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# Coexistent but Uncoordinated: Asset Freezing Measures at the International Criminal Court and the UN Security Council

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## Abstract

Both the International Criminal Court (ICC) and the UN Security Council (UNSC) are vested with the capacity to request States to freeze individuals' assets. The two bodies are also bound to cooperate closely under the terms of their relationship agreement 'with a view to facilitating the effective discharge of their respective responsibilities'. This article examines whether this obligation extends to the UNSC coordinating its targeted sanctions regime to support the ICC in respect of the enforcement powers with which the latter is equipped. It does so by analysing eight cases where UNSC action (could) have coincided with ICC operations, with a particular focus on the (non-)parallel implementation of the two bodies' asset freezing procedures. The article demonstrates that, though the activities of the UNSC and the ICC in this sphere of their respective operations might have overlapped on a number of occasions, they have rarely been deliberately coordinated. This leads the author to conclude that close cooperation as envisaged in the relationship agreement between the two bodies is unlikely on this front.

## Keywords

asset freezing – International Criminal Court (ICC) – UN Security Council (UNSC) – peace and security – targeted sanctions – Rome Statute – UN Charter – ICC-UN Relationship Agreement

## 1 Introduction

Both the International Criminal Court (ICC, Court) and the UN Security Council (UNSC) are empowered to request States to freeze individuals' assets. At the ICC, Article 57(3)(e) of the Court's constituent instrument, the Rome Statute of the International Criminal Court (Rome Statute),<sup>1</sup> permits the relevant Pre-Trial Chamber to 'seek the cooperation of states ... to take protective measures for the purpose of forfeiture' on condition that a warrant of arrest or a summons to appear has been issued against the individual(s) targeted by the measures.<sup>2</sup> The Pre-Trial Chamber is also required by Article 57(3)(e) of the Rome Statute to take into account 'the strength of the evidence and the rights of the parties concerned' in deciding whether to ask States to freeze individuals' assets.<sup>3</sup> The power of the UNSC to order States to freeze assets finds its legal basis in Chapter VII of the UN Charter, Article 41 of which permits the organ upon which 'primary responsibility for the maintenance of international peace and security'<sup>4</sup> is conferred to call upon States to take action short of the use of armed force to give effect to its decisions.<sup>5</sup>

1 ICC Statute, Art. 57(3)(e); *see also* ICC Statute, Art. 93(1)(k).

2 ICC Statute, Art. 57(3)(e). In order for an arrest warrant or summons to be issued, the ICC Prosecutor is required to demonstrate the existence of 'reasonable grounds to believe' that the person in question has committed one of the crimes within the Court's jurisdiction. *See* ICC Statute, Art. 58(1)(a) (for a warrant of arrest) and Art. 58(7) (for a summons to appear). This could be one of the four 'most serious crimes of concern to the international community as a whole' listed in Article 5 of the Rome Statute (genocide, crimes against humanity, war crimes, or the crime of aggression) or offences against the administration of justice.

3 ICC Statute, Art. 57(3)(e). The failure of the Prosecutor to continue to satisfy these important criteria has already led to the suspension of one Pre-Trial Chamber order for the freezing of assets by an ICC Trial Chamber. *See* ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11-931, Trial Chamber V(B), Decision on the implementation of the request to freeze assets, 8 July 2014, para. 29. For discussion, *see* Daley J. Birkett, 'Pre-trial "Protective Measures for the Purpose of Forfeiture" at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests', 32(2) *Leiden Journal of International Law* (2019) 585–602, at pp. 589–593.

4 UN Charter, Art. 24.

5 UN Charter, Art. 41. The UNSC can only make such requests after determining the existence of a 'threat to the peace, breach of the peace, or act of aggression'. *See* UN Charter, Art. 39. Moreover, the UNSC, in discharging its duties in terms of maintaining international peace and security, 'shall act in accordance with the Purposes and Principles of the United Nations' listed in the first two articles of the UN Charter. *See* UN Charter, Art. 24(2). Should the body 'consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate', the subsequent provision empowers the UNSC to take measures involving the use of armed force. *See* UN Charter, Art. 42.

A non-exhaustive<sup>6</sup> list of measures available to the UN body by virtue of Article 41 of the UN Charter ‘include[s] complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’.<sup>7</sup> It is pursuant to this provision that the UNSC’s ‘targeted sanctions’ regime has developed.<sup>8</sup> Among other ‘targeted’ measures, the freezing of individuals’ assets under the auspices of specially appointed sanctions committees<sup>9</sup> is one of the tools the UNSC has utilised when discharging its responsibilities under the UN Charter.

Not only have the ICC and the UNSC been equipped with such asset freezing procedures, but the two bodies are also bound to cooperate closely with one another by virtue of an agreement. A number of provisions of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (ICC-UN Relationship Agreement) regulate the matter of cooperation and coordination between the two bodies, with Article 3 containing an express obligation for the two international organisations to work together in the following terms:

The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.<sup>10</sup>

This general obligation is therefore qualified insofar as cooperation and coordination are only obligatory when ‘appropriate’ and if conducted in accordance with the two bodies’ respective constituent instruments. As far as the freezing of individuals’ assets is concerned, the question might therefore be

6 The list begins with the words ‘These may ...’.

7 UN Charter, Art. 41.

8 According to Biersteker, Tourinho and Eckert, ‘Targeted sanctions differ from comprehensive measures in that they are discriminating policy measures. Rather than being applied indiscriminately on an entire country (as comprehensive sanctions are) with resultant harmful humanitarian consequences, targeted sanctions are focused on specific individuals, entities, sectors, and/or regions of a country’. Thomas J. Biersteker, Marcos Tourinho and Sue E. Eckert, ‘Thinking about United Nations Targeted Sanctions’, in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho (eds.), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press, Cambridge, 2016) p. 13.

9 Under Rule 28 of the UNSC Provisional Rules of Procedure, ‘The Security Council may appoint a commission or committee or a rapporteur for a specified question’.

10 ICC-UN Relationship Agreement, Art. 3.

asked whether UNSC support for ICC measures fulfils these requirements. This article aims to answer this question by examining eight situations where the two bodies' activities (could) have coincided, with a particular focus on the (non-) parallel implementation of the asset freezing procedures detailed in the preceding paragraphs.

Part 2 further examines the breadth of and justifications underpinning the obligation of mutual cooperation found in ICC-UN Relationship Agreement, with a particular focus on how UNSC action might strengthen the weak State cooperation procedures to which the ICC has recourse. Part 3 comprises an analysis of eight cases where the UNSC (could have) supported the Court by exercising its power to request States to freeze assets under Chapter VII of the UN Charter. This analysis demonstrates that, though the two bodies' respective activities in this area might have overlapped on a number of occasions, they have seldom been coordinated. This, in turn, leads the author to reach the conclusion, in Part 4, that to argue in favour of closer, formalised cooperation between the two asset freezing regimes is aspirational but an unlikely outcome.

## 2 Incentives to Cooperate

Beyond the general obligation to cooperate closely, the ICC-UN Relationship Agreement also contains several provisions governing specific areas of cooperation. These provisions regulate matters such as administrative cooperation,<sup>11</sup> cooperation between the UNSC and the Court,<sup>12</sup> and cooperation between the UN and the Court's Prosecutor.<sup>13</sup> But why have these two bodies agreed to enter into such an agreement? In other words, why cooperate at all? Paul Szasz and Thordis Ingadottir, in evaluating how far general UN-ICC cooperation ought to extend, draw attention to multiple relevant factors. These include 'the fact that the Court was created under the *aegis* of the United Nations and that the General Assembly and the Secretary-General have repeatedly called on states to sign and ratify the Rome Statute',<sup>14</sup> UN involvement in creating international(ised) criminal tribunals in response to mass atrocities in the

11 ICC-UN Relationship Agreement, Art. 9.

12 *Ibid.*, Art. 17. Notably, this provision makes no reference to the bodies' respective asset freezing procedures. Nor, however, does the provision specify that the forms of cooperation detailed therein are exhaustive.

13 *Ibid.*, Art. 18.

14 Paul C. Szasz and Thordis Ingadottir, 'The UN and the ICC: The Immunity of the UN and Its Officials', 14 *Leiden Journal of International Law* (2014) 867, p. 875.

former Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia,<sup>15</sup> and UN support for compliance with the applicable rules of international humanitarian law on the part of its peacekeeping forces.<sup>16</sup> All of the foregoing considerations inform the authors' conclusion that 'full and ready compliance with demands made by the Court appears to be completely consistent with the general posture of the United Nations'.<sup>17</sup> Consequently, despite the *de jure* and *de facto* independence of the Court from the UN apparatus,<sup>18</sup> it has been suggested that the UNSC might assist the ICC in fulfilling its purposes, not least in respect of the Court's weak cooperation regime.<sup>19</sup>

At the same time, it has been claimed that the ICC, by pursuing its objectives, can support the UNSC in realising its goals under the UN Charter; in other words, that peace and justice can, and perhaps even ought to, be pursued simultaneously.<sup>20</sup> For some scholars, there can be 'no peace without justice',<sup>21</sup> while others contend that the removal of international criminals, who may well constitute obstacles to peace, can serve the interests of both peace and justice.<sup>22</sup> Still others propose that focusing on individual criminal responsibility, rather than collective guilt, is able to prevent future conflict.<sup>23</sup> Despite

15 *Ibid.*

16 *Ibid.*, pp. 875–876.

17 *Ibid.*, p. 876.

18 ICC-UN Relationship Agreement, preamble ('in accordance with the Rome Statute, the International Criminal Court is established as an independent permanent institution in relationship with the United Nations system').

19 See also Morten Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council', 69 *Nordic Journal of International Law* (2000) 87, p. 110.

20 *Ibid.*, pp. 91–92, 112; Sir Franklin Berman, 'The Relationship between the International Criminal Court and the Security Council', in Herman von Hebel, Johan G. Lammers and Jolien Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T. M. C. Asser Press, The Hague, 1999) pp. 177–178; Matthias Neuner, 'The Security Council and the ICC: Assessing the First Ten Years of Coexistence', 18 *New England Journal of International and Comparative Law* (2012) 283, pp. 297–298.

21 M. Cherif Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability over Realpolitik', 35 *Case Western Reserve Journal of International Law* (2003) 191, p. 204.

22 See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', 95 *American Journal of International Law* (2001) 7, p. 7; Luigi Condorelli and Annalisa Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', 3 *Journal of International Criminal Justice* (2005) 590, p. 592; Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace: Reconciling Judicial Romanticism with Political Realism', 31 *Human Rights Quarterly* (2009) 624, p. 629.

23 Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2, p. 9.

broad consensus that a relationship exists between the maintenance and restoration of international peace and security and international criminal justice,<sup>24</sup> however, tensions between these objectives are also recognised.<sup>25</sup>

It has been contended that this tension flows from the political character of the UNSC and the independent judicial position held by the Court, which do not neatly converge. In this regard, some scholars argue, on the one hand, that the Court must be allowed to act independently of the influence of certain States, not least the five permanent members of the UNSC,<sup>26</sup> lest it be perceived as politicised, which could entail negative consequences for both its credibility and its legitimacy.<sup>27</sup> At the same time, others acknowledge that the ICC must navigate the realities of global politics<sup>28</sup> in its day-to-day operations and that, in order to fulfil its mandate, the ICC may rely upon the exercise of coercive power (military, economic, etc.) by other international actors.<sup>29</sup> Robinson neatly characterises the foregoing tension as dyadic: '[l]egally, the ICC is independent, and indeed its juridical legitimacy hinges on that independence. Yet the ICC is also, factually, utterly dependent'.<sup>30</sup> Consequently, regardless of the path chosen by the Court, it will result in seemingly opposite criticisms

24 See Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 77, pp. 88–90.

25 Janine Natalya Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities', 9 *Journal of International Criminal Justice* (2011) 521, pp. 542–543; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford, 2003) p. 68.

26 Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', 19 *Leiden Journal of International Law* (2006) 195, p. 206; William A. Schabas, 'The Banality of International Justice', 11 *Journal of International Criminal Justice* (2013) 545, p. 550.

27 Lionel Yee, 'The International Criminal Court and The Security Council: Articles 13(b) and 16', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999) pp. 146–147; Lutz Oette, 'Peace and Justice, or Neither? The Repercussions of the Al-Bashir Case for International Criminal Justice in Africa and Beyond', 8 *Journal of International Criminal Justice* (2010) 345, pp. 356–358.

28 For a prominent proponent of this view, see Kenneth A. Rodman, 'Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding', 12 *Journal of International Criminal Justice* (2014) 437, p. 439.

29 *Ibid.*, p. 442. See also Kenneth A. Rodman, 'Darfur and the Limits of Legal Deterrence', 30 *Human Rights Quarterly* (2008) 529, p. 530; Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', 22 *Leiden Journal of International Law* (2009) 99, p. 108.

30 Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of International Law* (2015) 323, p. 338 (footnote omitted).

because 'each side of the dyad is based in values that can be credibly regarded as values underlying international criminal justice'.<sup>31</sup> This utter dependence by the Court upon other actors is arguably most conspicuous in the context of its cooperation procedures, where the ICC is particularly reliant on State action.

The cooperation procedures in the Rome Statute are intrinsically weak. According to Antonio Cassese, the framers of the Court's constituent instrument 'left too many loopholes permitting states to delay or even thwart the Court's proceedings'.<sup>32</sup> Indeed, the weaknesses in the ICC's enforcement mechanisms drew the attention of the international media in June 2015 when the then Sudanese President, Omar Al Bashir, travelled to (and shortly thereafter fled from) South Africa, a State Party to the Rome Statute, despite the existence of two active warrants of arrest issued against him by the Court's Prosecutor.<sup>33</sup> The ICC is not only inherently reliant on States to arrest accused persons, but also to identify, trace, freeze, and/or seize their assets.<sup>34</sup>

The Court considers its asset freezing powers to be part of a wider system of 'asset recovery', which entails the preliminary steps of identifying, tracing, freezing, and/or seizure of assets.<sup>35</sup> The primary theoretical underpinnings for the freezing of assets with a view to their eventual forfeiture in most domestic criminal law contexts, that is to say both preventive and restorative rationales,<sup>36</sup> also manifest themselves in the Rome Statute. Indeed, William

31 *Ibid.*, p. 330.

32 Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* (1999) 144, p. 170. Cassese is particularly critical of: (i) the sanctions available in the event of non-cooperation with a request from the Court; (ii) in the event of competing requests for surrender or extradition, the failure to afford priority to ICC-issued requests; and (iii) the modalities of the provision allowing States to deny assistance on grounds of national security. See also Göran Sluiter, 'Obtaining Cooperation from Sudan – Where Is the Law?', 6 *Journal of International Criminal Justice* (2008) 871, p. 883.

33 See, e.g., Owen Bowcott, 'Sudan president Omar al-Bashir leaves South Africa as court considers arrest', *The Guardian*, 15 June 2015, [www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan](http://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan). All websites were accessed on 20 October 2020, unless otherwise mentioned.

34 This is not to say that States not party to the Rome Statute cannot assist the ICC; rather, they are not bound to do so under its constituent instrument. See ICC Statute, Art. 87(5) (a). For the view that this group of States could be obliged to cooperate under customary international law, see Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court', 88 *International Review of the Red Cross* (2006) 87.

35 See ICC, *Financial Investigations and Recovery of Assets*, [www.legal-tools.org/doc/ozm12](http://www.legal-tools.org/doc/ozm12), p. 5.

36 On which, see, e.g., Peter Alldrige, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing, Oxford, 2003), p. 45 *et seq.*

Schabas describes the purpose behind freezing accused persons' assets at the ICC as 'twofold':<sup>37</sup> 'First, it facilitates enforcement should the accused person be convicted and an order of forfeiture be imposed as part of the sentence. Second, freezing of assets is also important in the process of arrest and surrender, in that it helps to disrupt support networks of suspects'.<sup>38</sup>

As far as 'enforcement' is concerned, in the Rome Statute system, the Pre-Trial Chamber can request States to take protective measures for the purpose of forfeiture, which include freezing assets 'in particular for the ultimate benefit of victims'.<sup>39</sup> Further, in the event of a conviction, victims' claims to forfeited assets are explicitly prioritised above those of all other prospective claimants, with Rule 221(2) of the ICC Rules of Procedure and Evidence stating that: '[i]n all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims'.<sup>40</sup>

The weaknesses in the Court's cooperation regime can thus have serious implications for its forfeiture powers, pursuant to which fines, forfeiture orders, and orders for reparation can be imposed upon persons convicted of crimes under its jurisdiction. Scholars have claimed that, should the Trust Fund for Victims<sup>41</sup> be required to operate with insufficient resources, victims of international crimes may be left disappointed and disillusioned with the Court's reparation framework.<sup>42</sup> The significance of this problem is exacerbated by the fact that some individuals who commit crimes within the Court's jurisdiction may possess substantial personal wealth.<sup>43</sup> Cooperation is therefore paramount to

37 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edition, Oxford University Press, Oxford, 2016), p. 1320.

38 *Ibid.*

39 ICC Statute, Art. 57(3)(e).

40 ICC RPE, Rule 221(2). For analysis of how the Rome Statute governs competing claims for frozen assets, see Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations', in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, Leiden, 2016) pp. 242–244.

41 See ICC Statute, Art. 79; Assembly of States Parties, *Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of Such Victims* (ICC-ASP/1/Res.6).

42 See Mirjan Damaška, 'The International Criminal Court between Aspiration and Achievement', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 19, p. 31.

43 See, e.g., David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', 23 *Fordham International Law Journal* (1999) 473, p. 479 (noting, in discussing the ICTY, that 'most observers believe that indicted leaders such as Milosevic deliberately fostered inter-communal hostility and conflict as a means to secure and maintain political power and personal wealth'); Manuel Galvis Martínez, 'Forfeiture of Assets at the International

the effective functioning of the ICC reparations system as well as the capacity of the Court to enforce orders for fines and forfeiture of assets.

In response to the weaknesses in the ICC's cooperation regime, some scholars have suggested that a closer relationship between the Court and the UNSC might strengthen the enforcement powers at the disposal of the ICC.<sup>44</sup> Among the tools available to the UNSC, asset freezes and travel bans have been suggested as valuable tools for strengthening the enforcement capacity of the ICC.<sup>45</sup> Indeed, not only have the Court and the UN already acknowledged the existence of a relationship between their respective responsibilities, particularly in respect of peace and security,<sup>46</sup> but the ICC-UN Relationship

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Criminal Court: The Short Arm of International Criminal Justice', 12 *Journal of International Criminal Justice* (2014) 193, pp. 195–204. Cf. Mahnouch H. Arsanjani and W. Michael Reisman, 'The Law-in-Action of the International Criminal Court', 99 *American Journal of International Law* (2005) 385, p. 401; Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law* (2011) 475, p. 490. On certain perpetrators of international crimes as 'profiteers', see Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in Alette Smeulers and Roelof Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, Antwerp, 2008) pp. 249–250; Alette Smeulers and Barbora Holá, 'ICTY and the Culpability of Different Types of Perpetrators of International Crimes', in Alette Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia, Antwerp, 2010) p. 186.

44 See, e.g., Dan Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations', 32 *Netherlands Yearbook of International Law* (2001) 27, pp. 36–38.

45 See Michael P. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', 49 *DePaul Law Review* (2000) 925, pp. 944–946; Annie Wartanian, 'The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation: Lessons from the U.N. Tribunals Applied to the Case of Uganda', 36 *Georgetown Journal of International Law* (2005) 1289, p. 1307; Marina Mancini, 'UN Sanctions Targeting Individuals and ICC Proceedings: How to Achieve a Mutually Reinforcing Interaction', in Natalino Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, Leiden, 2016) p. 228; Nadia Banteka, 'Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem', 49 *Cornell International Law Journal* (2016) 521, p. 541. See also, on the potential use of UNSC sanctions to bring an end to grave violations of international humanitarian law committed against children, some of which could constitute war crimes under the Rome Statute, David S. Koller and Miriam Eckenfels-Garcia, 'Using Targeted Sanctions to End Violations against Children in Armed Conflict', 33 *Boston University International Law Journal* (2015) 1, pp. 20–21.

46 See ICC-UN Relationship Agreement, preamble ('Noting the important role assigned to the International Criminal Court in dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute, and which threaten the peace, security and well-being of the world'). See also ICC, *Report of*

Agreement<sup>47</sup> and the Rome Statute<sup>48</sup> offer firm legal bases upon which such closer cooperation might be built. The following section surveys eight situations in which the two bodies' actions (could) have interacted, primarily in circumstances related to armed conflict, demonstrating that, despite the UNSC having had ample opportunity to play an active role in supporting the ICC in this manner, it has rarely chosen to do so.

### 3 In Search of Coordination

The ICC is not the first international(ised) criminal tribunal<sup>49</sup> whose objectives and operations have coincided with those of the UNSC,<sup>50</sup> with the mandates of sanctions regimes established by the latter interacting with the activities of the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>51</sup> the International Criminal Tribunal for Rwanda,<sup>52</sup> the Special Court for Sierra Leone,<sup>53</sup> and the Special Tribunal for Lebanon.<sup>54</sup> This is hardly unexpected in view of the partially overlapping objectives of some international(ised) criminal justice processes and UNSC action briefly discussed in Part 2. Nor is it startling

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*the International Criminal Court on its Activities in 2014/15* (UN Doc. A/70/350), para. 95 ('United Nations targeted sanctions are an important tool for addressing threats to international peace and security, including atrocity crimes').

47 ICC-UN Relationship Agreement, Art. 3.

48 ICC Statute, Art. 87(6) ('The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'). See also Rod Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities', 21 *Leiden Journal of International Law* (2008) 431, p. 444.

49 According to Sarah Williams, there is no universally-agreed definition of internationalised criminal tribunals, but they do appear to share a number of defining features, including 'a mix of national and international elements in the material jurisdiction of the tribunals, or at least that the crimes within the jurisdiction are of concern to the international community'. Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart, Oxford, 2012) p. 249.

50 See Paul Bentall, 'United Nations targeted sanctions and other policy tools: diplomacy, legal, use of force', in Biersteker et al. (eds.), *supra* note 8, pp. 96–97.

51 S/RES/724 (1991), para. 5(b), terminated pursuant to S/RES/1074 (1996), para. 6.

52 S/RES/918 (1994), para. 14, terminated pursuant to S/RES/1823 (2008), para. 2.

53 S/RES/1521 (2003), para. 21, terminated pursuant to S/RES/2288 (2016), para. 2; S/RES/1532 (2004), para. 1. S/RES/1521 (2003), para. 1 dissolved the committee established under S/RES/1343 (2001), para. 14. In turn, S/RES/1343 (2001), para. 1 dissolved the committee established under S/RES/985 (1995), para. 4.

54 S/RES/1636 (2005), para. 3(b).

that the UNSC has requested States to give effect to targeted sanctions measures under Chapter VII of the UN Charter in multiple situations in which the ICC Prosecutor has also been engaged in investigative activities. This section examines eight cases where the respective asset freezing powers with which the Court and the UNSC are equipped (might) have coincided. One purpose of this inquiry is to identify situations in which the request of such measures by the UN body has (whether deliberately or incidentally) served to support the actions of the Court. A further objective is to draw attention to cases where UNSC action could have assisted the Court in achieving its objectives, but the UN body took no such action. A final goal is to ascertain the reasons behind UNSC (in)action in each of the two foregoing scenarios. It is beyond the scope of the article to scrutinise cases in which the Court has failed to act in scenarios in which the UNSC has taken coercive action. There have been a number of occasions since the entry into force of the Rome Statute in which the UN body has called upon UN Member States to freeze individuals' assets where the Court has not been engaged.<sup>55</sup> However, in view of the many political objectives for which targeted sanctions measures have been sought by the UNSC compared with the comparatively narrow legal basis on which the Court can request the execution of such measures,<sup>56</sup> it is the view of the present author that to conduct such an investigation would be of little value.

### 3.1 *Libya: Coexistent and Coordinated?*

The UNSC instituted its (second)<sup>57</sup> sanctions regime for Libya in Resolution 1970.<sup>58</sup> Targeted sanctions were imposed to respond to the actions of the Libyan Government taken against demonstrators protesting against the regime of Muammar Gaddafi (or Qadhafi). As well as imposing measures aimed at preventing the supply, sale, or transfer of arms to the Gaddafi regime, a travel ban, and asset freezes,<sup>59</sup> the UNSC also referred the situation in Libya to the Prosecutor of the ICC.<sup>60</sup> In addition, Resolution 1970 established a sanctions

55 See, e.g., the UNSC sanctions regimes for Iran, established under S/RES/1737 (2006), terminated pursuant to S/RES/2231 (2015), and Guinea-Bissau, established under S/RES/2048 (2012).

56 See discussion *infra* note 228 and accompanying text.

57 The UNSC had previously imposed targeted sanctions in response to the suspected involvement of Libyan Government officials in the bombing of Pan Am flight 103 and *Union des transports aériens* flight 772. See S/RES/748 (1992), paras. 4–6; S/RES/883 (1993), paras. 3–7. The UNSC terminated the sanctions regime in September 2003. See S/RES/1506 (2003), paras. 1–2.

58 S/RES/1970 (2011), para. 24.

59 *Ibid.*, paras. 9–21.

60 *Ibid.*, paras. 4–8.

committee charged with, among other responsibilities, monitoring the execution of the measures imposed, designating individuals for listing, and considering exemptions.<sup>61</sup> As for the targeted individuals, Muammar Gaddafi and five of his children, including his son Saif Al-Islam Gaddafi, became the object of assets freezing measures.<sup>62</sup> While the travel ban also targeted members of the immediate Gaddafi family, senior members of his regime, including Director of Military Intelligence, Abdullah Al-Senussi, were also listed.<sup>63</sup> Mr Al-Senussi was added to the list of individuals subject to an assets freeze in Resolution 1973,<sup>64</sup> in which the UNSC also decided to impose financial sanctions on entities.<sup>65</sup> The UNSC partially relaxed the sanctions imposed by these two resolutions after anti-Gaddafi forces captured the Libyan capital, Tripoli.<sup>66</sup> This said, the Libya sanctions regime remains in force, having been renewed with a particular focus on tackling the illicit export of crude oil from Libya.<sup>67</sup> At the time of writing, Muammar Gaddafi,<sup>68</sup> Saif Al-Islam Gaddafi,<sup>69</sup> and Abdullah Al-Senussi<sup>70</sup> all remain listed, despite the death of Muammar Gaddafi on 20 October 2011.

After the UNSC referred the situation in Libya to the ICC in Resolution 1970, the Prosecutor successfully applied for the issue of warrants of arrest for three individuals in the first instance. Those were: (i) Muammar Mohammed Abu

61 *Ibid.*, paras. 24–25.

62 *Ibid.*, Annex II.

63 *Ibid.*, Annex I.

64 S/RES/1973 (2011), Annex II.

65 *Ibid.*

66 S/RES/2009 (2011), paras. 13–19.

67 See S/RES/2146 (2014).

68 Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, *Muammar Mohammed Abu Minyar Qadhafi*, [www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/muammar-mohammed-abu-minyar-qadhafi](http://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/muammar-mohammed-abu-minyar-qadhafi) (noting, by way of '[a]dditional information', his '[r]esponsibility for ordering repression of demonstrations' and 'human rights abuses').

69 Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, *Saif Al-Islam Qadhafi*, [www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/saif-al-islam-qadhafi](http://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/saif-al-islam-qadhafi) (noting, in the '[a]dditional information' category, his '[c]loseness of association with regime' and '[i]nflammatory public statements encouraging violence against demonstrators').

70 Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, *Abdullah Al-Senussi*, [www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/abdullah-al-senussi](http://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/abdullah-al-senussi) (noting, under the heading '[a]dditional information', his 'Military Intelligence involvement in suppression of demonstrations', 'suspicion of [his] involvement in [the] Abu Selim prison massacre', and his conviction in absentia for the bombing of *Union des transports aériens* flight 772).

Minyar Gaddafi;<sup>71</sup> (ii) Saif Al-Islam Gaddafi;<sup>72</sup> and (iii) Abdullah Al-Senussi.<sup>73</sup> As for their assets, in the words of the then Prosecutor of the Court, Luis Moreno Ocampo, speaking after the death of Muammar Gaddafi in November 2011:

ICC Pre-Trial Chamber I has since unsealed arrest warrants for two individuals in the situation in Libya: (i) for the alleged former Head of the Libyan Internal Security Agency, Al-Tuhamy Mohamed Khaled, in April 2013<sup>74</sup> and (ii) for an alleged commander in the Al-Saiqa Brigade, one of many armed groups involved in the conflict in post-Gaddafi Libya, Mahmoud Mustafa Busayf Al-Werfalli, in August 2017<sup>75</sup> and again in July 2018.<sup>76</sup>

The coexistent activities of the UNSC and the ICC with regard to Libya might appear to present an ‘appropriate’<sup>77</sup> opportunity for the two bodies to coordinate their respective asset freezing powers for mutual benefit. Indeed, there is some evidence of coordination in this situation, where the UNSC listed two individuals, Muammar Gaddafi and Saif Al-Islam Gaddafi, later subject to ICC arrest warrants in the same resolution as that which referred the situation in Libya to the Court under Article 13(b) ICC Statute, with a third, Abdullah Al-Senussi, following less than one month thereafter. Bentall describes the responses of the UN organ and the ICC to events in Libya, as ‘reinforcing’, arguing that ‘[t]he judicial processes and targeted sanctions pulled logically in the same direction in isolating the Qadhafi regime’.<sup>78</sup> Larissa van den Herik offers a plausible reason behind the UNSC’s reinforcement of the ICC in the situation

71 ICC, *Situation in the Libyan Arab Jamahiriya*, Case No. ICC-01/11-01/11-2, Pre-Trial Chamber I, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.

72 ICC, *Situation in the Libyan Arab Jamahiriya*, Case No. ICC-01/11-01/11-3, Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011.

73 ICC, *Situation in the Libyan Arab Jamahiriya*, Case No. ICC-01/11-01/11-4, Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011.

74 ICC, *Prosecutor v. Al-Tuhamy Mohamed Khaled*, Case No. ICC-01/11-01/13-1, Pre-Trial Chamber I, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and *ex parte* Annex, 18 April 2013.

75 ICC, *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case No. ICC-01/11-01/17-2, Pre-Trial Chamber I, Warrant of Arrest, 15 August 2017.

76 ICC, *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case No. ICC-01/11-01/17-13, Pre-Trial Chamber I, Second Warrant of Arrest, 4 July 2018.

77 *ICC-UN Relationship Agreement*, Art. 3.

78 Bentall, *supra* note 52, p. 98.

in Libya, namely the unanimity of the UN body in referring the situation in Libya to the Court.<sup>79</sup>

In 2014, Australia, Finland, Germany, Greece, and Sweden sponsored a project studying how to revise and improve the implementation of UNSC sanctions.<sup>80</sup> This project culminated in the publication of the Compendium of the High-level Review of United Nations Sanctions in June 2015.<sup>81</sup> Among the recommendations put forward in the Compendium are several directed at the relationship between targeted sanctions and international(ised) criminal justice institutions.<sup>82</sup> Recommendation 100 resembles the pattern observed with regard to the 2011 situation in Libya:

With the ICC as an example, sanctions committees should consider enabling the automatic listing of persons sought by the Court once a warrant for their arrest has been issued by a Pre-Trial Chamber for the alleged commission of crimes within the jurisdiction of the Court, particularly where the situation has been referred by the Security Council itself.<sup>83</sup>

Yet, as this article will demonstrate in the following sections, practical support for the Court by sanctions committees has very much constituted the exception rather than the rule.

### 3.2 *Coexistent but Uncoordinated*

#### 3.2.1 Democratic Republic of the Congo

The UNSC established a sanctions regime for the Democratic Republic of the Congo (DRC) in Resolution 1493.<sup>84</sup> The first measures taken in this context were not targeted at individuals, but consisted of an arms embargo against a number of armed groups operating in the North Kivu, South Kivu, and Ituri regions.<sup>85</sup>

79 Larissa van den Herik, 'The Individualization of Enforcement in International Law: Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings', in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds.), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff, Leiden, 2017) p. 244.

80 *Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General* (UN Doc. A/69/941-S/2015/432).

81 *Ibid.*, Annex.

82 *Ibid.*, pp. 57–59.

83 *Ibid.*, p. 59.

84 S/RES/1493 (2004), para. 20.

85 *Ibid.*

This reflects the objectives pursued by the measures, which primarily related to the armed conflict in the region.<sup>86</sup> It was not until March 2004 that a sanctions committee, with the power, *inter alia*, to monitor violations of the arms embargo, was established.<sup>87</sup> In a further resolution, adopted in May 2005,<sup>88</sup> the UNSC extended the arms embargo across the DRC.<sup>89</sup> In the same resolution, the UN organ decided that UN Member States should enforce a travel ban and an asset freeze against 'all persons designated by the Committee as acting in violation of' the broadened arms embargo.<sup>90</sup> These measures were extended to target the political and military leadership of foreign armed factions operating in DRC territory and the leaders of Congolese militias in receipt of foreign support.<sup>91</sup> The UNSC decided upon a further extension of the sanctions in July 2006, on this occasion targeting:

- Political and military leaders recruiting or using children in armed conflict in violation of applicable international law; [and]
- Individuals committing serious violations of international law involving the targeting of children in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement[.]<sup>92</sup>

The UN body has renewed (and revised) the measures in a series of subsequent resolutions.<sup>93</sup> It was pursuant to the foregoing targeted sanctions that a number of Congolese nationals who later also became the object of ICC-issued arrest warrants were listed by the Resolution 1533 Sanctions Committee.

It was the President of the DRC who referred the situation on Congolese territory to the ICC's Prosecutor.<sup>94</sup> Having determined that the criteria enabling the initiation of an investigation, including that '[t]he information available to the Prosecutor provide[d] a reasonable basis to believe that a crime within the

86 *Ibid.*, preamble; paras 13–14.

87 S/RES/1533 (2004), para. 8.

88 S/RES/1596 (2005).

89 *Ibid.*, para. 1.

90 *Ibid.*, paras. 13–16.

91 S/RES/1649 (2005), para. 2.

92 S/RES/1698 (2006), para. 13.

93 S/RES/1768 (2007); S/RES/1771 (2007); S/RES/1799 (2008); S/RES/1804 (2008); S/RES/1857 (2008); S/RES/1896 (2009); S/RES/1952 (2010); S/RES/2021 (2011); S/RES/2078 (2012); S/RES/2136 (2014); S/RES/2198 (2015); S/RES/2293 (2016); S/RES/2360 (2017); S/RES/2424 (2018); S/RES/2478 (2019).

94 Office of the Prosecutor, *Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo* (ICC-OTP-20040419-50), [www.legal-tools.org/doc/520b63](http://www.legal-tools.org/doc/520b63).

jurisdiction of the Court ha[d] been or [was] being committed',<sup>95</sup> were met,<sup>96</sup> the Prosecutor informed the Court's Presidency, which assigned the Situation in the DRC to ICC Pre-Trial Chamber I.<sup>97</sup> Within this Situation, the Prosecutor successfully sought warrants of arrest for multiple individuals, all of whom have also been listed by the Sanctions Committee established by the UNSC pursuant to Resolution 1533.

### 3.2.1.1 *Thomas Lubanga Dyilo*

The DRC Sanctions Committee listed Thomas Lubanga Dyilo, the then leader of a Congolese militia, *Union des Patriotes Congolais* (Union of Congolese Patriots or UPC), on 1 November 2005 for contravening the arms embargo.<sup>98</sup> The narrative summary of reasons<sup>99</sup> for the listing of Mr Lubanga provided by the Committee also notes his involvement in the 'recruitment and use of children in Ituri in 2002 to 2003' under the heading '[a]dditional information'.<sup>100</sup> This said, the sole '[r]eason' for his listing is limited to violations of the measures concerning the movement of arms established in Resolution 1493.<sup>101</sup>

As for his ICC arrest warrant, Pre-Trial Chamber I found that there were 'reasonable grounds to believe' that Mr Lubanga was criminally responsible under the Rome Statute for three war crimes, namely enlisting and conscripting children under the age of fifteen and using children under the same age to participate actively in hostilities.<sup>102</sup> It was for this reason, among others, that the Pre-Trial Chamber issued a warrant for Mr Lubanga's arrest. After the issuance of an arrest warrant, in accordance with Article 57(3)(e) of the Rome Statute, the Pre-Trial Chamber ordered the Registry of the Court to transmit requests for cooperation from States with a view to identifying, tracing, freezing,

95 ICC Statute, Art. 53(1)(a).

96 ICC, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04-1, Presidency, Decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2005.

97 *Ibid.*

98 Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Thomas Lubanga*, [www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/thomas-lubanga](http://www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/thomas-lubanga).

99 *Ibid.* 'In accordance with paragraph 2 (g) of the Guidelines for the conduct of its work, the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo makes accessible a narrative summary of reasons for the listing for individuals, groups, undertakings and entities included in its sanctions list.'

100 *Ibid.*

101 *Ibid.*

102 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2-tEN, Pre-Trial Chamber I, Warrant of Arrest, 10 February 2006, p. 4.

and seizing Mr Lubanga's property and assets.<sup>103</sup> In terms of specific assets targeted, Pre-Trial Chamber 1's request to the DRC refers to information from the Prosecutor, according to which Mr Lubanga possessed houses in Bunia and Goma as well as a vehicle in the latter.<sup>104</sup> The Prosecutor also indicated that 'funds from a local airline might in fact belong to Mr Lubanga'.<sup>105</sup> Notable for the purposes of the present analysis, in each of the two requests for cooperation issued by the Pre-Trial Chamber (*i.e.* one directed at the DRC and the second aimed at other States Parties to the Rome Statute), explicit reference was made to Mr Lubanga's listing by the Sanctions Committee established by the UNSC in Resolution 1533, as follows:

CONSIDERING that paragraph 15 of United Nations Security Council resolution 1596, states that "... all States shall ... immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated by the [Sanctions] Committee pursuant to paragraph 13 above, or that are held by entities owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction ...";

CONSIDERING that the "List of individuals and entities subject to the measures imposed by Paragraphs 13 and 15 of Security Council resolution 1596 (2005)", in which the Sanctions Committee identifies Mr Thomas Lubanga Dyilo as one of the persons concerned by the said resolution[.]<sup>106</sup>

103 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-22-tEN, Pre-Trial Chamber I, Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo, 9 March 2006; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-62-tEN, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo, 31 March 2006. *See also* ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1-Corr-Red, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, p. 64.

104 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-22-tEN, Pre-Trial Chamber I, Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo, 9 March 2006, p. 3.

105 *Ibid.*

106 *Ibid.* *See also* ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-62-tEN, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo, 31 March 2006, p. 3.

*Prima facie*, the respective asset freezing measures adopted by the DRC Sanctions Committee and the Court with respect to Mr Lubanga might appear to indicate concerted action. However, as Annalisa Ciampi contends, '[t]he ground which justifies the listing [by the DRC Sanctions Committee] ... has little, if anything, to do with the crimes within the jurisdiction of the ICC for which Lubanga [was] charged'.<sup>107</sup> Paul Bentall reaches a similar conclusion, namely that the execution of targeted sanctions against Mr Lubanga under the UN Charter shortly before the ICC issued a warrant for his arrest was 'coincidental',<sup>108</sup> rather than coordinated. Bentall references the fact that the UNSC did not refer the situation in the DRC to the Court in accordance with Article 13(b) of the Rome Statute as further evidence in support of this argument.<sup>109</sup> It is difficult to dispute these conclusions. Mr Lubanga's listing by the DRC Sanctions Committee (despite overtly recognising his participation in the recruitment and use of children in armed conflict) was for violations of the arms embargo, while the ICC issued a warrant for his arrest for enlisting, conscripting, and using child soldiers. Accordingly, though the ICC referred to Mr Lubanga's listing by the DRC Sanctions Committee in requesting the DRC and other States Parties to its constituent instrument to freeze his assets, it is a stretch to describe the respective action of the two bodies here as coordinated. As will be demonstrated in the following paragraphs, similar conclusions can be reached with regard to numerous other DRC-based individuals subject to parallel, if not coordinated, asset freezing requests from the UNSC and the ICC.

### 3.2.1.2 *Germain Katanga*

On the same day that Thomas Lubanga Dyilo was added to the list of targeted individuals, the DRC Sanctions Committee listed Germain Katanga, a commander in the *Force de résistance patriotique d'Ituri* (Front for Patriotic Resistance in Ituri or FRPI), a Congolese armed group, for breaching the arms embargo.<sup>110</sup> Again, similar to the listing of Mr Lubanga, the Sanctions Committee notes Mr Katanga's involvement in recruiting and using children in Ituri between 2002 and 2003 in the '[a]dditional information' category.<sup>111</sup>

107 Annalisa Ciampi, 'Security Council Targeted Sanctions and Human Rights', in Bardo Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press, Oxford, 2011) p. 136.

108 Bentall, *supra* note 52, pp. 97–98.

109 *Ibid.*, p. 97.

110 Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Germain Katanga*, [www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/germain-katanga](http://www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/germain-katanga).

111 *Ibid.*

Turning to the ICC, Pre-Trial Chamber I issued a warrant of arrest for Mr Katanga on 2 July 2007.<sup>112</sup> The warrant listed multiple allegations of crimes against humanity and war crimes.<sup>113</sup> After the warrant had been issued, Pre-Trial Chamber I requested cooperation from States in the identification, tracing, freezing, or seizure of Mr Katanga's property and assets, 'including his moveable and immovable property, bank accounts, [and] shares in a partnership, business or private company'.<sup>114</sup> In a further order on the execution of the arrest warrant, the same Pre-Trial Chamber took note of information supplied by the Prosecutor that, at the time the crimes contained in his application for a warrant were allegedly committed, Mr Katanga 'reportedly had two residences in Aveba [and] that he also can be expected to have retained at least some of the fruits of the crimes in which his combatants frequently engaged'.<sup>115</sup> Pre-Trial Chamber I also decided that the ICC's Registrar ought to transmit a request for cooperation to the DRC with respect to Mr Katanga's assets,<sup>116</sup> having referenced 'resolution 1596 (2005) and the list of persons and entities which are subject to measures imposed by paragraphs 13 and 15 of the resolution'.<sup>117</sup> In this request for cooperation, as with the cooperation requests transmitted to the DRC and other States Parties to the Rome Statute with respect to Thomas Lubanga Dyilo's assets,<sup>118</sup> the Registrar overtly mentioned the inclusion of Mr Katanga on the DRC Sanctions Committee's list of targeted individuals.<sup>119</sup> The wording used is identical to that contained in the request issued to the

112 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-1-tENG, Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, 2 July 2007.

113 *Ibid.*, p. 6 (listing the crimes against humanity of murder, other inhumane acts, and sexual slavery and the war crimes of wilful killing, inhuman treatment, using children under the age of fifteen years to participate actively in hostilities, sexual slavery, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging a town or place, even when taken by assault).

114 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-7-tENG, Pre-Trial Chamber I, Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga, 6 July 2007, p. 3.

115 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-54-tENG, Pre-Trial Chamber I, Order on the execution of the warrant of arrest against Germain Katanga, 5 November 2007, p. 5.

116 *Ibid.*, p. 8.

117 *Ibid.*, p. 3.

118 *See supra* note 109.

119 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-7-tENG, Pre-Trial Chamber I, Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga, 6 July 2007, p. 2.

DRC by Pre-Trial Chamber I in respect of Mr Lubanga's assets, but for naming Mr Katanga rather than Mr Lubanga as an individual targeted by the UNSC's targeted sanctions measures.<sup>120</sup>

### 3.2.1.3 *Bosco Ntaganda*

The Sanctions Committee also added Bosco Ntaganda, a UPC military commander, to the list of targeted individuals on 1 November 2005.<sup>121</sup> As with Thomas Lubanga Dyilo and Germain Katanga, Mr Ntaganda was listed for violating the arms embargo,<sup>122</sup> while his involvement in the recruitment and use of children in the armed conflicts in Ituri and North Kivu is mentioned by way of '[a]dditional information'.<sup>123</sup>

ICC Pre-Trial Chamber I issued an arrest warrant for Mr Ntaganda on 7 August 2006.<sup>124</sup> The crimes for which, in the opinion of the Pre-Trial Chamber, there were 'reasonable grounds to believe' that Mr Ntaganda was criminally liable were enlistment and conscription of children under the age of fifteen and use of children under fifteen to participate actively in hostilities,<sup>125</sup> all war crimes under Article 8(2) of the Rome Statute.<sup>126</sup> As for Mr Ntaganda's property and assets, in evaluating the Prosecutor's application for a warrant of arrest,<sup>127</sup> Pre-Trial Chamber I requested that the Court's Registry prepare (and transmit) requests for cooperation from the DRC,<sup>128</sup> Uganda,<sup>129</sup> and Rwanda.<sup>130</sup> Pre-Trial Chamber I made this request so that these States might 'identify, trace and freeze or seize the property and assets belonging to Bosco Ntaganda at the

<sup>120</sup> *Ibid.*

<sup>121</sup> Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Bosco Taganda*, [www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/bosco-taganda](http://www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/bosco-taganda).

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* ('According to the Office of the [Special Representative of the Secretary-General] on Children and Armed Conflict, he was responsible for recruitment and use of children in Ituri in 2002 and 2003, and 155 cases of direct and/or command responsibility for recruitment and use of children in North Kivu from 2002 to 2009').

<sup>124</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2-Anx-tEN, Pre-Trial Chamber I, Warrant of Arrest, 22 August 2006.

<sup>125</sup> *Ibid.*, p. 4.

<sup>126</sup> Rome Statute, *supra* note 2, Art. 8(2).

<sup>127</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1-Red-tENG, Pre-Trial Chamber I, Decision on the Prosecution Application for a Warrant of Arrest, 6 March 2007.

<sup>128</sup> *Ibid.*, p. 35; *see also* para. 87.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, p. 36; *see also* para. 87.

earliest opportunity, without prejudice to the rights of third parties',<sup>131</sup> despite the ICC Prosecutor having made 'no application to this effect'.<sup>132</sup>

It is noticeable that, unlike with Thomas Lubanga Dyilo and Germain Katanga, no mention is made of Mr Ntaganda's pre-existing place on the DRC sanctions list, at least not in documents that are publicly available and/or unredacted. This could be seen as an indication that the ICC abandoned its strategy of explicitly referencing an individual's listing by the Resolution 1533 Sanctions Committee when requesting cooperation from States in the freezing of assets. This, in turn, could be viewed as a decline in the already minimal level of coordination between the UNSC and the ICC in this sphere of their respective operations.

#### 3.2.1.4 *Mathieu Ngudjolo Chui*

Another individual added to the DRC sanctions list on 1 November 2005 is FRPI commander Mathieu Ngudjolo Chui.<sup>133</sup> Similar to his fellow FRPI leader, Germain Katanga, Mr Ngudjolo was listed for flouting the arms embargo.<sup>134</sup> As with the three foregoing listees, the Sanctions Committee remarked upon Mr Ngudjolo's use of children in armed conflict, this time in Ituri in 2006, under the heading '[a]dditional information'.<sup>135</sup>

The Court's Pre-Trial Chamber I issued a warrant of arrest for Mr Ngudjolo shortly after that of his FRPI colleague, Germain Katanga.<sup>136</sup> The warrants also shared similarities with respect to the crimes contained therein.<sup>137</sup> On 14 November 2007, the Registrar transmitted a request for cooperation from the DRC with a view to identifying, tracing, freezing, and/or seizing Mr Ngudjolo's property and assets<sup>138</sup> in accordance with an order by Pre-Trial Chamber I to this

<sup>131</sup> *Ibid.*, pp. 35, 36.

<sup>132</sup> *Ibid.*, para. 88.

<sup>133</sup> Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Mathieu Chui Ngudjolo*, [www.un.org/security-council/sanctions/1533/materials/summaries/individual/mathieu-chui-ngudjolo](http://www.un.org/security-council/sanctions/1533/materials/summaries/individual/mathieu-chui-ngudjolo).

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-260-tENG, Pre-Trial Chamber I, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007.

<sup>137</sup> *Ibid.*, p. 6 (listing the crimes against humanity of murder, other inhumane acts, and sexual slavery and the war crimes of wilful killing, inhuman treatment, using children under the age of fifteen years to participate actively in hostilities, sexual slavery, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging a town or place, even when taken by assault).

<sup>138</sup> ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-266, Pre-Trial Chamber I, Demande adressée à la république démocratique du Congo en vue d'obtenir

effect.<sup>139</sup> The order on the execution of the warrant of arrest for Mr Ngudjolo<sup>140</sup> also resembles that of Germain Katanga. For the purposes of the present analysis, it is notable that Pre-Trial Chamber I took note of UNSC Resolution 1596 (2005) and the list of persons and entities targeted by measures imposed by paragraphs 13 and 15 thereof.<sup>141</sup> As for specific assets identified as belonging to Mr Ngudjolo, the same Pre-Trial Chamber noted information provided by the Prosecutor that Mr Ngudjolo allegedly had a residence in Ituri at the time of the events covered by the Prosecutor's application for a warrant of arrest, and that he retained part of the proceeds of the crimes in which his troops regularly engaged.<sup>142</sup>

It is important to observe at this stage that the Court's Trial Chamber II acquitted Mr Ngudjolo on 18 December 2012,<sup>143</sup> with the Appeals Chamber upholding this decision on 27 February 2015.<sup>144</sup> Neither of these ICC decisions led to Mr Ngudjolo's de-listing by the DRC Sanctions Committee. On the contrary, he remains a designated individual at the time of writing, that is to say more than six years after his acquittal at trial. Might the lack of effect on the part of the Court's decision on Mr Ngudjolo's continued presence on the DRC sanctions list indicate an absence of coordination between the two asset freezing processes under examination? Larissa van den Herik offers another possible explanation, namely that 'individuals can be listed and subjected to UN sanctions for different reasons than those underlying ICC prosecutions'.<sup>145</sup> It has been shown that Mr Ngudjolo, like Thomas Lubanga Dyilo, Germain Katanga, and Bosco Ntaganda, found himself on the sanctions list for violating the arms embargo. As van den Herik contends: 'most listings are grounded on an

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l'identification, la localisation, le gel et la saisie des biens et avoirs de Mathieu Ngudjolo Chui [Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Mathieu Ngudjolo Chui], 14 November 2007.

139 *Ibid.*, p. 2.

140 ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-294, Pre-Trial Chamber I, Version Publique Expurgée de l' « Ordonnance relative à l'exécution du mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chui » rendue le 6 juillet 2007 [Public redacted version of the "Order on the execution of the warrant of arrest against Mathieu Ngudjolo Chui" issued on 6 July 2007], 21 February 2008.

141 *Ibid.*, p. 2.

142 *Ibid.*, p. 5.

143 ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12-3-tENG, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 18 December 2012.

144 ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12-271-Corr, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 27 February 2015.

145 van den Herik, *supra* note 82, p. 249.

individual's contribution to obstructing the peace process and such a reason may maintain or even increase in validity upon return of an acquitted person, thus potentially justifying the continuation of the listing<sup>146</sup> Such a conclusion would appear to be more than reasonable when scrutinising the cases of the individuals subject to financial sanctions implemented under the auspices of the UNSC and ICC proceedings in the DRC context. It remains to be seen, however, whether an individual designated by a UNSC-established sanctions committee for alleged violations of international humanitarian law and acquitted of those same violations by the ICC would find themselves delisted at the UN level following their acquittal. In view of the state of sanctions committee practice as far as the delisting of individuals (and entities) is concerned at the time of writing,<sup>147</sup> the present author doubts whether this would be the case.

### 3.2.1.5 *Callixte Mbarushimana*

The Sanctions Committee established in Resolution 1533 listed Callixte Mbarushimana, who allegedly had a senior role in the *Forces démocratiques de libération du Rwanda* (Democratic Forces for the Liberation of Rwanda or FDLR), an armed militia active in the eastern DRC, on 3 March 2009.<sup>148</sup> According to the Sanctions Committee, Mr Mbarushimana was targeted by individual sanctions because 'he impeded the disarmament and the voluntary repatriation and resettlement of combatants' in contravention of paragraph 4 of Resolution 1857.<sup>149</sup>

ICC Pre-Trial Chamber I issued a warrant of arrest for Callixte Mbarushimana on 28 September 2010.<sup>150</sup> The arrest warrant contained a list of 11 crimes under the Court's jurisdiction for which Pre-Trial Chamber I was satisfied to the required standard that Mr Mbarushimana was responsible.<sup>151</sup> However,

<sup>146</sup> *Ibid.*

<sup>147</sup> See *supra* notes 70–72 and accompanying text. On entities, see Dini Sejko and Daley J. Birkett, 'When United Nations Sanctions Impact International Financial Governance: Lessons from the Libyan Sovereign Wealth Fund' 34 *American University International Law Review* (2018) 387, pp. 420–425.

<sup>148</sup> Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Callixte Mbarushimana*, [www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/callixte-mbarushimana](http://www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/callixte-mbarushimana).

<sup>149</sup> *Ibid.*

<sup>150</sup> ICC, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10-2-tENG, Pre-Trial Chamber I, Warrant of Arrest for Callixte Mbarushimana, 28 September 2010.

<sup>151</sup> *Ibid.*, para. 10 (listing the crimes against humanity of murder, torture, rape, other inhuman acts, and persecution and the war crimes of attacks against the civilian population, destruction of property, murder, torture, rape, and inhuman treatment).

unlike in certain earlier decisions on applications for arrest warrants, the Pre-Trial Chamber made no mention of Mr Mbarushimana's assets.<sup>152</sup> Nor, to the best of the present author's knowledge, was any such mention made in later publicly available filings. Similar to the situation with Mathieu Ngudjolo Chui,<sup>153</sup> despite the Court's Pre-Trial Chamber I declining to confirm the charges<sup>154</sup> against Mr Mbarushimana on 16 December 2011,<sup>155</sup> and with the Appeals Chamber having unanimously dismissed the Prosecutor's appeal against this decision on 30 May 2012,<sup>156</sup> his name remains on the list of designated individuals. There is therefore limited evidence of coordinated action between the two bodies in this case. A similar conclusion can be reached with regard to Sylvestre Mudacumura.

### 3.2.1.6 *Sylvestre Mudacumura*

The DRC Sanctions Committee listed Sylvestre Mudacumura, the alleged commander of the FDLR-affiliated *Forces Combattantes Abacunguzi*, on 1 November 2005 for trafficking arms in violation of the embargo.<sup>157</sup> The Committee also mentions information from the Office of the Special Representative of the UN Secretary-General on Children and Armed Conflict as regards Mr Mudacumura's responsibility for '27 cases of recruitment and use of children by troops under his command in North Kivu from 2002 to 2007' in the '[a]dditional information' category.<sup>158</sup>

ICC Pre-Trial Chamber II issued an arrest warrant for Sylvestre Mudacumura on 13 July 2012.<sup>159</sup> The warrant specified multiple war crimes for which the Pre-Trial Chamber was satisfied that there were 'reasonable grounds to believe'

<sup>152</sup> ICC, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10-7, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest for Callixte Mbarushimana, 28 September 2010.

<sup>153</sup> van den Herik, *supra* note 82, p. 249.

<sup>154</sup> ICC Statute, Art. 61.

<sup>155</sup> ICC, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10-465-Red, Pre-Trial Chamber I, Decision on the confirmation of charges, 16 December 2011.

<sup>156</sup> ICC, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10-514, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012.

<sup>157</sup> Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Sylvestre Mudacumura*, [www.un.org/security-council/sanctions/1533/materials/summaries/individual/sylvestre-mudacumura](http://www.un.org/security-council/sanctions/1533/materials/summaries/individual/sylvestre-mudacumura).

<sup>158</sup> *Ibid.*

<sup>159</sup> ICC, *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12-1-Red, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 77

that Mr Mudacumura was criminally responsible.<sup>160</sup> In a similar manner to Pre-Trial Chamber I's decision on the arrest warrant for Callixte Mbarushimana, Pre-Trial Chamber II made no mention of Mr Mudacumura's assets, at least not in the unredacted paragraphs of the decision. At the same time, while the Pre-Trial Chamber did not refer to the asset freeze measures imposed against Mr Mudacumura pursuant to his listing by the Sanctions Committee (again, in the unredacted parts of the decision), the Chamber did order the Court's Registrar to take steps to request an exemption from the travel ban imposed by the same listing.<sup>161</sup>

### 3.2.2 Côte d'Ivoire

The UNSC first imposed targeted sanctions against individuals and entities in Côte d'Ivoire in November 2004. Acting pursuant to Chapter VII of the UN Charter, and in accordance with Rule 28 of its Provisional Rules of Procedure,<sup>162</sup> the UN organ instituted a sanctions committee in Resolution 1572.<sup>163</sup> The sanctions regime for Côte d'Ivoire aimed to respond to renewed fighting in contravention of a ceasefire agreement brokered following the disputed 2000 Ivorian presidential election, of which Laurent Gbagbo was the victor and which Alesane Ouattara, among other opposition candidates, was excluded from contesting. As for the sanctions requested, Resolution 1572 includes an arms embargo,<sup>164</sup> a travel ban,<sup>165</sup> and asset freezing measures.<sup>166</sup> Thirteen months later, having determined that the situation in Côte d'Ivoire continued 'to pose a threat to international peace and security in the region,'<sup>167</sup> the UNSC decided to renew the sanctions imposed by Resolution 1572 for an additional year.<sup>168</sup> Further measures were adopted in the aftermath of the disputed presidential

160 *Ibid.*, pp. 28-29 (listing the war crimes of murder, mutilation, cruel treatment, torture, outrage upon personal dignity, attack against the civilian population, pillaging, rape, and destruction of property).

161 *Ibid.*, p. 30 ('Orders the Registrar [...] to liaise with the Prosecutor in order to invite the DRC and the Kingdom of The Netherlands to request an exemption from the travel ban imposed by the UN Security Council and the Council of the European Union to allow the surrender of Sylvestre Mudacumura to the Court and to enter the territory of the The Netherlands').

162 *See supra* note 10.

163 S/RES/1572 (2004), para. 14.

164 *Ibid.*, para. 7.

165 *Ibid.*, para. 9.

166 *Ibid.*, para. 11.

167 S/RES/1643 (2005), preamble.

168 *Ibid.*, para. 11.

election of 2010, the result of which, a victory for Mr Ouattara, Mr Gbagbo refused to accept. Having implored 'all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election' in Resolution 1962,<sup>169</sup> in view of Mr Gbagbo's continued refusal to do so,<sup>170</sup> the UNSC adopted further individual sanctions measures targeting Mr Gbagbo, Simone Gbagbo (his wife), and three prominent supporters of his regime.<sup>171</sup> The UNSC renewed and modified the measures on a number of occasions<sup>172</sup> before terminating the sanctions regime for Côte d'Ivoire in Resolution 2283 of 28 April 2016.<sup>173</sup>

The governments led by Mr Gbagbo and Mr Ouattara, respectively, granted jurisdiction over crimes committed in Côte d'Ivoire to the Court. On 18 April 2003, Mr Gbagbo's Minister of Foreign Affairs, Mamadou Bamba, submitted a declaration, with validity 'for an unspecified period of time' from 19 September 2002,<sup>174</sup> under Article 12(3) of the Rome Statute.<sup>175</sup> This provision allows States not party to the ICC's constituent instrument to accept the jurisdiction of the Court on an *ad hoc* basis.<sup>176</sup> Following the 2010 presidential election, Mr Ouattara sent a letter addressed to the ICC's President, Prosecutor, and Registrar in which he confirmed the declaration of 18 April 2003.<sup>177</sup> In a further letter to the ICC Prosecutor on 3 May 2011, Mr Ouattara explicitly requested an ICC investigation into crimes committed on Ivorian territory, emphasised Côte d'Ivoire's readiness to cooperate with the Court, and confirmed his intention that Côte d'Ivoire become a State party to the Rome Statute 'as soon as practicable'.<sup>178</sup> It was pursuant to the *ad hoc* declaration that the Prosecutor sought authorisation from the Pre-Trial Chamber to commence an investigation into the

169 S/RES/1962 (2010), para. 1.

170 S/RES/1975 (2011), para. 3.

171 *Ibid.*, para. 12, Annex (listing, in addition to Laurent and Simone Gbagbo, Désiré Tagro, Pascal Affi N'Guessan, and Alcide Djédjé).

172 S/RES/1980 (2011); S/RES/2045 (2012); S/RES/2101 (2013); S/RES/2153 (2014); S/RES/2219 (2015).

173 S/RES/2283 (2016), para. 1.

174 ICC, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11-129-Anx16-tENG, Declaration Accepting the Jurisdiction of the International Criminal Court dated 18 April 2003, 6 September 2012.

175 ICC Statute, Art. 12(3).

176 *Ibid.* ('... [A] State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9').

177 ICC, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11-129-Anx14-tENG, Letter from Alassane Ouattara to the President of the ICC dated 14 December 2010, 9 October 2012.

178 ICC, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11-129-Anx15-tENG, Letter from Alassane Ouattara to the Prosecutor of the ICC dated 3 May 2011, 10 October 2012.

situation in Côte d'Ivoire,<sup>179</sup> a request granted by ICC Pre-Trial Chamber III on 15 November 2011.<sup>180</sup> Three individuals sanctioned by the Côte d'Ivoire Sanctions Committee thereafter became the object of ICC arrest warrants.

### 3.2.2.1 *Charles Blé Goudé*

Charles Blé Goudé was among three individuals designated by the Resolution 1572 Sanctions Committee in February 2006.<sup>181</sup> In addition to his leadership of the *Congrès Panafricain des Jeunes et des Patriotes* (Pan-African Youth and Patriots Congress or COJEP) a group widely known as the *Jeunes patriotes* (Young Patriots),<sup>182</sup> the Sanctions Committee for Côte d'Ivoire targeted Mr Blé Goudé for the following reasons:

repeated public statements advocating violence against United Nations installations and personnel, and against foreigners; direction of and participation in acts of violence by street militias, including beatings, rapes and extrajudicial killings; intimidation of the United Nations, the International Working Group (IWG), the political opposition and independent press; sabotage of international radio stations; obstacle to the action of the IWG, the United Nations Operation in Côte d'Ivoire, (UNOCI), the French Forces [present in Côte d'Ivoire to support UNOCI] and to the peace process as defined by resolution 1633 (2005).<sup>183</sup>

ICC Pre-Trial Chamber III issued a warrant of arrest for Charles Blé Goudé on 21 December 2011, for his alleged responsibility for the crimes against humanity of murder, rape and other forms of sexual violence, other inhumane acts, and persecution.<sup>184</sup> To the best of the author's knowledge, no mention of Mr Blé Goudé's designation by the CAR Sanctions Committee is made in publicly

179 ICC, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-3, Request for authorisation of an investigation pursuant to article 15 (June 23, 2011).

180 ICC, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-14-Corr, Pre-Trial Chamber III, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 15 November 2011.

181 UNSC, *Security Council Committee Concerning Côte d'Ivoire Issues List of Individuals Subject to Measures Imposed by Resolution 1572 (2004)*, [www.un.org/press/en/2006/sc8631.doc.htm](http://www.un.org/press/en/2006/sc8631.doc.htm). The other individuals designated by the Sanctions Committee on this date were Eugène Ngoran Kouadio Djué and Martin Kouakou Fofié.

182 *Ibid.*

183 *Ibid.*

184 ICC, *Prosecutor v. Charles Blé Goudé*, Case No. ICC-02/11-02/11-1, Pre-Trial Chamber III, Warrant Of Arrest For Charles Blé Goudé, 21 December 2011, p. 8.

available documents. Moreover, as with Mathieu Ngudjolo Chui in the DRC context, the acquittal of Mr Blé Goudé (together with Laurent Gbagbo) by ICC Trial Chamber I on 15 January 2019<sup>185</sup> has not (explicitly<sup>186</sup>) resulted in his (nor Mr Gbagbo's) delisting.

### 3.2.2.2 *Laurent Gbagbo and Simone Gbagbo*

It was the UNSC itself that added Laurent Gbagbo and Simone Gbagbo to the list of sanctioned individuals in Resolution 1975.<sup>187</sup> Both were listed for obstructing the peace and reconciliation process in Côte d'Ivoire.<sup>188</sup> Mr Gbagbo was also targeted for rejecting the results of the 2010 presidential election,<sup>189</sup> while Ms Gbagbo, who served as the Chairperson of the Parliamentary Group of the Ivorian Popular Front, the political party co-founded by Mr Gbagbo, was also listed for 'public incitement to hatred and violence'.<sup>190</sup>

ICC Pre-Trial Chamber III issued warrants of arrest for Laurent Gbagbo and Simone Gbagbo on 23 November 2011<sup>191</sup> and 29 February 2012,<sup>192</sup> respectively. Both warrants included the same four crimes against humanity for which, in the judgment of the Pre-Trial Chamber, there were 'reasonable grounds to believe' that Mr Gbagbo and Ms Gbagbo were responsible under the Rome Statute. These were the crimes against humanity of murder, rape and other forms of sexual violence, other inhumane acts, and persecution.<sup>193</sup>

Paul Bentall argues that the listing of Laurent Gbagbo by the UNSC a number of months before the Court issued a warrant for his arrest appears

185 ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15-T-232-FRA, Trial Chamber I, Transcript, 15 January 2019; ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15-1263, Trial Chamber I, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, 16 July 2019. The Appeals Chamber is seised of an appeal by the Prosecutor against this decision at the time of writing.

186 See *supra* notes 148–149 and accompanying text.

187 S/RES/1975 (2011), Annex I.

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 ICC, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-1, Pre-Trial Chamber III, Warrant Of Arrest For Laurent Koudou Gbagbo, 23 November 2011.

192 ICC, *Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12-1, Pre-Trial Chamber III, Warrant of Arrest for Simone Gbagbo, 29 February 2012.

193 ICC, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-1, Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, p. 7. *Ibid.*, p. 8.

'coincidental'.<sup>194</sup> In support of this conclusion, Bentall again<sup>195</sup> takes note of the mechanism under Article 13 ICC Statute pursuant to which the ICC was seised of the situation in Côte d'Ivoire, namely self-referral, observing that '[t]he Court's jurisdiction was engaged without Security Council involvement, with targeted sanctions therefore being used coincidentally alongside<sup>196</sup> ICC activity focused on the same individuals. According to Bentall, further support for this argument can be found in the more than eight months that passed between Mr Gbagbo's listing (3 March 2011) and the issue of a warrant for his arrest (23 November 2011) by the ICC.<sup>197</sup> Such a conclusion is even stronger in the cases of Charles Blé Goudé and Simone Gbagbo, where over five years<sup>198</sup> and a few days short of one year,<sup>199</sup> respectively, passed between their designation at the UN level and the issue of warrants for their arrest by Pre-Trial Chamber III of the Court.

### 3.2.3 Sudan

The genesis of the (second)<sup>200</sup> UNSC sanctions regime for Sudan can be found in Resolution 1556.<sup>201</sup> The first round of sanctions consisted of an arms embargo against 'all non-governmental entities and individuals, including the Janjaweed [militia], operating in the states of North Darfur, South Darfur and West Darfur'.<sup>202</sup> Responding to the protracted armed conflict in the Darfur region, the UNSC established a sanctions committee and an individual sanctions regime, comprising an expanded arms embargo, a travel ban, and asset freezing measures, in Resolution 1591 of 29 March 2005.<sup>203</sup> Very shortly thereafter, the UNSC referred 'the situation in Darfur since 1 July 2002' to the Prosecutor of the ICC,<sup>204</sup> thereby enabling the Court to exercise jurisdiction with respect to international crimes allegedly committed in Darfur pursuant to Article 13(b) of

194 Bentall, *supra* note 52, pp. 97–98.

195 See *supra* note 112 and accompanying text.

196 Bentall, *supra* note 52, p. 97.

197 *Ibid.*, p. 98.

198 The Resolution 1572 Sanctions Committee listed Charles Blé Goudé in February 2006, while ICC Pre-Trial Chamber III issued a warrant for his arrest in December 2011.

199 The UNSC listed Simone Gbagbo on 3 March 2011, while ICC Pre-Trial Chamber III issued a warrant for her arrest on 29 February 2012.

200 S/RES/1054 (1996), para. 3 (instituting a sanctions regime in response to Sudan's failure to extradite three individuals suspected of carrying out an assassination attempt against the then President of Egypt, Hosni Mubarak, in Addis Ababa, Ethiopia). See also S/RES/1044 (1996), para. 4. The UNSC terminated the sanctions regime in S/RES/1372 (2001), para. 1.

201 S/RES/1556 (2004), paras. 7–9.

202 *Ibid.*, para. 7.

203 S/RES/1591 (2005), para. 3.

204 S/RES/1593 (2005), para. 1.

the Rome Statute.<sup>205</sup> UNSC Resolution 1672 explicitly named the first four individuals to be added to the list of targeted persons, but none of these individuals was subject to an (unsealed) arrest ICC warrant at the time of their listing (nor, indeed, have they been since that time).<sup>206</sup>

The Court has issued arrest warrants for former Sudanese President, Omar Hassan Ahmad Al Bashir (Omar Al Bashir),<sup>207</sup> the former Minister of the Interior and Special Representative of the President in Darfur, Abdel Raheem Muhammad Hussein,<sup>208</sup> alleged Janjaweed leader, Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb),<sup>209</sup> and a second former Interior Minister, Ahmad Muhammad Harun (Ahmad Harun).<sup>210</sup>

The ICC has also issued summonses to appear, an alternative to an arrest warrant issued if the Pre-Trial Chamber is satisfied that serving such a document is sufficient to ensure the person's voluntary appearance before the ICC,<sup>211</sup> for three individuals in the situation in Darfur. These are Bahr Idriss Abu Garda,<sup>212</sup> Saleh Mohammed Jerbo Jamus,<sup>213</sup> and Abdallah Banda Abakaer Nourain,<sup>214</sup> all

<sup>205</sup> ICC Statute, Art. 13(b).

<sup>206</sup> S/RES/1672 (2006), para. 1 (adding Major General Gaffar Mohamed Elhassan (Commander of the Western Military Region for the Sudanese Armed Forces, Sheikh Musa Hilal (Paramount Chief of the Jalul Tribe in North Darfur), Adam Yacub Shant (Sudanese Liberation Army Commander), and Gabriel Abdul Kareem Badri (National Movement for Reform and Development Field Commander) to the list of sanctioned individuals).

<sup>207</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Case No. ICC-02/05-01/09-1, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Case No. ICC-02/05-01/09-95, Pre-Trial Chamber I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.

<sup>208</sup> ICC, *Prosecutor v. Abdel Raheem Muhammad Hussein*, Case No. ICC-02/05-01/12-2, Pre-Trial Chamber I, Warrant of Arrest for Abdel Raheem Muhammad Hussein, 1 March 2012.

<sup>209</sup> ICC, *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07-3, Pre-Trial Chamber I, Warrant of Arrest for Ali Kushayb, 27 April 2007.

<sup>210</sup> ICC, *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07-2, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, 27 April 2007.

<sup>211</sup> ICC Statute, Art. 58(7).

<sup>212</sup> ICC, *Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05-02/09-2, Pre-Trial Chamber I, Summons to Appear for Bahr Idriss Abu Garda, 7 May 2009.

<sup>213</sup> ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09-2-RSC, Pre-Trial Chamber I, Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009.

<sup>214</sup> ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09-3, Pre-Trial Chamber I, Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009.

of whom were alleged rebel commanders operating in the Darfur region at the time their summonses to appear before the Court were issued.

Sudan might, at first glance, appear to offer an ideal situation in which the UNSC and the Court could coordinate the asset freezing powers at their disposal. Indeed, the ICC Prosecutor noted the potential support available to the Court through concerted action by the UN body:

[T]he UNSC can act [...] to secure the cooperation for the arrest of Ali Kushayb and Ahmad Harun. The Prosecution understands that the Council can accomplish this under various mechanisms including the existing UNSCR 1591 regime. UNSCR 1591, para 3(c) provides for application of these measures to individuals “who (...) commit violations of international humanitarian or human rights law or other atrocities.” The UNSCR 1591 regime has already been put into practice through UNSCR 1672, which added four names of individuals to be subject to the measures set out in UNSCR 1591, namely freezing all funds, other financial assets and economic resources owned or controlled by the individuals in question. ... The means to act are entirely within the UNSC’s remit. The Prosecution would however urge the UNSC to focus first on individual measures in relation to Kushayb and Harun, in particular the identification and freezing of their assets.<sup>215</sup>

This said, no such support has materialised, with none of the individuals subject to ICC-issued arrest warrants having been added to the Resolution 1591 sanctions list at the time of writing, a state of affairs that Beth van Schaack accurately labels ‘remarkabl[e]’.<sup>216</sup> This is despite the fact that the UNSC referred the situation in Darfur to the ICC pursuant to Article 13(b) of the Rome Statute, the absence of which has been cited as a reason behind the lack of coordination between the two bodies in the DRC and Côte d’Ivoire contexts.<sup>217</sup> In order to explain this inconsistency, Bentall plausibly suggests that division between members of the UNSC over referring the situation to the ICC might have spilled over to its consideration of utilising targeted financial sanctions to support Court activity with respect to Sudan, particularly in light of the ‘[c]ontroversy’ that followed the issuance of warrants of arrest for the then

<sup>215</sup> *Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, [www.legal-tools.org/doc/3krzml](http://www.legal-tools.org/doc/3krzml), paras. 63, 66.

<sup>216</sup> Beth Van Schaack, ‘ICC Fugitives: The Need for Bespoke Solutions’, in Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, Leiden, 2016) p. 419.

<sup>217</sup> See Bentall, *supra* note 52, p. 97.

Sudanese President Omar Al Bashir.<sup>218</sup> Larissa van den Herik further posits that the heated debate<sup>219</sup> concerning immunities and States' obligations to cooperate with the Court might also have reduced the likelihood of UNSC support for the ICC in relation to its activities in Darfur.<sup>220</sup> This leads her to the conclusion, shared by the present author, that '[i]nstead of reinforcing each other, in the Darfur situation the Council's attitude rather undermined ICC proceedings'.<sup>221</sup>

But are political considerations the sole factor explaining why further UNSC support for ICC action was not forthcoming in this situation? Van Schaack identifies another possible reason: 'the standards employed to impose sanctions are not co-extensive with the standards employed for issuing an arrest warrant. In particular, the former requires a host of bio-identifiers (national identity number, proper name, etc.) in order to be effective'.<sup>222</sup> However, she continues that UNSC-appointed sanctions committees have been able to gather the requisite information to add alleged militia leaders to the sanctions list, and they ought to be able to do likewise for Sudanese officials against whom the ICC has issued arrest warrants.<sup>223</sup> In a similar vein, Kristen Boon identifies the jurisdictional differences between the Court and sanctions committees, briefly discussed at the outset of this article,<sup>224</sup> as a potential hurdle to broader UNSC support for ICC action, at least in terms of adding individuals subject to Court-issued arrest warrants is concerned.<sup>225</sup> She therefore advises against the automatic cross listing of individuals between the respective regimes.<sup>226</sup> Yet, Boon continues, with reference to Omar Al Bashir:

218 *Ibid.*, p. 98; see also Mancini, *supra* note 47, p. 235.

219 For a contemporaneous discussion of this issue, see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009) 315; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009) 333.

220 van den Herik, *supra* note 82, p. 244.

221 *Ibid.*, p. 245.

222 Van Schaack, *supra* note 219, p. 419.

223 *Ibid.*

224 See *supra* notes 2–8 and accompanying text.

225 Kristen E. Boon, 'Use the Sanctions Power against Bashir', *Opinio Juris*, 20 September 2013, [www.opiniojuris.org/2013/09/20/use-sanctions-power-bashir/](http://www.opiniojuris.org/2013/09/20/use-sanctions-power-bashir/). 'The jurisdictional thresholds for the ICC and the Sanctions Committees are different. The ICC proceeds against individuals who are alleged to have committed the gravest international crimes. In contrast, under Article 41 of the UN Charter, individuals are added to blacklists because they violate the terms of existing sanctions and/or contribute to the threat to peace and security'.

226 *Ibid.* This stands in contrast to the authors of the Compendium. Cf. *supra* notes 83–86 and accompanying text.

but where a head of state has openly flouted a ICC warrant, and where he independently meets the criteria for inclusion on the travel ban and asset freeze, what better opportunity for the Security Council and the ICC to act together? It would demonstrate coherent policy on peace and security issues, and joint condemnation of international crimes.<sup>227</sup>

Framing such inaction on the part of the UNSC in terms of the mutual obligation to cooperate with the ICC explicitly laid out in the ICC-UN Relationship Agreement, it can hardly be said that support in these circumstances would have failed to satisfy the criteria listed therein. On the contrary, the failure on the part of the UN body to list any of the individuals against whom the Court issued arrest warrants or summonses to appear after having referred the situation to the ICC might even be said to constitute a violation of this (albeit qualified) obligation.

#### 3.2.4 Central African Republic

It was through Resolution 2127 that the UNSC established a sanctions regime for the Central African Republic (CAR) by way of response to 'a total breakdown in law and order' across the CAR following the seizure of power by the *Séléka* (Alliance) group of anti-government militias.<sup>228</sup> The UN organ imposed an arms embargo,<sup>229</sup> confirmed its intention to consider imposing measures targeting individuals,<sup>230</sup> and formed a sanctions committee to, among other tasks, monitor the implementation of the arms embargo.<sup>231</sup> With the violence in the CAR not having abated, the UNSC elected to enact targeted measures, i.e. travel bans<sup>232</sup> and asset freezes,<sup>233</sup> in Resolution 2134 of 28 January 2014. Shortly before the anniversary of Resolution 2134, the UN organ renewed and extended the targeted sanctions measures in Resolution 2196.<sup>234</sup> Further extensions were effected in January 2016,<sup>235</sup> January 2017,<sup>236</sup> and January 2018.<sup>237</sup>

<sup>227</sup> *Ibid.*

<sup>228</sup> S/RES/2127 (2013), preamble.

<sup>229</sup> *Ibid.*, para. 54.

<sup>230</sup> *Ibid.*, para. 56.

<sup>231</sup> *Ibid.*, para. 57.

<sup>232</sup> S/RES/2134 (2014), para. 30.

<sup>233</sup> *Ibid.*, para. 32.

<sup>234</sup> S/RES/2196 (2015).

<sup>235</sup> S/RES/2262 (2016).

<sup>236</sup> S/RES/2339 (2017).

<sup>237</sup> S/RES/2399 (2018).

Conspicuously, the UNSC explicitly references ICC activity in the CAR in all of these resolutions.<sup>238</sup> In Resolution 2196, the UN body:

Reiterate[d] that all perpetrators of such acts [e.g. attacks targeting peacekeepers] must be held accountable and that some of those acts may amount to crimes under the Rome Statute ..., to which the CAR is a State party, noting in this regard the opening by the Prosecutor of the [ICC] on 24 September 2014 of an investigation following the request of the national authorities on alleged crimes committed since 2012 and welcoming the ongoing cooperation by the CAR Transitional Authorities in this regard[.]<sup>239</sup>

The CAR Government has referred two situations on its territory to the ICC's Prosecutor. The first self-referral came in December 2004,<sup>240</sup> almost a decade *before* the establishment of a UN Security Council sanctions regime for the CAR. A second referral followed on 30 May 2014,<sup>241</sup> shortly *after* the UN body adopted sanctions measures targeting individuals. But the CAR Sanctions Committee has not (yet) designated any individuals subjected to an ICC arrest warrant in the context of either of these situations within the meaning of Article 14 of the Rome Statute.<sup>242</sup>

### 3.2.4.1 *Jean-Pierre Bemba Gombo (and Others)*

It was in the course of investigating the first situation in the CAR that the Court's Prosecutor successfully applied for a warrant of arrest for Mr Jean-Pierre Bemba Gombo.<sup>243</sup> Shortly after the warrant was issued, ICC Pre-Trial Chamber III requested the Court's Registrar to transmit a request for cooperation to the

<sup>238</sup> S/RES/2127 (2013), preamble; S/RES/2134 (2014), para. 21; S/RES/2196 (2015), preamble; S/RES/2262 (2016), preamble; S/RES/2339 (2017), preamble; *ibid.*, preamble.

<sup>239</sup> S/RES/2196 (2015), preamble.

<sup>240</sup> ICC, *Situation in the Central African Republic*, Case No. ICC-01/05-1, Presidency, Decision Assigning Situation in the Central African Republic to PTC III, 19 January 2005, Annex.

<sup>241</sup> ICC, *Situation in the Central African Republic II*, Case No. ICC-01/14-1-Anx1, Presidency, Decision Assigning the Situation in the Central African Republic II to PTC II, 18 June 2014, Annex 1.

<sup>242</sup> See Michael Ramsden and Tomas Hamilton, 'Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC', 66 *International & Comparative Law Quarterly* (2017) 893, p. 907.

<sup>243</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1-tENG-Corr, Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-15-tENG, Pre-Trial Chamber III, Warrant of arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008, 10 June 2008.

Republic of Portugal.<sup>244</sup> In its decision, the Pre-Trial Chamber requested the Portuguese authorities to identify, locate, freeze or seize the property and assets located in Portugal and owned by Mr Bemba, or in which he had a share, 'in accordance with the procedures provided for by its national legislation'.<sup>245</sup> Mr Bemba has also submitted that the ICC issued similar requests to Belgium and the DRC,<sup>246</sup> but notes that these orders remain confidential *ex parte*.<sup>247</sup>

It has been argued that Mr Bemba was never designated on a UNSC sanctions list because there was no UN-level sanctions regime focused on the CAR in place at the time the Court issued his warrant of arrest.<sup>248</sup> This said, the Resolution 2134 Sanctions Committee could have designated Mr Bemba after its establishment in January 2014, especially as he had not yet been acquitted at that time.<sup>249</sup> As to other warrants of arrest issued in the course of the first of two situations in the CAR, these do not concern the commission of the crimes listed in Article 5 of the Rome Statute,<sup>250</sup> but offences against the administration of justice contrary to Article 70 thereof.<sup>251</sup> On 20 November 2013, the Court's Pre-Trial Chamber II ordered the arrest of Mr Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido for presenting evidence that the party knows is false or forged and for corruptly influencing witnesses.<sup>252</sup> In the same arrest warrant, the Pre-Trial

244 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-8, Pre-Trial Chamber III, Decision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise [Decision and Request to the Republic of Portugal for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets], 27 May 2008, p. 5.

245 *Ibid.*, p. 4.

246 ICC, *Situation in the Central African Republic*, Case No. ICC-01/05-01/08-3663-Red, Public Redacted Version of "Urgent request for partial reconsideration and associated orders", 10 December 2018), p. 34 ("The freezing orders were issued on 23 May 2008 (Belgium), 27 May 2008 (Portugal) and 29 May 2008 (DRC)').

247 *Ibid.* (appealing that the requests issued to Belgium and the DRC be reclassified as public, as is the case with the request to Portugal). See *supra* note 247.

248 See Mancini, *supra* note 47, p. 234.

249 The Court's Appeals Chamber acquitted Mr Bemba on 8 June 2018. See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3636-Red, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018. Larissa van den Herik describes the failure of the CAR Sanctions Committee to add Mr Bemba to the list of designated individuals as '[r]emarkabl[e]'. See van den Herik, *supra* note 82, p. 246.

250 ICC Statute, Art. 5 (the crime of genocide, crimes against humanity, war crimes, and the crime of aggression).

251 ICC Statute, Art. 70.

252 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Case No. ICC-01/05-01/13-1-Red2-tENG, Pre-Trial Chamber II, Warrant of Arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo

Chamber also ordered the Registrar to prepare requests for cooperation from the State(s) effecting the arrest of the named individuals and any other relevant State(s) to locate and freeze their assets.<sup>253</sup> It could be contended that offences against the administration of justice, as opposed to the ‘most serious crimes of concern to the international community as a whole’<sup>254</sup> are rather less likely to attract UNSC attention under the targeted sanctions framework. This could explain why none of these five individuals has been listed by the CAR Sanctions Committee. From a practical perspective, Marina Mancini also observes that all but one of the individuals had been arrested and transferred to the ICC before Resolution 2134 was adopted.<sup>255</sup>

### 3.2.4.2 *Alfred Yekatom and Patrice-Edouard Ngaiissona*

The CAR Sanctions Committee listed Alfred Yekatom, a former officer in the *Forces Armées Centrafricaines* (CAR armed forces) and alleged leader of a militia in the anti-Balaka alliance of groups engaged in an armed conflict with (ex-)Séléka<sup>256</sup> forces, on 20 August 2015.<sup>257</sup> The Sanctions Committee listed Mr Yekatom pursuant to Resolution 2196, namely for:

engaging in or providing support for acts that undermine the peace, stability or security of the CAR, including acts that threaten or violate transitional agreements, or that threaten or impede the political transition process, including a transition toward free and fair democratic elections, or that fuel violence.<sup>258</sup>

Although the CAR Sanctions Committee has not listed Patrice-Edouard Ngaiissona, his position as ‘general coordinator of the anti-Balaka’ is mentioned

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Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 20 November 2013.

253 *Ibid.*, pp. 15–16.

254 ICC Statute, Art. 5.

255 Mancini, *supra* note 47, p. 234. Narcisse Arido was transferred to the ICC on 18 March 2014. See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Case No. ICC-01/05-01/13-274, Pre-Trial Chamber II, Decision on “Narcisse Arido’s regulation 35 motion to extend time for initial appearance to March 24, 2014 to allow attorney, Abbe Jolles, to travel from Washington DC, USA” dated 18 March 2014, 19 March 2014, p. 3.

256 The then President of the CAR and former leader of the Séléka, Michel Djotodia, dissolved the group by way Presidential Decree on 12 September 2013.

257 Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Alfred Yekatom*, [www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/alfred-yekatom](http://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/alfred-yekatom).

258 *Ibid.*

by way of '[a]dditional information' in the listing of Habib Soussou, an alleged anti-Balaka zone commander for the town of Boda and the province of Lobaye.<sup>259</sup> As for the ICC, Pre-Trial Chamber II has issued arrest warrants for both Mr Yekatom<sup>260</sup> and Mr Ngaïssona.<sup>261</sup> Both warrants of arrest followed the listing of Mr Yekatom by the Resolution 2134 Sanctions Committee and, while the Pre-Trial Chamber explicitly states that the protracted armed conflict in the CAR had gained the attention of the UNSC in issuing a warrant for Mr Yekatom's arrest,<sup>262</sup> the latter's designation by the CAR Sanctions Committee is not accorded similar attention.

### 3.2.4.3 *Joseph Kony*

An anomaly in the examination of the overlap between the activities of UNSC-established sanctions committees and the ICC concerns Joseph Kony, the alleged founder and leader of the Lord's Resistance Army (LRA), an armed group with roots in Uganda but which has since been operational across Central Africa, including in the CAR.<sup>263</sup> The CAR Sanctions Committee listed Mr Kony on 7 March 2016, in accordance with Resolution 2262.<sup>264</sup> Among the multiple reasons provided for his listing are his involvement in violations of international human rights law or international humanitarian law, including the use

259 Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Habib Soussou*, [www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/habib-soussou](http://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/habib-soussou). 'On 28 June 2014, general coordinator of the anti-Balaka Patrice Edouard Ngaïssona appointed Habib Soussou as provincial coordinator for the town of Boda since 11 April 2014 and since 28 June 2014 for the entire province of Lobaye. Targeted killings, clashes and attacks by anti-Balaka in Boda against humanitarian organizations and aid workers have occurred on a weekly basis in areas for which Soussou is the anti-Balaka commander or coordinator'.

260 ICC, *Prosecutor v. Alfred Yekatom*, Case No. ICC-01/14-01/18-1-Red, Pre-Trial Chamber II, Public Redacted Version of "Warrant of Arrest for Alfred Yekatom", ICC-01/14-01/18-1-US-Exp, 11 November 2018, 17 November 2018.

261 ICC, *Prosecutor v. Patrice-Edouard Ngaïssona*, Case No. ICC-01/14-01/18-89-Red, Pre-Trial Chamber II, Public Redacted Version of "Warrant of Arrest for Patrice-Edouard Ngaïssona", 13 December 2018.

262 ICC, *Prosecutor v. Alfred Yekatom*, Case No. ICC-01/14-01/18-1-Red, Pre-Trial Chamber II, Public Redacted Version of "Warrant of Arrest for Alfred Yekatom", ICC-01/14-01/18-1-US-Exp, 11 November 2018, 17 November 2018.

263 Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Joseph Kony*, [www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/joseph-kony](http://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/joseph-kony).

264 *Ibid.* The Sanctions Committee designated the LRA on the list of sanctioned entities on the same day, *ibid.*

of sexual violence, the targeting of civilians, and the recruitment or use of children in armed conflict.<sup>265</sup>

The reason for categorising Mr Kony's listing by the Sanctions Committee for the CAR as an anomaly stems from the existence of his pre-existing warrant of arrest, issued by the Court in 2005 in the situation in Uganda,<sup>266</sup> rather than in the course of the (first) situation in the CAR. The article will return to the (justifiable) lack of UNSC support for the ICC, at least in terms of imposing targeted sanctions, in the Uganda situation in Part 3.3.1.

### 3.2.5 Mali

The UNSC established a sanctions regime, comprising, *inter alia*, a travel ban, asset freezing measures, and the creation of a new sanctions committee, for Mali in Resolution 2374 of 5 September 2017.<sup>267</sup> The UN body decided that coercive action under Chapter VII of the UN Charter was required to respond to violations of various ceasefire agreements, not least by terrorist groups operating on Malian territory. In addition, and of note for the purposes of the present article, in the preamble to Resolution 2374, the UNSC:

Not[ed] with grave concern the involvement of non-state actors, notably terrorist groups, in the destruction of cultural heritage and the trafficking in cultural property and related offences and further [took note] of the fact that on 27 September 2016 the ICC found Mr Al Mahdi guilty of the war crime of intentionally directing attacks against religious and historical monuments in Timbuktu.<sup>268</sup>

UNSC action therefore followed ICC activity in the context of the situation in Mali. The sanctions remain in force at the time of writing, having been renewed on three occasions.<sup>269</sup>

Turning to ICC action in Mali, it was the Malian Government that referred the situation on its territory to the Court's Prosecutor in July 2012.<sup>270</sup> It was pursuant to this referral that the ICC Prosecutor successfully applied for a warrant

<sup>265</sup> *Ibid.*

<sup>266</sup> ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-53, Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005.

<sup>267</sup> S/RES/2374 (2017), para. 9.

<sup>268</sup> *Ibid.*, preamble.

<sup>269</sup> S/RES/2432 (2018); S/RES/2484 (2019); S/RES/2541 (2020).

<sup>270</sup> ICC, *Situation in the Republic of Mali*, Case No. ICC-01/12-1-AnxI, Presidency, Decision assigning the situation in the Republic of Mali to Pre-Trial Chamber II, 19 July 2012, Annex.

of arrest for Ahmad Al Faqi Al Mahdi,<sup>271</sup> whose conviction in 2016 the UNSC explicitly references in Resolution 2374. Mr Al Mahdi was an alleged member of the *Ansar Dine* group, a movement affiliated with Al-Qaeda in the Islamic Maghreb.<sup>272</sup> The Prosecutor was also successful in her application for an arrest warrant for another alleged member of *Ansar Dine*, and *de facto* chief of the Islamic police in Timbuktu, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,<sup>273</sup> in March 2018.

Given that the application for a warrant of arrest for Mr Al Mahdi preceded the establishment of the Mali Sanctions Committee, it is perhaps unsurprising that he has not been added to the list of sanctioned individuals. As for Mr Hassan, the situation appears to be less clear-cut. The designation criteria listed in Resolution 2374 include individuals believed ‘responsible for or complicit in, or having engaged in ... [p]lanning, directing, or committing acts in Mali that violate international human rights law or international humanitarian law.’<sup>274</sup> The latter could include the war crimes for which the Court’s Pre-Trial Chamber I found ‘reasonable grounds to believe that he is criminally responsible’<sup>275</sup> under the Rome Statute. The same can be said of the former inasmuch as the crimes against humanity for which the same Pre-Trial Chamber was satisfied to the required standard that Mr Hassan was responsible to issue the warrant for his arrest violate international human rights law.<sup>276</sup> Again here, a sanctions committee created under the auspices of the UN Charter was faced with a choice between supporting the Court and not doing so and opted for the latter.

### 3.3 *Neither Coexistent nor Coordinated*

#### 3.3.1 Uganda

Uganda was the first State Party to the Rome Statute to refer a situation on its territory to the Prosecutor of the ICC, with the President of Uganda submitting a self-referral in December 2003.<sup>277</sup> It was pursuant to this referral that the Court’s Prosecutor succeeded in applying for warrants of arrest for Joseph

271 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-1-Red, Pre-Trial Chamber I, Mandat d’arrêt à l’encontre d’Ahmad Al Faqi Al Mahdi, 18 September 2015.

272 *Ibid.*, para. 5.

273 ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-2-tENG, Pre-Trial Chamber I, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 27 March 2018.

274 S/RES/2374 (2017), para. 8.

275 *Supra* note 273, p. 9.

276 *Ibid.* (listing the crimes against humanity of torture, rape and sexual slavery, persecution on religious and gender grounds, and other inhumane acts).

277 ICC, *Situation in Uganda*, Case No. ICC-02/04-1, Presidency, Decision Assigning Situation in Uganda to PTC II, 5 July 2004, Annex.

Kony,<sup>278</sup> Vincent Otti,<sup>279</sup> Raska Lukwiya,<sup>280</sup> Okot Odhiambo,<sup>281</sup> and Dominic Ongwen.<sup>282</sup>

The UNSC has not established a sanctions committee for Uganda, although it could be argued that there is some overlap between the work of the Resolution 2127 Sanctions Committee, established for the CAR, and the crimes investigated by the ICC in Uganda. This is because all five individuals for whom the Court has issued warrants of arrest in this situation are members of the LRA, an armed group also designated by the CAR Sanctions Committee. This is not to say, however, that the UN body has ignored the situation. To the contrary, it is clear from various resolutions that members of the UNSC are concerned about events in (northern) Uganda, particularly the activities of the LRA.<sup>283</sup> Instead, it could simply be the case that the UN organ decided to respond to this situation without imposing targeted sanctions under the auspices of a sanctions committee, a reasonable option entirely within its remit. The UNSC adopted a similar approach with regard to Kenya.

### 3.3.2 Kenya

The ICC Prosecutor initiated an investigation into the situation in Kenya under Article 15 of the Rome Statute, which regulates the Prosecutor's *proprio motu* powers.<sup>284</sup> The Prosecutor initiated this process in November 2009 with respect to Kenya, sending a letter to the Court's then President to inform the Presidency of his intention to request the authorisation of an investigation pursuant to the Article 15 framework.<sup>285</sup> A formal request followed shortly thereafter.<sup>286</sup>

278 ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-53, Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005.

279 ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-54, Pre-Trial Chamber II, Warrant of Arrest for Vincent Otti, 8 July 2005.

280 ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-55, Pre-Trial Chamber II, Warrant of Arrest for Raska Lukwiya, 8 July 2005.

281 ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-56, Pre-Trial Chamber II, Warrant of Arrest for Okot Odhiambo, 8 July 2005.

282 ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05-57, Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, 8 July 2005.

283 See, e.g., S/RES/1653 (2006), preamble.

284 ICC Statute, Art. 15.

285 ICC, *Situation in the Republic of Kenya*, Case No. ICC-01/09-1, Presidency, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II, 6 November 2009, Annex.

286 ICC, *Situation in the Republic of Kenya*, Case No. ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2009.

After Pre-Trial Chamber II authorised the Prosecutor's investigation,<sup>287</sup> he was successful in applications for summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang,<sup>288</sup> and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.<sup>289</sup> The same Pre-Trial Chamber subsequently issued warrants for the arrest of a further three individuals in connection with the alleged commission of crimes under the ICC's jurisdiction in Kenya, namely Walter Osapiri Barasa,<sup>290</sup> Paul Gicheru,<sup>291</sup> and Philip Kipkoech Bett,<sup>292</sup> following applications to this end by the second ICC Prosecutor, Fatou Bensouda. As far as the assets of the accused were concerned, less than one month after issuing summonses for the individuals' appearance, Pre-Trial Chamber II instructed the Registrar of the Court 'to prepare and transmit ... in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya' with the declared aim of identifying, tracing, and freezing and/or seizing property and assets owned by Mr Muthaura, Mr Kenyatta, and Mr Ali (or under their control) 'without prejudice to the rights of bona fide third parties'.<sup>293</sup>

The UNSC did not establish a sanctions committee by way of response to the post-election violence in Kenya, though the body's President did issue a statement expressing concern at the situation in February 2008.<sup>294</sup> The lack

287 ICC, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19-Corr, Pre-Trial Chamber II, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 30 March 2011.

288 ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11-1, Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para. 59.

289 ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-01, Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 57.

290 ICC, *Prosecutor v. Walter Osapiri Barasa*, Case No. ICC-01/09-01/13-1-Red2, Pre-Trial Chamber II, Warrant of arrest for Walter Osapiri Barasa, 2 August 2013.

291 ICC, *Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, Case No. ICC-01/09-01/15-1-Red, Pre-Trial Chamber II, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", 10 March 2015.

292 *Ibid.*

293 ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-42, Pre-Trial Chamber II, Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 5 April 2011, p. 5.

294 *Statement by the President of the Security Council* (UN Doc S/PRST/2008/4).

of subsequent action could perhaps be attributed (in part) to the fact that the UN body did not refer the situation to the ICC pursuant to the Article 13(b) ICC Statute mechanism. Indeed, divisions among the membership of the UNSC over ICC action in Kenya are clear from the results of a 2013 vote on deferring the investigation by the Court's Prosecutor into crimes allegedly committed by Mr Kenyatta and Mr Ruto in accordance with Article 16 of the Rome Statute.<sup>295</sup>

#### 4 Conclusion

The ICC-UN Relationship Agreement envisages the ICC and the UNSC enjoying 'a mutually beneficial relationship' to better enable the discharge of their respective responsibilities.<sup>296</sup> In practice, the UN body has requested the execution of asset freezing measures in a number of situations in which the ICC has also been engaged. Yet, as this article has demonstrated, there is scant evidence of the two bodies acting in concert. It is this absence of 'coordinated' action that leads the present author to conclude that to expect close, formalised cooperation between the UNSC and the ICC in this sphere of their respective (albeit related) operations, as foreseen in the mutual obligation to cooperate by which both bodies are bound, is unrealistic.

On the tenth anniversary of the ICC-UN Relationship Agreement, the UN Secretary-General and the President of the Court issued a joint statement in which they observed, *inter alia*, that '[t]he Relationship Agreement has provided a solid basis for cooperation between the United Nations and the International Criminal Court in a wide range of fields'.<sup>297</sup> But the analysis in the foregoing paragraphs demonstrates that such cooperation rarely extends to support for the Court by UNSC-established sanctions committees. Only in response to the situation in Libya can, what could be termed 'coordinated' (or 'harmonious')<sup>298</sup> action, be observed on this front. Elsewhere, such support

295 UN SCOR, 68th session, 7060th meeting (UN Doc S/PV.7060) (seven members voted in favour of the draft resolution, with eight abstaining).

296 ICC-UN Relationship Agreement, preamble. *See also* ICC-UN Relationship Agreement, Art. 3.

297 The Secretary-General of the United Nations and the President of the International Criminal Court, 'Joint statement on the Occasion of the Tenth Anniversary of the Relationship Agreement between the United Nations and the International Criminal Court', [www.legal-tools.org/doc/6s6ojf/](http://www.legal-tools.org/doc/6s6ojf/). The statement continues: 'We are fully committed to strengthening the partnership between our two organizations, which is indispensable for a strong international community and the protection of the interests of humanity'.

298 van den Herik, *supra* note 82, p. 244.

has been coincidental and, as a result, piecemeal. This is despite the potential benefits of such support, especially for the ICC's (reparations) procedures.

This article has not sought to argue that the UNSC ought to appoint a sanctions committee for every situation in which the ICC is operating. Nor has it explicitly proposed that the UN organ ought to automatically add all individuals against whom the Court has issued an arrest warrant to sanctions lists, though the merits of following such an approach are discussed. Instead, the article makes the argument, based on an analysis of eight concrete scenarios in which the two bodies (could) have coordinated the exercise of their asset freezing procedures, for tempering expectations of the UNSC as far as its support for the Court is concerned. Initial prognoses of the UN body playing an active role in backing the ICC are simply not borne out in practice.<sup>299</sup>

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