperation and Exchanges of Experience at 20 Years of the Rome Statute (June

Caught between powerful international organizations on one side and domineering states (including both States Parties and influential non-States Parties)⁸ on the other, the Court is buffeted between the proverbial twin demons of Scylla and Charybdis. Navigating this treacherous course requires both skill and a steady hand at the helm (favorable winds would also be welcomed, although not necessarily expected, as this Comment further explains).

Recently, and without much fanfare, the ICC had the occasion to demonstrate both traits, as it confronted one of the latest in a series of flagrant instances of non-compliance with the outstanding arrest warrant for Sudanese President Omar al-Bashir.⁹ In a remarkable display of maturity and Solomonic judicial creativity, the bench found a way to assert itself while giving the outward appearance of deference. In so doing, the Court has proven that it can think and act *politically* without becoming *politicized*.¹⁰

A. Infancy to Adolescence: The ICC's Difficult Childhood and Growing Pains

Since its inception, the Court has confronted the fundamental challenge of balancing judicial independence against inevitable and necessary interdependence with other institutions and actors.¹¹ Its own former president

7, 2018) (“International criminal justice, for the purposes of accountability, is here to stay.”) (transcript available at https://www.icc-cpi.int/news/seminarsDocuments/180607-seminar-ecuador-stat-president_ENG.pdf).

⁶ “Though the Rome Statute was adopted 20 years ago, the dream that culminated that event started well over 50 years before. In our own turn . . . we may . . . allow ourselves to dream to improve the edifice . . . [and] make the world a better place for humanity.” Judge Chile Eboe-Osuji, President, Int’l Crim. Ct., Remarks at Solemn Hearing in Commemoration of the 20th Anniversary of the Rome Statute of the International Criminal Court (July 17, 2018), <https://www.icc-cpi.int/itemsDocuments/20180717-pres-speech.pdf>; see also WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 4, 8–11 (5th ed. 2017).

⁷ STRUETT, *supra* note 2, at 179.

⁸ *I.e.*, The United States, Russia, and China. See *The States Parties to the Rome Statute*, *infra* note 67.

⁹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1. While President al-Bashir’s last name is transliterated from Arabic to the Roman alphabet with various spellings, this Comment will use the aforementioned spelling throughout for consistency, except where other sources are directly quoted and employ other variations.

¹⁰ To state that the Court and its members have acted politically is not intended in any way to impugn its motivations, but to suggest that it has demonstrated an ability to operate strategically.

¹¹ Judge Philippe Kirsch, President, Int’l Crim. Ct., Frederick K. Cox Lecture in Global Legal Reform: The International Criminal Court: Independence in a Context of Interdependence, Case Western Reserve University School of Law (Nov. 7, 2005); see also Martin J. Burke & Thomas G. Weiss, *The Security*

has suggested that the cooperation of States, intergovernmental organizations, and civil society is *sine qua non* for the Court to deliver effectively on its mission to end impunity.¹²

During the protracted negotiations, from early talks at U.N. Headquarters in New York to the final Rome conference,¹³ advocates sought to protect the Court from political machinations, including the influence of powerful permanent members of the United Nations Security Council (U.N.S.C.).¹⁴ Upon the adoption of the Rome Statute for the ICC, then-United Nations (U.N.) Secretary General Kofi Annan famously lauded the Court as “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”¹⁵ Others have hailed the Court’s founding as “one of the boldest progressive moves in the history of international relations.”¹⁶ However, observers are fond of saying that international law is “in recession,”¹⁷ “under assault,”¹⁸ or “in crisis.”¹⁹ Entire

Council and Ad Hoc Tribunals: Law and Politics, Peace and Justice, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR 241, 242 (Vesselin Popovski & Trudy Fraser, eds. 2014).

¹² Judge Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. L. REV. 539, 547 (2007) (“The Court will never be able to end impunity alone. Its success will depend upon the support and commitment of States, international organizations, and civil society.”); see also Burke & Weiss, *supra* note 12, at 242.

¹³ “The negotiations for the International Criminal Court took place almost entirely at the United Nations [in New York]. They would be authorized by the United Nations General Assembly, take place in committees it created and end in a diplomatic conference convened by the UN [in Rome] The Ad Hoc Committee and the Preparatory Committee met in halls on the ground floor of the conference wing of the United Nations building in New York.” FANNY BENEDETTI, KARINE BONNEAU, & JOHN WASHBURN, *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994-1998*, at 17, 20 (2014). The process culminated in the grand Campidoglio in Rome; See Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Court, U.N. Press Release L/2889 (July 20, 1998), <https://www.un.org/press/en/1998/19980720.l2889.html>; See generally M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of the International Criminal Court*, 32 CORNELL INT’L L.J. 443 (1999); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT’L L. REV. 361 (1999).

¹⁴ STRUETT, *supra* note 2, at 165.

¹⁵ Press Release, Secretary-General Says Establishment of International Criminal Court is Major Step in March towards Universal Human Rights, Rule of Law, U.N. Press Release L/2890 (July 20, 1998), <http://www.un.org/press/en/1998/19980720.l2890.html>.

¹⁶ Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 75 L. & CONTEMP. PROBS. 275 (2016).

¹⁷ Christine Kaufman, *International Law in Recession? The Role of International Law When Crisis Hits: Food, Finance, and Climate Change*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA (Ulrich Fastenrath et al. eds., 2011).

¹⁸ See OHLIN, *supra* note 3.

¹⁹ Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT’L L. 1543 (2009); Joel P. Tractman, *The Crisis of International Law*, 44 CASE W. RES. J. INT’L L. 407 (2011), <http://>

conferences have been dedicated to the latter topic.²⁰ Even one of its staunchest and most celebrated advocates, the Hon. Richard Goldstone, when asked to discuss “international law in crisis,” demurred, only to go on to suggest that there was a crisis with regard to its *implementation*.²¹ Although “normative consensus and organizational machinery have largely been established . . . the Court is still young.”²² At the frontlines of this battleground and now in its adolescence, the ICC continues to struggle to assert its autonomy.²³

While well-intentioned, the ambitious notion that the Court could be shielded from state interests reflects a naïveté about the realities the ICC would confront. As one of its more respected observers suggests, the “encomium to legal objectivity understates the complexity of challenges to the Court . . . the Statute is ultimately a document of political compromise . . . political choices abound at all levels.”²⁴ Phrased differently (and with some degree of understatement), “[t]he relationship between the ICC and the United Nations Security Council was one of the stumbling blocks in the negotiations on the establishment of the Court. . . . The emerging picture is characterized as friction.”²⁵ In the summer of 2017, this fractious relationship took a turn.

scholarlycommons.law.case.edu/jil/vol44/iss1/6; Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45 (2009); Joel P. Tractman, *The Crisis of International Law*, 44 CASE W. RES. J. INT’L L. (2011).

²⁰ In 2011, “ten years after 9/11, legal experts [met] to consider [the] turbulent year” at a Case Western Reserve Law School symposium, “International Law in Crisis,” co-sponsored by the American branch of the International Law Association, Case Western Reserve’s Frederick K. Cox International Law Center, and the American Society of International Law. *Accord Symposium Sept. 9 at Case Western Reserve University School of Law Tackles a Global Question: Is International Law in Crisis?*, PR NEWS WIRE (Aug. 10, 2011), <https://www.prnewswire.com/news-releases/symposium-sept-9-at-case-western-reserve-university-school-of-law-tackles-a-global-question-is-international-law-in-crisis-127471963.html>.

²¹ Hon. Richard Goldstone, *The Crisis in the Implementation of International Law*, 44 CASE W. RES. J. INT’L L. 13, 17–18 (2011). Hon. Goldstone hastened to add that international law “is being relied upon and called in aid more frequently by international leaders than ever before,” citing examples from the U.S. and Germany. *Id.*

²² SCHIFF, *supra* note 2, at 257.

²³ See, e.g., YVONNE DUTTON, RULES, POLITICS, AND THE INTERNATIONAL CRIMINAL COURT: COMMITTING TO THE COURT (2013); see also Judge Chile Eboe-Osuji, President, Int’l Crim. Ct., Keynote Address at the 70th Anniversary of the International Law Commission: The International Law Commission and the Fight against Impunity (May 8, 2018) (transcript available at <https://www.icc-cpi.int/itemsDocuments/180508-pres-stat.pdf>) (“International criminal justice . . . is here to stay. And yet, we cannot rest content . . . [t]here is still much to do.”).

²⁴ DUTTON, *supra* note 24, at 258 (quoting former ICC President Philippe Kirsch).

²⁵ Deborah Ruiz Verdusco, *The Relationship between the ICC and the United Nations Security Council*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 30, 30 (Carsten Stahn, ed. 2015).

B. Potential Proving Ground and Rite of Passage

On July 6, 2017, Pre-Trial Chamber II (PTC II) reached decision regarding South Africa's failure to arrest Omar al-Bashir while he was on South African sovereign territory for the African Union (AU) summit in June 2015.²⁶ The decision did two things: first, the Court resoundingly rejected South Africa's claim that sovereign immunity applied to al-Bashir while he was on South African soil.²⁷ In fact, this point should have been a foregone conclusion, as South African diplomats consulted the Court on the issue prior to al-Bashir's visit and received the same answer.²⁸ Moreover, the Court previously had ruled on numerous similar instances of state non-compliance with al-Bashir's arrest warrant (although differing legal arguments were given by the various judges in these cases, as discussed in Section III.A.).²⁹

Having ruled on South Africa's culpability, PTC II was confronted with a second (implicit) decision: to whom to refer the case to take action against South Africa given that the Court itself has no mandate to sanction and no enforcement mechanism.³⁰ On this second point, the Chamber's decision is notable. Article 87(7) of the Rome Statute provides,

[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [hereafter, ASP] or, where the Security Council referred the matter to the Court, to the Security Council.³¹

However, it is important to note that,

²⁶ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

²⁷ For a more comprehensive discussion of sovereign immunities, *See* Johan D. van der Vyver, *Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court*, 11 AFR. HUMAN RTS. L.J. 683 (2011).

²⁸ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

²⁹ Dov Jacobs, *The ICC and Immunities, Round 326: ICC Finds that South Africa had an Obligation to Arrest Bashir but no Referral to the U.N.S.C.*, SPREADING THE JAM (July 6, 2017), <https://dovjacobs.com/category/bashir/>.

³⁰ *See Understanding the International Criminal Court*, THE INTERNATIONAL CRIMINAL COURT 19, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> ("In establishing the ICC, the States set up a system based on two pillars. The Court itself is the judicial pillar. The operational pillar belongs to States, including the enforcement of Court's orders.")

³¹ Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].

[w]hile the Court can make such determinations, it has no authority to decide on remedies or consequences arising from a failure to cooperate. The Statute delegates this function to two executive arms, the ASP, and in cases arising from situations referred to by the Council, the Security Council. The Council and the Assembly are expected to react, within the purview of their own powers, to address the instances of non-cooperation The provisions on non-cooperation are the sole manner in which the Court and formally and judicially denounce lack of compliance.³²

The Chamber not only used its discretionary authority *not* to refer the case to either of the available enforcement organs, the ASP or the U.N.S.C., but took the occasion to criticize both.³³ In bold, exceptional, and volatile language, PTC II stated that a referral would be “futile” given the numerous instances of inaction by both bodies with regard to al-Bashir’s arrest.³⁴ Further, in a masterful stroke, at a time when “Africa’s current relationship with the International Criminal Court has deteriorated considerably”³⁵ and South Africa itself has attempted—unsuccessfully—to withdraw from the Rome Statute,³⁶ the decision not to recommend sanctions or censorious measures gave the State Party an honorable way out of a legal bind. Moreover, citing the state’s cooperation (by “self-referring” the matter to the ICC) and referencing the decision of its own Constitutional Court also reinforced the principle of complementarity, reassuring a suspicious and reluctant State Party, as well as chary onlookers (notably, the AU) that the ICC respects state sovereignty and does not intend to overstep its mandate.³⁷

Although largely unnoticed, this Comment posits that the ICC’s decision regarding the non-compliance by South Africa regarding the arrest and

³² Ruiz Verduzco, *supra* note 26, at 44–45.

³³ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

³⁴ *Id.*

³⁵ Juliet Okoth, *Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals*, in AFRICA AND THE INTERNATIONAL CRIMINAL COURT 195 (Gerhard Werle et al. eds., 2014); see also Otilia Anna Maunganidze & Anton du Plessis, *The ICC and the AU*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 30, 65 (Carsten Stahn ed. 2015).

³⁶ See, e.g., Jason Burke, *South African Judge Blocks Attempt to Withdraw from ICC*, GUARDIAN (Feb. 22, 2017); Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017); Dewa Mavhinga, *South African High Court Rejects ICC Withdrawal*, HUM. RTS. WATCH DISPATCHES (Feb. 22, 2017), <https://www.hrw.org/news/2017/02/22/south-african-high-court-rejects-icc-withdrawal>.

³⁷ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

surrender of Omar al-Bashir represents the Court's own "*Marbury v. Madison* moment," whereby an instance of judicial restraint becomes a power play.³⁸

C. Structure of this Comment and Limitations of Research

Following an introduction, this Comment reviews the history of the case against Omar al-Bashir of Sudan, including the charges against him; his subsequent conduct and that of states he visited; and how these developments have evinced and contributed to dynamics among and between the ICC, individual African states, the AU, and the U.N.S.C. The Comment then analyzes the recent and exceptional decision of PTC II regarding South Africa in light of previous jurisprudence involving state non-cooperation in al-Bashir's arrest. After decoding the messages contained in the decision, the Comment explores if and how the decision betokens an evolving rapport for the ICC *vis-à-vis* States Parties and empowering organs. Finally, the Comment concludes with some modest recommendations.

This Comment does not purport to analyze the merits of the al-Bashir prosecution; that path is well-trodden.³⁹ Rather, this Comment regards the al-

³⁸ *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the U.S. Supreme Court does not have the power to fulfill the executive function of granting writs of mandamus, while establishing the basis for judicial review). The turn-of-phrase is the author's own.

³⁹ For further discussion of accountability for the situation in Darfur, *see*, for example, Lucas Buzzard, *Holding an Arsonist's Feet to the Fire? The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir*, 24 AM. U. INT'L L. REV. 897 (2009); Kathleen A. Doty et al., *Toward Peace with Justice in Darfur: A Framework for Accountability*, 18 U.C. DAVIS J. INT'L L. & POL'Y 1 (2011); Michael J. Kelly, *The Debate Over Genocide in Darfur, Sudan*, 18 U.C. DAVIS J. INT'L L. & POL'Y 205 (2011); John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 265 LOY. U. CHI. INT'L L. REV. 367 (2009). Regarding the theory of prosecution against al-Bashir, *see*, for example, Theresa Giamanco, *The Perpetrator behind the Perpetrator: A Critical Analysis of the Theory of Prosecution against Omar Al-Bashir*, 25 TEMP. INT'L & COMP. L.J. 217 (2011). Concerning the difficulties of enforcing the indictment, *see* Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L.J. 1584 (2011); Saher Valiani, *Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar Al-Bashir*, 35 BERKELEY J. INT'L L. 150 (2017). For a more comprehensive discussion of the dispute over sovereign immunities, *see*, for example, Ntombizozuko Dyani-Mhango, *South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir*, 26 WASH. INT'L L.J. 535 (2017); Aoife F. Martin, *Stop Letting Them Get Away with Murder: The Need to Limit the Use of Head of State Immunity as a Defense for War Crimes and Crimes Against Humanity*, 48 SUFFOLK U. L. REV. 923 (2015); Dan Terzian, *Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593*, 16 UCLA J. INT'L L. & FOREIGN AFF. 279 (2011); Van der Vyver, *Prosecuting the President*, *supra* note 28. Concerning the case and its implications for plea bargaining, *see*, for example, Roza Pati, *The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option?*, 15 U.C. DAVIS J. INT'L L. & POL'Y 265 (2009).

Bashir situation as illuminating the broader dynamics between the ICC and its empowering organs. The Comment specifically considers the legal significance of Pre-Trial Chamber II's recent decision regarding South Africa and what it may portend for interinstitutional relations in the future.⁴⁰

I. OMAR AL-BASHIR; THE CONTENTIOUS RELATIONSHIP BETWEEN AFRICA, THE COURT, AND THE U.N.S.C.; AND POWER STRUGGLES IN THE FIGHT AGAINST IMPUNITY

President al-Bashir is the only sitting head of state or government with a currently outstanding arrest warrant before the ICC.⁴¹ While the merits of the charges and history of the case against al-Bashir are not the direct subject of this inquiry, it is necessary to provide a brief overview of the prosecution to illustrate how this case became a battleground in the complex and ongoing power struggles among the ICC, individual member states, the AU, and the ICC's own empowering organs: the ASP and the U.N.S.C.

A. *The Charges against President al-Bashir*

Since 2004, “dozens of political officials and bodies (including the U.S. Congress and the [European] Parliament)” have categorized the situation in Darfur as a genocide, with varying degrees of fervor.⁴² A notable example was “Senator, candidate, and President Obama [who] not only declared that genocide was occurring in Darfur, but campaigned on the issue in 2008, referring to the Darfur genocide as a ‘stain on our souls.’”⁴³ Leading human rights authorities and “such commemorative bodies as the U.S. Holocaust Memorial Museum and *Vad Yashem* in Israel” share this view.⁴⁴

The United Nations estimates that approximately three million people have been displaced and that, in aggregate, over 500,000 individuals killed as a direct or indirect result of violence orchestrated by the government in

⁴⁰ See *infra* Section II.C. for discussion of the subsequent case against Jordan.

⁴¹ *The Case against Al-Bashir*, BASHIRWATCH, <http://bashirwatch.org/updates/#section-case-against-bashir> (last visited Oct. 22, 2017).

⁴² Eric Reeves, *Darfur, the Most Successful Genocide in a Century*, HUFFINGTON POST (Apr. 21, 2017, 10:13AM EST), https://www.huffingtonpost.com/entry/darfur-the-most-successful-genocide-in-a-century_us_58fa0eb9e4b086ce58980fe3.

⁴³ *Id.*; see also Mia Farrow & Daniel Jonah Goldhagen, *Mass Slaughter and Obama's Mystifying Indifference*, WALL ST. J. (Sept. 26, 2013), <https://www.wsj.com/articles/mass-slaughter-and-obama8217s-mystifying-indifference-1380236391?tesla=y>.

⁴⁴ Reeves, *supra* note 43.

Khartoum,⁴⁵ making the tragedy “the most successful genocide in a century.”⁴⁶

Amid mounting international pressure, on March 31, 2005, the U.N.S.C. adopted Resolution 193, referring the Darfur conflict to the ICC as a situation for investigation.⁴⁷ Subsequently, having examined the Prosecutor’s Application under Article 58, Pre-Trial Chambers issued two arrest warrants for President Omar al-Bashir, in 2009⁴⁸ and 2010,⁴⁹ respectively. The first warrant cited seven counts of crimes against humanity and war crimes,⁵⁰ while the second added three counts of genocide for the attempted ethnic cleansing of the Fur, Masalit, and Zaghawa tribes.⁵¹ When issuing the second warrant, Pre-Trial Chamber I (PTC I) stated that “there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.”⁵² In addition to the existing charges of war crimes and crimes against humanity, the additional charge is sufficient to constitute a basis for prosecution under the crime of genocide.⁵³ Specifically, the Pre-Trial Chamber: (a) recognized the protracted devastation in Darfur as a non-international armed conflict (NIAC); (b) acknowledged that “a core component of that campaign was the unlawful attack on part of the civilian population”; (c) enumerated six categories of offenses allegedly committed by Sudanese forces that would constitute genocidal acts, crimes against humanity and/or war crimes; and (d) named Omar al-Bashir, as the *de jure* and *de facto* head of state, head of government, and Commander-in-Chief

⁴⁵ *Id.*, citing Eric Reeves, *Quantifying Genocide: Darfur Mortality Update*, SUDAN RES. ANALYSIS & ADVOC. (Jan. 5, 2017), <http://sudanreeves.org/2017/01/05/quantifying-genocide-darfur-mortality-update-august-6-2010/>.

⁴⁶ Reeves, *supra* note 43.

⁴⁷ S.C. Res. 1593, ¶ 1 (March 31, 2005).

⁴⁸ Prosecutor v. al-Bashir, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hussein Ahmad Al Bashir (March 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

⁴⁹ Prosecutor v. al-Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, https://www.icc-cpi.int/CourtRecords/CR2010_04826.PDF.

⁵⁰ Decision on the Prosecution’s Application for a Warrant of Arrest, *supra* note 49.

⁵¹ Second Decision on the Prosecution’s Application for a Warrant of Arrest, *supra* note 50, at ¶ 5.

⁵² Prosecutor v. al-Bashir, ICC-02/05-01/09, *Case Information Sheet*, <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf> (last visited Oct. 22, 2017).

⁵³ Article 6 of the Rome Statute defines genocide “as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” Rome Statute, *supra* note 32.

of the armed forces of Sudan, as playing “an essential role in coordinating the design and implementation of the common plan.”⁵⁴

Supporters hailed the U.N.S.C.’s landmark referral of the Darfur situation to the ICC as ushering in an era governed by “a new politics of justice.”⁵⁵ Detractors cited the indictment as an example of the Court’s exercise of “twenty-first century neo-colonialism.”⁵⁶ However, subsequent developments (or lack thereof) have supported neither narrative, and instead contributed fodder for the overarching impression of impotence, allowing for criticism that the possibility of justice for Darfur is illusory⁵⁷—just so much “sound and fury, signifying nothing.”⁵⁸

B. *Justice Deferred or Justice Denied?*

Across the intervening twelve years, while the toll of dead and displaced in Darfur continues to mount,⁵⁹ the suspect has remained at large.⁶⁰ As the Rome Statute forbids the ICC from prosecuting a defendant *in absentia*, the case has lingered in the purgatory of the pre-trial phase, while the atrocities in Sudan continue.⁶¹ During that time, President al-Bashir is estimated to have made at least eighty-nine international trips to more than a score of countries. (See *Figure 1*).⁶² Al-Bashir is alleged to have cancelled plans to visit at least

⁵⁴ Second Decision on the Prosecution’s Application for a Warrant of Arrest, *supra* note 50, at ¶ 221.

⁵⁵ Caroline Fehl, *Growing Up Rough: The Changing Politics of the International Criminal Court*, 10 PEACE RES. INST. FRANKFURT REP. NO. 127 (2014).

⁵⁶ RES SCHUERCH, THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS 2-3 (2017).

⁵⁷ See generally Kirsten Ainley, *Retreat or Retrenchment? An Analysis of the International Criminal Court’s Failure to Prosecute Presidents*, in CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY (Alison Brysk & Michael Stohl eds. forthcoming 2018); Suzanne Bullock, *Prosecuting President Al Bashir and the Short Arm of Justice*, 25 DENNING L.J. 197 (2013); Stuart Ford, *The ICC and the Security Council: How Much Support Is There for Ending Impunity*, 26 IND. INT’L & COMP. L. REV. 33 (2016); Valiani, *supra* note 40; Johan D. van der Vyver, *The Al Bashir Debacle*, 15 AFRICAN HUMAN RIGHTS L.J. 559 (2015).

⁵⁸ WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH act 5, sc. 5.

⁵⁹ See Rep. of the Comm. on Human Rights in South Sudan, U.N. Doc. A/HRC/34/63 (Mar. 6, 2017), at <http://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx>.

⁶⁰ *Case Information Sheet*, *supra* note 53.

⁶¹ Rome Statute, *supra* note 32 (providing that “[t]he accused shall be present during the trial.”). For a discussion on the controversy around this requirement in light of the request by Kenyan President Uhuru Muigai Kenyatta and Deputy President William Samoei Ruto not to be continuously present at their trial, See J. D. van der Vyver, *Trials in Absentia* (manuscript on file with author). Regarding evidence of ongoing ethnic cleansing in Sudan, see Rep. of the Comm. on Human Rights in South Sudan, *supra* note 60.

⁶² *Bashir Travels*, NUBA REPORTS, <https://nubareports.org/bashir-travels/> (last updated April 12, 2017) (noting 79 trips to 228 countries along with infographics displaying countries visited and their status as state

nine additional countries whose leaders have expressed their intent to cooperate with the ICC and execute the warrant.⁶³ Discussing al-Bashir's motivations for the extensive travel, which so clearly flouts the ICC's arrest warrant, one observer emphasized that "[t]his was obviously a political decision, meant to show that the president would not be affected by the warrant," before going on to note that "[t]he percentage of official trips that al-Bashir was forced to cancel is rising continuously since 2009. While he had to cancel 30% of his trips in 2009, the share rose to 42% in 2010 and 50% in 2011."⁶⁴



*Figure 1*⁶⁵

or non-State Party to the ICC—*i.e.*, signatory or non-signatory to the Rome Statute). Those countries include: Algeria, Bahrain, Chad, China, Djibouti, the Democratic Republic of the Congo (DRC), Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Libya, Malawi, Mauritania, Morocco, Nigeria, Qatar, Rwanda, South Africa, South Sudan, the United Arab Emirates (UAE), and Uganda. Since the site was last updated, Bashir has added Russia and Turkey to the list; *see also* PATRICK S. WEGNER, THE INTERNATIONAL CRIMINAL COURT IN ONGOING INTRASTATE CONFLICTS: NAVIGATING THE PEACE-JUSTICE DIVIDE 115 (2015) (charting al-Bashir's travel from his indictment in 2004 to 2012). Since the site was last updated, Bashir has additionally traveled to Russia and Turkey. Agence France-Presse, *Turkish President 'Laughs Off' Demand to Arrest Sudan Leader*, TIMES ISRAEL (Dec. 28, 2017, 4:05 PM), <https://www.timesofisrael.com/turkish-president-laughs-off-demand-to-arrest-sudan-leader/>.

⁶³ These countries include Botswana, the Central African Republic (CAR), France, Malaysia, Turkey, Uganda, and Zambia. The Case against Al-Bashir, *supra* note 39. In 2017, Saudi Arabia joined this list. *Sudan's Bashir Declines to Attend Saudi Summit with Trump*, BBC (May 19, 2017), <http://www.bbc.com/news/world-africa-39978742>.

⁶⁴ WEGNER, *supra* note 63 (charting al-Bashir's travel from his indictment in 2004 to 2012).

⁶⁵ *See* NUBA REPORTS, *supra* note 63.

The states visited include nine States Parties to the Rome Statute, which fall under the ICC's jurisdiction and have a responsibility to cooperate with the Court.⁶⁶ All but one of the states is on the African continent.⁶⁷ As one observer recounted: "On each occasion the Prosecutor has taken the proactive approach of forewarning the Trial Chamber of Al Bashir's impending travel plans and the latter has issued decisions requesting that the relevant State arrest the accused in keeping with the order of the Court. Securing cooperation has however proven to be problematic and, thus far, illusory."⁶⁸

This failure to act has been encouraged and abetted by the African Union, contributing to what the president of the International Commission of Jurists Canada calls "worrying signs that key co-combatants in the fight against impunity are retreating from the battlefield."⁶⁹ He continues to note that culpable actors "include not only recalcitrant regional organizations such as the African Union and the Arab League, but even the powerful States Parties to the ICC and the U.S. which are on the UN Security Council and doing little to come to the aid of the court in getting the arrest warrants issued by the Court enforced, especially those against the Sudanese officials."⁷⁰

C. The AU, ICC, and U.N.S.C.: A Bermuda Triangle from which Al-Bashir Fails to Emerge

The AU has taken umbrage with the Court's approach and repeatedly expressed its discontent in various forms.⁷¹ As the I.T. Cohen Professor of International Law and Human Rights at Emory University School of Law, Johan D. van der Vyver, drily observed, the "African Union . . . did not take

⁶⁶ For a list of States Parties to the Rome Statute, see *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 8, 2018); Rome Statute, *supra* note 32, art. 12(3); see also *Understanding the International Criminal Court*, *supra* note 31. For States Parties that have allowed al-Bashir to visit without executing the warrant for his arrest, see *infra* Appendix I.

⁶⁷ See NUBA REPORTS, *supra* note 63.

⁶⁸ Lorraine Smith-van Lin, *Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases*, in COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE 114, 121 (Olympia Bekou & Daley J. Birkett, eds. 2016).

⁶⁹ ERROL P. MENDES, PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: A COURT OF LAST RESORT 200 (Edward Elgar Publishing, 2010).

⁷⁰ *Id.*

⁷¹ See H. Thijssen, *The African Union and the International Criminal Court*, PEACE PALACE LIB.: LIB. BLOG (June 22, 2012), <https://www.peacepalacelibrary.nl/2012/06/the-african-union-and-the-international-criminal-court/>.

kindly to the indictment of President Al Bashir.”⁷² First, in July 2009, the AU endorsed a proclamation that “the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute relating to immunities, for the arrest and surrender of Omar El Bashir of The Sudan.”⁷³ That same year, the AU requested that the UN Security Council suspend the ICC proceedings under Article 16⁷⁴ of the Rome Statute.⁷⁵ The Security Council demurred and declined to defer the case against al-Bashir.⁷⁶

For critics, the selective invocation of the Court’s authority is symptomatic of a vendetta by the U.N.S.C. against African nations, as well as the Council’s significant vested interest in preserving archaic dynamics that afford disproportionate power to the Global North.⁷⁷ While some degree of skepticism predated al-Bashir’s indictment, many African nations were early and assiduous supporters of the ICC.⁷⁸ It was only following the indictment of al-Bashir and other Sudanese officials that the “narrative of the court’s anti-African bias began to take hold among African leaders.”⁷⁹ The subsequent deafening of U.N.S.C. ears regarding deferral redoubled this narrative.⁸⁰ The

⁷² Van der Vyver, *Prosecuting the President*, *supra* note 28, at 684.

⁷³ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) ¶ 10, U.N. Doc. Assembly/AU/13(XIII) (July 3, 2009).

⁷⁴ Rome Statute, *supra* note 32. Article 16 allows the U.N.S.C., under its Chapter VII powers, to pass a resolution suspending an ICC investigation or prosecution for a period of 12 months, which may be renewed. While the U.N.S.C. has not invoked this power to date, its very existence has led critics to “conclude that a range of geopolitics has undermined the judicial independence of the ICC . . . [T]he drafting history of Article 16 of the Rome Statute shows the workings of the political origins of the law and the manner in which foundational inequalities were woven into the very fabric of the Rome Statute.” Kamari Maxine Clarke & Sarah-Jane Koulen, *The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council, and Ontologies of a Contemporary Compromise*, 7 AFR. J. L. STUD. 297, 297, 309 (2014); *see also* Ken Obura, *The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?*, 1 STRATHMORE L.J. 118, 127–28 (2015).

⁷⁵ African Union Peace and Security Council Communiqué, PSC/OR/COMM.(CLXXV) (Mar. 5, 2009).

⁷⁶ Okoth, *supra* note 36, at 196, 203.

⁷⁷ SCHUERCH, *supra* note 57, at 2–3.

⁷⁸ “As a matter of fact, the majority of ICC situations have been self-referred by African States, putting the claim of a neo-imperialist court into a different perspective. Moreover, not all African governments and members of African civil society attack the ICC equally; most continue their support and actively participated in the Review Conference in Kampala.” Ignaz Stegmiller, *Positive Complementarity and Legitimacy—Is the International Criminal Court Shifting from Judicial Restraint Towards Interventionism*, in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 247, 266–267 (Nobuo Hayashi & Cecilia M. Baillie eds., 2017).

⁷⁹ Victor Peskin, *Battles of Legitimation and the Politics of Noncompliance and African Sovereignty from the Rwanda Tribunal to the ICC*, in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 401, 416 (Nobuo Hayashi & Cecilia M. Baillie eds., 2017).

⁸⁰ *Id.*

Security Council's failure to honor the AU's request provided the objecting states with evidence of the Court as an instrument of neo-colonialism yoked to powerful members of the U.N.S.C..⁸¹

In 2010, at the Review Conference of the International Court in Kampala, the Malawian delegation, speaking in its capacity as the AU chair, "stated that the indictment of heads of state could jeopardize effective co-operation with the ICC."⁸² The resolution that emanated from the conference expressed the AU's disappointment by the failure of the U.N.S.C. to consider its request for a deferral and repeated the request;⁸³ reiterated its ban against AU Member State cooperation in al-Bashir's arrest and surrender;⁸⁴ requested "Member States to balance where applicable, their obligations to the AU with their obligations to the ICC";⁸⁵ and expressed "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."⁸⁶

Finally, in 2016 and 2017, several African states announced their intent to withdraw from the Rome Statute, citing the Court's selective justice and alleging unfair targeting of the continent.⁸⁷ On October 27, 2016, one year after announcing its intention to withdraw, Burundi became the first country in history to officially withdraw from the Rome Statute, disappointing many observers who had hoped the State's leaders would have a change of heart amid robust diplomatic inducements to remain.⁸⁸ While South Africa's High

⁸¹ See Tim Murithi, *The African Court and the International Criminal Court: An Embattled Relationship?*, INST. JUST. & RECONCILIATION, Mar. 2013, at 6; Makau Mutua, *The International Criminal Court in Africa: Challenges and Opportunities*, BUFFALO L. STUD. RES. PAPER 2011-003 (Sept. 2010), http://www.peacebuilding.no/var/ezflow_site/storage/original/application/d5dc6870a40b79bf7c1304f3befc0b55.pdf.

⁸² Johan D. van der Vyver, *Prosecuting President Omar Al Bashir in the International Criminal Court*, <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/15338/PDF%20Files/Johan%20van%20der%20Vyver.pdf> (last accessed Oct. 27, 2017).

⁸³ Assembly Dec. 296(XV), A.U. Doc. Doc. Assembly/AU/10(XV), at § 4 (July 27, 2010).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Lyal S. Sunga, *Has the ICC Unfairly Targeted Africa or Has Africa Unfairly Targeted the ICC*, in *THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY* 147 (Triestino Marinello ed., 2015).

⁸⁸ Ismail Akwei, *Burundi is Officially Not a Member of the International Criminal Court (ICC)*, AFRICA NEWS (Oct. 27, 2017, 12:44 AM), <http://www.africanews.com/2017/10/27/burundi-is-officially-not-a-member-of-the-international-criminal-court-icc/>. Subsequently, in response to the initiation of preliminary

Court blocked its government's attempt to withdraw from the Rome Statute, the damage to the relationship with the ICC was done.⁸⁹

The conflict among these mighty players at loggerheads has escalated in gravity and scale to the extent their sparring has emerged as a dominant controversy of international criminal justice.⁹⁰ The adversarial mentality is epitomized “by an ideological chasm that has pitted villains against protagonists—with both sides casting the other as villains intent on wanton destruction and themselves as the protagonists fighting the good fight.”⁹¹ It remains to be seen whether the standoff can be resolved. However, the March 2018 election⁹² of Judge Chile Eboe-Osuji⁹³ as the first African president of the ICC may offer a positive signal for future ICC relations on the continent.⁹⁴ In an early official visit, President Eboe-Osuji “assured African leaders that the continent would be treated fairly by the Court under his leadership[,] . . . blamed the strained relationship between ICC and African leaders on [a] ‘communication gap’[,] . . . [and] explained that his first

investigations on their territories, Afghanistan and the Philippines have threatened to withdraw from the Rome Statute. On Mar. 17, 2018, the Philippines made good on that threat and, barring rescindment of that intention, the withdrawal will come into force one year later. Rome Statute, *supra* note 32, at art. 127(1); Press Release, International Criminal Court, ICC Statement on The Philippines’ Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law, ICC Press Release ICC-CPI-20180320-PR1371 (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>. Importantly, the investigation and any possible further proceedings may continue notwithstanding the Philippines’ withdrawal, as it was under the ICC’s jurisdiction during the period of the alleged activity in question. Rome Statute, *supra* note 32, art. 127(2).

⁸⁹ See, e.g., Burke, *supra* note 37; Mavhinga, *supra* note 37.

⁹⁰ Dire Tladi, *When Elephants Collide It Is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic*, 7 AFR. J. LEGAL STUD. 381, 381–82 (2014).

⁹¹ *Id.*

⁹² Press Release, New Presidency Elected for 2018-2021, ICC Press Release ICC-CPI-20180311-PR1367 (March 11, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1367>; see also AT Editor, *Nigerian named ICC President; Judges from Benin, Uganda Sworn In*, AFRICA TIMES (March 12, 2018), <https://africatimes.com/2018/03/12/nigerian-named-icc-president-new-judges-from-benin-uganda-sworn-in/>.

⁹³ ICC presidents are elected by their fellow judges sitting in a plenary of fifteen. See Rome Statute, *supra* note 32, art. 38. Judge Eboe-Osuji initially was nominated by the Federal Republic of Nigeria as a candidate in the 2011 judicial elections for the ICC. Notably, at that time, he was endorsed by the AU and the Economic Community of West African States (ECOWAS). *Statement of Qualifications*, https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2011/ICC-ASP-EJ2011-NI-ST-ENG.pdf (last visited Aug. 31, 2018).

⁹⁴ As an indication of a renewed efforts to engage African leaders, the Court invited President Muhammadu Buhari of Nigeria as guest of honor and keynote speaker at the commemoration of the twentieth anniversary of the Rome Statute in July 2018. See Emma Emeozor, *Time for an African Court*, SUN NEWS (July 23, 2018), <http://sunnewsonline.com/icc-time-african-court/>. However, the gesture was not uncontroversial, given that Nigeria currently is an active situation country. See ElombahNews, *Buhari’s ICC Visit: Detain, Prosecute Him There, Lawyer Writes ICC*, ELOMBAH NEWS (July 17, 2018), <https://elombah.com/buharis-icc-visit-detain-prosecute-buhari-lawyer-writes-icc/>.

priority in office would be effective communication with all States Parties so as to avoid misinformation and misunderstanding.”⁹⁵

II. ANALYSIS OF THE PRE-TRIAL CHAMBER’S DECISION

Beginning with the Republics of Chad and Kenya in 2010, the ICC began to consider cases of State Party non-compliance or cooperation with the arrest warrant for al-Bashir. To date, the (in)action of eight African states and the Hashemite Kingdom of Jordan have been considered by the ICC in the matter of the *Prosecutor v. Omar Hassan Ahmad Al-Bashir* (see Appendix 1 below and accompanying citations). The cases are similar in that they each arose when al-Bashir traveled to a State Party to the Rome Statute, with the knowledge (and indeed, often at the invitation) of state officials.⁹⁶ They are also similar in that, with the telling exception that is the subject of this Comment, the Court has (a) held that the offending state failed to meet its obligation to cooperate with the arrest warrant; (b) informed the Security Council of this failure; and (c) ordered the Registry to immediately transmit the decision to the U.N.S.C. and ASP.⁹⁷ As Appendix I demonstrates, the Court’s decision with regard to South Africa is an aberration in an otherwise well-established pattern over seven years of jurisprudence.⁹⁸ Before examining the *sui generis* aspects of the Pre-Trial Chamber II’s decision with regard to South Africa, it is necessary to note one procedural distinction: only South Africa has “self-referred” the matter for the Court’s consideration, while the Court has considered the others at the behest of the U.N.S.C..⁹⁹ The

⁹⁵ News Nigeria, *Eboe-Osuji Assures African Leaders of Fairness at the ICC*, NEWS NIGERIA (May 17, 2018), <http://thenewsnigeria.com.ng/2018/05/eboe-osuji-assures-african-leaders-of-fairness-at-icc/>.

⁹⁶ See *infra*, Appendix I for relevant case citations.

⁹⁷ *Id.* But see *infra* Section II.C. regarding subsequent developments *vis-à-vis* The Hashemite Kingdom of Jordan.

⁹⁸ *Id.*

⁹⁹ State referral, including “self-referral,” is one of three mechanisms by which a case can come before the ICC. The other two are referral by the U.N.S.C. or, exceptionally, *proprio motu*, by discretion of the Office of the Prosecutor (OTP). Constraints of personal and subject matter jurisdiction apply to all, but the latter entails further procedural hurdles designed to safeguard against aggressive approaches to prosecution by the OTP. Rome Statute, *supra* note 32. For a further discussion of trigger mechanisms for the ICC, see, for example, *Understanding the International Criminal Court*, *supra* note 31. To date, at least eight States Parties have “self-referred” cases for the ICC’s adjudication. However, the motives behind these referrals have been the subject of controversy. State Party referrals have been made by CAR (twice), Comoros, the Democratic Republic of the Congo, Gabon, Mali, Uganda, and now, South Africa. *How the ICC Works*, ABA-ICC PROJECT, <https://how-the-icc-works.aba-icc.org/> (last visited Oct. 25, 2017); see also *Situations and Cases*, THE INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/#>, (last visited Oct. 25, 2017). For information regarding political controversy surrounding self-referrals; see generally Fehl, *supra* note 56, at 4–6; Patrick Wegner, *Self-Referrals and the Lack of Transparency at the ICC: The Case of Northern*

differing “trigger mechanisms” through which the cases came before the ICC are a telling detail that would factor significantly into the Court’s decision-making and which will reemerge later in this Comment.¹⁰⁰

A. *Crescendo or Broken Record? Tracking the Court’s Decision-Making Regarding State Non-Compliance in the Arrest of Omar al-Bashir*

Almost immediately after the issuance of the first warrant for his arrest in March 2009, Omar al-Bashir “made a point of traveling.”¹⁰¹ While initially confined to neighboring allies, Egypt, Eritrea, Libya, and Saudi Arabia, less than a month after the warrant’s promulgation, al-Bashir scored a decisive political victory in February 2010, attending the Arab League summit in Qatar at which fellow Arab leaders expressed solidarity with and vocally opposed al-Bashir’s prosecution.¹⁰² To add insult to injury, UN Secretary General Ban Ki-Moon was present at the summit as an observer.¹⁰³ Shortly thereafter, the AU issued its resolution roundly rebuking the Office of the Prosecutor, leaving proverbial mud on the face of the ICC.¹⁰⁴

Al-Bashir’s first travels to States Parties to the Rome Statute following the arrest warrant (and subsequent to the addendum of the crime of genocide in February 2010) came in July and August 2010 to Chad and Kenya, to attend the Summit of Sahel-Saharan States¹⁰⁵ and “celebrations for the promulgation of the new Kenyan Constitution,”¹⁰⁶ respectively. The day of al-Bashir’s anticipated travel to Kenya (approximately a month after his trip to Chad), a

Uganda, JUSTICE IN CONFLICT (Oct. 4, 2011) <https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/>. For information regarding the political dimension of Uganda’s self-referral, see generally PHILIPP KASTNER, INTERNATIONAL CRIMINAL JUSTICE IN BELLO? THE ICC BETWEEN LAW AND POLITICS IN DARFUR AND NORTHERN UGANDA 45–75 (Martinus Nijhoff, vol. 34 2012).

¹⁰⁰ See *infra*, Sections III(B) and III(D)1.

¹⁰¹ DAVID BOSCO, ROUGH JUSTICE 156 (2014).

¹⁰² *Id.* at 157.

¹⁰³ *Id.*

¹⁰⁴ Assembly/AU/Dec.296(XV), *supra* note 84, at 3.

¹⁰⁵ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s Recent Visit to the Republic of Chad, 3 (Aug. 27, 2010) [hereinafter Al-Bashir Chad Non-Compliance Decision I], https://www.icc-cpi.int/CourtRecords/CR2010_05769.PDF.

¹⁰⁶ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s Presence in the Territory of the Republic of Kenya, ¶ 2 (Aug. 27, 2010) [hereinafter Al-Bashir Kenya Non-Compliance Decision], https://www.icc-cpi.int/CourtRecords/CR2010_05760.PDF.

three-judge panel of PTC I issued a matched pair of short, four-page decisions finding that both states had an “obligation to cooperate with the Court in relation to such warrants of arrest,”¹⁰⁷ and informing the Security Council and Assembly of States Parties “in order for them to take any measure they may deem appropriate.”¹⁰⁸ The Registry complied with the Chamber’s order and delivered the decisions accordingly to the U.N.S.C. and ASP, where they were met with silence.¹⁰⁹

Nonetheless, it took nine months for al-Bashir to again travel to States Parties to the Rome Statute, visiting Djibouti and returning to Chad in Spring and Summer 2011.¹¹⁰ Several months later—and a day apart from one another—the same PTC panel (albeit with a different judge presiding) issued two rather different decisions.¹¹¹ In the case of Chad, PTC I escalated the action taken from “informing” to “referring” the present decision to the U.N.S.C. and ASP.¹¹² Both the Chad and Malawi decisions also for the first time added the states’ failure “to comply with [their] obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir’s immunity to the Chamber for its determination”¹¹³ The decisions thus reaffirmed the states’ duty to consult with the Court under Article 89 of the Rome Statute

¹⁰⁷ Al-Bashir Chad Non-Compliance Decision I, *supra* note 106. The Kenya decision contains similar, but not identical language and states, “[T]he Republic of Kenya has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest.” Al-Bashir Kenya Non-Compliance Decision, *supra* note 107.

¹⁰⁸ Al-Bashir Chad Non-Compliance Decision I, *supra* note 106; Al-Bashir Kenya Non-Compliance Decision, *supra* note 107.

¹⁰⁹ See Report of the International Criminal Court, U.N. Doc. A/73/349 (Aug. 17, 2017) (“The Chamber further observed that despite proposals from various States to develop a follow-up mechanism concerning such referrals of States to the Security Council by the Court, past referrals had not resulted in the taking of measures by the Council to address instances of failure by States parties to arrest and surrender Mr. Al Bashir.”).

¹¹⁰ BOSCO, *supra* note 102, at 158.

¹¹¹ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s Recent Visit to the Republic of Chad, ¶ 6, 7 (Aug. 27, 2010) [hereinafter Al-Bashir Chad Non-Compliance Decision II], https://www.icc-cpi.int/CourtRecords/CR2010_05769.PDF; Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 36–47 (Dec. 12, 2011) [hereinafter Al-Bashir Malawi Non-Compliance Decision], https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF.

¹¹² Al-Bashir Chad Non-Compliance Decision II, *supra* note 112, at ¶ 6, 7 Al-Bashir Malawi Non-Compliance Decision, *supra* note 112, at ¶ 36–47.

¹¹³ Al-Bashir Malawi Non-Compliance Decision, *supra* note 112, at ¶ 48.

(The Surrender of Persons) and struck a hortative note, imploring action by the ASP and/or U.N.S.C..¹¹⁴

The Malawi decision was also significant (and significantly longer): in response to the Malawian brief, the decision rehearsed the corpus of law regarding heads of state immunities to refute Malawi's assertion that the principle applied to al-Bashir.¹¹⁵ This was thus the first decision (and the lengthiest until the South Africa matter) in which the Court fully articulated its rationale for finding a duty to arrest al-Bashir as a sitting head of state.¹¹⁶

Undeterred, al-Bashir continued his globe-trotting.¹¹⁷ Decisions of a similar nature subsequently were taken by various sets of judges sitting for PTC II against Chad (again),¹¹⁸ Nigeria,¹¹⁹ and the Democratic Republic of the Congo (DRC)¹²⁰ in 2013 and 2014. The decisions followed a similar pattern, with the exception of Nigeria; there, the *ex ante* holding referred the matter to the Federal Republic of Nigeria rather than the U.N.S.C. and ASP.¹²¹

By July 2016, when the Court considered the cases of Djibouti and Uganda, relations between the AU and the ICC were at an all-time low, with momentum churning among African states for a mass exodus from the ICC.¹²² At the same time, even engaged governments, including the European

¹¹⁴ Rome Statute, *supra* note 31.

¹¹⁵ Al-Bashir Malawi Non-Compliance Decision, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ NUBA REPORTS, *supra* note 63.

¹¹⁸ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 3 (Mar. 26, 2013) [hereinafter Al-Bashir Chad Non-Compliance Decision III], https://www.icc-cpi.int/CourtRecords/CR2013_02245.PDF.

¹¹⁹ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (Sept. 5, 2013) [hereinafter Al-Bashir Nigeria Non-Compliance Decision], https://www.icc-cpi.int/CourtRecords/CR2013_05860.PDF.

¹²⁰ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, 3 (Apr. 9, 2014) [hereinafter Al-Bashir DRC Non-Compliance Decision], https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF.

¹²¹ Al-Bashir Nigeria Non-Compliance Decision, *supra* note 120.

¹²² See, e.g., Assembly/AU/Dec.366(XVII), Decision on the Implementation of the Assembly Decisions on The International Criminal Court Doc. EX.CL/670(XIX) 9, 14 (July 31, 2016) (decrying the ICC generally and specifically with regard to the situations in Libya and Sudan), https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf; see also Jean-Baptiste Jeangène Vilmer, *The African Union and the International Criminal Court: Counteracting the Crisis*, 92 INT'L AFFS. 1319 (2016).

major powers entreating for al-Bashir's arrest, struggled to effectively respond to his moves, as "[c]orallying Bashir implied routinely sending demarches and interceding with governments . . . [n]or were [the major powers] willing to link compliance with the ICC arrest warrant to development aid or other forms of leverage."¹²³ For the Obama administration, "the effort to quarantine Bashir sometimes succumbed to other priorities," namely, securing a peace agreement in Darfur and shepherding the independence of South Sudan.¹²⁴ Despite the fact that the U.N.S.C. referred the situation to the Court in the first place, with key permanent members antagonistic (*e.g.* China, Russia) or ambivalent (the United States), after nine separate cases involving seven States Parties, inertia prevailed. Throughout, the Prosecutor had little recourse other than "berating key member states for their passivity . . ."¹²⁵

The decision in the matter of Djibouti of July 11, 2016 is reflective of the Court's frustration and impatience with the status quo.¹²⁶ The decision, presided over by Judge Cuno Tarfusser (who by this point had been hearing nearly identical cases for almost six years), did not mince words when it came to Djibouti's non-compliance, finding "[this controversy] constitutes yet another instance in which Djibouti has failed to abide by its obligation to cooperate with the Court."¹²⁷ However, for the first time, the holding also sounded a plaintive note aimed at the U.N.S.C. and ASP:

[T]he Chamber reiterates once again that, unlike domestic courts, the Court has no direct enforcement mechanism and must rely on cooperation by the States in order to fulfill its mandate. It is therefore of particular importance that the Security Council, after referring a situation to the Prosecutor of the Court as constituting a threat to international peace and security, responds with any appropriate measure to the failure on the part of States Parties to the Statute to cooperate with the Court in order for it to fulfil the mandate with which it has been entrusted. In the absence of follow-up actions on the part of the Security Council any referral to the

¹²³ BOSCO, *supra* note 102, at 157.

¹²⁴ *Id.* at 158.

¹²⁵ *Id.* at 159.

¹²⁶ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 1, 10 (July 11, 2016) [hereinafter Al-Bashir Djibouti Non-Compliance Decision], https://www.icc-cpi.int/CourtRecords/CR2016_04946.PDF.

¹²⁷ *Id.*

Court under Chapter VII of Charter of the United Nations would become futile and incapable of achieving its ultimate goal of putting an end to impunity.¹²⁸

With this entreaty unheeded, when the Court rendered its decision in the matter of South Africa almost a year later,¹²⁹ the stage was set for a showdown.

B. The Decision Regarding South Africa

The parties—the Office of the Prosecutor of the ICC and Representatives of the Republic of South Africa—did not contest the facts.¹³⁰ South African authorities were aware of al-Bashir’s intent to travel to Pretoria, South Africa to participate in the twenty-fifth African Union summit in June 2015.¹³¹ In anticipation of his visit, state officials requested an advisory opinion from the Court on the extent of their duty to arrest al-Bashir while on their sovereign territory.¹³² On June 13, 2015, when he was already on South African soil, PTC II issued a decision clarifying South Africa’s obligation to arrest al-Bashir and surrender him to the Court’s justice.¹³³ Additionally, on June 14, 2015 the High Court of Pretoria issued an interim order that barred al-Bashir’s departure until further notice: “[o]n June 15, the High Court ordered the authorities ‘to take all reasonable steps to prepare to arrest President Bashir . . . and detain him, pending a formal request for his surrender from the International Criminal Court.’”¹³⁴ South African authorities did not deign to heed the orders of either the ICC or the High Court; al-Bashir safely departed the country on June 15, 2015.¹³⁵

This Comment does not assess the merits of the South African defense, (and the similar defenses of the other states at issue) or the argument put forth by the Office of the Prosecutor. What is important to note in this context, summarizing, condensing, and reducing a complex dispute, is that South Africa cited to Article 98(1) of the Rome Statute—a provision included at the behest of several cagey states that affirms that

¹²⁸ *Id.*

¹²⁹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for waiver of the immunity.¹³⁶

The Office of the Prosecutor contended that such an expansive reading of Article 98 “has not [been] supported by many analysts or by the ICC itself. They [have] insisted that States Parties are without further ado legally obliged to arrest and to surrendering President Al Bashir for trial . . . basing their position on Article 27 of the ICC Statute.”¹³⁷ Article 27 states, in part, that:

[The Rome] Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State of Government . . . shall in no case exempt a person from criminal responsibility under this Statute Immunities or special procedural rules which may attach to the official capacity of a person . . . shall not bar the Court from exercising its jurisdiction over such person.¹³⁸

PTC II’s decision is bifurcated into Parts A and B.¹³⁹ Part A answered the question: “Whether South Africa failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute.”¹⁴⁰ Put bluntly, the answer was “yes,” with the Pre-Trial Chamber affirming the Prosecutor’s argument and rejecting South Africa’s defense on the grounds of sovereign immunity.¹⁴¹ However, this issue was only the first of two before the Chamber.¹⁴²

While Part A contained the Chamber’s legal reasoning, it is Part B that is most pertinent in considering how the Court navigates its relationships with states and international organizations. Part B considered “[w]hether a referral of the matter to the Assembly of States Parties or the Security Council is warranted.”¹⁴³ Part B sends two powerful messages: Part B.1. is addressed to

¹³⁶ Rome Statute, *supra* note 32.

¹³⁷ Van der Vyver, *Prosecuting the President*, *supra* note 28.

¹³⁸ Rome Statute, *supra* note 32.

¹³⁹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

South Africa, as emollient and pacification.¹⁴⁴ Part B.2. is addressed to the U.N.S.C. and ASP as chastisement and spur (with a dash of self-absolution).¹⁴⁵

With regard to Part B.1., the title of a representative press release by the Southern Africa Litigation Centre—“ICC Finding on South Africa’s Non-Compliance Falls Short”—captured the initial reaction to the decision by the non-governmental organization (NGO) community.¹⁴⁶ The statement maintained, “we are disappointed in the ICC’s decision not to impose a sufficiently harsh penalty against South Africa for its non-compliance.”¹⁴⁷ This impulsive analysis, while understandable, also was myopic; it failed to view this single skirmish in terms of the greater existential war the ICC faces.

On February 22, 2017, the High Court of South Africa blocked as unconstitutional its government’s attempts to withdraw from the ICC.¹⁴⁸ While praised by proponents of the ICC, President Jacob Zuma’s administration unsurprisingly denounced the High Court’s decision as furthering the pursuit of the “imperialist agendas of foreign nations.”¹⁴⁹ The High Court’s repudiation served as fodder for critics of the scandal-plagued Zuma administration, who saw the attempted maneuver as a preemptive safeguard against future prosecutions against Zuma and his allies.¹⁵⁰

In this political minefield, another opprobrium against a truant State Party would only fan the flames of discontent by South Africa and its allies. And yet, the Court’s prior jurisprudence had made its position quite clear; retreat at this juncture would severely impact the ICC’s legitimacy.¹⁵¹ The nuanced verbiage of PTC II’s decision cannily managed to *commend* South Africa,

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ SALC Staff Writer, *News Release: ICC Finding on South Africa’s Non-Compliance Falls Short*, SOUTHERN AFRICA LITIGATION CENTRE (July 7, 2017), <http://www.southernafricalitigationcentre.org/2017/07/07/news-release-icc-finding-on-south-africas-non-compliance-falls-short/>.

¹⁴⁷ *Id.*

¹⁴⁸ James Macharia, *South African Court Block’s Government’s ICC Withdrawal Bid*, REUTERS (Feb. 22, 2017), <https://www.reuters.com/article/us-safrica-icc/south-african-court-blocks-governments-icc-withdrawal-bid-idUSKBN1610RS>.

¹⁴⁹ Kevin Sieff & Krista Mahr, *South Africa Says it Will Quit the International Court*, WASH. POST (Oct. 21, 2016), https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6_story.html?utm_term=.a4da1b2db710.

¹⁵⁰ See, e.g., Henning Melber, *Is South Africa’s Departure from the International Criminal Court a Sinister Sign of Things to Come?*, BIZ NEWS (Oct. 31, 2016), <https://www.biznews.com/thought-leaders/2016/10/31/south-africa-international-criminal-court>.

¹⁵¹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

even while finding (once again) that it failed to meet its obligations as a State Party.

The PTC found that South Africa “distinguish[ed its] conduct from that of other states that, in the past have been involved in proceedings under article 87(7) of the Statute.”¹⁵² In voluminous detail, the Chamber praised South Africa’s invocation of its Article 97 obligations.¹⁵³ PTC II also resoundingly rejected the Prosecutor’s arguments (a) that the delay in bringing the matter before the Court was evidence of bad faith in cooperation, and (b) that South Africa “took measures to create a legal impediment of the pending Arrest Warrants.”¹⁵⁴ In both instances, the Chamber accepted as reasonable South Africa’s explanation that “any delay . . . arose as a result of domestic processes” and further cited the “certain level of uncertainty due to the novelty of the issues involving the use of the instrument of consultations with the Court.”¹⁵⁵

Thus, at a time when the stakes were highest, in one masterful stroke, the Court stood its ground on principle while extending an olive branch (and opportunity to save face) to a volatile State Party.¹⁵⁶ In contrast, the Chamber conveyed far less conciliatory messages to the U.N.S.C. and ASP.¹⁵⁷ Part IV of this Comment will attempt to interpret these communiqués. Beforehand, however, a brief interlude is necessary to account for the latest chapter in the al-Bashir saga.

C. Coda: The Case of Jordan

On December 11, 2017, during this Comment’s drafting, Pre-Trial Chamber II heard yet another case of State Party non-compliance in al-Bashir’s arrest—the first subsequent to the case of South Africa.¹⁵⁸ Aware of al-Bashir’s intent to accept an invitation to the Arab League Summit in Amman, authorities of the Hashemite Kingdom of Jordan transmitted two

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (Dec. 11, 2017) [hereinafter Al-Bashir Jordan Non-Compliance Decision], <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-309>.

notes verbale to the ICC Registry, affirming the Jordanian understanding of its international obligations (contrary to the Court's preceding decisions, Jordanian interlocutors adhered to the belief that "its international obligations, including [the] applicable rules of customary international law" prohibited the arrest of al-Bashir on the grounds of sovereign immunity).¹⁵⁹ Consequently, Omar al-Bashir "travelled to Jordan and attended the 28th Arab League Summit in Amman on 29 March 2017. While he was on Jordanian territory, Jordan did not arrest and surrender him to the Court."¹⁶⁰

Al-Bashir's continued flouting of his outstanding arrest warrant to attend a major international summit and the acquiescence by a host State Party would appear to adhere to the established pattern; however, the Jordanian episode has proven *sui generis* in two key respects. Most obviously, for the first time, the State Party failing to comply with al-Bashir's arrest warrant was not on the African continent.¹⁶¹ Jordan's geographic position beyond the Suez could not further bolster a narrative that the Court selectively and unfairly targets African nations. Second, Jordan is the only country to have pursued its defense *vis-à-vis* al-Bashir seriously and juridically in the forum of the ICC.¹⁶²

With two options as to how to proceed with regard to Jordan's initial non-compliance, to refer or not to refer was the question. An identical bench composed of the same judges¹⁶³ departed from their decision in the South Africa case and referred the report of Jordan's non-cooperation to the ASP and U.N.S.C..¹⁶⁴ In fact, Jordan became the first State Party granted leave to appeal a decision regarding its obligation to arrest and surrender al-Bashir.¹⁶⁵

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See infra*, note 165.

¹⁶³ Presiding Judge Cuno Tarfusser, Judge Chang-ho Chung, and Judge Marc Perrin de Brichambaut constituted the Chamber. But *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09-309-Anx-tENG (Dec. 14, 2017), ICC-02/05-01/09-309-Anx-tENG (finding an alternative basis for state responsibility in Jordan's and Sudan's accession to the Genocide Convention).

¹⁶⁴ *Id.*

¹⁶⁵ Shortly after granting leave to appeal, the Appeals Chamber "invited observations" from the United Nations and Regional Organizations (specifically the African Union, the European Union, the League of Arab States and the Organization of American States), as well as "ICC States Parties and Professors of International Law on legal questions raised by Jordan." Press Release, Al Bashir Case: ICC Appeals Chamber Invites Observations from International Organizations, States Parties and Professors of International Law on Legal Matters Raised by Jordan, ICC Press Release ICC-CPI-20180329-PR1375

The Jordanian case is ongoing and will doubtless provide much fodder for future inquiry. While the outcome is unknown, what has been confirmed through the adjudication to date is that “non-referral” is not the ICC’s new default policy stance. It therefore is all the more important to unpack *what* the Court was attempting to accomplish in its exceptional South Africa decision and *why*.

III. THE DEVIL IS IN THE DICTA: DECODING THE MESSAGES TO THE U.N.S.C. AND ASP IN THE SOUTH AFRICA DECISION

Paradoxically, although it “was highly anticipated and the finding of non-compliance on the part of South Africa widely expected,”¹⁶⁶ PTC II’s decision nonetheless “came as quite the surprise.”¹⁶⁷ The surprise was not the non-compliance finding, although some observers have argued that the rationale given helped clarify previously muddy waters regarding the legal basis for the Court’s repeated findings of state obligation in light of the conflicting Article 98 vs. Article 27 arguments.¹⁶⁸

In addition to the question of non-compliance, the Chamber weighed the following question: “[w]hether a referral of the matter to the Assembly of States Parties and/or the Security Council is warranted.”¹⁶⁹ It was this answer

(Mar. 28, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1375>. Subsequently, on May 25, 2015, the Appeals Chamber “invited submissions, by 16 July 2018, from the competent authorities of the Republic of Sudan and Mr. Omar Hassan Ahmad Al Bashir on the legal questions raised by the Hashemite Kingdom of Jordan.” Press Release, Al Bashir Case: ICC Appeals Chamber Invites Submissions from Sudan and Mr Al Bashir on Legal Questions Raised by Jordan, ICC Press Release ICC-CPI-20180525-PR1385 (May 25, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1385>. In total, the Court received eleven *amici curiae* submissions. See Prosecutor v. Al-Bashir, Case No. ICC-02/05-10/09, Prosecution Response to the Eleven *Amici Curiae*, (July 16, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_03719.PDF. In another novel development, from September 10 to 14, the Appeals Chamber for the first time heard oral testimony in the case, including from representatives of Jordan and the African Union, academic *amici*, and the Office of the Prosecutor. Media Advisory, Al-Bashir Case: ICC Appeals Chamber Hearing Submissions on Legal Matters Raised by Jordan from 10 to 14 September 2018, ICC Media Advisory ICC-CPI-20180904-MA232 (Sept. 4, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=ma232>.

¹⁶⁶ Beitel van der Merwe, *Non-Compliance with a Twist: Some Thoughts on the ICC’s Decision on South Africa’s Failure to Arrest and Surrender President Al-Bashir*, ICJ AFRICA (July 14, 2017), <https://www.icjafrika.com/single-post/2017/07/14/Non-compliance-with-a-twist-Some-thoughts-on-the-ICCs-decision-on-South-Africas-failure-to-arrest-and-surrender-President-Al-Bashir>.

¹⁶⁷ Mark Kersten, *Good Politics or Bad Law? The International Criminal Court, Bashir, and South Africa*, JUSTICE IN CONFLICT (July 21, 2017), <https://justiceinconflict.org/2017/07/21/good-politics-or-bad-law-the-international-criminal-court-bashir-and-south-africa/>.

¹⁶⁸ Jacobs, *supra* note 30. *But see* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-302, Minority Opinion of Judge Brichambaut (July 6, 2017), https://www.icc-cpi.int/RelatedRecords/CR2017_04403.pdf.

¹⁶⁹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

that occasioned the astonishment of longstanding ICC observers.¹⁷⁰ The Chamber found that referral was not warranted based on consideration of (a) “South Africa’s interactions with the Court with respect to the execution of the Court’s request and surrender of Omar Al-Bashir” and (b) “[w]hether a referral of South Africa’s non-compliance would be an effective way to foster cooperation.”¹⁷¹

This portion of the decision may read as dicta. However, dismissing this section on those grounds would be to underestimate the rarity, strategic maneuvering, and potential weight of the Court’s opinion.

A. *Debunking the Fallacy of the ICC as Sheriff*

Considerable anxiety regarding the ICC emanates from the specter of selective targeting and prosecutorial freewheeling.¹⁷² This phantom menace has been cunningly analogized to the proverbial Old West sheriff whose responsibility, while legally authorized, is highly discretionary and whose mandate “conflates in one person the three different functions of law in a political order: legislation, judgment, and enforcement.”¹⁷³ While the sheriff’s actions may be legitimate based on a credible mandate and even a moral justification, his unilateral behavior stands to “increase his own power at the expense of other agents in the community.”¹⁷⁴ Thus, much of the ink spent on hand-wringing over the ICC has focused on the role of the Office of the Prosecutor (OTP), who would seem to personify the sheriff-in-chief.¹⁷⁵ While pervasive and (apparently) persuasive *apocrypha*, the depiction of the ICC as marshal¹⁷⁶ misses the mark based on both statute and precedent.¹⁷⁷

¹⁷⁰ Kersten, *supra* note 168.

¹⁷¹ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

¹⁷² See Aidan Hehir & Anthony F. Lang, Jr., *The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect*, in HUMANITARIANISM AND CHALLENGES OF COOPERATION 199 (Volker M. Heins, et al. eds., 2016).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Stegmiller, *supra* note 79, at 247 (“Politics and law converge . . . when it comes to the selectiveness that is inherent to the international criminal law system. . . . [A]ctors of the ICC, such as the Office of the Prosecutor (OTP) justify their decisions based on the ICC’s limited legal framework, they are not politically unaware of the implications caused by an intervention into a conflict situation through ICC trials.”).

¹⁷⁶ Hehir & Lang make the important distinction between the sheriff, who is officially authorized by the state, and the vigilante, who “may be acting in conformity with a shared normative sensibility about who deserves punishment, but [who does not have] an officially sanctioned role.” Hehir & Lang, Jr., *supra* note 174, at 199.

At the most basic level, the ICC is not a monolithic entity conflating legislative, judicial, and executive functions.¹⁷⁸ First, based on the Rome Statute, the Court has no legislative capacity.¹⁷⁹ Second, conceptualizing the ICC as an “executive” organ at all requires unpacking. The ability of the Prosecutor to initiate investigations *proprio motu* was among the most controversial and hotly contested items on the Rome agenda.¹⁸⁰ While it remains divisive and has been the apparent cause for several states to refrain from accession,¹⁸¹ the final statute contains numerous checks and safeguards designed to mitigate the OTP’s powers, which are enshrined, *inter alia*, in Articles 13(c), 15, and 53(1).¹⁸² In addition to falling within the subject matter jurisdiction of the Court¹⁸³ and ascribing to the principle of complementarity (whereby states must demonstrate the inability or unwillingness to genuinely prosecute a crime within the Court’s jurisdiction),¹⁸⁴ Article 15 raises the bar regarding the admissibility of *proprio motu* investigations.¹⁸⁵ Given the heightened requirements, it is perhaps unsurprising that the OTP has only invoked this power twice (in the matter of Kenya’s post-election violence and the situation in Cote d’Ivoire) and that both instances have been highly controversial.¹⁸⁶ Moreover, as previously mentioned, the ICC has no enforcement mechanism.¹⁸⁷

¹⁷⁷ Rome Statute, *supra* note 32; see also *Understanding the International Criminal Court*, *supra* note 31.

¹⁷⁸ See, e.g., *Understanding the International Criminal Court*, *supra* note 31.

¹⁷⁹ Rome Statute, *supra* note 32, art. 15(1) (“The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”).

¹⁸⁰ See, e.g., Kafayat Quadri, *The Proprio Motu Power of the ICC Prosecutor: Why Some States Have Refused to Ratify the Rome Statute*, 2 INT’L J. OF HUMAN. & MGMT. SCI. 11, 11 (2014); Manuel Ventura, *Proprio Motu Investigations by the ICC Prosecutor*, THE PEACE AND JUSTICE INITIATIVE: TOWARD UNIVERSAL IMPLEMENTATION OF THE ICC STATUTE, <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor> (last accessed Jan. 5, 2018).

¹⁸¹ *Id.*

¹⁸² Rome Statute, *supra* note 32, arts. 13(c), 15, and 53(1).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Article 15 mandates additional procedural mechanisms (prior investigation and review by a Pre-Trial Chamber, a higher evidentiary standard (reasonable basis for belief of wrongdoing) and reiterates the gravity requirement. It is not the Prosecutor, but the PTC that then decides whether the investigation may proceed. Rome Statute, *supra* note 32, art. 15.

¹⁸⁶ Quadri, *supra* note 182.

¹⁸⁷ See, e.g., Nada Ali, *Bringing the Guilty to Justice: Can the ICC be Self-Enforcing?*, 14 CHICAGO J. OF INT’L L. 408 (2014).

It is therefore quite incorrect to accord the ICC the appellation of “sheriff.”¹⁸⁸ Conversely, although there is nothing in the U.N. Charter that designates the U.N.S.C. as an executive body, that designation and association has emerged over time.¹⁸⁹ Observers have noted: “The UN Security Council’s functions often resemble those of an executive, and it comes closest to the power to take authoritative decisions for the maintenance of international peace and security”¹⁹⁰ As such, it has been suggested that the “source of the seemingly antagonistic posture of the African Union against the ICC [can] be traced, not to the ICC itself, but to the United Nations Security Council.”¹⁹¹

B. *The Struggle for Symbiosis*

Frustratingly, “the major weaknesses of the Court do not seem to derive from the deficiencies of its *legal* apparatus They do not lie either in lack of, or poor, implementation of the ICC at the national level.”¹⁹² Instead, the ICC’s greatest vulnerability is its dependency.¹⁹³ Former Prosecutor for the International Criminal Tribunal for the former Yugoslavia Louse Arbour understatedly opined: “In contemporary practice, the [Security] Council has ‘not convincingly demonstrate[d] an exemplary commitment to the Court and its pursuit of international accountability.’”¹⁹⁴

Describing the relationship between the UN Security Council and the ICC’s antecedents, the *ad hoc* tribunals, two observers offered the memorable understatement: “The supremacy of politics over law has always been awkward. . . .”¹⁹⁵ Unlike the *ad hoc* tribunals, which were created by U.N.S.C. resolutions and thus depended on the U.N.S.C. for their legitimacy, the ICC stands on its own feet, having been created by treaty, which conferred

¹⁸⁸ See *Understanding the International Criminal Court*, *supra* note 31 (“In establishing the ICC, the States set up a system based on two pillars. The Court itself is the judicial pillar. The operational pillar belongs to States, including the enforcement of Court’s orders.”).

¹⁸⁹ See generally MICHAEL MATHESON, COUNCIL UNBOUND (2006).

¹⁹⁰ Burke & Weiss, *supra* note 12, at 241.

¹⁹¹ Ovo Catherine Imoedeche, *Unpacking the Tension Between the African Union and the ICC: The Way Forward*, in THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT 123 (2017).

¹⁹² Annalisa Cimapi, *Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court*, in COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE 7, 46 (Olympia Bekou & Daley J. Birkett, eds. 2016).

¹⁹³ *Id.*

¹⁹⁴ Ruiz Verduzco, *supra* note 26, at 33.

¹⁹⁵ Burke & Weiss, *supra* note 12, at 242.

on the Court an independent foundation in the international legal order.¹⁹⁶ And yet, the “awkwardness” persists, as the U.N.S.C. and ICC now share responsibility for global peace and security.¹⁹⁷

Former Special Assistant to the President of the Assembly of States Parties Deborah Ruiz Verduzco posited three general lenses for the interplay between the ICC and U.N.S.C.: a “functionalist” logic, portraying the ICC as a “tool” of the Council; a contrasting vision, stressing judicial independence and the need for institutional autonomy; and one purporting the Council as the executive enforcement organ for the ICC, thereby supporting the functionality of the Rome Statute. All three dimensions have become evidence in different areas of practice.¹⁹⁸

The former paradigm would clearly be most attractive to a Security Council intent on retaining its power. However, “[t]he idea of the ICC as an ‘enforcement tool of the Council’ stands in conflict with concerns of judicial independence and with the necessary separation between the ‘judicial’ and the ‘political’ space.”¹⁹⁹ Such a posture “may entail dangerous consequences when taken to the extreme. The leverage of international justice is weakened when used as a tool by the Council to promote specific political agendas.”²⁰⁰ At the same time, complete judicial autonomy is impracticable when the Court lacks its own enforcement mechanism.²⁰¹

Given the inadequacies of the two previous models, Ruiz Verduzco exhumed a surprisingly early defense of the third archetype, tracing its genealogy to Alexander I of Russia, who first advocated in 1818 for a

supranational mechanism to prosecute individuals engaged in the slave trade. The proposal recognized expressly that additional execute authority was necessary to enforce the decisions of such mechanism. . . . A supreme council was charged with the mandate to coordinate the operations of the naval force, execute the orders of the tribunal, and report back to the organization’s member states.²⁰²

¹⁹⁶ Hehir & Lang, *supra* note 173, at 202.

¹⁹⁷ *Id.*

¹⁹⁸ Ruiz Verduzco, *supra* note 26, at 31.

¹⁹⁹ *Id.* at 33.

²⁰⁰ *Id.* at 32.

²⁰¹ *See, e.g.*, Ali, *supra* note 189.

²⁰² Ruiz Verduzco, *supra* note 26, at 34.

When exploring avenues for the ICC to claim its space between the proverbial “rock and hard place,” scholars have entertained a panoply of functional and procedural alternatives. Some emphasize the importance of prosecutorial discretion.²⁰³ Others scrutinize and recommend reforms to the systems of referral and deferral,²⁰⁴ and consider ways to instrumentalize the principle of complementarity more effectively.²⁰⁵ One enterprising academic has attempted to employ game theory to explain the deterrent effect of ICC arrest warrants on future criminal conduct by state leaders.²⁰⁶ Some creative commentators have gone further, exploring ways in which the Court might leverage the International Monetary Fund and World Bank²⁰⁷ and the court of public opinion through publication of preliminary examinations and monitoring activities.²⁰⁸ Others have persistently (and controversially) advocated for guilty pleas and plea bargaining practices, suggesting that a “more supportive institutional practice”²⁰⁹ could appease troublesome states (plea bargaining was a common feature of the *ad hoc* tribunals; Ahmad Al Mahdi’s guilty plea in March 2016 was the first heard by the ICC).²¹⁰ All of these ideas have merit and should be explored as possible mechanisms to strengthen the Court and the international justice system.

C. Forging Ahead

As Ruiz Verduzco has noted, “[t]he *Rome Statute* provides no guidance regarding how the Council or the Assembly should respond before, during, or after an instance of non-cooperation.”²¹¹ A Resolution adopted on December 21, 2011 aimed to address this lacuna by introducing a mechanism mandating the involvement of the President of the Assembly, the Bureau, and the plenary

²⁰³ See, e.g., KASTNER, *supra* note 100 (envisioning “a possibly proactive role of the ICC Prosecutor through his prosecutorial discretion”).

²⁰⁴ See, e.g., DUTTON, *supra* note 24; CHRISTOPHER K. LAMONT, *INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE* (2010).

²⁰⁵ See, e.g., Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 185 (W.G. Werner & I.F. Dekker eds., 2004); Sibylle Scheipers, *NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: INTERNATIONAL SOCIETY AND THE INTERNATIONAL CRIMINAL COURT* (2009).

²⁰⁶ Ali, *supra* note 188.

²⁰⁷ MENDES, *supra* note 70, at 190–97.

²⁰⁸ *Id.* at 133.

²⁰⁹ Alex Whiting, *Developing a Practice Around Guilty Pleas at the ICC*, JUST SECURITY (Apr. 4, 2016), <https://www.justsecurity.org/30399/developing-practice-guilty-pleas-icc/>.

²¹⁰ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, (Sept. 17, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF.

²¹¹ Ruiz Verduzco, *supra* note 26, at 49.

to acknowledge, discuss, and resolve on a course of action in instances of failure to cooperate.²¹² In practice, the President of the Assembly has reacted to the Court's reports of non-cooperation by meeting with the President of the Security Council "to clarify how the Council might properly react to communications by the Court."²¹³ However, as Ruiz Verduzco points out, "[r]egrettably, there is no public record" of these conversations.²¹⁴

An open and public dialogue among representatives of the Court, the Assembly, and the Security Council may not yield al-Bashir's arrest, but could demonstrate that the ICC's decisions had at least been heard and taken into consideration. Alternatively, of the "various ways in which interaction between the Council and the Court may be improved after a referral . . . [i]t has, in particular, been suggested that the Council Working Group on Tribunals could serve as a forum for dialogue on follow-up."²¹⁵

Moreover, these talking shops need not necessarily be exercises of empty chatter. There are proposed—albeit uncharted—courses of action: "[p]ossible reactions include (i) the issuing of a Press Statement or a Presidential Statement, or (ii) the adoption of a resolution calling for cooperation, condemning failure to arrest, or calling states to arrest ICC fugitives."²¹⁶ Freezing and/or seizure of assets have been suggested as other "sticks" at the Security Council's disposal.²¹⁷ The threat of sanctions always lurks in the background.²¹⁸

At this point, what may be most important is that some action—any action—is taken by the ICC's empowering organs with regard to its findings of non-cooperation in the arrest of al-Bashir. Closing with a final bracing quote from Ruiz Verduzco:

The relationship between the Court and the Council is marked by tensions between law, politics, and judicial diplomacy. The promotion of accountability requires fresh initiatives to address the challenges in the interaction between the two bodies. . . . An improvement of the status quo requires a better balancing of

²¹² Annex to the ASP Resolution, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5 (Dec. 21, 2011).

²¹³ Ruiz Verduzco, *supra* note 26, at 49.

²¹⁴ *Id.*

²¹⁵ *Id.* at 61.

²¹⁶ *Id.* at 49.

²¹⁷ *Id.* at 61.

²¹⁸ *Id.*

interests. Interaction needs to take into account judicial independence and the virtues and necessity of the Council as agent for the Court. . . . Mechanisms of follow-up must be coherent The declarations of the Council should reflect [its] commitment and leave no doubt as to the support enjoyed by the Court internationally.²¹⁹

CONCLUSION: DISCRETION AS ASSERTION

On a 2006 visit to Tokyo on the eve of Japan's (relatively late) deposit of its instrument of ratification to the Rome Statute, former ICC President Philippe Kirsch confidently asserted that "[t]here's not a shred of evidence after three-and-a-half years that the court has done anything political. The court is operating purely judicially."²²⁰ It should be obvious that President Kirsch meant that the Court's motivations are not borne of nefarious motivations and that its activities should not be politicized. However, if it is to uphold its role in the fight against impunity, the Court cannot, and should not, be agnostic in its relationships with other bodies.

One commentator has attempted to reconcile the ICC's profoundly idealistic origins and more terrestrial operations, explaining that, "acknowledging this underlying political objective of the ICC makes more intelligible and defensible certain political limits on its mandate and jurisdiction."²²¹ Not only is it impractical to imagine an entirely apolitical ICC, it may also be undesirable; put another way "to say that the Court should never become politicized is to ignore its role in enforcing peace and security. On the other hand, it is important that we prevent geopolitical interests from intruding on the operations of the ICC."²²²

²¹⁹ Ruiz Verduzco, *supra* note 26, at 50. More critically, Ruiz Verduzco also admonishes "the failure of the Council to use these techniques sends an ambivalent message. It suggests that the Council uses the ICC whenever it is convenient for Council members, while turning a blind eye on the Court when its mandate needs to be operationalized. This contradiction raises doubts as to what extent the Council usefully serves as an executive arm for the Court." *Id.* at 61.

²²⁰ Steve Herman, *Japan's Expected to Join International Criminal Court*, VOICE AMERICA (June 12, 2006), http://www.amazines.com/article_detail.cfm/183987?articleid=183987.

²²¹ Catherine Lu, *The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects*, in BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 191, 194 (Joanna Harrington et al. eds., 2006).

²²² STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW 6 (2006).

In the South Africa decision, the Court seemingly confined itself to a ruling on the legal merits of the case and refrained from further political engagement or enforcement *vis-à-vis* a State Party (i.e. referring South Africa to the U.N.S.C. and ASP for censure or sanction). However, by choosing not to refer the case to the ASP or U.N.S.C., the Court broke with tradition and sent a powerful message.²²³

As ICC President Eboe-Osuji reminded onlookers on the twentieth anniversary of the Rome Statute on July 17, 2018,

Like every other human institution . . . there will always be an ongoing need to reform the Court and its processes, in order to improve its ability to achieve its mandate with greater purpose and efficiency [while] leaving undiluted the essential properties that make this Court a vital instrument of accountability.²²⁴

Given the connotations attached to “political” maneuvers, it may be more diplomatic to interpret the bench as acting “tactically” in its decision regarding South Africa. Regardless of semantics, however, the decision should be read as a gambit by a still-nascent judicial institution on a playing field embedded with inherent formalistic and mounting practical challenges.

REBECCA A. SHOOT*

²²³ Although Article 21(2) of the Rome Statute holds that “[t]he Court may apply principles and rules of law as interpreted in its previous decisions,” the ICC is not technically bound by the principle of *stare decisis*. Rome Statute, *supra* note 32. This Comment therefore refers to “tradition” rather than “precedent.” See Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, including Reparations and Intermediaries, ICC-ASP/12/38, 2 (Oct. 15, 2013) (“Principles established by one trial chamber do not create a *stare decisis* effect on future trial chambers.”); see also Gilbert Bitti, *The ICC and the Treatment of Sources of Law under Article 21*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 281 (Carsten Stahn, ed. 2015); Sardar M.A. Waqar Khan Arif, *Judicial Precedent and its Authority under International Law*, 3 J. INT’L L. 75 (2017); Stewart Manley, *Referencing Patterns at the International Criminal Court*, 27 EUR. J. INT’L L. 191 (2016) (raising concerns about ICC judges “self-citing”).

²²⁴ Judge Chile Eboe-Osuji, President, Int’l Crim. Ct., Remarks at Solemn Hearing in Commemoration of the 20th Anniversary of the Rome Statute of the International Criminal Court (July 17, 2018) (*available at* <https://www.icc-cpi.int/itemsDocuments/20180717-pres-speech.pdf>).

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APPENDIX I: CASES OF STATE NON-COMPLIANCE IN THE ARREST OF
OMAR AL-BASHIR²²⁵
(WITH SALIENT INFORMATION DENOTED IN BOLD TYPEFACE)

State	Date	Trigger	Bench	Decision Length	Holding Summary	Action Taken
Chad	Aug. 27, 2010 ²²⁶	U.N.S.C.	Pre-Trial Chamber (PTC) I: Tarfusser (Presiding), Steiner, Mmasenono Monageng	4 Pages	"The Republic of Chad has an obligation to cooperate with the Court in the relation to such warrants of arrest." ²²⁷	"INFORMS the Security Council of the United Nations and the Assembly of States Parties . . . in order for them to take any measure they may deem appropriate." ²²⁸
	Dec. 13, 2011 ²²⁹	U.N.S.C.	PTC I: Mmasenono Monageng (Presiding), Steiner, Tarfusser	9 Pages	"Chad: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute." ²³⁰	"REFERS . . . the present decision . . . to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties." ²³¹
	Mar. 26,	U.N.S.C.	PTC II: Trendafilova	11 Pages	"[T]he Republic of Chad:	"[R]efers the present

²²⁵ Compiled from ICC records, <https://www.icc-epi.int/CourtRecords/> (last visited Oct. 27, 2017).

²²⁶ Al-Bashir Chad Non-Compliance Decision I, *supra* note 106.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Al-Bashir Chad Non-Compliance Decision II, *supra* note 112.

²³⁰ *Id.*

²³¹ *Id.*

	2013 ²³²	(Presiding), Kaul, Tarfusser		1) has failed to comply with its obligations to consult with the Chamber . . . on the problem(s) which have impeded the execution of the requests for arrest and surrender of Omar Al-Bashir during his visit, and 2) has failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al-Bashir. . . . ²³³	decision to the President of the Court for transmission to the Security Council . . . and to the Assembly of States Parties ²³⁴
Democratic Republic of Congo (DRC)	Apr. 9, 2014 ²³⁵	PTC II: Trendafilova (Presiding), Kaul, Tarfusser	U.N.S.C.	18 Pages	"[R]efers . . . the present decision . . . to the Security Council . . . and . . . to the Assembly of States Parties." ²³⁷
					"[T]he Democratic Republic of the Congo: (1) has failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al Bashir . . . and (2) has failed to comply with its obligations to consult with the Chamber in accordance . . . on the problem(s) which have impeded the execution of the requests for arrest and surrender of Omar Al Bashir during his visit, namely to bring to the attention of the Court relevant information which would have assisted it in deciding on the problem

²³² Al-Bashir Chad Non-Compliance Decision III, *supra* note 119.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Al-Bashir DRC Non-Compliance Decision, *supra* note 121.

²³⁷ *Id.*

Djibouti	July 11, 2016 ²³⁸	U.N.S.C.	PTC II: Tarfusser (Presiding), Perrin de Brichambaut (Minority), Chung	10 Pages	raised ²³⁶ “[T]he present one constitutes yet another instance in which Djibouti has failed to abide by its obligation to cooperate with the Court.” ²³⁹	“[T]he Chamber reiterates once again that, unlike domestic courts, the Court has no direct enforcement mechanism and must rely on cooperation by the States in order to fulfill its mandate. It is therefore of particular importance that the Security Council, after referring a situation to the Prosecutor of the Court as constituting a threat to international peace and security, responds with any appropriate measure to the failure on the part of States Parties to the Statute to cooperate with the Court in order for it to fulfill the mandate with which it has been entrusted. In the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of Charter of the United Nations would become futile and incapable of achieving
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²³⁶ *Id.*

²³⁸ Al-Bashir Djibouti Non-Compliance Decision, *supra* note 127.

²³⁹ *Id.*

Jordan	Dec. 11, 2017 ²⁴¹	U.N.S.C.	PTC II: Tarfusser (Presiding), de Brichambaut (Minority), Chung	22 Pages	“Jordan was not entitled to rely on its own understanding of article 98 of the Statute . . . to decide unilaterally not to comply with the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court . . . [I]rrespective of whether Jordan considered itself obliged to respect the immunity of Omar Al-Bashir, it nevertheless had the duty under the Statute to arrest him and surrender him to the Court.” ²⁴²	its ultimate goal of putting an end to impunity. ²⁴⁰ “DECIDES that the matter of Jordan’s non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred . . . to the Assembly of States Parties of the Rome Statute and the United Nations Security Council.” ²⁴³
Kenya	Aug. 27, 2010 ²⁴⁴	U.N.S.C.	PTC I: Tarfusser (Presiding), Steiner, Mmasenono Monageng	4 Pages	“[T]he Republic of Kenya has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest.” ²⁴⁵	“INFORMS the Security Council . . . and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s presence on the territory of the Republic Kenya, in order for them to take any measure they may deem appropriate.” ²⁴⁶
Malawi	Dec. 12,	U.N.S.C.	PTC I: Mmasenono Monageng (Presiding),	22 Pages	“FINDS . . . that the Republic of Malawi: (i)	“ORDERS the Registrar to transmit the present

²⁴⁰ *Id.*²⁴¹ Al-Bashir Jordan Non-Compliance Decision, *supra* note 159.²⁴² *Id.*²⁴³ *Id.*²⁴⁴ *Id.*²⁴⁵ Al-Bashir Kenya Non-Compliance Decision, *supra* note 107.²⁴⁶ *Id.*

Nigeria	Sept. 5, 2013 ²⁴⁷	U.N.S.C.	PTC II: Trendafilova (Presiding), Kaul, Tarfusser	7 Pages	<p>failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court. . . .²⁴⁸</p> <p>"[R]eminds the Federal Republic of Nigeria of its obligations to execute the pending decisions concerning the arrest and surrender of Omar Al-Bashir to the Court."²⁵¹</p>	<p>decision to the Security Council . . . and, to the Assembly of States Parties.²⁴⁹</p> <p>"[R]equests the Federal Republic of Nigeria to immediately arrest Omar Al-Bashir and surrender him to the Court should a similar situation arise in the future, and . . . instructs the Registry to transmit the present decision to the Federal Republic of Nigeria."²⁵²</p>
Uganda	July 11, 2016 ²⁵³	U.N.S.C.	PTC II: Tarfusser (Presiding), Perrin de Brichambaut, Chung	10 Pages	<p>"FINDS . . . that the Republic of Uganda has failed to comply with the request for arrest and surrender of Omar Al-Bashir to the Court."²⁵⁴</p>	<p>"DECIDES that the matter of Uganda's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred . . . to the Assembly of States Parties to the Rome</p>

²⁴⁷ Al-Bashir Malawi Non-Compliance Decision, *supra* note 112.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Al-Bashir Nigeria Non-Compliance Decision, *supra* note 120.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016), https://www.icc-otp.int/CourtRecords/CR2016_04947.PDF.

²⁵⁴ *Id.*

South Africa	July 6, 2017 ²⁵⁶	Self-Referral (regarding compliance duties)	PTC II, Tarfusser (Presiding), Perrin de Brichambaut (Minority), Chung	53 Pages	<p>"The Chamber concludes that, by not arresting Omar Al-Bashir while he was on its territory . . . South Africa failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute . . ."²⁵⁷</p>	<p>Statute and the United Nations Security Council.²⁵⁵</p> <p>"[T]he Chamber considers of significance that South Africa is the first State Party to seek from the Court a final legal determination on the extent of its obligations to execute a request for arrest and surrender of Omar Al-Bashir. In addition, the Chamber is not convinced that a referral to the Assembly of States Parties and/or the Security Council of the United Nations would be warranted in order to achieve cooperation from South Africa, in light of the fact that South Africa's domestic courts have already found South Africa to be in breach of its obligations under its domestic legal framework . . . the Chamber therefore considers that a referral to the Assembly of States Parties or the Security Council of the</p>
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²⁵⁵ *Id.*

²⁵⁶ Al-Bashir South Africa Non-Compliance Decision, *supra* note 1.

²⁵⁷ *Id.*

United Nations of South Africa's non-compliance with the Court's request for arrest and surrender of Omar Al-Bashir is not warranted. ¹⁷²⁵⁸						
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²⁵⁸ *Id.*