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# State Cooperation and the Challenge to International Criminal Justice

States are opposing and undermining the ICC through their non-cooperation precisely because they feel threatened by its capability to prosecute their top leaders for the most serious crimes under international law.



Headquarters of the International Criminal Court in The Hague. Photo: Hypergio/CC BY-SA 4.0



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*This is the seventh in a series of articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two*

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“I will never go to the ICC alive,” declared Rodrigo Duterte, president of the Philippines, recently. He had previously said during a **press conference** that the International Criminal Court (ICC) could “do whatever it wanted” but it would not be able to gather evidence against the President without the country’s cooperation.

On June 14, 2021, the ICC prosecutor had announced that she had completed the preliminary investigation into the Philippines’s “war on drugs” campaign in which tens of thousands of people are believed to have been extra-judicially killed by the police from 2016 to 2019.

Duterte is the topmost leader in the country responsible for the campaign. The government’s open defiance of the ICC is symptomatic of one of the biggest challenges faced by the court in recent times – that of state cooperation.

### **The Rome statute and the edifice for state cooperation**

of prosecuting individuals for war crimes, crimes against humanity, genocide and the crime of aggression.

From the drafting stages of the Rome statute, state cooperation in the court's investigative, prosecutorial and judicial functions was a key principle built into it. Part 9 of the Rome statute is devoted to aspects of international cooperation and judicial assistance and Part 10 to enforcement of sentences. These provisions – which lead to the ICC's dependence on state parties for cooperation – arise from the need to minimise what states perceive to be an infringement of their sovereignty.

As a result, the ICC is a judicial institution with no independent police force, independent enforcement agency or prison facilities. Its detention facilities in The Hague are limited to housing undertrials while their trials are pending before the court. The ICC relies on the cooperation of the 123 state parties (as of September 13, 2021) to the Rome statute and willing non-state parties and institutions.

The ICC is an independent judicial institution, not a part of the United Nations (unlike the International Court of Justice). However, it has a cooperation agreement with the UN.

State parties (who have ratified the ICC treaty) have a legal obligation to cooperate with the ICC at all stages of the investigation, trial and its outcome. This obligation entails providing support to the ICC's preliminary examinations, investigations, prosecutions and judicial proceedings; cooperation in the arrests and surrenders of suspects to the ICC for trial; identifying, seizing and freezing of assets of suspects; implementing ICC's protection measures for victims and witnesses; relocating witnesses facing threats and

In reality, the willingness of a state party to cooperate with the ICC is coloured by global, regional and domestic politics, diplomatic relations and extraneous considerations.

### **Implementing arrest warrants**

One of the crucial areas where the ICC has faced the challenge of non-cooperation is in implementing arrest warrants.

The conclusion of an investigation by the ICC prosecutor leads to the issuing of a summons (for personal attendance of the trial) and an arrest warrant against the suspects. Since the ICC does not conduct the trial of an accused in their absence, the arrest or the voluntary appearance of the accused in the ICC is necessary for their trial to commence in the ICC.

Since its inception in 2002, the ICC has issued 36 arrest warrants, out of which 20 had been implemented. Three arrest warrants were subsequently withdrawn following the death of the suspects while 17 persons have been detained by the ICC at its detention centre. Thirteen suspects continue to be at large.

Arrests of suspects depend largely on the cooperation of member states and UN organisations. The UN Security Council, for example, has a wide range of diplomatic tools to support the ICC and facilitate the implementation of arrest warrants.

For example, on May 23, 2008, the ICC issued an arrest warrant against **Jean-Pierre Bemba** – President of the *Mouvement de Libération du Congo* (MLC) and commander-in-chief of the MLC's military branch, *Armée de Libération*

next day, he was arrested by Belgian authorities and produced before a Belgian court which subsequently transferred him to the ICC for trial.

In the case of **Bosco Ntaganda**, the ICC issued arrest warrants against him in August, 2006 and July, 2012. He was the former deputy chief of staff for military operations and commander of operations of the *Forces Patriotiques pour la Libération du Congo* (Patriotic Forces for the Liberation of Congo, FPLC) from the situation in Democratic Republic of Congo (DRC).

He was accused of 18 counts of war crimes and crimes against humanity, including murder, rape, sexual slavery, persecution, conscripting child soldiers, deliberate attacks against civilians and protected objects, forcible transfer of population and displacement. Neither DRC nor the UN agencies arrested him after the issuance of the warrants.

In fact, in 2009, he was made a general in the Congolese army as part of a peace agreement between the Congolese government and the armed groups, while victims waited for his arrest.



Bosco Ntaganda. Photo: Reuters

On March 18, 2013, he arrived at the US embassy in the Rwandan capital of Kigali and requested to be transferred to The Hague. Neither the United States nor Rwanda are state parties to the ICC. However, they cooperated with the ICC and transferred him there for trial.



issued two arrest warrants in 2009 and 2010 against the former Sudanese President **Omar al-Bashir** for war crimes, crimes against humanity and genocide. He was overthrown in 2019, however, he remains at large till date. According to UN statistics, at least 300,000 people were killed and 2.5 million displaced in the Darfur conflict of 2003, indicating the scale of ICC crimes that he is alleged to have committed.

The arrest warrants have certainly reduced the number of countries that he can travel to as safe havens without the risk of being arrested and surrendered to the ICC. However, he has also unabashedly continued to travel to ICC member states without being arrested, despite those states having an express mandate to cooperate with the ICC and implement its arrest warrants.

The ICC judges **referred** the non-cooperation of Chad, DRC, Djibouti, Jordan, Malawi and Uganda in implementing al-Bashir's arrest warrant, sometimes repeatedly, from 2010 to 2019, to the Assembly of State Parties (ASP). The ASP is an oversight body of the court, consisting of all state parties to the Rome statute.

Ten years of multi-pronged effort at arresting and transferring al-Bashir from Sudan (where he is currently jailed) to the ICC finally bore fruit last month. On August 12, 2021, it was **reported** that the Council of Ministers in Sudan had decided to hand over al-Bashir as well as the former defence minister **Abdel Hussain** and **Ahmed Harun** – a former minister of state for the interior, to the ICC. The move was appreciated by the **Human Rights Watch**, which also urged that the Sovereign Council of Sudan take a similar decision and expedite the transfer of the three suspects to the ICC.

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against them for war crimes, crimes against humanity and genocide, as well as a strong indication of Sudan's cooperation with the ICC

In another instance, the ICC issued an arrest warrant against **Simone Gbagbo**, a former first lady of the Côte d'Ivoire (Ivory Coast), in 2012 on four counts of crimes against humanity as a co-perpetrator for planning murder, rape and other sexual violence, persecution and other inhuman acts, allegedly committed in the country during the post-election violence of 2010-11.

She was arrested by the Ivorian authorities in 2014, who refused to transfer her to the ICC. She was prosecuted and convicted by an Ivorian court in 2015 for undermining state security and sentenced to twenty years in prison. The appellate chamber of the ICC determined that the Ivorian trial and sentence did not include the same crimes as the ICC's case and hence the Ivory Coast is duty-bound to surrender her to the ICC for trial.

The Ivorian government did not do so and as a result, her trial in the ICC could not commence. The Ivory Coast is a state party to the ICC. On July 19, 2021, based on the prosecutor's request, the effect of the arrest warrant against her was **vacated** by the ICC on the basis that evidence against her did not meet the necessary threshold under the ICC Statute.

Additionally, the arrest warrant against **Saif al-Islam Gaddafi** – son of Muammar Gaddafi, the deposed leader of Libya and a key accused – has not been executed due to the non-cooperation of the Libyan government even though he is believed to be at large in the country.

prosecutor of the ICC – Fatou Bensouda – in a **statement to the Security Council, issued in May, 2021.**

The ICC faces a formidable challenge in securing state cooperation for implementing arrest warrants. As the case of al-Bashir illustrates, state parties of the ICC are reluctant to comply with its request for arrest and transfer of suspects, – particularly if the person is a sitting head of state or holds a powerful governmental position – even if they are under a legal obligation to do so.

### **Withdrawals from the ICC statute**

To make matters worse, states have “unsigned” themselves or withdrawn from the Rome statute.

The first such instance was by the United States. In 2002, the Bush administration “unsigned” the statute by informing the UN Secretary General that the US did not intend to ratify the statute and hence had no legal obligations arising from it. This was followed by Russia’s ‘unsigned’ in 2016, triggered by the ICC Prosecutor’s **report** of preliminary investigations, including the Russian forces’ alleged crimes committed in Ukraine and Crimea. Russia’s ‘unsigned’ is discussed in further detail in the article titled ‘**Catching the Big Fish: Examining the Efficacy of International Criminal Justice**’ in this series.

In October, 2016, **South Africa, Burundi and Gambia** wrote to the UN Secretary General, indicating their intent to withdraw from the ICC Statute. They were motivated by a 2015 resolution of the African Union that granted immunity from ICC prosecution to the heads of state and called out the ICC’s “bias against Africa.” The resolution was passed against the

South Africa and Gambia reversed their decision to withdraw thereafter. South Africa had been forced to revoke its notification of withdrawal due to a high court order. The high court ruling was a **significant and defining moment** for its legal obligations to international law.

Burundi withdrew from the ICC statute in 2017. It had been a state party of the statute from 2004. In November, 2017, a pre-trial chamber of the ICC authorised the prosecutor to investigate serious crimes, including killings, torture, rape, enforced disappearances and persecution, allegedly committed in Burundi from April 2015 – October 2017. This was the clear motivation for Burundi's withdrawal.

The ICC's chamber of judges **clarified** that the court retained jurisdiction over crimes allegedly committed *during the time* that Burundi was a state party to the Rome statute. It further said that Burundi had a legal obligation to cooperate with the ICC as the investigation had been authorised at a time when it was a state party. Burundi is considered to be the first country to formally withdraw from the ICC as a state party (the United States withdrew before ratification).

The relationship between the ICC and the African Union is a

cases in the ICC have also been from the African region, though many are through state referral of their own situation to the ICC.

The relationship between the two became fraught with tensions due to the repeated calls by the ICC for implementing its arrest warrants against the Sudanese President Omar al-Bashir. In February, 2017, the African Union **issued a resolution** calling upon the member states of the Union to withdraw from the ICC Statute *en masse*. Till date, no country from the African Union other than Burundi has withdrawn from the ICC statute in pursuance of the resolution.

In fact, African states are confronted with conflicting obligations in their roles as members of the African Union and as state parties of the ICC; by virtue of being a state party of the ICC, they are obliged to arrest and transfer al-Bashir and other such suspects whose arrest warrants have been issued by the ICC, however, they are bound by the African Union's resolution to give immunity to heads of state and face the pressures to withdraw from the ICC statute. This has created an impasse that needs to be urgently addressed.

The Philippines had ratified the ICC statute in 2011, but **withdrew** from it in March 2018, weeks after the ICC prosecutor **announced** a preliminary examination into the commission of atrocities during the “war on drugs” campaign. The withdrawal was seen as its attempt to shield President Duterte – the chief architect of the campaign – from a possible investigation by the ICC.



Philippine President Rodrigo Duterte holds a Galil sniper rifle next to outgoing Philippine National Police Chief Ronald Bato Dela Rosa during the National Police chief handover ceremony in Camp Crame, Quezon City, metro Manila, Philippines, April 19, 2018. Photo: Reuters/Dondi Tawatao

In March, 2021, the Philippines Supreme Court **dismissed** a petition challenging the withdrawal from the ICC Statute. However, the full bench of the country's **Supreme Court**, in a judgment delivered in March, 2021 (but released to the public only in July this year) said that despite its withdrawal from the ICC, the international court could prosecute government actors for alleged crimes committed prior to the withdrawal and that the country is obliged to cooperate with the ICC for the same.

These examples illustrate that state acts of withdrawal from the ICC are mostly motivated by ICC's allegations against their nationals, particularly those who are or were political leaders, with commission of ICC crimes. Withdrawal prior to ratification of the ICC treaty is symbolic in nature with no

## Blatant opposition to the ICC

In addition to the failures to implement ICC's arrest warrants and withdrawals from the ICC statute (threatened or actual), a third challenge to state cooperation comes from a blatant opposition to the ICC by some countries. The **second article in this series** discusses the opposition of some powerful countries, such as Russia, the United States and the United Kingdom.

The United States' close ally, Israel, has also openly defied an ICC investigation into the Palestine situation, which began in March, 2021. Through its investigation, the ICC opened the door for Palestinians to submit complaints of ICC crimes committed by Israeli forces in the Occupied Palestine Territory, namely Gaza and the West Bank, including East Jerusalem.

The Israel government termed the decision to commence an ICC investigation as “**absurd and undiluted anti-Semitism,**” and an act of “moral and legal bankruptcy.” The government was reported to have categorically said that **it would not cooperate** with the ICC. The erstwhile Prime Minister, Benjamin Netanyahu is **reported** to have said that, “The court was established to prevent atrocities like the Nazi Holocaust against the Jewish people [and] is now targeting the one state of the Jewish people.” Like the United States, Israel is not a state party to the ICC Statute, although Palestine is. This is discussed in greater detail in the fourth part of this series titled **Israel's Colonisation of Palestine and the Pursuit of International Justice**.

States' more recent open defiance to the ICC and their active opposition to its investigations have a longer history. In 2013,



Uhuru Muigai Kenyatta. Photo: Official White House  
Photo by Amanda Lucidon)

deputy  
Prime  
Minister of  
Kenya.  
The  
prosecutor  
had been  
examining  
his  
complicity  
in crimes  
against  
humanity.

The  
erstwhile  
prosecutor  
alleged  
that the  
Kenyan

government, despite being a state party to the ICC statute, did not cooperate with her investigation and had failed to provide key evidence, thereby failing to discharge its obligations as a state party to the Rome statute. Charges against Kenyatta were withdrawn in 2014. In 2016, the trial chamber **referred** the issue of non-cooperation by the Kenyan government to the Assembly of State Parties (ASP).

Such blatant opposition to the ICC and acts of scuttling the ICC's processes of justice are clearly intended at shielding



complementarity, the ICC has no jurisdiction if the concerned state is able and willing to investigate and prosecute persons for the ICC crimes. The problem is that these states want to do neither, thereby perpetuating impunity for the most serious crimes under international law.

## Future possibilities

The issue of withdrawal from the Rome statute raises many questions of international justice and commitment to the rule of law. Prominent among them is the issue of immunity to heads of state, which the ICC or International Court of Justice (ICJ) must convincingly address and issue a ruling on.

As the ICC prosecutor conducts investigations into situations in the various regions of the world over and above Africa, the allegation of bias made by the African Union may get blunted. At the same time, it is important that the ICC does not soft-peddle investigating the culpability of nationals from powerful countries, for its own credibility and institutional integrity.

Domestic and regional prosecutions for ICC crimes, through the exercise of **universal jurisdiction** or otherwise, have a

was prosecuted and convicted for war crimes, crimes against humanity and torture, by a specially constituted tribunal – **the Extraordinary African Chambers** – in Senegal. A commission of inquiry had found that he was responsible for at least 40,000 politically motivated killings and torture of 200,000 persons while he was in power from 1982 to 1990. The Chambers was established in pursuance of an agreement between the African Union, Senegal and Chad. He was convicted in 2016 of crimes committed between 1982 and 1990 – crimes that the ICC could never have prosecuted as it had the mandate only over ICC crimes committed after its establishment in 2002. Habré’s conviction is the outcome of seventeen years of victims’ pursuit for justice. Sovereign immunity and impunity were ended through the conviction – fulfilling the objective for which the ICC was created in the first place.

Instances of non-cooperation with the ICC have become common, necessitating the ASP (which consists of state parties to the ICC statute) to examine their responses to the same. At a time when the ICC desperately needs increasing global support in its fight against impunity, the opposite trend of withdrawals from the ICC statute signals a weakening of its established mechanisms for state cooperation. Newer approaches, such as a combination of legal, non-legal and political responses could be explored, utilising channels of diplomacy, using measures of persuasion, incentivising state cooperation, imposing sanctions and issuing judicial findings.

States are opposing and undermining the ICC through their non-cooperation precisely because they feel threatened by its capability to prosecute their top leaders for the most serious crimes under international law. The ICC openly challenges the non-cooperating states' vested interest in shielding perpetrators. Mostly, these perpetrators occupy high echelons of political and military power, who can hardly be touched by national/domestic legal systems. This should be a shot in the arm for believers of justice and accountability to extend their support to and strengthen the ICC, helping it overcome its shortcomings.

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