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## **The Past, Present and Future of the International Criminal Court**

Alexander Heinze and Viviane E. Dittrich (editors)





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(editors)**

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## FOREWORD BY THE SERIES EDITOR

The *Nuremberg Academy Series* seeks to cover relevant and topical areas in the field of international criminal law, and includes work that is interdisciplinary or multidisciplinary, bringing together academics and practitioners. Grounded in the legacy of the Nuremberg Principles – the foundation of contemporary international criminal law – it addresses persistent and pressing legal issues, and explores the twenty-first century challenges encountered in pursuing accountability for core international crimes. The Series was established in April 2017 by the International Nuremberg Principles Academy (‘Nuremberg Academy’), in co-operation with the Centre for International Law Research and Policy (‘CILRAP’), to produce high-quality open access publications on international law published by the Torkel Opsahl Academic EPublisher (‘TOAEP’).

The first volume in the Series, *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*,<sup>1</sup> explored the deterrent effect in international justice, including case studies of deterrent effect in ten situations of four different international tribunals. The second volume, *Islam and International Criminal Law and Justice*,<sup>2</sup> focused on Islamic perspectives and criminal law, and examined the relevancy and applicability of the Nuremberg Principles to notions of justice in the Muslim world. The third volume in the Series, *The Tokyo Tribunal: Perspectives on Law, History and Memory*,<sup>3</sup> presented a contemporary rereading of the International Military Tribunal for the Far East (‘IMTFE’), combining perspectives from law, history and social science. The fourth volume, *Integrity in International Justice*,<sup>4</sup> provided the first book-length account of integrity

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<sup>1</sup> Linda Carter and Jennifer Schense (eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2017 (<http://www.toaep.org/nas-pdf/1-carter-schense>).

<sup>2</sup> Tallyn Gray (ed.), *Islam and International Criminal Law and Justice*, TOAEP, Brussels, 2018 (<http://www.toaep.org/nas-pdf/2-gray>).

<sup>3</sup> Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds.), *The Tokyo Tribunal: Perspectives on Law, History and Memory*, TOAEP, Brussels, 2020 (<http://www.toaep.org/nas-pdf/3-dittrich-lingen-osten-makraiova>).

<sup>4</sup> Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020 (<http://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

in international justice, revisiting integrity through different perspectives, addressing primarily individual integrity within international justice institutions.

The present volume, *The Past, Present and Future of the International Criminal Court*, the fifth volume in the Series, makes a timely contribution to the extensive literature on the International Criminal Court, bringing together scholars and practitioners, and outside experts as well as insiders. This edited collection provides a broad perspective on the Court's development over time and explores some of the topical issues, achievements, challenges and critiques of the Court. The anthology features multiple readings of the Court, its activities, practice and future developments. In particular, the book examines five key topics: prosecutorial policy and strategy, jurisdiction and admissibility, victims and witnesses, defence issues, and legitimacy and independence. The book also includes a number of papers and speeches given at the Nuremberg Forum 2018 "The 20th Anniversary of the Rome Statute: Law, Justice and Politics", held at Courtroom 600 of the Nuremberg Palace of Justice in October 2018. It is hoped that, as an open access publication, this volume will be widely read by scholars, students, and practitioners, as a contribution to the contemporary debates on the Court and international criminal law more broadly.

A special thank you to the Nuremberg Academy and TOAEP teams that made the book publication and Nuremberg Forum possible, with the support of the Academy's Director as well as its Foundation Board and Advisory Council. I am grateful to TOAEP, and especially Morten Bergsmo, for agreeing to publish the book in the *Nuremberg Academy Series*. Special thanks are owed to all contributors and, in particular, to the co-editor of this volume, Alexander Heinze, for his dedication, continuous support, invaluable legal expertise and the productive collaboration on this book.

Viviane E. Dittrich

*Editor, Nuremberg Academy Series*  
*Deputy Director, International Nuremberg Principles Academy*

## PREFACE BY THE EDITORS OF THE VOLUME

The International Criminal Court heralded a new era in the fight against impunity and human rights protections. Arguably, while its Statute constitutionalizes the law with regard to core international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognized human rights, the Court may be seen as the institutionalization of that law. The new era witnessed a move from *ad hoc* imposition to a treaty-based universal system. This anthology follows the twentieth anniversary of the Rome Statute and preempts the twentieth anniversary of the Court. It is designed to reflect the dynamics that shaped and continue to shape the work of the Court as an intercultural, interdisciplinary and international endeavour. Moreover, it puts a special emphasis on the important role of victims in the accountability process of those who commit core international crimes.

The book brings together authors from different backgrounds, disciplines and nationalities. The authors portray the establishment and development of the Court (hence the theme ‘past’), critically engage with its successes and challenges (‘present’) and draw conclusions on its way forward (‘future’). This book is a collective effort. It includes contributions from insiders, that is, officials and staff of the Court reflecting on their own institution, and external experts, lending their scholarly voices to enhance understanding and analysis of the Court. All chapters are original and have been written or revised specifically for this publication, some are based on previous research and some originated at the Nuremberg Forum 2018.

We sincerely thank all contributors for their immense care and dedication, and allowing us to provide a platform for their original ideas and fundamental expertise. We are especially grateful for the authors’ constructive engagement with all the editors’ suggestions. We wish to express our genuine gratitude to the authors who decided to walk this road with us.

When it comes to acknowledging people that contributed to the production of this book, we must start with those that accompanied us almost from the beginning and invested endless time and effort. We thank especially Jolana Makraiová and Marialejandra Moreno Mantilla of the Nuremberg Academy for their most valuable assistance in the making of this book. We would also like to thank Alina Sviridenko and Malina Marie Ma-

roschek for formidable assistance in formatting and copy-editing. Thanks also to Klaus Rackwitz and Eduardo Toledo for providing comments on some chapters.

Thank you also to the many experts who have engaged with us in stimulating conversations and shared insightful reflections on the Court over the past years. Particular thanks to Robert Cryer, whose sudden passing in 2021 was a great loss, for his dedication and manifold contributions to the field of international criminal law.

We also thank everyone who contributed to the Nuremberg Forum 2018 “The 20th Anniversary of the Rome Statute: Law, Justice and Politics”. The conference, which spurred the idea of the book project, was made possible by the International Nuremberg Principles Academy and its dedicated staff. We gratefully acknowledge that the Director of the Academy, Klaus Rackwitz, and the Foundation Board and Advisory Council lend their full support to the conference and this book.

Finally, we would like to thank the Torkel Opsahl Academic EPublisher (‘TOAEP’) for not only providing a publishing platform for this volume in the *Nuremberg Academy Series*, but also for allowing us be part of the TOAEP publishing philosophy. Especially thank you to Morten Bergsmo for his support and Antonio Angotti for his dedicated editorial assistance in the finalization of the manuscript, and to Rohit Gupta and Harshit Rai for their precise work on the volume.

Alexander Heinze and Viviane E. Dittrich  
*Göttingen and Nuremberg,*  
*July 2021*

## FOREWORD BY PIOTR HOFMAŃSKI

The International Criminal Court ('ICC' or 'Court') will soon celebrate its twentieth anniversary. One might say that 20 years is long enough to solidify and secure a place in the history of international criminal law. Surely, the importance and role of the Court as the first permanent international court created prospectively for the trial of crimes committed after the entry into force of the Rome Statute – the treaty on which it was established – cannot be overestimated. At the same time, however, 20 years is too short a period to formulate universal and conclusive assessments. Accordingly, those who refer to the Court as an ambitious but still fresh project are right.

Against this background, the promise of three temporal perspectives contained in the title of the present anthology, *The Past, Present and Future of the International Criminal Court*, is an appropriate one.

Indeed, understanding the essence of international criminal justice and the need for a permanent international court is best achieved from a historical perspective. There would be no ICC if it were not for the experience of the Nuremberg Trials and the Tokyo Tribunal, or the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The historical perspective also reflects a long, complicated political process of negotiations culminating in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998. The present anthology gives us an interesting picture of the complex conditions that had to be met before an epochal decision could be reached.

The contemporary perspective covers a broad spectrum of issues of key nature for the functioning of the ICC system. Particular attention is paid here to the issues of complementarity, jurisdiction and admissibility, as well as the participation of witnesses and victims in proceedings before the Court. This last point, in particular, is very significant. For the first time in the history of international criminal law, the Rome Statute specifically defined the role of the victims of the crime in the proceedings and opened the way for reparations for them. Issues related to the course of proceedings based on a unique combination of experiences of two great legal cultures of the world – common law and civil law – also occupy an important place in the book. Another part is devoted to issues related to elementary procedural

guarantees in proceedings before the Court, in particular the right to defence and how to ensure its effective implementation.

The prospect of the future is, unsurprisingly, the most challenging one. It may already be said that the ICC has become a permanent feature of the international legal and judicial landscape. However, will it prove to be an effective tool in the fight against impunity for the most atrocious crimes in the long run? What will be the dynamics of its further development? With the Court's workload continually growing, will States provide it with sufficient resources and the high level of co-operation required for the effective discharge of its mandate? Will national jurisdictions step up to the plate, in accordance with the principle of complementarity, to prevent the ICC from being overburdened? Can the Court avoid the pitfalls and overcome the challenges of a changing global landscape and remain apolitical and independent in the face of increasing external pressure? Will it be possible – and when – to make the Rome Statute system more universal than it is today with its 123 States Parties? These are just some of the questions that arise. In this book, the reader will find reflections from some of the most experienced professionals in the field on many of these themes, but only time will tell whether the authors' predictions and expectations will be verified in the future.

In sum, this publication is a highly valuable contribution to the academic and professional discourse on the ICC. Undoubtedly, the growing number of academic publications, standing at an increasingly higher level, is the best way to popularize the idea of international criminal justice. The works of the International Nuremberg Principles Academy certainly play a leading role here, not only because of the historical connotations of Nuremberg, but due to the high substantive level of the published works and their topicality. The present anthology promises to follow that path.

Prof. Dr. Piotr Hofmański  
*President, International Criminal Court*

## FOREWORD BY MAMA KOITÉ DOUMBIA

Justice extends to reparative and, insofar as achievable, restorative justice for victims, families, communities and situation countries affected by the most serious crimes of concern to humanity. The role of the International Criminal Court ('ICC') is inextricably linked with the victims of the crimes for which perpetrators are held accountable. These victims have a right to reparations against the convicted person and beyond, which is usually realised by the Trust Fund for Victims ('TFV'), a body created by the Rome Statute and established by its Assembly of States Parties. Accordingly, in considering *The Past, Present and Future of the International Criminal Court*, as in this volume, the victims' perspective and reparations are pivotal.

The international community has witnessed various and different reparation frameworks established by international institutions and States. In Africa alone, investigations and prosecutions of international crimes have led to significant reparations to victims aiming at improving their situation. Despite this, serious challenges have been posed as to how international institutions and States should address victims' concerns arising from mass crimes and gross violations of human rights. The interpretation and implementation of policies and legal frameworks have hampered reparation strategies, and a lack of political will has resulted in additional complications to such processes and strategies. Views on how to meet the needs of victims may diverge: the lack of a co-ordinated common strategy, as well as the limited resources provided for its implementation, have not helped the restorative justice project.

In the evaluation of its outcome, policy-makers should realize that the scope and extent of the harm suffered by direct or indirect victims of crimes is a key aspect of the reparative process. Beyond and on top of criminal justice and proceedings, gender issues and relations, child well-being and economic costs should also be seriously considered.

Reparations for the millions of victims in post-conflict African States have at best been an afterthought in criminal accountability processes, and at worst, a tool used for political and electoral purposes. The implementation, at the international and domestic levels, of different models of restora-

tive justice could encourage States to reflect on the processes set forth internally to comply with their obligations in terms of reparations to victims.

Victims have a right to express their intention to receive reparations. In order for reparation frameworks to advance the cause of victims, their liberal and progressive interpretation is required. Decision-makers should consider and have in mind transformative approaches to formulation, interpretation and implementation of policies and strategies. From an international law perspective, reparations and restorative justice should always take into account victims' satisfaction and include the right to an effective remedy, the respect and protection of human rights, and a gender justice component. Moreover, it is generally accepted in international law that reparations should be proportionate and effective in adequately repairing the harm suffered by victims, to the extent possible.

At the ICC, many challenges related to reparative justice would be alleviated if delays in implementing reparations to victims were addressed and fixed. Consultations amongst all actors are required to develop ICC-wide strategies to deliver restorative justice to victims in all situation countries. In light of this, the volume *The Past, Present and Future of the International Criminal Court*, edited by Alexander Heinze and Viviane E. Ditrlich for the *Nuremberg Academy Series*, will contribute greatly to the reflection and debate on the achievements and future ahead of the ICC. With a view to strengthening this institution, this volume takes stock of the current state of the ICC; through the lenses of esteemed colleagues and practitioners, it provides a privileged account on the work done, and still to be done, by this unique institution and in the field of international criminal justice at large. Specific parts are devoted to the role of the Prosecution as the engine of the criminal justice machine and the two distinctive features of the ICC as an international criminal jurisdiction: its complementarity to national courts and the centrality of victims and their rights.

States and international governance should engage with and support the ICC and the TFV and their operations, legitimacy and independence. Nowadays, more than ever, international politics must focus and support justice and the plight of victims of the gravest crimes. This volume ultimately provides a timely account of and insights in how such processes should take place in order for the ICC to be able to fully discharge its mandate and meet the universal cry for justice.

Mama Koité Doumbia

*Chair of the Board of Directors, Trust Fund for Victims  
at the International Criminal Court*

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# The International Criminal Court: Between Continuity and Renewal

Viviane E. Dittrich\*

## 1.1. Introduction

The International Criminal Court ('ICC' or 'Court'), established as a permanent international criminal court, has developed into an enduring fixture in international criminal law. As ICC President Piotr Hofmański writes in his Foreword to this book: "It may already be said that the ICC has become a permanent feature of the international legal and judicial landscape". The Court has gained momentum at the vanguard of accountability efforts worldwide, while constantly remaining the focus of vigorous debate and intense scrutiny. International courts and tribunals are increasingly scrutinized – legally and politically – in light of recurring criticisms of their cost, pace, legitimacy and effectiveness. Against the backdrop of the growing complexity of criminal prosecutions, continuation of conflict and crimes, transformation of the accountability landscape with new mechanisms established, ongoing contestation of fundamental norms and multilateralism, and a preoccupation with pushback *vis-à-vis* courts, critical appraisals have appeared more vocal and vociferous.

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In light of the twentieth anniversary of the entry into force of the Rome Statute in 2002, it is anew timely and topical to critically examine the achievements, challenges and critiques of the ICC. Placing the Court's development in time and constructing "moving pictures" rather than taking a "snapshot view",<sup>1</sup> that is, to situate moments in a temporal sequence and examine the development and transformation in the *longue durée*, is essential. This edited volume, *The Past, Present and Future of the International Criminal Court*, provides a broad perspective on the Court's development over time.

During the process of writing this book, the ICC has experienced an almost unparalleled phase in its young existence. The Court underwent an independent external review and has been scrutinized day in, day out. The ICC has been threatened, its staff sanctioned, and it has been campaigned against. At the same time, its Chambers have produced landmark decisions – some debated at the front pages of newspapers, some largely ignored. The role of the Prosecutor at the ICC was arguably the most dominant issue in international criminal justice in the last two years, not only because of key decisions but also due to the election of the new Prosecutor. The election process was followed closely by observers, constantly commented and analysed, involving sexual misconduct allegations against candidates, and the public rejection or support of candidates. It is no mean feat for editors, authors and observers of the Court to keep up with new developments. As a result, the book is opened by a chapter that is solely dedicated to these developments – with a special focus on the themes and discussions of the Nuremberg Forum 2018 entitled "The 20th Anniversary of the Rome Statute: Law, Justice and Politics",<sup>2</sup> which spurred the idea of this book project. In Chapter 2, co-editor Alexander Heinze provides an impressive *tour d'horizon* of cross-cutting topics, court decisions and judgments, combined with a detailed analysis of the literature that has been published in recent years. An in-depth account of some of the key themes and issues raised in this introduction can thus be found in Chapter 2.

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<sup>1</sup> Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis*, Princeton University Press, 2004, p. 2.

<sup>2</sup> See Nuremberg Academy, "Nuremberg Forum 2018 Conference Report" (available on its web site). See also, Alexander Heinze, "The 20th Anniversary of the Rome Statute – A Review Essay About the Nuremberg Forum 2018", in *Criminal Law Forum*, 2019, vol. 30, pp. 109–135.

This chapter is organized as follows: setting the scene for more detailed, fine-grained analyses of specific topics in the chapters of this volume, this chapter first elucidates three broader dynamics, which the Court is faced with: commitment and contestation, continuity and renewal, and permanence and impermanence. The second section provides a retrospective of the twentieth anniversary of the adoption of the Rome Statute with a cursory sketch of some main anniversary events and activities. The third section presents a comprehensive overview of the focus and structure of the book and summaries of individual chapters.

## **1.2. The International Criminal Court: Context, Constraints and Complexities**

The first two decades of the ICC have seen significant milestones and achievements but also revealed a myriad of challenges that the Court has to face. The political, jurisdictional and operational challenges have been manifold. The Court had to handle the usual complexities of prosecuting international crimes and the specific challenges facing the ICC, including, *inter alia*, accessing evidence, investigating and prosecuting crimes in situations of ongoing conflict, victim participation and reparations. In the following, setting the scene for the thematic analyses that follow in the individual chapters of this volume, three broader dynamics are addressed under the headings: commitment and contestation, continuity and renewal, and permanence and impermanence.

### **1.2.1. Commitment and Contestation**

The interplay of law and politics, State engagement and disengagement, and commitment and contestation, has coloured the Court's trajectory and perceptions about the institution operating in a political and institutional landscape that has constantly been changing. The Court had to deal with varying manifestations of disengagement and withdrawal, resistance and opposition from several States, including States Parties.

Overall, the changing political climate deserves attention in light of broader dynamics of pushback and backlash against other international courts<sup>3</sup> and contestation of multilateral institutions and the rules-based in-

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<sup>3</sup> For example, the Southern African Development Community Tribunal, European Court of Human Rights, Inter-American Court of Human Rights, East African Court of Justice, African Court on Human and Peoples' Rights, World Trade Organization's Appellate Body and even the International Court of Justice, see Mikael Rask Madsen, Pola Cebulak and Micha

international order. Several trends can be observed: mechanisms that apply international criminal law have multiplied, new investigative mechanisms have been created, a considerable wealth of judicial practice has accumulated; at the same time, the global political context has changed, new crises have unfolded, and there is preoccupation with pushback *vis-à-vis* courts and tribunals as well as contestation of fundamental norms,<sup>4</sup> and a phenomenon referred to as ‘democratic decay’ or ‘rule of law backsliding’.<sup>5</sup> The central importance of international law as a foundation for effective multilateralism and strong international organizations, courts and tribunals is paramount. As a counterpoint to contested multilateralism, the Alliance for Multilateralism and Alliance against Impunity championed by Germany and Federal Foreign Minister Heiko Maas is particularly noteworthy.<sup>6</sup>

From the very beginning, the Court has been the target of criticism and attack. It has faced contestation coming prominently from the United States (‘US’) and other major powers, and later on especially from the African Union and several African countries. With regard to the US, the decision of the previous administration to impose economic sanctions against the ICC Prosecutor and the Head of the Court’s Jurisdiction, Complementarity and Cooperation Division was probably the most visible, but hardly the only attack that the Court has faced during the past two decades.<sup>7</sup> The unprecedented decision was gravely concerning indeed. This “unusual and extraordinary assault on international justice” as the US President “has

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Wiebusch, “Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts”, in *International Journal of Law in Context*, 2018, vol. 14, no. 2, pp. 197–220. See also, on backlash against international criminal tribunals, Henry Lovat, “International Criminal Tribunal backlash”, in Kevin Jon Heller *et al.* (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, 2020, pp. 601–625.

<sup>4</sup> Nicole Deitelhoff, “What’s in a name? Contestation and backlash against international norms and institutions”, in *The British Journal of Politics and International Relations*, 2020, vol. 22, no. 4, pp. 718–724.

<sup>5</sup> For a mapping of the burgeoning literature on the phenomenon labelled democratic decay, rule of law backsliding or authoritarianism broadly construed, see Tom Gerald Daly, “Democratic Decay: Conceptualising an Emerging Research Field”, in *Hague Journal of the Rule of Law*, 2019, vol. 11, pp. 9–36. See also Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”, in *Cambridge Yearbook of European Legal Studies*, 2017, vol. 19, pp. 3–47.

<sup>6</sup> Alliance for Multilateralism, “Declaration of Principles”, 25 September 2020 (available on its web site). See also the web site of the Alliance against Impunity.

<sup>7</sup> On a possible impact of the hostile environment on ICC decision making, see Heinze, Chapter 2, Section 2.3.1., this volume.

chosen intimidation of officials as a form of confrontation with the court”<sup>8</sup> caused numerous reactions and official statements by, amongst others, individual States, the UN, the ICC itself, academia and civil society. For instance, in an immediate reaction O-Gon Kwon, then President of the Bureau of the ICC’s Assembly of States Parties (‘ASP’), noted: “I strongly reject such unprecedented and unacceptable measures against a treaty-based international organization. They only serve to weaken our common endeavour to fight impunity for mass atrocities”.<sup>9</sup> A joint statement on behalf of 72 ICC States Parties issued on 2 November 2020 reiterated their

commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity and independence undeterred by any measures or threats against the Court, its officials and those cooperating with it. We note that sanctions are a tool to be used against those responsible for the most serious crimes, not against those seeking justice. Any attempt to undermine the independence of the Court should not be tolerated.<sup>10</sup>

In recent years, dissonance and discontent towards the ICC has been fueled and the Court has faced threats of withdrawal and actual withdrawals from the Rome Statute. In light of Africa-ICC relations and what has been called “pan-Africanist pushback”,<sup>11</sup> some African countries, erstwhile

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<sup>8</sup> Claus Kieß, “Editorial: An Unusual and Extraordinary Assault on International Justice”, in *Journal of International Criminal Justice*, 2020, vol. 18, no. 4, pp. 791–792.

<sup>9</sup> See also ICC, President of the Bureau of the Assembly of States Parties, “ASP President, O-Gon Kwon, rejects US measures against ICC”, 2 September 2020 (<http://www.legal-tools.org/doc/xaduvf/>).

<sup>10</sup> UN General Assembly, “Adopting Draft Upholding International Criminal Court’s Goal to End Impunity, Calls for Cooperation in Arresting Fugitives”, Statement by Christoph Heusgen (Germany), seventy-fifth session, 2 November 2020, Meetings Coverage no. GA/12280. The full statement is available on the web site of the Permanent Mission of the Federal Republic of Germany to the UN.

<sup>11</sup> Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, Duke University Press, Durham, 2019. For recent accounts of the complexities of Africa-ICC relations, see, for example, Christopher Gevers, “Africa and International Criminal Law”, in Heller *et al.* (eds.), 2020, pp. 154–193, see above note 3; Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics*, Cambridge University Press, 2018; Charles C. Jalloh and Ilias Bantekas (eds.), *The International Criminal Court and Africa*, Oxford University Press, 2017.

supporters of the Court, have become strong critics.<sup>12</sup> The asymmetrical implementation gave rise to severe criticism and allegations that the Court had an anti-African bias, which increasingly called into question the ICC's legitimacy. The African Union called for the mass withdrawal of its Member States in February 2017 amid growing tensions and contestations. The situation reached a peak when South Africa, the Gambia and Burundi indicated their intention to withdraw from the Statute. Finally, only Burundi pursued this path, withdrawing from the Rome Statute in 2017. Two years later, albeit on different grounds, it was joined by The Philippines.<sup>13</sup> The withdrawal of The Philippines reflects another challenge that the Court has to face: the notification was presented a few weeks after the Office of the Prosecutor ('OTP') announced the opening of a preliminary investigation of the situation in that country, focusing on crimes allegedly committed in the context of the 'war on drugs' campaign launched by the government. Thus, the decision of The Philippines to denounce the Rome Statute reflects a climate more hostile to human rights, international justice and accountability, which is becoming more frequent in current times.<sup>14</sup>

Another area of scrutiny and discussion has been the role of the UN Security Council. Under Article 13(b) of the Rome Statute, the Security Council may refer a situation to the Prosecutor of the ICC, authorizing the Court to exercise jurisdiction over crimes committed in the territory of non-States Parties, by nationals of non-States Parties. Some have argued that the decision of the Security Council to refer certain situations – but not others – suggests that the Court is being used as a 'political tool' of the Security Council. Hence, the complex relationship between the Security Council and the ICC is seen to increase the challenges to the legitimacy of the latter.<sup>15</sup>

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<sup>12</sup> M. Cherif Bassiouni, "Concerning the ICC Withdrawal Problem", in Richard H. Steinberg (ed.), *The International Criminal Court: Contemporary Challenges and Reform Proposals*, Brill Nijhoff, Leiden/Boston, 2020, pp. 115–119.

<sup>13</sup> On these developments see, for instance, Hannah Woolaver, "Withdrawal from the International Criminal Court: International and Domestic Implications", in Gerhard Werle and Andreas Zimmermann (eds.), *The International Criminal Court in Turbulent Times*, T.M.C Asser Press, The Hague, 2019, pp. 23–42.

<sup>14</sup> See David Tolbert, "Looking Forward and Looking Back: How Can the International Criminal Court (ICC) Navigate in a Complicated and Largely Hostile World?", in *Georgia Journal of International and Comparative Law*, 2019, vol. 47, pp. 659–667.

<sup>15</sup> See, for example, Robert Frau, "The International Criminal Court and the Security Council – The International Criminal Court as a Political Tool?", in Werle and Zimmermann (eds.),

Time and again, it has been proclaimed the ICC, and more generally international criminal justice, is in crisis – again and again and again. For years, the Court is portrayed in crisis mode and perpetual crisis management is called for.<sup>16</sup> It was once suggested the ICC “has become a symbol of both the promise of international law and its stunning shortcomings”.<sup>17</sup> Overall, the complex interplay of law and politics, State engagement and disengagement, and commitment and contestation, raises larger questions about the power and powerlessness of international law and international criminal law, and about continuity and renewal.

### 1.2.2. Continuity and Renewal

Operational and jurisdictional issues, as well as institutional dynamics and alleged deficiencies, have increasingly come into focus. In the practice and regular work of the Court, various substantive and procedural aspects of proceedings have come into sharper relief. Key issues have been infused with new urgency in contemporary discussions, many of which are explored at length in various chapters in this volume. These include, *inter alia*, prosecutorial independence, jurisdiction and admissibility; situation and case selection; sustainability of preliminary examinations, investigations and prosecutions; focus and raising standards of investigations and prosecutions; length of proceedings; quality of evidence and the use of digital evidence and open-source evidence; private investigations; universality; co-operation; complementarity; victim participation and reparations; complexity and number of cases; internal issues, including governance structure, organizational culture and staffing challenges; effectiveness and legitimacy deficits, whether real or perceived. Already on the tenth anniversary of the Rome Statute, M. Cherif Bassiouni argued that the legitimacy of the

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2019, pp. 111–130, see above note 13. See also Tom Dannenbaum, “Legitimacy in war and punishment. The Security Council and the ICC”, in Heller *et al.* (eds.), 2020, pp. 129–153, see above note 3. On wider political aspects of the ICC, see Sarah M.H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2011, vol. 21, no. 4, pp. 941–965.

<sup>16</sup> For critical accounts of such crisis talk, see, for instance, Sergey Vasiliev, “The crises and critiques of international criminal justice”, in Heller *et al.* (eds.), 2020, pp. 626–651, see above note 3; Joseph Powderly, “International Criminal Justice in an Age of Perpetual Crisis”, in *Leiden Journal of International Law*, 2019, vol. 32, no. 1, pp. 1–11.

<sup>17</sup> Elizabeth Rubin, “If Not Peace, Then Justice”, *New York Times Magazine*, 2 April 2006.

ICC would be accomplished by a regular flow of investigations and cases, and the fairness, objectivity and effective management of the institution.<sup>18</sup>

A particular lens of scrutiny concerns the performance, effectiveness and efficiency of the Court.<sup>19</sup> Proposals for enhancing the Court's efficiency have been frequent.<sup>20</sup> The Court itself has engaged in this discussion, with the ASP calling for the development of performance indicators.<sup>21</sup> The Court published three reports on the development of performance indicators immediately between 2015 and 2017,<sup>22</sup> and a number of documents have been produced, including the Chambers Practice Manual and strategic plans and policy papers of the OTP. However, resorting to much-touted performance indicators for the Court has been viewed critically.<sup>23</sup> Today, a novel, contemporary challenge, which impacted the ICC like all other courts and organizations, has been the COVID-19 pandemic. The Court has

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<sup>18</sup> M. Cherif Bassiouni, "The ICC – Quo Vadis?", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, pp. 421–427.

<sup>19</sup> See, for instance, "Special Issue: The Rome Statute at Twenty: Enhancing Efficiency and Effectiveness at the International Criminal Court", *International Criminal Law Review*, 2018, vol. 18, no. 3; Theresa Squatrito, Oran R. Young, Andreas Føllesdal and Geir Ulfstein (eds.), *The Performance of International Courts and Tribunals*, Cambridge University Press, 2018; Yuval Shany, *Assessing the Effectiveness of International Courts*, Oxford University Press, 2014.

<sup>20</sup> For instance, Silvia Fernández de Gurmendi, "Enhancing the Court's Efficiency: From the Drafting of the Procedural Provisions by States to their Revision by Judges", in *Journal of International Criminal Justice*, 2019, vol. 16, no. 2, pp. 341–361.

<sup>21</sup> ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/13/Res.5, 17 December 2014 (<http://www.legal-tools.org/doc/3e8cf6/>).

<sup>22</sup> ICC, "Report of the Court on the development of performance indicators for the International Criminal Court", 12 November 2015 (<http://www.legal-tools.org/doc/1eiswn/>); ICC, "Second Court's report on the development of performance indicators for the International Criminal Court", 11 November 2016 (<http://www.legal-tools.org/doc/bcyo3m/>); ICC, "Third Court's report on the development of performance indicators for the International Criminal Court", 15 November 2017 (<http://www.legal-tools.org/doc/galah8/>).

<sup>23</sup> On performance indicators, see, for instance, Annika Jones, "Measuring Performance and Shaping Identity", in *Journal of International Criminal Justice*, 2021, vol. 18, pp. 825–850; Andrea Carcano, "On the Governance of International Judicial Institutions: The Development of Performance Indicators for the International Criminal Court", in *Max Planck Yearbook of United Nations Law Online*, 2019, vol. 22, no.1, pp. 83–113; Philipp Ambach, "Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?", in *International Criminal Law Review*, 2018, vol. 18 no. 3, pp. 426–460; Birju Kotecha, "The ICC's Office of the Prosecutor and the Limits of Performance Indicators", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 543–565.

taken a series of measures and adapted its activities to ensure continuation. Still, the difficulties of travelling and mandatory partial or complete lockdowns in different countries have affected the possibilities of investigators to collect evidence in the field,<sup>24</sup> among other effects.

For years, there have been more and more calls to study the factors affecting the length of proceedings and causes of delays and to consider possible areas of reform to expedite proceedings.<sup>25</sup> Indeed, the length of proceedings,<sup>26</sup> and the question of whether international justice is in fast or slow motion, has been a constant bone of contention. On the eve of the twentieth anniversary of the adoption of the Rome Statute, on 26 June 2018, the German Parliament passed a motion entitled ‘Strengthening the International Criminal Court’ across party lines, underscoring the widely held view of the Court’s significance and relevance. The motion urges the government to work to strengthen the Court, for instance, by encouraging more countries to join the Court and by ensuring that it has sufficient financial support. With a view to strengthening the institution and the work of the Court, it also calls for a study to ascertain the factors affecting the length of proceedings and formulate proposals to accelerate proceedings.<sup>27</sup> The Nuremberg Academy has been conducting a research project on the length of proceedings of the ICC with the aim to identify the main factors that affect the length of proceedings based on a detailed analysis of Court records and drawing on interview and survey data.

In terms of continuity and renewal, the recently conducted Independent Expert Review (‘IER’) has crystallized certain debates. The IER, ordered by the ASP on 6 December 2019, had the mandate to “making concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole, [...] and submit those to the Assembly and the Court

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<sup>24</sup> See, for example, Hiram Abtahi, “The International Criminal Court during the COVID-19 Pandemic”, in *Journal of International Criminal Justice*, 2020, vol. 8, no. 5, pp. 1–8.

<sup>25</sup> See, for instance, Håkan Friman, “Trial Procedures—With a Particular Focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 909–931.

<sup>26</sup> In detail and with examples, see Heinze, Chapter 2, Section 2.3.6., this volume.

<sup>27</sup> German Parliament, Motion by CDU/CSU, SPD, FDP and BÜNDNIS 90/DIE GRÜNEN, “Internationalen Strafgerichtshof stärken”, 28 June 2018, Drucksache 19/2983 (available on the German Parliament’s web site).

for consideration”.<sup>28</sup> The final IER report published on 30 September 2020 runs to 348 pages and includes 384 recommendations, of which 76 are summarized as “prioritised recommendations” in Annex I.<sup>29</sup> Following a description of its terms of reference,<sup>30</sup> the IER report first addresses Court-wide matters, such as governance, human resources, ethics and prevention of conflicts of interest, and internal grievance procedures. Subsequently, the IER report addresses organ-specific matters of Chambers, the OTP and Registry, delving into their working methods, the Code of Judicial Ethics,<sup>31</sup> defence-related matters, and victim participation, reparations and assistance. In addition, the Court’s external governance, oversight bodies and mechanisms, and the system of nomination of judges are examined in the report.<sup>32</sup>

The IER and final report have sparked a flurry of activity and advocacy and a chorus of voices for the formulation of a veritable reform agenda for the Court. It has been seen to provide “one of the first systematic assessments of the ICC’s procedural effectiveness” and “unique insights into the inner workings of the Court”.<sup>33</sup> Developments in the field now will depend on how the report is received and further acted upon in the short and long term.

From a practitioners’ perspective, introspection with regard to how institutions function, their values, purposes, strategies and policies is certainly not easy, however is essential. Cultivating and bolstering a culture of accountability, integrity and independence appears critical to increase the confidence of the public in justice institutions and to enhance the upholding

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<sup>28</sup> ICC ASP, Review of the International Criminal Court and the Rome Statute System, ICC-ASP/18/Res.7, 6 December 2019, para. 6 (<http://www.legal-tools.org/doc/d1fyfk/>).

<sup>29</sup> See Independent Expert Review, “Review of the International Criminal Court and the Rome Status System, Final Report”, 30 September 2020, p. 331 (‘IER Report’) (<http://www.legal-tools.org/doc/cv19d5/>).

<sup>30</sup> ICC ASP, Review of the International Criminal Court and the Rome Statute system, ICC-ASP/18/Res.7, 6 December 2019, Annex I, p. 4 (<http://www.legal-tools.org/doc/d1fyfk/>).

<sup>31</sup> For concrete examples of a violation of judicial ethics see Heinze, Chapter 2, Section 2.3.4., this volume.

<sup>32</sup> For a more detailed overview especially of the ethical considerations and the notion of integrity throughout the report, see Morten Bergsmo and Viviane E. Dittrich, “Integrity as Safeguard Against the Vicissitudes of International Justice Institutions”, in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020, pp. 1–43 (<http://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

<sup>33</sup> Samaria Muhammad, Barbora Holá and Anja Dirkzwager, “Reimagining the ICC: Exploring Practitioners’ Perspectives on the Effectiveness of the International Criminal Court”, in *International Criminal Law Review*, 2021, vol. 21, p. 128.

of the rule of law. In this regard, the role of individuals and the importance of integrity cannot be overstated.<sup>34</sup> Overall, reviewing practice continues to be an ongoing conversation. It remains important to move beyond snapshot descriptions and anecdotalism and to be mindful of the theoretical and practical challenges of assessing the Court's performance. Moreover, in view of overcoming the primacy of doctrinalism and of empiricism, it has been argued that "the proper study of international law, including ICL [...] necessitates the integration of *doctrine, data* and *doxa*".<sup>35</sup> It is paramount to heed calls to study organizations not solely in the sense of abstract institutions but as complex social environments.<sup>36</sup>

Individuals shape an institution as leadership counts. Bassiouni once noted that the ICC's success depends on the three Principals, that is, the President, the Prosecutor and the Registrar, arguing that "[i]t is always individuals who make the institution".<sup>37</sup> The relevance of effective and exemplary leadership is likewise highlighted in the IER Report.<sup>38</sup>

The Prosecutor's role is critical for the functioning of the Court. Unsurprisingly, the recent discussion has especially focused on the important election of the next Prosecutor and the leadership transition. In light of the pending completion of Prosecutor Bensouda's term, we witnessed a burgeoning activity in terms of critical appraisal and stocktaking – reflecting on achievements of the Court, the OTP and on individual legacies of the Prosecutor. Various events with scholars and practitioners have already taken place in 2021. Interestingly, an official event organized by the OTP enti-

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<sup>34</sup> For the first book-length treatment of integrity in international justice, see Bergsmo and Dittrich (eds.), 2020, see above note 32.

<sup>35</sup> Jens Meierhenrich and Richard A. Wilson, "The Life of the Law Has Not Been Logic; It Has Been Experience: International Legal Ethnography and the New Legal Realism", in Heinz Klug, Elizabeth Mertz, Shahin Talesh and Frances Tung (eds.), *Handbook on New Legal Realism*, Edward Elgar, forthcoming 2021. On 'practices' in particular, see Jens Meierhenrich, "The Practices of the International Criminal Court", in *Law and Contemporary Problems*, 2013, vol. 76, nos. 3 and 4, pp. i–x; Jens Meierhenrich, "The Practice of International Law: A Theoretical Analysis", in *Law and Contemporary Problems*, 2014, vol. 76, nos. 3 and 4, pp. 1–83.

<sup>36</sup> Alastair Iain Johnston, "Treating International Institutions as Social Environments", in *International Studies Quarterly*, 2001, vol. 45, no. 4, pp. 487–515; Marie-Bénédicte Dembour and Tobias Kelly, *Paths to International Justice: Social and Legal Perspectives*, Cambridge University Press, 2007.

<sup>37</sup> Bassiouni, 2006, p. 427, see above note 18.

<sup>38</sup> For instance, see IER Report, para. 63, p. 18; R14, p. 20; R16, p. 20; R87, p. 47; R101, p. 55; and para. 952, p. 210, see above note 29.

tled “Virtual Farewell Event and Celebration of Prosecutor Fatou Bensouda’s Achievements and Legacy at the International Criminal Court” was held on 7 June 2021. Prosecuting international crimes ‘without fear or favour’ as Prosecutor Fatou Bensouda has expressed and exhibited time and again, remains critical. For example, the ICC Colloquium has been jointly organized by the Center for International Law and Policy in Africa, the American Society of International Law and the Nuremberg Academy. The first two roundtables of the four-part series, held on 29 March and 14 May 2021 respectively, were dedicated to a critical stocktaking of the election process of the new Prosecutor and of achievements and challenges of the previous and current Prosecutor.

The recent appointment of the new Prosecutor, who assumed office on 16 June 2021, will undoubtedly impact the future developments of the Court. Over the past years, the Prosecutor and the OTP have achieved notable successes but also faced setbacks. The achievements are considerable, while internal and external challenges remain significant. The new Prosecutor will have to address the never-fading requests for more and stronger cases, while also addressing the concerns for more efficiency.<sup>39</sup> With Karim Khan now at the helm of the OTP, further dynamics of continuity and renewal will unfold. It is important to bear in mind that legacies of individuals live on after any official terms are concluded, and legacy formation begins before any mandate is completed. This illustrates the interplay of permanence and impermanence.

### 1.2.3. Permanence and Impermanence

In a landmark development with the adoption of the Rome Statute, the ICC was created as a permanent court as opposed to an *ad hoc* tribunal. Former UN Secretary-General Kofi Annan referred to the ICC as “the most significant recent development in the international community’s long struggle to advance the cause of justice and rule of law”.<sup>40</sup> It was proclaimed the Rome Statute “could well be the most important institutional innovation

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<sup>39</sup> Alex Whiting, “A Program for the Next ICC Prosecutor”, in *Case Western Reserve Journal of International Law*, 2020, vol. 52, no. 1, pp. 479–489.

<sup>40</sup> The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para. 49 (<http://www.legal-tools.org/doc/77bebf/>).

since the founding of the United Nations”.<sup>41</sup> The Court has long been hailed as, *inter alia*, “the most significant development in international criminal law since the existence of the discipline”,<sup>42</sup> “the brightest star in the cosmopolitan firmament”<sup>43</sup> and a “global civil society achievement”.<sup>44</sup> It has even been said that the year 1998 represents nothing less than a pivotal moment in international politics like 1648.<sup>45</sup> At the 2010 ICC Review Conference, then UN Secretary-General Ban Ki-Moon ceremonially declared: “The era of impunity is dead. We have entered a new age of accountability.”<sup>46</sup> Under Article 125(3), the Rome Statute is open to accession by all States, and thus, its geographic scope of jurisdiction is much broader than those of other international tribunals, which were of an *ad hoc* nature and limited to a specific situation. A voluminous and rich literature on the law and practice of the ICC has emerged, including leading commentaries<sup>47</sup> and edited volumes<sup>48</sup> on the Rome Statute.

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<sup>41</sup> Robert C. Johnson, “A Turning Point in International Relations? Establishing a Permanent International Criminal Court”, Report No.13, Joan B. Kroc Institute for International Peace Studies, 1997, p. 1.

<sup>42</sup> William Schabas, *An Introduction to the International Criminal Court*, 2nd. ed., Cambridge University Press, 2004, p. 25.

<sup>43</sup> Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 39.

<sup>44</sup> Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, New York, 2007, p. i.

<sup>45</sup> Frédéric Mégret, “Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution in International Law”, in *European Journal of International Law*, 2001, vol. 12, pp. 247–268.

<sup>46</sup> UN News, “At ICC review conference, Ban declares end to ‘era of impunity’”, 31 May 2010 (available on its web site).

<sup>47</sup> See Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002; Georgios M. Pikis, *The Rome Statute for the International Criminal Court. Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Martinus Nijhoff Publishers, Leiden/Boston, 2010; M. Cherif Bassiouni and William A. Schabas (eds.), *The Legislative History of the International Criminal Court*, Brill Nijhoff, Leiden/Boston, 2016; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016; Sylvia Helena Steiner and Leonardo Nemer Caldeira Brandt (eds.), *O Tribunal Penal Internacional – Comentários ao Estatuto de Roma*, Del Roy Editora, Belo Horizonte, 2016; Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017 (<http://www.toaep.org/ps-pdf/29-klamberg>); Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression. A Commentary*, Cambridge University Press, 2017; Julian Fernandez, Xavier Pancreau and Muriel Ubéda-Saillard, *Statut de Rome de la Cour pénale internationale: Commentaire article par article*, 2nd. ed., Pedone, Paris, 2019; William A. Schabas,

A prominent dimension of the Court's significance and self-understanding is its permanent character. The newly built permanent premises cement a public image of and commitment to its permanent nature and convey a greater sense of permanence than any temporary and not purpose-specific facilities. Accordingly, the move to the new premises on 14 December 2015 was welcomed by then ICC President Judge Silvia Fernández de Gurmendi: "As a permanent institution, the ICC now has a permanent home".<sup>49</sup> Two years prior, during a ceremony to mark the beginning of construction work, the Chair of the Oversight Committee Roberto Bellelli stated that "this is a point of no return on the path of international criminal justice [...] the transition [...] to a permanent architecture in international relations [whose] roots [...] are being excavated in a visible and permanent structure in the ground of The Hague".<sup>50</sup> Then ICC President Sang-Hyun Song echoed this sentiment by stating that "[a]n institution of global significance deserves a world class premises".<sup>51</sup>

For any new institution, the focus is on beginnings and not on endings. The permanent nature of the ICC as an institution should not be confused with the permanent presence of the Court in countries where preliminary examinations or investigations have been taking place, or with any permanent imprint. Finite elements and proceedings have a significant bearing yet often remain occulted. Several related yet distinct institutional dynamics of finite elements or impermanent aspects are worth noting, among others, completion of trials, debates on possible time limits for preliminary examinations, possible exit and completion strategies, and legacies.

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*An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020; Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 4th. ed., C.H. Beck, Hart and Nomos, München, Oxford and Baden-Baden, 2021 (see also previous editions of the Triffterer and later Triffterer and Ambos commentary). On a brief discussion on how commentaries have been cited by Chambers at the ICC, see Heinze, Chapter 2, Section 2.4.3. in this volume.

<sup>48</sup> Including, for instance, Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999; Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden, 2009; Stahn (ed.), 2015, see above note 25.

<sup>49</sup> ICC, "The ICC has moved to its permanent premises", 14 December 2015, ICC-CPI-20151214-PR1180.

<sup>50</sup> ICC ASP, "ICC holds groundbreaking ceremony for Permanent Premises construction", 16 April 2013, ICC-ASP-20130416-PR898.

<sup>51</sup> *Ibid.*

Completion has become a key focus. Indeed, it is critical how completion is addressed and managed. It has been argued that the ICC should establish and implement completion and exit strategies, to help catalysing the development of the domestic justice system and alleviate the resource restraint that the Court is facing – this was once called the “ICC’s exit problem”.<sup>52</sup> The Court opened its first investigations in Uganda and the Democratic Republic of the Congo in 2004, and in Darfur in 2005. More than 16 years later, those investigations are still open, and no guidelines on the possibility of completion and closure were presented until recently. However, and following the path of other criminal tribunals,<sup>53</sup> important lessons learned in terms of completion strategies of other courts and tribunals are also relevant for the ICC.<sup>54</sup> Significant aspects of the completion strategies of the *ad hoc* tribunals included case referrals, which may also contribute to the enhancement of domestic judiciary systems, and victim and witness protection and access to public archival information.<sup>55</sup> The timing, modalities and sustainability of ICC engagement and, ultimately, disengagement, that is completion and exit, have longtime remained sidelined and under-examined. Gradually, the topic has garnered greater attention and public discussion.<sup>56</sup>

The OTP’s Policy on Situation Completion was published on 15 June 2021. This development is in line with the commitment made in the ICC

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<sup>52</sup> Rebecca J. Hamilton, “The ICC’s Exit Problem”, in *New York University Journal of International Law and Policy*, 2014, vol. 47, pp. 1–58.

<sup>53</sup> On the different completion strategies adopted by previous international tribunals and hybrid courts, see: Kevin Jon Heller, “Completion”, in Luc Reydam, Jan Wouters and Cedric Ryngeert (eds.), *International Prosecutors*, Oxford University Press, 2012, pp. 886–925.

<sup>54</sup> See, for example, Dafna Gozani, “Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court”, in *Loyola of Los Angeles International and Comparative Law Review*, 2015, vol. 36, no. 3, pp. 331–382; Gideon Boas and Gabriel Oosthuizen, “Suggestions for future lessons-learned studies: The experience of other international and hybrid criminal courts of relevance to the International Criminal Court”, in *International Criminal Law Services*, 2010, pp. 15–16.

<sup>55</sup> See, for instance, Justine Tillier, “The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?”, in *International Criminal Law Review*, 2013, vol. 13, pp. 507–591; Valerie Oosterveld, “The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals”, in *Loyola University Chicago International Law Review*, 2010, vol. 8, no. 1, pp. 13–32.

<sup>56</sup> See, for example, ICC Forum, *Completion Strategy Question*, February–May 2020 (available on its web site); see also the expert seminar “The Peripheries of Justice Intervention: Preliminary Examination and Legacy/Sustainable Exit”, The Hague, 29 September 2015.

Strategic Plan 2019–2021 (Goal 10) and the OTP’s Strategic Plan 2019–2021 (Goal 2). The long-awaited publication followed consultations with various stakeholders, including States Parties, practitioners, academics and civil society. The efforts of developing a policy have been welcomed by members of civil society, given long-standing advocacy efforts in this direction in the ICC-non-governmental organizations roundtables, events and publications.<sup>57</sup> Back in 2013, the ASP articulated the need for the development of a completion strategy or completion strategies.<sup>58</sup> Also, the IER final report recommended that from the outset of an investigation completion strategies are developed in view of a “wider and more comprehensive strategy for the ‘life-cycle’ of the OTP’s involvement in a given situation.”<sup>59</sup> The Policy on Situation Completion is the third policy paper in what is seen as a trilogy of policy papers, together with the OTP’s Policy Paper on Preliminary Examinations (2013) and the Policy Paper on Case Selection and Prioritisation (2016).

When publishing the Situation Completion Policy on her last day in office, Prosecutor Bensouda stated: “This is an important development that will serve the Office greatly by providing transparency, clarity and helpful guidance to the complex questions arising from the winding down of activities in relation to a situation under investigation and how best to respond”.<sup>60</sup> Court-wide approaches are certainly needed. Upon publication it has been made clear that the policy concerns only the internal activities of the OTP and “is without prejudice to further work which may be carried out by the Court as a whole—with its stakeholders—in consolidating the Court’s legacy in those situations where it exercises its jurisdiction”.<sup>61</sup> The policy paper stresses “it does not address how other Organs of the Court may complete their activities within a particular situation or the conduct of ‘legacy’ initiatives to which the Office may contribute, as appropriate, including in partnership with other actors such as the ASP and the Trust Fund

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<sup>57</sup> For instance, see No Peace Without Justice, “Developing a Comprehensive Completion Strategy for the International Criminal Court”, 17 November 2012 (available on its web site).

<sup>58</sup> ICC ASP, Report of the Court on complementarity: Completion of ICC activities in a situation country, ICC-ASP/12/32, 15 October 2013, para. 1 (<http://www.legal-tools.org/doc/13hnde/>).

<sup>59</sup> IER Report, R. 248, see above note 29.

<sup>60</sup> Fatou Bensouda cit. in ICC-OTP, “ICC Prosecutor, Fatou Bensouda, publishes Policy on Situation Completion”, 15 June 2021, ICC-OTP-20210615-PR1596.

<sup>61</sup> *Ibid.*

for Victims”.<sup>62</sup> Strategic considerations on completion are thus seen today as complementary to broader legacy initiatives, and legacy consolidation carried out by the Court.

For nearly two decades, the topic of legacy has been ubiquitous and ‘legacy talk’ had become pervasive at the *ad hoc* tribunals and hybrid courts.<sup>63</sup> In a similar vein, the ICC has to consider its long-standing impact and legacy. As observed elsewhere, since any serious discussion of legacy in relation to the ICC was remarkably missing in scholarship and practitioner circles until 2014, an important shift in perspective was proposed by challenging the often commonly held view that a legacy lens is not suitable for a permanent institution.<sup>64</sup> For the ICC, the issue of legacy, if explicitly discussed at all, was seen as future consideration rather than current preoccupation:

In the future, [...] consideration could be given to addressing, in a timely manner, relevant legacy issues such as preserving and developing the Court’s impact on the national judicial system, where appropriate, taking into account the lessons learnt from other international jurisdictions, in dialogue with the Assembly.<sup>65</sup>

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<sup>62</sup> ICC-OTP, “Policy on Situation Completion”, 15 June 2021, para. 3 (<http://www.legal-tools.org/doc/mdl417/>).

<sup>63</sup> For more detailed accounts of legacy formation and the first systematic examination of the institutional creation of legacies at the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, see Viviane E. Dittrich, “Legacies in the Making at the ICTY”, in Carsten Stahn, Carmel Agius, Serge Brammertz and Colleen Rohan (eds.), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach*, Oxford University Press, 2020, pp. 83–111; Viviane E. Dittrich, “Legacies in the Making: Assessing the Institutionalized Legacy Endeavour of the Special Court for Sierra Leone”, in Charles C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, 2014, pp. 663–691; for a more comprehensive and the first book-length analysis, see Viviane E. Dittrich, *Present at the Completion: Creating Legacies at the International Criminal Tribunals*, book manuscript, 2021.

<sup>64</sup> Viviane E. Dittrich, “Legacies of the International Criminal Court under construction”, in *Sicherheit und Frieden*, 2014, vol. 31, no. 4, pp. 197–20; for early voices, see also Elizabeth Evenson and Alison Smith, “Legacy, and Complementarity at the ICC”, in Stahn (ed.), 2015, pp. 1259–1276, see above note 25; Alison Cole, “What is the International Criminal Court’s legacy?”, *The Guardian*, 16 July 2012.

<sup>65</sup> ICC ASP, “Report of the Bureau on complementarity”, 7 November 2012, ICC-ASP/11/24, para. 20 (<http://www.legal-tools.org/doc/ajk8jm/>).

The idea of the Court's legacy eventually started being contemplated as relevant even for a permanent institution – especially in view of complementarity as a central component of legacy building. The term 'legacy' itself entered the vocabulary used at the ICC, albeit often in a technical sense. For example, the 2015 ICC Records and Retention Policy referred to a new category of records, so-called 'ICC legacy records' to be retained permanently. Such legacy records were defined as "ICC Records that contain information determined to be of historical value which maintain the legacy of the Court for the future".<sup>66</sup> This underscores an emergent understanding of the nexus between records, archives and legacies. More recently, in the context of interacting with communities after conflict and long-term engagement in situation countries, the ICC web site publicly declares: "In this way, the Court will leave a legacy long after its departure from those countries."<sup>67</sup>

Courts as legacy leavers, including the ICC as a permanent court, and particular individuals within the institution, as illustrated above for the Prosecutor, engage in legacy building, purposively and otherwise. Legacy formation depends on a multiplicity of actors and on how legacies are formed, received, activated, assessed, and commemorated and continuously constructed.<sup>68</sup> The struggle over the power of interpretation remains ongoing. Legacy construction as an ongoing process effectively undermines the idea that the past exists as independent and impenetrable from the present and future. In this sense, individuals or institutions retroactively become who or what they are said to represent.<sup>69</sup> At first glance, legacy formation conventionally appears to be inscribed in a linear conception of time. Yet, the legacy process contains the confluence of three temporalities, namely past, present and future, which chimes with the fitting title of this edited volume.

### 1.3. Twentieth Anniversary of the Rome Statute

More than 20 years ago, then UN Secretary-General Kofi Annan proclaimed the establishment of the Court, a "gift of hope to future generations,

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<sup>66</sup> ICC, "Records Retention and Disposal Policy", 18 March 2015, ICC/AI/2015/002 (<http://www.legal-tools.org/doc/c22367/>).

<sup>67</sup> ICC, "Interacting with communities affected by crimes" (available on its web site).

<sup>68</sup> For a detailed account of legacy construction see Dittrich, see above note 63.

<sup>69</sup> Maja Zehfuss, *Wounds of Memory: The Politics of War in Germany*, Cambridge University Press, 2011.

and a giant step forward in the march towards universal human rights and the rule of law” in Rome on 18 July 1998.<sup>70</sup> The twentieth anniversary of the adoption of the Rome Statute in 2018, the twentieth anniversary of the entry into force of the Rome Statute in 2022 and the commemorative settings in this context provide opportune moments and spaces for reflection and stocktaking, critical discussion and review.

Marking the twentieth anniversary of the adoption of the Rome Statute in 2018, a significant number of public and non-public events and conferences took place worldwide, including in Africa, America, Asia and Europe. While the twentieth anniversary was discussed in general law conferences and discussion fora that covered a broad array of topics in international law, many events organized by States, the ICC itself, as well as other institutions and organizations, civil society and universities, were specifically dedicated to the anniversary. Some events took a broad perspective covering a wide range of topics, some focused on a single issue or specific topic of heightened interest, and yet others foregrounded regional perspectives.<sup>71</sup> In the following, a cursory sketch of anniversary events, which cannot purport to be exhaustive, provides a flavour of topics at the forefront of discussion in 2018.

Kicking off the anniversary year, the Coalition for the International Criminal Court (‘CICC’) held a special high-level event in The Hague on 15–16 February 2018. Similar to the approach followed in this volume, the event focused on the Court’s past – reviewing the historical significance of the ICC –, the present – assessing the current challenges faced by the Court, including its successes and shortfalls –, and the future – examining the key challenges to be overcome in the system and the opportunities to position the ICC more positively within global politics.<sup>72</sup>

The anniversary was a welcome moment seized by the Court itself. The ICC organized a high-level official event in The Hague on 16–17 July 2018. The focus was on the enduring value of the Rome Statute for humanity, the achievements and challenges of the Court, the impact of the ICC’s

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<sup>70</sup> Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, 18 July 1998 (<http://www.legal-tools.org/doc/8b0ab6/>).

<sup>71</sup> For an overview of events listed on the ASP web site, see ICC ASP, “20th Anniversary Events” (available on its web site).

<sup>72</sup> See CICC, “Commemoration of the 20th Anniversary of the Rome Statute” (available on the ASP’s web site).

judicial process, the fight against impunity and the next 20 years of the Court – thus also prominently addressing the past, present and future.<sup>73</sup> It is no coincidence that the formal ICC event took place on 17 July, the very day of the adoption of the Rome Statute in 1998. The date is symbolic and was officially chosen by the ASP during the Kampala Review Conference in 2010 as the Day of International Criminal Justice, to celebrate the anniversary of the Rome Statute and landmark achievements with formal events each year. It is noteworthy that the Court developed a specific webpage dedicated to the anniversary and produced a tool kit at the disposal of States Parties for campaigns and national activities.<sup>74</sup>

In Nuremberg, the International Nuremberg Principles Academy dedicated its main annual conference, the Nuremberg Forum 2018, to the topic “The 20th Anniversary of the Rome Statute: Law, Justice and Politics” on 19–20 October 2018.<sup>75</sup> Leading practitioners and academics in the fields of international criminal law and international human rights law were amongst the around 150 participants who came together at the historic Courtroom 600 in the Nuremberg Palace of Justice. German Federal Minister for Foreign Affairs Heiko Maas and ICC Prosecutor Fatou Bensouda delivered the keynote addresses. Specific topics discussed included, *inter alia*, the making of the Rome Statute, case selection, length of proceedings, victims’ participation and reparations, exercise of jurisdiction and complementarity, State engagement and disengagement, and the next 20 years, which are themes also addressed in this book.

Throughout the year 2018, a multitude of international events was organized to take stock and stimulate further discussion on the current and future challenges of the Court. On the eve of the anniversary, an international workshop entitled “The International Criminal Court in Turbulent Times” was held in The Hague on 24–25 May 2018. Leading practitioners and scholars critically discussed topical issues, including the ICC 20 years after Rome, legal and political challenges of withdrawals from the Rome Statute, African regional developments, and immunity of high-ranking offi-

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<sup>73</sup> See ICC, “Commemoration of the 20th anniversary of the adoption of the Rome Statute of the International Criminal Court” (available on its web site).

<sup>74</sup> See ICC, “The ICC Rome Statute is 20” (available on its web site) and ICC ASP, “20th anniversary of the adoption of the Rome Statute” (available on its web site).

<sup>75</sup> See Nuremberg Forum 2018 Conference Report, see above note 2; Heinze, 2019, see above note 2. Also see Heinze, Chapter 2, this volume.

cials before the ICC.<sup>76</sup> On 7–8 September 2018, an event organized by Edge Hill University in Liverpool brought together practitioners, including judges, and academics to discuss theoretical approaches to international criminal law, the goals and functions of the ICC, its relationship with States Parties and the UN Security Council, and the effectiveness of the proceedings.<sup>77</sup> On 18–20 October 2018, Salzburg Law School organized an international symposium with leading practitioners and academics to examine the codification and application of the Rome Statute, the links between core crimes and other treaty crimes, the clash of legal cultures in international criminal law, the role of commanders, the impact of Security Council referrals and the activation of the jurisdiction over acts that fulfil the crime of aggression, among other topics.<sup>78</sup> Moreover, another conference took place in Bordeaux from 21–23 November 2018, with an assessment of the work of the Court so far and an analysis of future perspectives.<sup>79</sup> The seminar included an examination of the creative interpretation of the ICC, a study of all four core crimes, modes of participation, transitional justice, complementarity, co-operation, efficiency, victims' and defence's rights, the role of judges and sentencing, among others.

Although the various events covered a wide range of topics, some common themes reveal the topical issues and challenges currently faced by the Court and most widely discussed. For instance, at least nine events included panels discussing the challenges of co-operation with the Court,<sup>80</sup>

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<sup>76</sup> See Tanja Altunjan and Konrad Neugebauer, "Workshop Report: 'The International Criminal Court in Turbulent Times', The Hague, 31 May–1 June 2018", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2019, no. 6, pp. 377–379.

<sup>77</sup> See Edge Hill University, "Twenty Years of the ICC's Rome Statute: Utopia – Reality – Crisis" (available on its web site).

<sup>78</sup> See Salzburg Law School, "Twentieth Anniversary Symposium: 'The Sound of ICL'" (available on its web site).

<sup>79</sup> See Université de Bordeaux, "Colloque 'Les 20 ans du statut de Rome: bilan et perspectives de la Cour pénale internationale'" (available on its web site).

<sup>80</sup> See, for example, Argentina, "Conferencia sobre el 20º aniversario del Estatuto de Roma La Corte Penal Internacional: a veinte años de la adopción del Estatuto de Roma", 9 April 2018 (available on the ASP's web site); Switzerland, "Where do we go from here? The International Criminal Court 20 years after Rome", 25 May 2018 (available on the ASP's web site); Ecuador, "La Corte Penal Internacional y América del Sur: Oportunidades para la cooperación y el intercambio de experiencias en el marco de los 20 años del Estatuto de Roma", 7–8 June 2018 (see "Declaración de Quito", issued after the seminar, available on the ASP's web site); United Kingdom, "Twenty Years of the ICC's Rome Statute: Utopia – Reality – Crisis", 7–8 September 2018 (available on the Edge Hill University's web site); Singapore, "Challenges for global justice in the Asian context", 3–4 October 2018 (available on the

undoubtedly influenced by the developments regarding the execution of the arrest warrant against Omar Al-Bashir, and the lack of co-operation in the investigations concerning the situation in Kenya. State engagement and disengagement was a common topic of discussion.

An important and popular topic was victims' rights, participation, and reparations, covered in nine different events.<sup>81</sup> From June to September 2018, the Victims' Rights Working Group organized several talks in The Hague with a focus on victims' rights and the relationship with the ASP.<sup>82</sup> As Mama Koité Doumbia, the Chair of the Board of Directors of the Trust Fund for Victims, notes in her Foreword to this book, "in considering the Past, Present and Future of the International Criminal Court, as in this volume, the victims' perspective and reparations are pivotal". She critically notes that "[r]eparations for the millions of victims in post-conflict African States have at best been an afterthought in criminal accountability process-

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Singapore Management University's web site); Panama, "Seminario Conmemorativo de los 20 años de la Corte Penal Internacional", 10–11 October 2018 (available on the ASP's web site); Austria, "Twentieth Anniversary Symposium 'The Sound of ICL'", 18–20 October 2018 (available on the Salzburg Law School's web site); Georgia, "Opportunities for Cooperation and Exchange of Experience at 20 Years of the Rome Statute", 24–25 October 2018 (see ICC, "20 years of the Rome Statute: ICC holds High-Level Seminar on Cooperation in Eastern Europe", 24 October 2018, ICC-CPI-20181024-PR1414); France, "Les 20 ans du statut de Rome: bilan et perspectives de la Cour pénale internationale", 21–23 November 2018 (available on the Université de Bordeaux' web site).

<sup>81</sup> See, for example, Australia, "Where are we now? Looking forward to the 20th Anniversary of the Rome Statute", 4–5 September 2017; Uganda, "TFV Monitoring visit to northern Uganda", 19–23 February 2018 (see ICC, "Commemorating the 20th anniversary of the Rome Statute, the President of the Assembly of States Parties to the ICC, 10 States Parties, and the Trust Fund for Victims conclude a joint programme monitoring visit to Uganda", 23 February 2018, available on the ICC's web site); Argentina, "Conferencia sobre el 20º aniversario del Estatuto de Roma La Corte Penal Internacional: a veinte años de la adopción del Estatuto de Roma", 9 April 2018 (available on the ASP's web site); Central African Republic, "Je veux que le monde sache", 20 September 2018 (see ICC, "« Je veux que le monde sache ... »: Commémoration du vingtième anniversaire du Statut de Rome en République centrafricaine", 26 September 2018, ICC-CPI-20180926-PR1409); France, "Les 20 ans du statut de Rome: bilan et perspectives de la Cour pénale internationale", 21–23 November 2018 (available on the Université de Bordeaux' web site); Singapore, "Challenges for global justice in the Asian context", 3–4 October 2018 (available on the Singapore Management University's web site); Germany, "20th Anniversary of the Rome Statute: Law, Justice and Politics", 19–20 October 2018 (available on the ASP's web site).

<sup>82</sup> The Netherlands, "Lunch talks on victims' rights on the 20th anniversary of the Rome Statute", 20 June, 18 July, 27 September 2018 (see Victims' Rights Working Group, "The Victims' Rights Working Group (VRWG) and the Lunch Talks Series", available on the ASP's web site).

es, and at worst, a tool used for political and electoral purposes”. Given the important mandate of the Trust Fund for Victims and its essential role in the Court’s future, this book deliberately includes a section dedicated to victims and witnesses.

Another topical theme addressed in at least seven events was the activation of the crime of aggression.<sup>83</sup> Indeed, 2018 saw the activation of the Court’s jurisdiction over the crime of aggression within the Rome Statute, marking the end of a long journey in international criminal law, which started in Versailles and found a culmination in Kampala.<sup>84</sup> From 17 July 2018, the ICC gained jurisdiction over the last crime falling under the umbrella of the most serious crimes of concern to the international community as a whole.<sup>85</sup> Prominently, an interactive panel discussion was held in New York exactly on 17 July 2018, organized by the Permanent Missions of different States Parties, to discuss the importance of the activation of the ICC’s jurisdiction over the crime of aggression.<sup>86</sup> The fight against impunity and the crime of aggression were also the central focus of another event, organized by Parliamentarians for Global Action (‘PGA’), the International

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<sup>83</sup> See, for instance, Portugal, “O crime de agressão nos 20 anos do Estatuto do Tribunal Penal Internacional”, 19 April 2018 (available on the ASP’s web site); The Netherlands, “Transposing the Crime of Aggression into Domestic Law: The German Experience”, 5 July 2018 (available on the Club of International Law’s web site); United States of America, “20th anniversary of the Rome Statute: the need for universality and the International Criminal Court’s jurisdiction over the crime of aggression”, 17 July 2018 (available on the ASP’s web site); Italy, “Conference on the Commemoration of the 20th Anniversary of the Rome Statute of the International Criminal Court”, 18 July 2018 (available on the PGA’s web site); Panama, “Seminario Conmemorativo de los 20 años de la Corte Penal Internacional”, 10–11 October 2018 (available on the ASP’s web site); Republic of Korea, “70 Years of the Constitution and the Evolution of Korean Law”, 18 October 2018 (available on the ASP’s web site); Austria, “Twentieth Anniversary Symposium ‘The Sound of ICL’”, 18–20 October 2018 (available on the Salzburg Law School’s web site); France, “Les 20 ans du statut de Rome: bilan et perspectives de la Cour pénale internationale”, 21–23 November 2018 (available on the Université de Bordeaux’ web site).

<sup>84</sup> Claus Kreß, “On the Activation of ICC Jurisdiction over the Crime of Aggression”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1, pp. 1–17. See also ICC ASP, Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, ICC-ASP/16/L.10 (<http://www.legal-tools.org/doc/d7cb22/>).

<sup>85</sup> Rome Statute of the International Criminal Court, 17 July 1998, Articles 15*bis*, 15*ter* (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>86</sup> UN Headquarters, “20th anniversary of the Rome Statute: the need for universality and the International Criminal Court’s jurisdiction over the crime of aggression” (available on the ASP’s web site).

Association of Penal Law (‘AIDP’ – Italian chapter), and No Peace Without Justice, in Rome on 18 July 2018.<sup>87</sup>

Importantly, regional perspectives were central to a number of events held worldwide, with a particular focus on Africa, America and Asia, respectively. For instance, an event entitled “Africa and the International Criminal Court: Challenges and Prospects” was held by the Irish Department of Foreign Affairs and Irish Centre for Human Rights with ICC Judge Solomy Balungi Bossa on 18 June 2018.<sup>88</sup> Other commemorative events took place, for example, in the Central African Republic on 20 September 2018,<sup>89</sup> and Burkina Faso on 5–6 October 2018.<sup>90</sup>

The relationship between the ICC and Asia was examined, for instance, in an event organized by Singapore Management University, the Kingdom of the Netherlands and the CICC on 3–4 October 2018, covering topics including efficiency and effectiveness, collective modes of liability, co-operation and rights of victims, among others.<sup>91</sup> In Japan, an anniversary event was held at the University of Tokyo on 17 November 2018.<sup>92</sup> This event marked not only the twentieth anniversary of the Rome Statute but also the seventieth anniversary of the judgment of the Tokyo Tribunal, officially known as the International Military Tribunal for the Far East.<sup>93</sup>

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<sup>87</sup> See Parliamentarians for Global Action, the International Association of Penal Law (Italian chapter), and No Peace Without Justice, “Conference on the Commemoration of the 20th Anniversary of the Statute of the International Criminal Court Press Release” (available on the PGA’s web site).

<sup>88</sup> See Irish Department of Foreign Affairs and Irish Centre for Human Rights, “Africa and the International Criminal Court: Challenges and Prospects” (available on the ASP’s web site).

<sup>89</sup> ICC, “« Je veux que le monde sache ... »: Commémoration du vingtième anniversaire du Statut de Rome en République centrafricaine”, 26 September 2018, ICC-CPI-20180926-PR1409.

<sup>90</sup> Centre Africain de Droit International Pénal et de Droit Humanitaire (‘CADIPH’), “20ème Anniversaire du Statut de Rome” (available on the ASP’s web site).

<sup>91</sup> See Singapore Management University, “Challenges for Global Justice in the Asian context Conference” (available on its web site).

<sup>92</sup> Zentrum für Deutschland und Europastudien, Universität Tokyo, Komaba (‘DESK’), “The Present-Day Significance of Nuremberg and Tokyo in Modern International Law” (available on its web site).

<sup>93</sup> For a recent interdisciplinary appraisal of the Tokyo Tribunal, see Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds.), *The Tokyo Tribunal: Perspectives on Law, History and Memory*, TOAEP, Brussels, 2020 (<http://www.toaep.org/nas-pdf/3-dittrich-lingen-osten-makraiova>).

Another regional perspective on the relationship between the Court and South America was the focus of a seminar organized in Ecuador on 7–8 June 2018, where the Ministries of Foreign Affairs and high-level representatives of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Uruguay and Venezuela met with representatives from the ICC.<sup>94</sup> A conference was organized in Uruguay on 6 September 2018, discussing the challenges that the twentieth anniversary presents in the protection of human rights.<sup>95</sup> Another event was held in Panama on 10–11 October 2018, which included an evaluation of the Rome Statute system and the Panamanian approach to the ICC.<sup>96</sup> The commemoration of the anniversary continued in Colombia on 25–26 April 2019, with a conference organized by the Universidad del Rosario discussing the 20 years of the ICC.<sup>97</sup>

Overall, anniversary assessments marked the passage of time by affirming the importance of the institution and revisiting its achievements and the progress made. At first glance, anniversary events may be conceived as purely celebratory occasions. However, critical reflection is paramount. Portrayals of the achievements of the Court yet were often coloured by concerns about the Court’s record, credibility and effectiveness combined with preoccupation given the fickle political support for the Court by major powers and uneven implementation of accountability worldwide. The twentieth anniversary was marked more in a commemorative setting than a celebratory mood – with no celebration party in sight.<sup>98</sup> With a critical view and sociological perspective on the field and international criminal law community, it may be asked which topics garnered the most attention, what, where and when was discussed and whose voice was being heard in the conversations, and why. Taking its cue from the events held in 2018, and with the benefit of hindsight and from a distance, one conference subjected the anniversary activities to critical analysis and in-

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<sup>94</sup> See “Declaración de Quito”, issued after the seminar (available on the ASP’s web site).

<sup>95</sup> Parliamentarians for Global Action, “XX Anniversary of the Rome Statute: challenges in the protection of human rights” (available on the ASP’s web site).

<sup>96</sup> See Ministerio de Relaciones Exteriores de Panamá, Seminario Conmemorativo de los 20 años de la Corte Penal Internacional (available on the ASP’s web site).

<sup>97</sup> See Universidad del Rosario, “Segundo Congreso de Derecho Internacional ‘20 años de la Corte Penal Internacional’” (available on its web site).

<sup>98</sup> See, for instance, Elizabeth Evenson, “Too Few Trials, Too Many Tribulations: The ICC’s Terrible Year and Where to Go from Here”, in *Case Western Reserve Journal of International Law*, 2020, vol. 52, pp. 433–450; Klaus Rackwitz, “Geburtstag ohne Feier”, *Süddeutsche Zeitung*, 17 July 2018, (available on its web site).

vited voices considered sidelined.<sup>99</sup> It sought to feature more prominently certain ‘forgotten perspectives’ identified: the defence as a key actor in international criminal proceedings, voices from case countries and the Global South, and critical approaches to certain developments in the field and international criminal law more generally.

Looking back, the twentieth anniversary of the adoption of the Rome Statute certainly arrested the attention of the field of international criminal law. In particular, civil society was tremendously engaged and a multitude of events and activities were held. In addition to a plethora of events, and unsurprisingly, the anniversary spurred noticeable publishing activity. Numerous conference compilations, anthologies and books were published,<sup>100</sup> and journals and organizations dedicated special volumes to mark the anniversary.<sup>101</sup> Also, for example, the International Criminal Bar published a manifesto on 17 July 2018, highlighting the extraordinary step that the adoption of the Rome Statute represented for history and international law.<sup>102</sup>

Looking ahead, the year 2022 will mark the twentieth anniversary of the entry into force of the Rome Statute on 1 July 2002, after reaching the goal of the deposit of the sixtieth instrument of ratification, acceptance,

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<sup>99</sup> Conference “The 21st Anniversary of the Rome Statute: Perspectives Forgotten During the 20th Celebration Party”, organized by iCourts, Copenhagen, 14–15 November 2019.

<sup>100</sup> For example, Richard H. Steinberg (ed.), *The International Criminal Court: Contemporary Challenges and Reform Proposals*, Brill Nijhoff, Leiden; Boston, 2020; Thomas Herran (ed.), *Les 20 ans du Statut de Rome: Bilan et perspectives de la Cour pénale internationale*, Pedone, Paris, 2020; Werle and Zimmermann (eds.), 2019, see above note 13; Pavel Šturma (ed.), *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives*, Brill Nijhoff, Leiden/Boston, 2019; Tobias Beinder and Swantje Maecker, “Conference Report: ‘Twenty Years of the ICC’s Rome Statute: Utopia – Reality – Crisis’”, Liverpool, 7./8. September 2018”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2018, no. 12, pp. 621–623; Amal Nassar, *The Rome Statute at Twenty (1998–2018): 10 challenges for an Effective and Independent International Criminal Court*, International Federation for Human Rights (FIDH), Paris, 2018.

<sup>101</sup> See, for instance, “Special Issue: Twenty Years of the Rome Statute: Functions, Goals, Effectiveness – Challenges of the International Criminal Court”, *International Criminal Law Review*, 2019, vol. 19, no. 6; ICC Forum, *Anniversary Question*, June 2018–May 2019 (available on its web site); “Special Issue: The Rome Statute at Twenty: Enhancing Efficiency and Effectiveness at the International Criminal Court”, *International Criminal Law Review*, 2018, vol. 18, no. 3; “Commemorating the 20th Anniversary of the Rome Statute of the International Criminal Court”, *Africa Legal Aid Quarterly*, special edition, 2018.

<sup>102</sup> See “Manifesto of the International Criminal Bar on the Occasion of the International Day of Criminal Justice”, 17 July 2018 (available on the ASP’s web site).

approval or accession by States. This anniversary will grant scholars and practitioners a timely occasion and novel opportunity for introspection and critical reflection. Several special issues of journals and books are already in the making. In his Foreword to this book, Piotr Hofmański, President of the ICC, perceptively reflects on the twentieth anniversary:

One might say that 20 years is long enough to solidify and secure a place in the history of international criminal law. Surely, the importance and role of the Court as the first permanent international court created prospectively for the trial of crimes committed after the entry into force of the Rome Statute – the treaty on which it was established – cannot be overestimated. At the same time, however, 20 years is too short a period to formulate universal and conclusive assessments. Accordingly, those who refer to the Court as an ambitious but still fresh project are right.

The ICC has established itself as an important player, yet it remains a young institution that is still maturing, learning lessons and developing its record with an emerging jurisprudence and evolving practice.

#### **1.4. Focus and Structure of the Book**

This anthology makes a timely contribution to the extensive literature on the ICC by bringing together a broad and rich spectrum of views by both scholars and practitioners. In line with the chosen title of this book, *The Past, Present and Future of the International Criminal Court*, the assembled authors portray the establishment of the Court and the early days in terms of practice (hence the theme ‘past’), critically engage with achievements and challenges and its organs’ track record to date (‘present’) and draw conclusions and sketch possible contours, scenarios and suggestions for the way forward (‘future’).

The volume includes contributions from insiders, that is, officials and staff of the Court reflecting on their own institution, and external experts, lending their scholarly voices to enhance understanding and analysis of the Court. Admittedly, the present edited collection cannot do justice to the Court in terms of all topics and perspectives exhaustively. Still, it may present certain aspects of the ongoing interpretation and evaluation of the ICC, deepen common understanding, or revitalize discussion with new understanding. The authors bring to bear varied perspectives on the wide-ranging issues examined and at times draw different conclusions. In insightful accounts, some authors sketch the contours of past and present debates and

depict topical developments, some address critiques head-on and offer views that are critical of the Court, its practice and performance; and others focus on exploring underappreciated aspects or providing re-orientation and suggestions for the Court going forward. The book also draws on speeches and papers presented at the Nuremberg Forum 2018 held at Courtroom 600 of the Nuremberg Palace of Justice in Nuremberg.<sup>103</sup>

This book contains 26 chapters overall and is divided into three parts: I. Stocktaking: Looking Back and Looking Ahead; II. Context and Constraints; and III. Achievements and Legacy: Reflections on the Twentieth Anniversary of the Rome Statute. The anthology is graced by a Foreword by the President of the ICC, Piotr Hofmański, and a Foreword by the Chair of the Board of Directors of the Trust Fund for Victims, Mama Koité Dombia.

Part I on “Stocktaking: Looking Back and Looking Ahead” traces the origins of international criminal law from the International Military Tribunal in Nuremberg to the establishment of the ICC and beyond. Methodologically, it combines historical accounts with more prescriptive analyses. Part II (“Context and Constraints”) is the normative heart of the book. It contains five sections and 15 chapters overall on a variety of topics, including prosecutorial policy and practice, jurisdiction and admissibility, victims and witnesses, defence issues, and legitimacy and independence. The substructure of this part is oriented at the chapters’ alignment and emphasizes the topics that received considerable attention in the past years of the ICC’s work. Major parts deal with jurisdiction and admissibility, and victims and witnesses. The chapters of this part especially underline the amalgamation of international criminal law and international criminal justice and a trend towards shifting policy decisions from a substantive to a procedural level.<sup>104</sup> Part III (“Achievements and Legacy”) is reserved for both personal accounts and outlooks by former or current actors. It includes five contributions, which provide broader perspectives to the fundamental question

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<sup>103</sup> Nuremberg Academy, “Nuremberg Forum 2018 Conference Report” (available on its web site).

<sup>104</sup> In more detail see Alexander Heinze, “Bridge over Troubled Water – A Semantic Approach to Purposes and Goals in International Criminal Justice”, in Holly Cullen, Philipp Kastner and Sean Richmond (eds.), *The Politics of International Criminal Law*, Brill, Leiden, 2020, p. 49; Alexander Heinze, “Private International Criminal Investigations and Integrity”, in Bergsmo and Dittrich (eds.), 2020, pp. 671 ff., see above note 32.

‘*Quo vadis, ICC?*’, with a particular focus on previous achievements and challenges ahead.

In *Chapter 2*, Alexander Heinze provides a comprehensive reflection on the Nuremberg Forum 2018 topics, the panel discussions and main findings of the conference and a meticulous retrospective on the developments at the ICC that occurred since. This is combined with an expert survey of court decisions and judgments and a detailed analysis of the literature that has been published in recent years. The chapter examines continuously significant issues such as case selection, length of the proceedings, victims’ participation and reparations, exercise of jurisdiction and complementarity, and State engagement and disengagement. Moreover, the chapter addresses, for instance, integrity in international criminal justice, the quality of judges, the track record of the Court and the OTP, and the relevance of alternative mechanisms. Heinze takes a forward-looking approach to possible trajectories in the next 20 years, highlighting the need to seriously consider the interplay of the past and future of the Court to assure a bright present.

Part I opens with a thoughtful and incisive contribution by Benjamin Ferencz, the last living prosecutor of the Nuremberg Trials and one of the leading experts in international criminal law since the Second World War. *Chapter 3* reflects on the interlude between the holding of the Nuremberg Trial and the establishment of the ICC, in light of State support and efforts today to consolidate the first permanent international criminal court. Ferencz presents a thoughtful contemplation on the political obstacles, mostly exemplified in the opposition of certain States *vis-à-vis* jurisdiction over the crime of aggression and the policy shifts of certain States towards international criminal justice, particularly that of the US. In view of the changes and shifts with regard to State engagement and disengagement, Ferencz urges the reader to ponder whether power or reason is the way to peace.

Examining the development of the Court, Leila Nadya Sadat offers a lucid account starting from the efforts that led to the adoption of the Rome Statute and the establishment of the ICC to its current proceedings and jurisprudence in *Chapter 4*. At the outset, Sadat takes the reader back in time through key debates on the establishment of a permanent international criminal court in the twentieth century that led to the Rome Diplomatic Conference of Plenipotentiaries in 1998. The chapter presents the Court’s organizational structure and operational features and includes reflections on jurisdiction and admissibility and its current caseload. Sadat concludes by

assessing the Court's challenges and future prospects, including political challenges – from the turbulent relationship with the US governments since its origins, the opposition posed by some African States, and the obstacles concerning its universality – to more mundane challenges such as budget concerns.

In light of the practical difficulties faced by the Court, Christopher 'Kip' Hale takes a forward-looking approach to the future of the Court in *Chapter 5*. The chapter assesses what Hale identifies as the apparent conundrum confronted by the ICC of being a beacon of justice while being politically challenged. In order to surpass it, Hale suggests that the Court must prioritize arrests of fugitives, forge long-term budget resolutions and build a culture of professional development of all professional staff. In doing so, the chapter provides practical recommendations for the ICC, the ASP and the UN Security Council. Overall, Hale argues that a 'focus inward' is the best way to strengthen the Court's legitimacy facilitating its mandate to be fulfilled.

In the last chapter of Part I, Katarína Šmigová provides a stocktaking on the Nuremberg Trial and the Nuremberg Principles subsequently formulated by the International Law Commission, highlighting their paramount relevance for international criminal law in *Chapter 6*. Šmigová explores how the Nuremberg Principles have been incorporated into the Statutes and the case law of the *ad hoc* Tribunals and the ICC, even though there is no explicit mention of the principles as such. She concludes that the lasting significance of the Nuremberg Trial and the Nuremberg Principles is much more than a historical one, considering them a material source of law while exploring the possibilities of their application by the international judiciary in relation to their status as international custom.

Part II is divided into five sections: A. Prosecutorial Policy and Practice, B. Jurisdiction and Admissibility, C. Victims and Witnesses, D. Defence Issues, and E. Legitimacy and Independence.

The first section A deals with "Prosecutorial Policy and Practice". It begins with *Chapter 7*, in which Fannie Lafontaine and Claire Magnoux provide a cogent account of the evolving prosecutorial strategy of prosecuting high-ranking leaders. The authors dissect the concept of 'the most responsible' seen throughout the history and practice of international criminal tribunals with a view to breaking the impunity cycle for Heads of State and deterring the commission of serious crimes. Accordingly, 'the most responsible' is considered a key concept for prosecutorial strategy, having an im-

fact on the OTP's credibility and legitimacy, in light of considerations of admissibility, gravity, complementarity and the interests of justice. The chapter examines the challenges connected to prosecuting those 'most responsible', including the increase in expectations, the evidentiary challenges, and the Office's structural limits. Lafontaine and Magnoux conclude with a reflection on the subtle prosecutorial shift from 'the most responsible' towards 'the most serious crimes', and the issue of selectivity as a possible cause for the ICC's future success or failure.

In view of the increased occurrence of private investigations, André Nwadiakwa-Jonathan and Nicholas Ortiz address the under-examined relationship between non-governmental investigatory bodies ('NGIBs') and the OTP, considering what they identify as an effect of a lack of State cooperation on the Office's investigative capacity in *Chapter 8*. With a focus on the Commission for International Justice and Accountability ('CIJA') as the archetype, the authors seek to establish the characteristics and methodology underpinning what they call 'the NGIB Model'. Drawing on interviews with CIJA staff and thus empirically oriented, the chapter considers whether and how the OTP-NGIB relationship could be formally organized under the Rome Statute and the prospects of a future partnership, arguing that this is an offer the OTP cannot refuse.

The next section B on "Jurisdiction and Admissibility: Normative Considerations and Prosecutorial Discretion" centres around the principle of complementarity and the relationship between the ICC and the UN Security Council. It begins with Fergal Gaynor's perceptive assessment of the inadequacy of the existing UN Security Council referral function and the role of the UN General Assembly in *Chapter 9*. Gaynor examines whether the States Parties to the ICC can lawfully amend the ICC Statute to facilitate referral of a situation to the ICC by the UN General Assembly. Considering Security Council inaction, the chapter discusses the presumption of legality that attaches to actions approved by a two-thirds majority of the General Assembly and a purposive interpretation of the UN Charter. Lastly, Gaynor addresses concerns that the UN General Assembly might refer unmeritorious situations to the ICC by discussing safeguards in the UN Charter and the ICC Statute.

In *Chapter 10*, Andrea Marrone assesses the interlink between the ICC and the UN Security Council through the lens of complementary regimes around the concept of universal jurisdiction. In doing so, he surveys the UN Security Council's prerogatives such as referrals to the ICC, on the

one hand, and the veto powers and the initiatives to restrain them in the face of genocide, crimes against humanity and war crimes, on the other hand. The chapter explores, in particular, the Responsibility to Protect doctrine as the relevant link between complementary global regimes fostering peace and justice. Marrone provides the grounds for further discussion concerning the necessity to define complementary global regimes while strengthening international criminal justice beyond the peace versus justice debate.

With a different focus, in *Chapter 11* Anderson Javiel Dircie De León examines the interplay of the principle of complementarity and due process from a procedural perspective when assessing the admissibility of a case before the ICC. He thus addresses a popular topic within the complementarity debate, namely, whether the Rome Statute can be interpreted in a way that legal proceedings designed to facilitate convictions in violation of due process might fall within the ‘unwilling or unable’ admissibility criterion. Through a wider understanding of the principle of complementarity, the author examines how adequate the ‘due process thesis’ is and its procedural implications, and if these considerations are accepted as part of a case’s admissibility analysis. He advocates for the defendant’s possibility of challenging an inadmissibility decision, arguing that the ICC is concerned with the observance of international human rights standards and should aim to foster an effective administration of international criminal justice over merely securing convictions.

In *Chapter 12*, Adedeji Adekunle attends to the ambivalent but still highly relevant concept or principle of ‘positive complementarity’. He explores the OTP’s discretion concerning the application of positive complementarity as a policy in the preliminary examinations. Adekunle especially examines the concept’s impact on the length of some of the preliminary examinations carried out by the Office. He considers the delays that the application of positive complementarity as an element of the admissibility test carried out by the Prosecutor might imply, particularly in light of the engagement with domestic authorities and other stakeholders. Analysing the objectives of the OTP’s preliminary examination and its relevance as a tool of prosecutorial discretion, Adekunle concludes with a reflection on the impracticality of setting out time limits for the whole preliminary examination process. Finally, the chapter offers some recommendations concerning the OTP’s discretionary assessment on admissibility.

The next section C on “Victims and Witnesses” is a centrepiece of Part II. In *Chapter 13*, Ellie Smith provides an in-depth analysis of the practice of the ICC in terms of assessing the credibility of trauma-impacted testimony. Smith examines the role and responsibility of the ICC’s Trial Chambers in determining the accuracy and veracity of victim testimony and the fundamental requirements for this purpose. In light of the need for judges to understand the effects of trauma on victims and witnesses, Smith identifies areas for further developments, including the need for the Court to develop a framework to properly evaluate the veracity of trauma-impacted testimony by reference to the consistency of testimony with reported psychological symptoms and typically associated memory patterns.

In a more normative account, Christoph Safferling and Gurgun Petrossian examine carefully the ICC’s legal framework on victim participation in *Chapter 14*. The authors explore the issue of victim eligibility through an analysis of the Court’s jurisprudence and concepts, applying both an inductive and deductive approach. They especially focus on direct and indirect victimhood. Safferling and Petrossian group individual victims for participation in the different stages of ICC proceedings into five categories: potential victims, situation victims, victims unrelated to the charges, case victims and victims of specific charges. They favour a narrow approach to victim participation in ICC proceedings that leads to the inclusion of only ‘direct victims’, with a view to prioritizing the quality of the victims’ participation over the quantity of victims.

The highly relevant practice of protective measures for victims and witnesses is the subject of *Chapter 15*. Juan Pablo Pérez-León-Acevedo discusses the judicial protective measures to ensure the safety and security of victims and witnesses, mostly revolving around the non-disclosure of their identity. The chapter then focuses on special measures, tailored to facilitate the testimony of vulnerable or traumatized victims, such as children, with a focus on sexual and gender-based violence. The author concludes that, despite certain limitations and gaps, the ICC’s normative framework and practice are overall consistent with the main objectives of such protective measures, in view of risk minimization and prevention, reduction of trauma, and encouragement for victims and witnesses to testify.

The last chapter of section C is more of a general account of witness evidence law. Hilde Farthofer, who has published extensively on the topic, outlines the development of witness evidence law at the Court since its establishment and identifies the particularities of dealing with testimonial

evidence in *Chapter 16*. Arguably, this system of evidence is the result of the ICC Statute as a hybrid system, including elements of both the adversarial and inquisitorial tradition. Farthofer suggests that the Chambers of the ICC take a specific approach to witness evidence, thereby respecting the rights of the accused.

After a focus on victims and witnesses in section C, it is the Defence that is foregrounded in section D (“Defence Issues: Procedural and Institutional Perspectives”). The section begins in *Chapter 17* with a closer look at what has become a recurrent criticism against the Court: the length of its proceedings. Benjamin Gumpert and Yulia Nuzban consider the ICC’s distinctive institutional and procedural features and the principle of fair and expeditious trials. They explore the length of proceedings primarily through the lens of the accused persons’ rights, but also the interests of victims, management and governance and the interests of justice. Following a survey of ICC proceedings, Gumpert and Nuzban propose several measures designed to shorten the length of ICC proceedings: streamlining judicial proceedings, reducing interstitial delays between the various stages of the proceedings, and increasing the proportion of sitting days during trial.

The institutional aspect of the section is covered by Philippe Currat and Brice Van Erps in *Chapter 18*. Building on their extensive inside knowledge, they provide a detailed account of the recent history of mobilization and self-organization of the Defence. Drawing on their own experience and hands-on involvement in the proceedings and negotiations leading up to the creation of the ICC Bar Association (‘ICCBA’), the chapter recounts the origins and role of the International Criminal Bar and the story behind the creation of the ICCBA in 2016. The authors retrace the challenges faced in the founding process, highlighting the importance of achieving an association in line with international standards. The vital role of the ICCBA in strengthening the legitimacy of the Court is seen by the authors in the professional standards and ethics upheld, the protection provided to its members and the legal services provided.

Finally, Part II closes with a more conceptual topic in section D: “Legitimacy and Independence”. It opens with a perceptive analysis of the challenges for the ICC concerning Head of State prosecutions for aggression in *Chapter 19*. With a view of cultivating the Court’s legitimacy and using the lens of constitutive legitimacy, Cara Cunningham Warren evaluates the Court’s application of jurisdiction over the crime of aggression. She focuses on legitimacy challenges of input and consent related to the

Court's limited aggression jurisdiction and undeveloped complementarity rules, also in light of efficacy and compliance considerations regarding the difficulty of pursuing a case against a sitting Head of State successfully. Warren suggests that the OTP develop a prosecutorial framework for Head of State aggression situations, urging the Office to consider a constructivist lens to address the identified legitimacy gaps.

In *Chapter 20*, Nicolai von Maltitz and Thomas Körner turn their attention to the term 'situation' and offer a practically relevant but also conceptually rich analysis. They seek to define the term and propose an interpretation that upholds the neutrality function of the 'situation phase' in line with the Court's legal framework. What *prima facie* may seem to be a pure complementarity issue is discussed, in fact, as a question of legitimacy. The authors focus on preventing prosecutorial investigations from being arbitrarily limited to individual suspects and parties of a conflict. The chapter delves into the practical interpretations of 'situations', and how States and the UN Security Council, through Security Council referrals, and the Pre-Trial Chambers, through the authorization to open *proprio motu* investigations, may try to pre-determine the personal, temporal and territorial scope of investigations. In order to minimize these limitations, Maltitz and Körner propose the adoption of a procedural approach to the substantive understanding of the term 'situation', that is, by granting the Prosecutor the power to determine the scope of the individual 'situation' in the course of the investigations.

The last chapter in Part II is a philosophical one. *Chapter 21* sheds light on the interplay between politics and the institutional integrity of the ICC. At the outset, Shannon Fyfe presents structural conceptions of individual integrity, as well as substantive conceptions, understood in ways of virtue and moral purpose while proposing a normative framework for understanding the role of integrity in the institutional context. Regarding institutional integrity, she focuses on the substantive and structural integrity of institutional (judicial) actors, placing politics as a threat. The chapter scrutinizes the integrity of the ICC and its organs through three illustrative decisions: the *Bemba* appeal judgment and the decisions by the Pre-Trial Chamber and the Appeals Chamber regarding a continuation of investigations in the Situation in the Islamic Republic of Afghanistan. She also analyses the OTP's responses to these judicial decisions. Fyfe concludes that it is crucial for both the OTP and judiciary to consider substantive and struc-

tural integrity before making public decisions that may affect the ICC as the primary seat of international criminal justice.

Part III (“Achievements and Legacy: Reflections on the Twentieth Anniversary of the Rome Statute”) presents broader reflections on the past, present and future of the Court, and includes a number of papers and speeches given at the Nuremberg Forum 2018. The first two chapters provide practitioner’s perspectives on State engagement and disengagement and the political support enjoyed by the Court, at the regional and the national level, respectively.

In *Chapter 22*, Barbara Lochbihler provides a personal perspective on the European Union’s role and responsibility in terms of political and financial support and to the Court. Building on her practitioner’s perspective, Lochbihler provides an insightful account of how and to what extent the political, institutional and financial instruments of the European Union and the activities of the European Parliament have had effects on furthering the widest possible ratification of the ICC Statute, enhancing co-operation from States Parties and strengthening the ICC as a court for victims. The chapter critically points to challenges, past, present and future, both related to the Court itself as well as the international backlash *vis-à-vis* human rights and international justice.

Moving from the regional to the national level, Judge Bakhtiyar Tuzmukhamedov offers a personal reflection on the evolution of the official Russian position towards the Court and the ICC Statute in *Chapter 23*. Drawing on available government acts and statements and his own involvement, Tuzmukhamedov sheds light on what he observes to be a trend from ‘uncertain engagement to positive disengagement’. The chapter concludes that notwithstanding any official disengagement from the ICC, there is heightened and continued interest in the Russian legal community in international criminal law in general, and in the ICC in particular.

The final three chapters take account of key speeches given at the Nuremberg Forum 2018. In light of the interplay of law and politics, *Chapter 24* provides a cogent reading of the current political climate and role of the Court in the wider institutional landscape as presented in the keynote address on the twentieth anniversary of the Rome Statute as delivered by German Federal Foreign Minister Heiko Maas at the Nuremberg Forum 2018. Building on the importance and legacy of the Nuremberg Trials, Maas expresses his hopes as to the universality of the international criminal justice process, despite the challenges in light of the crisis of multilateral-

ism. Maas incisively highlights three core issues: first, the development of international criminal law, with a focus on the coming into force of the Kampala amendments on the crime of aggression; second, State support worldwide for the Court, exemplified in State referrals; and third, the focus on accountability and its preponderance as an international concern.

With a focus on prosecuting international crimes, *Chapter 25* features an insightful reflection by ICC Prosecutor Fatou Bensouda on the work and strategies of her Office, based on her keynote address on the twentieth anniversary of the Rome Statute at the Nuremberg Forum 2018. Bensouda critically explores challenges and setbacks, including the large-scale criminality and mass victimization the Court deals with, as well as the limited resources and co-operation. She highlights how the OTP has acted as the engine of the Court through strategic plans tailored to face the operational challenges it encounters, active preliminary examinations and in-depth and open-ended investigations. Bensouda reiterates the importance of prosecuting international crimes without fear or favour and concludes by urging States Parties to voice greater support for the Court and its operations as well as to co-operate more fully.

Finally, Judge Bertram Schmitt presents a lucid account of the achievements and challenges of the Court in light of the twentieth anniversary of the Rome Statute in *Chapter 26*. Pondering the Court's achievements, Schmitt highlights the existence of the ICC as an essential contribution to the rule of law in international affairs and the development of a global legal culture, enshrined in victims' participation and the upholding of the victims' right to truth. In terms of challenges, the chapter emphasizes the phenomenon of State withdrawals, highlighting that the ICC is not meant to be a comfort zone in international politics, and, *inter alia*, selectivity, co-operation, and the length of the proceedings. Schmitt concludes with reference to the Rome Statute's preamble, an ode to the fight against impunity through the strengthening of international justice.

Overall, it is timely to engage in stocktaking and re-engage the debates on the Court's development, practice and effectiveness. At this critical juncture, given the twentieth anniversary of the Court, there is much cause for retrospection to systematically appraise achievements and challenges, and identify best practices and lessons learned. The intricacies of recent developments, the sharpening contours of contemporary debates and discussions, and fine-grained analyses of specific issues and challenges showcase the importance of painting a nuanced picture and changing per-

spective to capture the full spectrum and nuances of continuity and renewal at the ICC. In so doing, this book presents current reflections and new understandings, and thus adds to the ongoing conversations about the Court's trajectory. It remains paramount to constantly examine assumptions, arguments and assessments. Accordingly, this anthology recognizes and contributes to a continuous task: revisiting the past, examining the present, and imagining the future.

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# Attacked, Applauded, Threatened, Universalized. Or: A Wednesday at the International Criminal Court

Alexander Heinze\*

## 2.1. Introduction

On 19 and 20 October 2018, in Courtroom 600 of the Nuremberg Palace of Justice, the International Nuremberg Principles Academy marked the twentieth anniversary of the Statute of the International Criminal Court ('ICC Statute').<sup>1</sup> This chapter, a supplement to the introduction, remembers key moments of the conference<sup>2</sup> and analyses how they may be perceived with the benefit of hindsight. It draws the line from the main findings of the conference to the *status quo* of the International Criminal Court ('ICC') and international criminal law in general. In addition, the chapter both lists and analyses selected literature that has been published on the topics of the book in recent years. The separate mentioning of this analysis is already a symptom of today's academic discourse. And it is the reason of the following intermediate section.

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>2</sup> These parts are taken from Alexander Heinze, "The 20th Anniversary of the Rome Statute – A Review Essay About the Nuremberg Forum 2018", in *Criminal Law Forum*, 2019, vol. 30, pp. 109–135. See also the "Nuremberg Forum 2018 Conference Report: '20th Anniversary of the Rome Statute: Law, Justice and Politics'", 2020 (available on the International Nuremberg Principles Academy's web site).

## 2.2. Interjection: Why This Chapter Includes References to Literature and How This Has Become Worth Mentioning

It seems that academic discourse has shifted from books and journal articles to social media platforms. This shift is not in itself regrettable. What is regrettable, though, is the changed level of academic quality control.

In this way, academic discourse mirrors society's discourse and has become both superficial and ambivalent. To be sure: superficiality and ambivalence may be a stylistic necessity in some debates. An op-ed article, for instance, cannot delve into the depth of substantive criminal law. Yet, this is due to the restrained role of the writer. I have made this point elsewhere<sup>3</sup> and this chapter only provides space for a short sketch of the argument: international criminal scholarship is about *candour* and *transparency*.

Especially upon the use of legal terms and theories, authors must show transparency as to its assigned meaning and as to its own role. I have called this *definitional transparency* and *role transparency*. The lack of the former may lead to a bad argument, since it questions the validity of a premise.<sup>4</sup> Without both, every attempt at defining (legal) terms is done as an end in itself, without any communicative value and superior goal. It is nothing more than a deconstructionist endeavour and might as well end there, given that anyone reading the argument brings their “own underlying implicit assumptions to the interpretive process” and controls the meaning of the words used.<sup>5</sup> Surely, especially on the international level, words can hardly carry the claim of objectivity or even universality like Plato's *universalia ante rem*.<sup>6</sup> Subjectivity is a given in the pluralistic regime of inter-

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<sup>3</sup> Alexander Heinze, “Bend it Like Bentham: The Ambivalent ‘Civil Law’ vs. ‘Common Law’ Dichotomy Within International Criminal Adjudication”, in Morten Bergsmo *et al.* (eds.), *Power in International Criminal Justice*, Torkel Opsahl Academic Epubliher (‘TOAEP’), Brussels, 2020, pp. 252 ff. (<http://www.toaep.org/ps-pdf/28-power>).

<sup>4</sup> See in more detail Pierre Schlag and David Skover, *Tactics of Legal Reasoning*, Carolina Academic Press, Durham, 1986, p. 13.

<sup>5</sup> Peter C. Schanck, “The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories”, in *University of Kansas Law Review*, 1988–1990, vol. 38, pp. 815, 825; Stanley Fish, *Doing What Comes Naturally*, Duke University Press, Durham, 1989/1995, pp. 42–44; Jonathan Culler, *Dekonstruktion*, Rowohlt, Reinbek bei Hamburg, 1988, pp. 36 ff., 81–86.

<sup>6</sup> Felix Ekardt and Cornelia Richter, “Ockham, Hobbes und die Geburt der säkularen Normativität”, in *Archiv für Rechts- und Sozialphilosophie*, 2006, pp. 552 ff.

national criminal justice<sup>7</sup> where decision makers from different backgrounds and legal traditions decide hard cases. Yet, the concepts and words used should at least be made sufficiently transparent to be fully grasped by the recipient of the communication.<sup>8</sup> Thus, definitional transparency includes (i) good and patient research to avoid missing how an argument is undermined “by an entire area of thought that the author ignores”,<sup>9</sup> and to avoid emphasising the differences rather than similarities; (ii) an appreciation of other opinions and views; and (iii) a disclosure of methodology.<sup>10</sup> These are no novel elements of definitional transparency. They go to the heart of scientific scholarship and are usually spelled by books on research methods and by academic journals: for instance, by the American Journal of International Law in their “Tips for Publishing”.<sup>11</sup>

Definitional transparency does, of course, not require extensive terminological elaborations – after all, time and space constraints reign over any kind of discourse outcome. It is sufficient to consider the envisaged ‘interpretive community’, a concept that postmodernist literary critic Stanley Fish promoted<sup>12</sup> – drawing on Peirce<sup>13</sup> and deviating from earlier deconstructionist views. *In concreto*, both decision makers and scholars are part of a certain (ideal type)<sup>14</sup> community of interpreters that curtails their subjective interpretations – as part of a cultural context<sup>15</sup> – and even oblig-

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<sup>7</sup> About pluralism of the international political system in general, Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, *Indiana Journal of Global Legal Studies*, 2009, vol. 16, pp. 621, 632 ff.; Jean L. Cohen, “Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)”, in *Humanity*, 2011, pp. 127, 128–129.

<sup>8</sup> Paul Horwitz, “Institutional Pluralism and the (Hoped-for) Effects of Candor and Integrity in Legal Scholarship”, in *Marquette Law Review*, 2018, vol. 101, pp. 925, 937.

<sup>9</sup> Leslie Francis, “Law Reviews: The Changing Roles of Law Schools and the Publications They Sponsor”, in *Marquette Law Review*, 2018, vol. 101, p. 1035.

<sup>10</sup> About methodological flaws in legal scholarship Adam Kolber, “How to Fix Legal Scholar-mush”, in *Indiana Law Journal*, 2020, vol. 95, pp. 1191 ff.

<sup>11</sup> Curtis A. Bradley and Laurence R. Helfer, “Tips for Publishing in the American Journal of International Law (AJIL)”, in *American Journal of International Law* (available on its web site). Thereon and with further advice: Alonso Gurmendi, “Writing in International Law and Cultural Barriers (Part I)”, in *OpinioJuris*, 7 August 2020 (available on its web site).

<sup>12</sup> Fish, 1989/1995, pp. 25, 69, see above note 5; Stanley Fish, *Is there a text in this class*, Harvard University Press, 1980, pp. 14–15.

<sup>13</sup> Charles Sanders Peirce, *Peirce on Signs: Writings on Semiotic*, edited by James Hoopes, University of North Carolina Press, Chapel Hill, 1991.

<sup>14</sup> William S. Blatt, “Interpretive Communities: The Missing Element in Statutory Interpretation”, in *Northwestern University Law Review*, 2001, vol. 95, pp. 629, 641.

<sup>15</sup> Blatt, 2001, p. 664, see above note 14.

es them to interpret legal terms in a certain way.<sup>16</sup> Especially in international criminal justice, this community is existent and there is a small but growing body of literature on *epistemic* communities in international (criminal) law, also known as the ‘invisible college’ of international lawyers.<sup>17</sup> To determine this community, the author must demonstrate *role transparency*. That means: the requirements to definitional transparency are dependent on the author’s role (that, in turn, determines the interpretive community). Concretely speaking, the extent an author is obliged to define a certain legal term or explain a certain argument is derived from the author’s role as judge, attorney, academic, activist, citizen, and others – and not only from the discourse’s platform. That means that the requirements of candour and transparency are not only determined by the expected audience<sup>18</sup> and thus the format of the publication as op-ed, tweet, article, book

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<sup>16</sup> Fish, 1989/1995, pp. 25 ff., see above note 5; Fish, 1980, pp. 14–15, see above note 12; Vera Willems, “International Courts and Tribunals and Their Linguistic Practices: A Communities of Practice Approach”, in *International Journal for the Semiotics of Law*, 2017, vol. 30, pp. 181, 183.

<sup>17</sup> See, for instance, Claus Kreß, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, TOAEP, Brussels, 2014 (<http://www.toaep.org/ops-pdf/4-kress>); Hugh Thirlway, *The Sources of International Law*, 2nd. ed., Oxford University Press, 2019, p. 146; Mikkel Jarle Christensen, “The Judiciary of International Criminal Law”, in *Journal of International Criminal Justice*, 2019, vol. 17, pp. 537, 540; Nora Stappert, “A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals”, in *Leiden Journal of International Law*, 2018, vol. 31, pp. 963, 966. A critical account is provided by Anthea Roberts, *Is International Law International?*, Oxford University Press, New York, 2017, pp. 6 ff. and reviews by ZHU Lu, in *Chinese Journal of International Law*, 2019, vol. 18, pp. 1009–1012 and Andrea Leiter, in *Melbourne Journal of International Law*, 2018, vol. 19, pp. 413–422; Gleider Hernández, “E Pluribus Unum? A Divisible College?: Reflections on the International Legal Profession”, in *European Journal of International Law*, 2018, vol. 29, pp. 1003–1022. Critical is also Morten Bergsmo, “Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues”, in Bergsmo *et al.* (eds.), 2020, pp. 1–46, see above note 3. From a gender-based perspective: Nienke Grossman, “Shattering the Glass Ceiling in International Adjudication”, in *Virginia Journal of International Law*, 2017, vol. 56, pp. 340–406. Specifically tailored to the ICC, Nerlich introduces – borrowing from the US Supreme Court – the term ‘audience’, which seems to be a broader concept of ‘interpretive community’, see Volker Nerlich, “Audiences of the International Criminal Court”, in *International Criminal Law Review*, 2019, vol. 19, pp. 1046–1056. Yet, Nerlich’s approach lacks an engagement with existing concepts (such as epistemic and interpretive communities).

<sup>18</sup> See also George P. Fletcher, *The Grammar of Criminal Law*, vol. 2, Oxford University Press, 2019, p. 2.

or judgment, but also by the role of the author.<sup>19</sup> They can surely vary: humour, intentional exaggeration or polemic may outweigh transparency. Yet, it should be made clear to the reader why transparency had to be sacrificed in the specific instance. This especially applies to a type of scholar who seems to become increasingly attractive in international criminal law: the – I borrow from Kolber – “scholar-as-advocate-or-public-intellectual”.<sup>20</sup> The attraction is due to the diversity of the field, where activists, practitioners and scholars meet on an ever-expanding Agora. The amalgamation of the role of the author increases the necessity of role transparency. In the words of Kolber: “It’s one thing to give special weight to a scholarly opinion in light of the scholars’ factual expertise in some field. But it is quite another to give special value to their opinions when they are not even acting in a true scholarly capacity”.<sup>21</sup>

Adhering to both role and definitional transparency requires authors to make an investment – an investment in time and resources. Both have always been rare but somehow academic discourse and the development of new discourse platforms (Twitter, blogs) create an environment where speed justifies intransparency (and, in the worst case, inaccuracy). Under the aegis of the first thought, the second thought remains unheard and is – at best – for the archives.

### **2.3. The Nuremberg Forum 2018 – A Reflection on the Presentations with the Benefit of Hindsight**

The Nuremberg Forum 2018 mirrored both hopes and anxiety of both observers and protagonists of the ICC. Many concerns voiced and demands made were reflected by developments at the ICC in the following months and year. These developments were of diverse nature: prosecutorial (the closing, opening and continuing of preliminary examinations); judicial (decisions by Chambers several cases and situations); and institutional (the Independent Expert Review and the response of the ICC; the election of Karim Khan as the next Prosecutor; the election of new Judges). I will address these developments within the themes of the Forum and locate them within the statements of the Forum’s participants.

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<sup>19</sup> See the detailed and instructive critiques by Horwitz, 2018, pp. 925 ff., see above note 8 and Franz Josef Lindner, *Rechtswissenschaft als Metaphysik*, Mohr Siebeck, Tübingen, 2017, pp. 11 ff.

<sup>20</sup> Kolber, 2020, p. 1231, see above note 10.

<sup>21</sup> *Ibid.*

### 2.3.1. The Integrity of International Criminal Justice

Navi Pillay<sup>22</sup> expressed concerns about a growing disrespect of international institutions and about the increasing amount of attacks against the integrity of international criminal justice. She especially addressed the “lack of basic respect for human rights” and described in cautious language what was expressed much more bluntly later on: the attacks on the ICC by State leaders such as Donald Trump. Navi Pillay combined her analysis with a concrete demand by calling on States to let international crimes not go unprosecuted and unpunished. Thomas Dickert saw the ICC weakened through the lack of State support, especially by some of the permanent members of the United Nations (‘UN’) Security Council such as China, Russia and the United States (‘US’).<sup>23</sup>

Unsurprisingly, the source of attacks against the ICC that caused the gravest concern was the (former) US government. Ben Ferencz – the last surviving former Prosecutor at the Nuremberg trials – addressed the ICC-hostile policy of the US *via* video. He was at his best, naming those people on the political playing field who are responsible for the current renaissance of nationalist tendencies: Donald Trump and John Bolton.<sup>24</sup> In this volume, he repeats his warning.<sup>25</sup> His clairvoyant remarks at the Nuremberg Forum seem all too justified, considering the events that unfolded after the Nuremberg Forum.

The former US Trump government, arguably as a result of a “ruptured ‘mutual accommodation’ that previously characterized the ICC-U.S. relationship”,<sup>26</sup> publicly attacked the ICC and its judges and staff and sanc-

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<sup>22</sup> President of the Advisory Council of the International Nuremberg Principles Academy, who gained international reputation as United Nations High Commissioner for Human Rights, Judge at the ICC and as Judge and President of the International Criminal Tribunal for Rwanda (‘ICTR’).

<sup>23</sup> See also the recent analysis by Lloyd T. Chigowe, “Allies or Foes? A Review of the Relationship between the International Criminal Court and the United Nations Security Council”, in *Netherlands International Law Review*, 2020, vol. 67, no. 3, pp. 403–425.

<sup>24</sup> See in more detail, Kevin S. Robb and Shan Patel, “The United States, the International Criminal Court, and Afghanistan: The Rupturing of Mutual Accommodation”, in *International Criminal Law Review*, 2020, vol. 20, p. 1069; Alexander Heinze, “The Statute of the International Criminal Court as a Kantian Constitution”, in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, TOAEP, Brussels, 2018, p. 370 with further references (<http://www.toaep.org/ps-pdf/34-bergsmo-buis>).

<sup>25</sup> See Chapter 3 in this volume.

<sup>26</sup> Robb and Patel, 2020, p. 1069, see above note 24.

tioned two members of the Office of the Prosecutor ('OTP').<sup>27</sup> This aggressive stance seems to have impressed the judges of the ICC's Pre-Trial Chamber ('PTC') in the Afghanistan situation<sup>28</sup> when they decided not to authorize the continuation of an investigation into crimes committed, allegedly, *inter alia* by the Taliban, Afghan and US forces.<sup>29</sup>

The PTC based its decision on a broad interpretation of the already vague concept of the 'interests of justice', stressing the (envisaged) lack of co-operation of the States concerned (US and Afghanistan) and thus the low chances of success of such proceedings.<sup>30</sup> Later, the PTC's position

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<sup>27</sup> For a critical view, Claus Kreß, "Editorial: An Unusual and Extraordinary Assault on International Justice", in *Journal of International Criminal Justice*, 2020, vol. 18, no. 4, pp. 791–792; *id.*, "Trump droht mit dem 'zivilen Tod'", in *Kölner Stadtanzeiger*, 29 June 2020, p. 4. See also Jennifer Trahan, "Reject the Dictator's Playbook: The Importance of Civil Society and States Supporting the ICC Against Threats by the U.S", in *OpinioJuris*, 1 May 2020 (available on its web site); Jennifer Trahan and Megan Fairlie, "The International Criminal Court is Hardly a Threat to US National Security", in *OpinioJuris*, 15 June 2020 (available on its web site). On 1 April 2021, the Biden administration revoked Executive Order 13928 that provided the legal basis for the sanctions, see Claus Kreß, "A Plea for True U.S. Leadership in International Criminal Justice", in *Lieber Institute, West Point*, 7 May 2021 (available on its web site).

<sup>28</sup> In a similar vein, Holly Cullen, Philipp Kastner and Sean Richmond, "The Politics of International Criminal Law", in *id.* (eds.), *The Politics of International Criminal Law*, Brill, Nijhoff, Leiden, Boston, 2021, pp. 5–6 (fn. 3 omitted):

[...] appears to have had a direct impact on the work of the Court. For example, the decision of Pre-Trial Chamber II in April 2019 that stopped the Prosecutor from opening a formal investigation into crimes allegedly committed by Taliban, American and Afghan forces in Afghanistan based in part on the assumption that little co-operation with the Court could be expected from the US.

<sup>29</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 (<http://www.legal-tools.org/doc/2fb1f4/>).

<sup>30</sup> *Ibid.*, paras. 89 *et seq.*, thereon critical Dov Jacobs, "Some extra thoughts on why the ICC Pre-Trial Chamber acted ultra vires in using the 'interests of justice' to not open an investigation in Afghanistan", in *Spreading the Jam*, 4 April 2019 (available on its web site); Parvathi Menon, "Not in the name of the other", in Hélène Ruiz Fabri *et al.* (eds.), *International Judicial Legitimacy: New Voices and Approaches*, Nomos, Baden-Baden, 2020, pp. 71–90, 71, 81; Jake Romm, "No Home in this World: The Case against John Yoo before the International Criminal Court", in *International Criminal Law Review*, 2020, vol. 20, no. 5, pp. 862–907, 865 ff. See also the analysis by Eleni Chaitidou, "Recent developments in the jurisprudence of the International Criminal Court – Part 1", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2020, 563 ff.

was rejected by the Appeals Chamber ('AC'), authorizing, by majority, the investigation.<sup>31</sup>

The PTC's decision in the Afghanistan situation underlines the importance of integrity in international criminal justice. Thus, an entire volume of the Nuremberg Academy Series, *Integrity in International Justice* edited by Morten Bergsmo and Viviane E. Dittrich, was dedicated to the topic and published at the end of 2020.<sup>32</sup>

### 2.3.2. Protection of Human Dignity and a Cosmopolitan Vision

The scene Ferencz set could not have been more appropriate for the speech of the German Federal Foreign Minister Heiko Maas. His speech is reprinted in this volume.<sup>33</sup> Maas' most interesting remark was this: "the fight for justice requires courage and stamina, particularly from Germany, as this fight always means striving for human dignity". What Maas does here is a justification of international criminal justice based on the protection of human dignity. This is reminiscent of the Kantian idea of a *Weltbürgerrecht* and his concept of human dignity, focusing on people instead of States as subjects of the international order – more like a cosmopolitan vision.<sup>34</sup>

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<sup>31</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 (<http://www.legal-tools.org/doc/x7kl12/>). On 27 September 2021 Prosecutor Khan not only sought authorisation to resume the OTP's investigation in the Afghanistan Situation, ICC, *Situation in the Islamic Republic of Afghanistan*, OTP, Request to authorise resumption of investigation under article 18(2) of the Statute, 27 September 2021, ICC-02/17-161 (<https://www.legal-tools.org/doc/pzfuq9/>); he also decided to focus on the "Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation", for example alleged crimes by members of the Central Intelligence Agency and US armed forces, "Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan", 27 September 2021 (available on the ICC's web site).

<sup>32</sup> Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020 (<http://www.toaep.org/nas-pdf/4-bergsmo-dittrich>). About the project, see also Gunnar M. Ekeløve-Slydal, "Why Individual Integrity Matters", in *OpinioJuris*, 12 December 2020 (available on its web site).

<sup>33</sup> See Chapter 24 in this volume.

<sup>34</sup> See Kant's Third Definitive Article: "Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right)", in Immanuel Kant, "Perpetual Peace: A Philosophical Sketch", in Hans Reiss (ed.), *Political Writings*, translation by Hugh Barr Nisbet, 2nd. ed., Cambridge University Press, 1991, p. 98. See also Kai Ambos, "Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First

Human dignity is here also understood as a moral source of subjective rights of all people, of universally recognized human rights which ultimately have to be protected by a universal, interculturally recognized criminal law. It is a form of cosmopolitanism based on principles of reason with a claim of universal validity. Maas' focus on the human – and thereby victims of international crimes – as the main justification of the existence of international criminal law and the ICC can certainly be identified as the common theme of the conference. Many speakers have taken recourse to it – including ICC Judge Bertram Schmitt in his closing remarks that are reprinted in this volume.<sup>35</sup>

### **2.3.3. The Prosecutor's Critical Analysis at the Forum and Her Track Record Since Then**

During his remarks, Maas not only saw shadow in the current political situation with regard to the ICC, but also light. He concretely mentioned the collective referral by a group of States Parties to the ICC Statute, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, regarding the situation in the Bolivarian Republic of Venezuela on 27 September 2018.<sup>36</sup> He passed the ball to then acting ICC Prosecutor Fatou Bensouda, who gave the keynote address of the conference, reprinted in this volume. If someone were to identify the main term of Bensouda's speech, it would be 'responsibility'. Bensouda did not grow tired of emphasizing the responsibilities of all actors involved in the ICC project. Apart from the necessary support by States Parties and civil society, she also addressed her own re-

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Contribution towards a Consistent Theory of International Criminal Law", in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, pp. 102–103; *id.*, *Treatise on International Criminal Law: Vol. I*, 2nd. ed., Oxford University Press, 2021, pp. 307–308; *id.*, "Ius puniendi and Constitution: A Comparative (Canadian-German) Perspective", in *ICL Journal Vienna Journal of International Law*, 2020, vol. 14, p. 261; Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest*, Oxford University Press, 2020, pp. 1 ff., defining cosmopolitanism as "a political-philosophical notion that the international community has a shared morality and that members of this community – whether states or individuals – have rights and duties towards each other" (pp. 1–2). Ryngaert both normatively and empirically examines "how the ambitions of cosmopolitan theory have informed, and could further inform actual legal practices" (pp. 13 ff.).

<sup>35</sup> See Chapter 26 in this volume.

<sup>36</sup> ICC, "Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela", 27 September 2018.

sponsibility as Prosecutor by promoting an “honest and open look at the OTP’s track record”. Here, Bensouda did not resort to general promises and programmatic statements but presented a rather concrete analysis of the investigatory work (“efforts to reduce the time gap between events on the ground and the Office’s investigation”; challenges posed by digital evidence and of her case selection policy (“quality over quantity”). Her speech is reprinted in this volume.<sup>37</sup>

And indeed, the perception of Bensouda’s term seems to be dominated by an admiration for her emphasis on important policy issues, combined with a critique of those case investigations that led to either acquittals<sup>38</sup> or a no-case-to-answer<sup>39</sup> decision.<sup>40</sup> It seems logically questionable, though, to equate acquittals with bad investigations: first and foremost, because this premise lacks justification. It is all too easy to simply deduce from an acquittal that the Prosecutor investigated badly. Surely, an acquittal *may also* result from a bad investigation, but does not necessarily have to.<sup>41</sup> No matter how well the Prosecutor investigated, once the standard of proof has not been met, the accused is acquitted. After all, acquittals support the legitimacy of international criminal justice.<sup>42</sup> Second, this equation seems also questionable from a conceptual standpoint, since it suggests that a trial was a game in which the Prosecutor is just one contestant. In that logic, or better: analogy, a conviction equals a win for the Prosecution and an acquittal

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<sup>37</sup> See in more detail Chapter 25 in this volume.

<sup>38</sup> Examples of acquittals are provided below in fn. 44 and fn. 52, both with main text.

<sup>39</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red, p. 1 (<http://www.legal-tools.org/doc/6baecd/>). About this controversial decision in detail, Alexander Heinze, “Witness Preparation”, in André Klip and Steven Freeland (eds.), *Annotated Leading Cases of International Criminal Tribunals*, vol. 61, Intersentia Publishing, Antwerpen, 2020, pp. 307 ff. Critical is also former ICC Judge Tarfusser in an interview with Chiarini, see Cuno Jakob Tarfusser and Giovanni Chiarini, “Can We Return to the Law, Please? Rethinking the Judicial Interpretation of Procedural Rules in the ICC – A Conversation with Judge Tarfusser after the Gbagbo-Blé Goude Appeal Judgment”, in *OpinioJuris*, 13 April 2021 (available on its web site).

<sup>40</sup> See, for instance, Dominic Johnson, “Frischer Wind im Kampf gegen Straflosigkeit”, in *Die Tageszeitung (taz)*, 15 February 2021, p. 3.

<sup>41</sup> See, for instance, the analysis of Patryk Labuda, “The ICC’s ‘evidence problem’”, in *Völkerrechtsblog*, 18 January 2019 (available on its web site).

<sup>42</sup> Emma Irving, *Multi-Actor Human Rights Protection at the International Criminal Court*, Cambridge University Press, 2020, pp. 93 ff. About acquittals at the ICTY: Kerstin Bree Carlson, *Model(ing) Justice: Perfecting the Promise of International Criminal Law*, Cambridge University Press, 2018, pp. 84 ff.

means the Prosecution lost.<sup>43</sup> Arguably, after the *Bemba* acquittal<sup>44</sup> and the PTC's declination of authorizing to continue the investigation in the Afghanistan situation, Bensouda's track record has improved: the AC amended the PTC's rejection to authorize. Arrest warrants were issued in other situations against Al-Tuhamy Mohamed Khaled<sup>45</sup> and Mahmoud Mustafa Busayf Al-Werfalli.<sup>46</sup> The arrest warrant against Al Hassan Ag Abdoul Aziz

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<sup>43</sup> In more detail about this culture, see Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker and Humblot, Berlin, 2014, pp. 226, 257 ff., with further references. This game-analogy has received both applause and criticism. For a nuanced account, see John D. King, "Gamesmanship and Criminal Process", in *American Criminal Law Review*, 2021, vol. 58, pp. 47 ff., especially 54 ff.

<sup>44</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, ICC-01/05-01/08-3636-Red (<http://www.legal-tools.org/doc/40d35b/>). For a comment, see Alexander Heinze, "Some Reflections on the Bemba Appeals Chamber Judgment", in *OpinioJuris*, 18 June 2018 (available on its web site); *id.*, "Ex-Vize des Kongos frei: Atlas wirft die Welt ab", in *Legal Tribune Online*, 23 June 2018 (available on its web site); *id.*, "Algunas reflexiones sobre el caso Bemba", in Kai Ambos and Fernando Velásquez Velásquez (eds.), *El Caso Bemba y la Responsabilidad del Mando*, Tirant Lo Blanch, Valencia, 2020, pp. 159–168; Amnesty International, "Lessons must be learned from the Bemba case as a whole", 1 October 2018 (available on its web site); Michael G. Karnavas, "The Reversal of Bemba's Conviction: what went wrong or right?", in *International Criminal Law Blog*, 19 June 2018 (available on its web site); Miles Jackson, "Commanders' Motivations in Bemba", in *EJIL:Talk!*, 15 June 2018 (available on its web site); *id.*, "Geographical Remoteness in Bemba", in *EJIL:Talk!*, 30 July 2018 (available on its web site). See also the critical responses of Leila Sadat, "Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo", in *EJIL:Talk!*, 12 June 2018 (available on its web site); Diane Marie Amann, "In Bemba and Beyond, Crimes Adjudged to Commit Themselves", in *EJIL:Talk!*, 13 June 2018 (available on its web site); Alex Whiting, "Appeals Judges Turn the ICC on its Head with Bemba Decision", in *Just Security*, 14 June 2018 (available on its web site); Susana Sacouto, "The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?", in *International Justice Monitor*, 22 June 2018 (available on its web site); Joseph Powderly and Niamh Hayes, "The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC", in *PhD Studies in Human Rights*, 26 June 2018 (available on its web site). Critically about the decision's impact on the standard of review, see Kevin W. Gray, "Is There Even a Standard of Review at the ICC?", in *International Criminal Law Review*, 2020, vol. 20, pp. 945 ff. About the role of integrity in the *Bemba* acquittal Shannon Fyfe, "Ethics, Integrity and the *Bemba* Acquittal", in Bergsmo and Dittrich (eds.), 2020, pp. 269 ff., see above note 32 and Chapter 21 in this volume.

<sup>45</sup> ICC, *Prosecutor v. Al-Tuhamy Mohamed Khaled*, Pre-Trial Chamber I, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and *ex parte* Annex, 18 April 2013, ICC-01/11-01/13-1 (<http://www.legal-tools.org/doc/8782b5/>).

<sup>46</sup> ICC, *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Pre-Trial Chamber I, Second Warrant of Arrest, 4 July 2018, ICC-01/11-01/17-13 (<http://www.legal-tools.org/doc/3275b0/>).

Ag Mohamed Ag Mahmoud was issued and executed in 2018. The trial opened on 14–15 July 2020.<sup>47</sup> On 4 February 2021, Dominic Ongwen, former militia leader and child soldier from Uganda, was found guilty of war crimes and crimes against humanity.<sup>48</sup> The judgment has received worldwide attention and the label of a “landmark judgment”,<sup>49</sup> especially since it made important conceptual clarifications, and due to the view that it sets “a number of important precedents”.<sup>50</sup> On 6 May 2021, Trial Chamber (‘TC’) IX sentenced Ongwen to 25 years imprisonment.<sup>51</sup> The case of *Laurent Gbagbo and Charles Blé Goudé* did not go as favourably: on 15 January 2019, TC I, by majority, acquitted both accused from all charges of crimes against humanity allegedly committed in Côte d’Ivoire in 2010 and 2011.<sup>52</sup> After TC I filed the written full reasons for its decision in July 2019,<sup>53</sup> on 16 September 2019 the Prosecutor filed a notice of appeal against this decision and submitted the document in support of the appeal

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<sup>47</sup> ICC, “Al Hassan Case” (available on its web site).

<sup>48</sup> ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Trial Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (<http://www.legal-tools.org/doc/kv27ul/>).

<sup>49</sup> Jason Burke *et al.*, “Ugandan ex-child soldier guilty of war crimes and crimes against humanity”, in *The Guardian*, 4 February 2021.

<sup>50</sup> ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Trial Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red (<http://www.legal-tools.org/doc/kv27ul/>), paras. 2685 (armed forces), 2683 (“protracted” armed violence), 2689 (nexus in war crimes), 2696-7 (*hors de combat*), 2718 (forced pregnancy). Authors of blog entries have the advantage of speed in their reactions. Due to the recent publication date of the decision, a reference to blog entries shall satisfy, for now, the need for analyses: Liana Georgieva Minkova, “Guilty on 61 Counts – What the Ongwen Verdict Indicates about the Limitations of Individual Criminal Responsibility for Mass Atrocities”, in *OpinioJuris*, 9 February 2021 (available on its web site); Mark Kersten, “‘Getting’ an Unforgettable Gettable: The Trial of Dominic Ongwen”, in *Justice in Conflict*, 5 February 2021 (available on its web site). Prior to the judgment more detailed case analyses from several perspectives have been published, see, for instance Liana Georgieva Minkova, “Expressing what? The stigmatization of the defendant and the ICC’s institutional interests in the Ongwen case”, in *Leiden Journal of International Law*, 2021, vol. 34, no. 1, pp. 223–245.

<sup>51</sup> ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red (<http://www.legal-tools.org/doc/vj1y8k/>). Judge Pangalangan issued a Partly Dissenting Opinion, ICC-02/04-01/15-1819-Anx (<http://www.legal-tools.org/doc/e1bsnn/>).

<sup>52</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, Transcript, 16 January 2019, ICC-02/11-01/15-T-234-ENG (<http://www.legal-tools.org/doc/496176/>).

<sup>53</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 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, 16 July 2019, ICC-02/11-01/15-1263 (<http://www.legal-tools.org/doc/440017/>).

the following month.<sup>54</sup> On 31 March 2021, the Appeals Chamber confirmed by majority, Judge Ibáñez<sup>55</sup> and Judge Bossa<sup>56</sup> dissenting, the TC's decision to acquit the accused and revoked the conditions on their release.<sup>57</sup> The charges against Al Hassan were confirmed on 30 September 2019.<sup>58</sup> PTC I found that there were substantial grounds to believe that Al Hassan was responsible for directly committing crimes against humanity and war crimes, for assisting in the commission of those crimes and/or for contributing in any other way to the crimes (different modes of liability in Article 25 of the ICC Statute applied).<sup>59</sup> On 23 April 2020, PTC I partially granted

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<sup>54</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, Public redacted version of "Prosecution Document in Support of Appeal", ICC-02/11-01/15-1277-Conf, 15 October 2019, 17 October 2019, ICC-02/11-01/15-1277-Red (<http://www.legal-tools.org/doc/1encbm/>).

<sup>55</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, Annex 4: Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber 1 of 15 January 2019 with written reasons issued on 16 July 2019, 31 March 2021, ICC-02/11-01/15-1400-Anx4-Red (<http://www.legal-tools.org/doc/0s2i3o/>).

<sup>56</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, Annex 5: Dissenting Opinion of Judge Solomy Balungi Bossa on Grounds One and Two, 31 March 2021, ICC-02/11-01/15-1400-Anx5 (<http://www.legal-tools.org/doc/bpe3bm/>).

<sup>57</sup> ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400 (<http://www.legal-tools.org/doc/4nflkju/>). Separate Concurring Opinions by Judge Eboe-Osuji, (*ibid.*, Annex 1: Separate Concurring Opinion of Judge Eboe-Osuji, ICC-02/11-01/15-1400-Anx1-Red (<http://www.legal-tools.org/doc/67yc1m/>)); Judge Morrison (*ibid.*, Annex 2: Separate Concurring Opinion of Judge Howard Morrison in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021, ICC-02/11-01/15-1400-Anx2 (<http://www.legal-tools.org/doc/fjzfuk/>)); and Judge Hofmański (*ibid.*, Annex 3: Separate Concurring Opinion of Judge Piotr Hofmański in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021, ICC-02/11-01/15-1400-Anx3, (<http://www.legal-tools.org/doc/bnc5nf/>)).

<sup>58</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 7 June 2020, ICC-01/12-01/18-461-Corr-Red (<http://www.legal-tools.org/doc/9lml5x/>).

<sup>59</sup> See, in more detail, Eleni Chaitidou, "Recent developments in the jurisprudence of the International Criminal Court – Part 2", in *Zeitschrift für internationale Strafrechtsdogmatik*, 2021, vol. 16, pp. 46 ff.

the Prosecutor's request to amend the charges,<sup>60</sup> and thus modified certain charges.<sup>61</sup> Charges were also (partly) confirmed in the case against Alfred Yekatom and Patrice-Edouard Ngaïssona.<sup>62</sup> In February 2021, the OTP signed a Memorandum of Understanding ('MoU') with the Sudanese government<sup>63</sup> for cooperating on the trial of former militant leader 'Ali Kushayb'<sup>64</sup> who is accused of committing war crimes in the Darfur region

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<sup>60</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Public redacted version of "Prosecution Request for corrections and amendments concerning the Confirmation Decision", 30 January 2020, ICC-01/12-01/18-568-Conf, 30 January 2020, ICC-01/12-01/18-568-Red (<http://www.legal-tools.org/doc/ks5oj0/>). A public redacted version was filed on 17 February 2020. See, in more detail, Chaitidou, 2021, see above note 59.

<sup>61</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf, 8 May 2020, ICC-01/12-01/18-767-Corr-Red (<http://www.legal-tools.org/doc/fsfp30/>). A corrected, public redacted version thereof was filed on 8 May 2020. See, in more detail, Chaitidou, 2021, p. 49, see above note 59.

<sup>62</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber I, Public Redacted and Corrected version of "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona", 11 December 2019, ICC-01/14-01/18-403-Red-Corr (<http://www.legal-tools.org/doc/314uw9/>). A public redacted version was made available on 20 December 2019, while a corrigendum to the decision was filed on 14 May 2020. About the rejection to amend the charges, their re-characterization *et cetera*, see Chaitidou, 2021, pp. 55 ff., see above note 59. Especially about the Prosecutor's attempt to amend the charges in the period between the confirmation of charges decision and the first day of trial, in order to include additional incidents of sexual violence, Rosemary Gray *et al.*, "The ICC's Troubled Track Record on Sexual and Gender Based Crimes Continues: The Yekatom and Ngaïssona Case Part I", in *OpinioJuris*, 3 July 2020 (available on its web site) and *id.*, "The ICC's Troubled Track Record on Sexual and Gender Based Crimes Continues: The Yekatom and Ngaïssona Case Part II", in *OpinioJuris*, 3 July 2020 (available on its web site).

<sup>63</sup> "Sudan, ICC sign cooperation agreement on Kushayb trial", in *Sudan Tribune*, 16 February 2021.

<sup>64</sup> 'Ali Kushayb' is Abd-Al-Rahman's nickname, hence not a legal name. Up to June 2020, case documents listed only this nickname. On 26 June 2020, Single Judge Rosario Salvatore Aitala, acting on behalf of Pre-Trial Chamber II, granted the Defence's request to amend the case name to 'Abd-Al-Rahman' or 'Mr. Abd-Al-Rahman' but rejected the request to omit the nickname altogether, see ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Pre-Trial Chamber II, Decision on the Defence request to amend the name of the case, 26 June 2020, ICC-02/05-01/20-8, p. 8 (<http://www.legal-tools.org/doc/adqp8t/>). That the case name is more than just a technicality shows the fact that the parties disagreed over the question of whether to also list Abd-Al-Rahman's nick name or not. Single Judge Aitala deferred this decision "until the Chamber will be in a position to make an informed decision on the matter" (para. 16). Even though Judge Aitala emphasized the neutrality of a case

of Sudan. The MoU is an important tool to secure the presence of the accused at trial, since Sudan is not a member of the ICC. After a second arrest warrant,<sup>65</sup> ‘Ali Kushayb’ appeared voluntarily in the Central African Republic (‘CAR’) and was transferred to the ICC on 9 June 2020.<sup>66</sup>

With regard to preliminary examinations and their conclusion, two decisions of the OTP drew special attention: it closed the preliminary examination in the Iraq-United Kingdom situation,<sup>67</sup> and it declared to move to the investigation phase (depending on an authorization by the PTC) in the Ukraine situation.<sup>68</sup>

With regard to office policy, at the end of 2020, the Prosecutor issued the Guidelines for Agreements Regarding Admission of Guilt.<sup>69</sup> These guidelines are internal (arguably binding) guidelines, which every organ of the ICC is entitled to issue. Article 42(2) of the ICC Statute clarifies that

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name, the deference to a later point indicates that he presumably acknowledged the communicative effect of a case name. This effect was reiterated by the Prosecution: “preserving the reference to ‘Ali Kushayb’ in the name of the case would [...] enable the public to continue to follow the proceedings in this case”, particularly in ‘Darfur and elsewhere in Sudan, where the name “Ali Kushayb” is inextricably linked to Mr Abd-Al- Rahman’s case” (para. 13).

<sup>65</sup> ICC, *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Pre-Trial Chamber II, Public redacted version of “Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)”, 16 January 2018, ICC-02/05-01/07-74-Secret-Exp, 11 June 2020, ICC-02/05-01/07-74-Red (<http://www.legal-tools.org/doc/d9jveq/>).

<sup>66</sup> ICC, “Situation in Darfur (Sudan): Ali Kushayb is in ICC custody”, 9 June 2020, ICC-CPI-20200609-PR1525.

<sup>67</sup> ICC-OTP, “Report on Preliminary Examination Activities 2020”, 14 December 2020, paras. 230 *et seq.* Critically Andreas Schueller, “The ICC, British War Crimes in Iraq and Very British Tradition”, in *OpinioJuris*, 11 December 2020 (available on its web site); Kevin John Heller, “Article 18 and the Iraq Declination”, in *OpinioJuris*, 12 December 2020 (available on its web site); Clive Baldwin, “The ICC Prosecutor Office’s Cop-Out on UK Military Crimes in Iraq”, in *OpinioJuris*, 18 December 2020 (available on its web site). About the preliminary examination into the situation and the employment of the gravity criterion, see Alexander K. A. Greenawalt, “Admissibility as a theory of international criminal law”, in Margaret M. deGuzman and Valerie Oosterveld (eds.), *The Elgar Companion to the International Criminal Court*, Elgar, Cheltenham, Northampton, 2020, pp. 86–87.

<sup>68</sup> ICC, “Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine”, 11 December 2020. Thereto: Iryna Marchuk, “The ICC concludes its preliminary examination in Crimea and Donbas: What’s next for the situation in Ukraine?”, in *EJIL:Talk!*, 16 December 2020 (available on its web site).

<sup>69</sup> ICC-OTP, “Guidelines for Agreements Regarding Admission of Guilt”, October 2020 (<http://www.legal-tools.org/doc/yp1dlf/>).

the OTP is a separate organ of the Court.<sup>70</sup> The publication of the guidelines is thus more of an act of transparency than an indication that the guidelines have any external effect. They especially do not count as sources within the meaning of Article 21 of the ICC Statute and can also not be used indirectly for a contextual interpretation pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties.<sup>71</sup> It is thus the head of the organ who is the final authority for the interpretation of these guidelines, that is, the President with regard to guidelines, or other similar documents, for the Court,<sup>72</sup> and the Prosecutor for the OTP. Shortly before the Prosecutor's term ends, her Office published two policy papers: first, the Policy on Cultural Heritage, addressing several problems in the investigation into crimes that affect cultural heritage.<sup>73</sup> The OTP especially names as a problem "issues relating to access to evidence".<sup>74</sup> Second, a *Policy on Situation Completion* as the final policy paper in the "trilogy of policy papers describing the life cycle of the Office's operations in a situation".<sup>75</sup> It complements the *Policy Paper on Preliminary Examinations*<sup>76</sup> and the *Policy Paper on Case Selection and Prioritisation*.<sup>77</sup>

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<sup>70</sup> With regard to 'guidelines' for the Court as a separate organ, both the Registrar ("principle administrative officer of the Court", Article 43(2)) and the President of the Court may issue the following: Presidential Directives; Administrative Instructions; Information Circulars. See ICC, Presidency, Procedures for the Promulgation of Administrative Issuances, 9 December 2003, ICC/PRES/D/G/2003/001, Section 1.1 ('Procedures for the Promulgation of Administrative Issuances') (<http://www.legal-tools.org/doc/6a92e0/>). See, in more detail, Cyril Laucci, "The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court", in Bergsmo and Dittrich (eds.), 2020, pp. 848 ff., see above note 32.

<sup>71</sup> Biazatti's statement the Guidelines were a "useful specification of Article 65(5) of the Rome Statute" is thus methodologically misleading, cf Bruno de Oliviera Biazatti, "The ICC Prosecutor Releases Guidelines for Agreements Regarding Admission of Guilt", in *EJIL:Talk!*, 14 December 2020 (available on its web site).

<sup>72</sup> Procedures for the Promulgation of Administrative Issuances, 9 December 2003, Section 1.4 see above note 70. This document even contains rules of interpretation (Section 7).

<sup>73</sup> ICC-OTP, "Policy on Cultural Heritage", June 2021 (<http://www.legal-tools.org/doc/lu5x3g/>).

<sup>74</sup> *Ibid.*, para. 8.

<sup>75</sup> ICC-OTP, "Policy on Situation Completion", 15 June 2021, para. 2 (<https://www.legal-tools.org/doc/mdl417/>).

<sup>76</sup> ICC-OTP, "Policy Paper on Preliminary Examinations", November 2013 (<http://www.legal-tools.org/doc/acb906/>).

<sup>77</sup> ICC-OTP, "Policy Paper on Case Selection and Prioritisation", 15 September 2016 (<http://www.legal-tools.org/doc/182205/>).

The role of the Prosecutor at the ICC was arguably the most dominant issue in international criminal justice in the last two years, not only because of key decisions but also due to the election of the new Prosecutor (by the way, the position of a so-called ‘Chief-Prosecutor’ is unknown at the ICC). The election process was followed closely by observers, commented on and analysed thoroughly,<sup>78</sup> involved claims of sexual misconduct against candidates,<sup>79</sup> the public rejection,<sup>80</sup> or support of candidates.<sup>81</sup>

Even though the old demand for more transparency in the election of the Prosecutor was met by the creation of the Committee on the Election of the Prosecutor and a Panel of Experts,<sup>82</sup> both the Committee’s findings and the ominous ‘shortlist’ of candidates provoked reactions from mild criticism over cynicism to blunt rejection.<sup>83</sup> At the end of a seemingly endless obstacle course, on 12 February 2021, the Assembly of States Parties

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<sup>78</sup> See the joint symposium, Kevin Jon Heller *et al.*, “The Next ICC Prosecutor: A Joint Opinion Juris and Justice in Conflict Symposium”, in *OpinioJuris*, 8 April 2020 (available on its web site).

<sup>79</sup> Kevin Jon Heller, “ATLAS Writes an Open Letter to the Committee Electing the ICC Prosecutor and the ASP”, in *OpinioJuris*, 3 May 2020 (available on its web site). See also Dienneke T. de Vos, “Institutional Ethics, Individual Integrity, and Sexual Harassment: Recent Developments in Ethics Standard-Setting and Mechanisms at the United Nations”, in Bergsmo and Dittrich (eds.), 2020, pp. 537 ff., see above note 32. Generally about illegal behaviour, especially sexual misconduct, of UN staff, see Matthias Neuner, “Sexual Harassment”, in *ibid.*, pp. 551 ff.

<sup>80</sup> Kevin Jon Heller, “The Coming Kerfuffle over the next ICC Prosecutor”, in *OpinioJuris*, 17 July 2020 (available on its web site).

<sup>81</sup> Kevin Jon Heller, “NGO Letter Supporting Karim Khan QC”, in *OpinioJuris*, 8 January 2021 (available on its web site).

<sup>82</sup> ICC Assembly of States Parties (‘ASP’), “Report of the Committee on the Election of the Prosecutor”, 30 June 2020.

<sup>83</sup> For an overview, see Evelyn A. Ankumah and James Goldston, “In Defense of Process: Why States Should Not Nominate New Candidates for the ICC Prosecutor”, in *OpinioJuris*, 23 July 2020 (available on its web site); Kevin Jon Heller, “More on Why – and How – States Should Open Up the Nomination Process”, in *OpinioJuris*, 24 July 2020 (available on its web site); Gregory Gordon, “The Third ICC Prosecutor: Is It the Process or the Outcome of the Process that Matters More?”, in *OpinioJuris*, 27 July 2020 (available on its web site); Gunnar Ekeløve-Slydal, “The Process of Electing the Next ICC Prosecutor Should Be Opened Up”, in *OpinioJuris*, 10 August 2020 (available on its web site); Kevin Jon Heller, “Four Thoughts on the Election for ICC Prosecutor (Updated)”, in *OpinioJuris*, 17 November 2020 (available on its web site); Gregory Gordon, “Selecting the ICC’s Next President: High Scrutiny for High Stakes”, in *OpinioJuris*, 16 November 2020 (available on its web site).

(‘ASP’) declared Karim Khan (United Kingdom national) as its next Prosecutor.<sup>84</sup> Khan assumed the post on 21 June 2021.

### **2.3.3.1. Situation on the Registered Vessels of the Union of the Comoros, Hellenic Republic and the Kingdom of Cambodia**

The appeal against the PTC I’s Second Review Decision in the Situation on the Registered Vessels of the Union of the Comoros, Hellenic Republic and the Kingdom of Cambodia, was unsuccessful: the AC rejected the Prosecutor’s appeal and instructed her to “reconsider her decision not to open an investigation in accordance with the 16 July 2015 Decision and the present judgment and to notify the Pre-Trial Chamber and those participating in the proceedings of her final decision by 2 December 2019”.<sup>85</sup> Yet, the Prosecutor – rather unsurprisingly – stood by her position that there was no reasonable basis to proceed with an investigation because there was no potential case that was sufficiently grave to be admissible before the ICC within the meaning of Article 17(1)(d) of the ICC Statute and that, therefore, the preliminary examination had to be closed.<sup>86</sup> PTC I rejected Comoros’ request

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<sup>84</sup> ICC, “Assembly of States Parties concludes the second resumption of its nineteenth session”, 12 February 2021.

<sup>85</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, 2 September 2019, ICC-01/13-98, para. 1 (<http://www.legal-tools.org/doc/802549/>). See the instructive analysis by Eleni Chaitidou, “Recent developments in the jurisprudence of the International Criminal Court”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2019, vol. 12, pp. 583 ff.; Shyamala Alagendra, and Victor Băieșu, and Karim A.A. Khan, “Fact-Finding Powers of International Prosecutors”, in Hélène Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law*, Oxford University Press, 2020; Priya Urs, “Judicial Review of Prosecutorial Discretion in the Initiation of Investigations into Situations of ‘Sufficient Gravity’”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 856 ff.

<sup>86</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber, Annex 1 to the Notice of Prosecutor’s Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019, 2 December 2019, ICC-01/13-99-Anx1 (<http://www.legal-tools.org/doc/jrysaj/>). See the analysis by Chaitidou, 2020, pp. 558 ff., see above note 30. About the preliminary examination into the situation and the employment of the gravity criterion, see Alexander K. A. Greenawalt, “Admissibility as a theory of international criminal law”, in deGuzman and Oosterveld (eds.), 2020, pp. 87 ff., see above note 67.

for judicial review of that decision.<sup>87</sup> On 22 September 2020, the Government of Comoros sought leave to appeal the Pre-Trial Chamber decision of 16 September 2020, a decision on which remains pending.<sup>88</sup>

### 2.3.3.2. Situation in Palestine

On 20 December 2019, Bensouda announced that the preliminary examination into the Situation in Palestine has concluded with the determination that all the criteria under the ICC Statute for the opening of an investigation had been met.<sup>89</sup> At the same time, pursuant to Article 19(3) of the ICC Statute, she requested from PTC I a jurisdictional ruling on the scope of the territorial jurisdiction of the ICC under Article 12(2)(a) of the ICC Statute in Palestine.<sup>90</sup> On 5 February 2021, PTC I followed the reasoning of the

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<sup>87</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the ‘Application for Judicial Review by the Government of the Comoros’, 16 September 2020, ICC-01/13-111 (<http://www.legal-tools.org/doc/mqu8bo/>). See the analysis by Chaitidou, 2020, pp. 560 ff., see above note 30.

<sup>88</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Application on behalf of the Government of the Union of the Comoros for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Comoros’” of 16 September 2020, 22 September 2020, ICC-01/13-112 (<http://www.legal-tools.org/doc/qiepbz/>). See the analysis by Chaitidou, 2020, p. 563, see above note 30.

<sup>89</sup> ICC, “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction”, 20 December 2019. See also ICC-OTP, “Report on Preliminary Examination Activities”, 14 December 2020, paras. 220–224 (<http://www.legal-tools.org/doc/fa25zp/>).

<sup>90</sup> ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12 (<http://www.legal-tools.org/doc/clur6w/>). Thereon: Dapo Akande, “The Monetary Gold Doctrine and the ICC: Can the ICC determine the Territorial Boundaries of Israel and Palestine?”, in *EJIL:Talk!*, 16 June 2020 (available on its web site); Jonathan Turner, “Jurisdiction in Palestine: What the ICC Prosecutor Did Not Say in Her Response ...”, in *OpinioJuris*, 9 May 2020 (available on its web site); Ahmed Abofoul, “Why Palestine Must Be Considered a State for the Purposes of the International Criminal Court?”, in *International Law Blog*, 10 August 2020 (available on its web site); Özgen Özdemir, “Deutschland als amicus curiae - Zur Debatte um die Staatlichkeit Palästinas als Voraussetzung der Jurisdiktion des Internationalen Strafgerichtshofs”, in *Völkerrechtsblog*, 24 February 2020 (available on its web site); Rohan Sinha, “Staat oder kein Staat, das ist hier die (einzige) Frage. Zur Debatte um die Staatlichkeit Palästinas als Voraussetzung der Jurisdiktion des Internationalen Strafgerichtshofs”, in *Völkerrechtsblog*, 4 March 2020 (available on its web site).

Prosecutor<sup>91</sup> and found that Palestine was a State Party to the ICC Statute, by majority (Judges Perrin de Brichambaut and Alapini-Gansou, Judge Kovács dissenting),<sup>92</sup> that, as a consequence, Palestine qualified as “[t]he State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute”; and by majority (Judge Kovács dissenting), “that the Court’s territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem”.<sup>93</sup> In preparation to the highly anticipated decision, many *amicus curiae* observations were filed.<sup>94</sup> The judges of PTC I were apparently aware of the political ramifications of their decision and installed a ‘disclaimer’ or ‘reservation clause’ – so to say – at the end of the decision:

As a final matter, the Chamber finds it appropriate to underline that its conclusions in this decision are limited to defining the territorial parameters of the Prosecutor’s investigation in accordance with the Statute. The Court’s ruling is [...] without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court’s jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Court is neither adjudicating a border dispute under international law nor prejudging the question of any future borders.<sup>95</sup>

As warranted as this remark might seem – it is merely stating the obvious since this reservation clause is in-built in the ICC Statute. Article 10 of the ICC Statute reads: “Nothing in this Part shall be interpreted as limit-

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<sup>91</sup> ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, 5 February 2021, ICC-01/18-143, para. 22 (‘ICC, *Situation in the State of Palestine*, Decision, 5 February 2021’) (<http://www.legal-tools.org/doc/haip3/>).

<sup>92</sup> ICC, *Situation in the State of Palestine*, Judge Péter Kovács’ Partly Dissenting Opinion, 5 February 2021, ICC-01/18-143-Anx1 (<http://www.legal-tools.org/doc/m8bebi/>)

<sup>93</sup> ICC, *Situation in the State of Palestine*, Decision, 5 February 2021, para. 60 (emphasis in the original), see above note 91. See the analysis by Kai Ambos, “‘Solid jurisdictional basis’? The ICC’s fragile jurisdiction for crimes allegedly committed in Palestine”, in *EJIL:Talk!*, 2 March 2021 (available on its web site).

<sup>94</sup> For an overview, see ICC, *Situation in the State of Palestine*, Decision, 5 February 2021, paras. 31 ff., see above note 91. Generally: Sarah Williams and Hannah Woolaver, “The Role of State Amici Curiae in the Article 19(3) ICC Statute Proceedings”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 891–904.

<sup>95</sup> ICC, *Situation in the State of Palestine*, Decision, 5 February 2021, para. 130, see above note 91.

ing or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. I have elaborated on Article 10 elsewhere<sup>96</sup> and will return to the matter later.<sup>97</sup>

The main jurisdictional question, namely, the question of Palestine’s statehood, remained unanswered.<sup>98</sup> This led the German Government and Minister Maas to publicly reiterate their argument already made in an *amicus curiae* observation<sup>99</sup> that “the International Criminal Court and its Office of the Prosecutor do not have jurisdiction because of Palestine’s lack of statehood in international law. A Palestinian State and the determination of its territorial borders “can [...] only be achieved through direct negotiations between Israelis and Palestinians”.<sup>100</sup>

### 2.3.4. The Making of the Rome Statute

William Schabas chaired the Panel ‘Making of the Rome Statute’.<sup>101</sup> In this panel, Ambassador Hans Corell, former Under-Secretary-General for Legal Affairs and Legal Counsel at the UN, gave insights into the challenges he experienced during the Rome Conference. He especially criticized the rules

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<sup>96</sup> Alexander Heinze, “Article 10”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court – A Commentary*, 4th. ed., CH Beck *et al.*, Munich *et al.*, 2022, pp. 756 ff.

<sup>97</sup> See below Section 2.3.10.3.

<sup>98</sup> About the role of the right to self-determination with regard to statehood, see Yaël Ronen, “Palestine in the ICC: Statehood and the Right to Self-determination in the Absence of Effective Control”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 947–966. Discussing the impact of belligerent occupation on Palestine’s ability to possess an effective government, and whether Palestine thus fulfils the criteria for statehood, Robert Heinsch and Giulia Pinzauti, “To Be (a State) or Not to Be? The Relevance of the Law of Belligerent Occupation with regard to Palestine’s Statehood before the ICC”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 927–945.

<sup>99</sup> ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Observations by the Federal Republic of Germany, 29 March 2020, ICC-01/18-103 (<http://legal-tools.org/doc/8bwxc0/>). Critical about this observation and other observations by State Parties: Ardi Imseis, “State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 905–925.

<sup>100</sup> Translation by Stefan Talmon, “Germany publicly objects to the International Criminal Court’s ruling on jurisdiction in Palestine, GPIL – German Practice in International Law”, in *German Practice in International Law*, 11 February 2021. See Original Protocol of the press conference of 8 February 2021 (available on the German government’s web site).

<sup>101</sup> See also the detailed analysis in William A. Schabas, “The dynamics of the Rome Conference”, in deGuzman and Oosterveld (eds.), 2020, pp. 3 ff., see above note 67; Frédéric Mégret, “The Rome Conference: institutional design and the constraints of diplomacy”, in *ibid.*, pp. 20 ff.

on the selection and nomination of ICC Judges and suggested abolishing List B altogether.<sup>102</sup>

Corell touched upon an issue that received considerable attention in the Independent Expert Review of the ICC, commissioned by the ASP and published on 30 September 2020.<sup>103</sup> The review, which is also dealt with in this volume,<sup>104</sup> contains several sections that address both quality and ethics of judges at the ICC.<sup>105</sup> This expert review was frequently demanded,<sup>106</sup> not least because of the (rather infamous) Afghanistan decision by the ICC Pre-Trial Chamber already mentioned.<sup>107</sup> This decision was not the only instance where judges at the ICC caused an irritational raise of eyebrows. Judges were also fighting publicly about the position of the presiding judge

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<sup>102</sup> The judges are elected from two lists (Article 36(5) of the ICC Statute): List A shall consist of candidates with established competence in criminal law and procedures, and the necessary relevant experience, whether as Judge, Prosecutor, advocate, or in another similar capacity in criminal proceedings. List B shall consist of candidates with established competence in relevant areas of international law, such as international humanitarian law and human rights law, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. See, in more detail, Ambos, 2013, p. 26, see above note 34. For Powderly, List B is not the key problem but “competence is”: Joseph Powderly, *Judges and the Making of International Criminal Law*, Brill, Nijhoff, Leiden, Boston, 2020, p. 80: “The underlying issue is competence, and whether the judge be List A or List B is not necessarily determinative of the matter”.

<sup>103</sup> About background and mandate of the Report, see Douglas Guilfoyle, “The International Criminal Court Independent Expert Review: Reforming the Court: Part II”, in *EJIL:Talk!*, 7 February 2020 (available on its web site); Taegin Reismann, “Open Society Justice Initiative Makes Recommendations to ICC Independent Expert Review”, in *International Justice Monitor*, 18 May 2020 (available on its web site) – thereto Parisa Zangeneh, “The ICC Independent Expert Review – A Response to Prof. Guilfoyle’s Post on Questions of Trust and Tenure”, in *OpinioJuris*, 21 November 2020 (available on its web site). On the ICC’s effectiveness as evaluated in the Expert Review, combined with an analysis from the perspective of the ICC’s personnel, see Samaria Muhammad, Barbora Holá, and Anja Dirkzwager, “Reimagining the ICC: Exploring Practitioners’ Perspectives on the Effectiveness of the International Criminal Court”, in *International Criminal Law Review*, 2021, vol. 21, pp. 126–153.

<sup>104</sup> See Chapter 5 in this volume. See also the ICC’s detailed response with illuminating governance insights, ICC, *Overall Response of the International Criminal Court to the ‘Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report’*, 14 April 2021 (<https://www.legal-tools.org/doc/e553hu/>).

<sup>105</sup> ICC ASP, “Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report”, 30 September 2020, paras. 414 *et seq.* (<http://www.legal-tools.org/doc/cv19d5/>).

<sup>106</sup> See Kai Ambos, “Interests of Justice? The ICC urgently needs reforms”, in *EJIL:Talk!*, 11 June 2019, with further references (available on its web site).

<sup>107</sup> See above Section 2.3.1.

in the AC, and criticized decisions of their colleagues publicly, even if they sat together in the same chamber. Other judges complained about their low salary.<sup>108</sup> During the ongoing trial against the Congolese paramilitary leader Ntaganda, Japanese Judge Ozaki accepted a job offer as the Japanese ambassador to Estonia without first stepping down from her judicial office.<sup>109</sup> Article 40(3) of the ICC Statute explicitly prohibits judges from having other occupational duties. As a result, the Court's President, possibly due to increasing international pressure,<sup>110</sup> announced on 1 May 2019 that Ozaki had resigned from her diplomatic post.<sup>111</sup> As Ambos puts it: "There is a climate of rivalry between the judges which affects the general working climate at the Court and led several senior officials, including legal officers, to leave the Court or move internally".<sup>112</sup> Judicial ethics is key,<sup>113</sup> and was a topic ICC judges discussed during their retreat in 2020, with the result of a revised Code of Judicial Ethics entering into force on 27 January 2021.<sup>114</sup> The judges amended Article 5 of that Code concerning integrity, and added a new paragraph elaborating on ethical obligations in

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<sup>108</sup> In more detail, see Ambos, 2019, see above note 106, with further references. See, generally, the account of David Re, "Some Reflections on Integrity in International Justice", in Bergsmo and Dittrich (eds.), 2020, pp. 1125, 1131 ff., see above note 32.

<sup>109</sup> See David Donat Cattin and Melissa Verpile, "Integrity and the Preservation of Independence in International Criminal Justice", in Bergsmo and Dittrich (eds.), 2020, pp. 1084 ff., see above note 32.

<sup>110</sup> Kevin Jon Heller, "Judge Ozaki Must Resign – Or Be Removed", in *OpinioJuris*, 29 March 2019 (available on its web site).

<sup>111</sup> ICC, *Prosecutor v Ntaganda*, Notification concerning Judge Kuniko Ozaki, 1 May 2019, ICC-01/04-02/06-2338 (<http://legal-tools.org/doc/839d14/>).

<sup>112</sup> See Ambos, 2019, see above note 106.

<sup>113</sup> See, in detail, Powderly, 2020, pp. 114 ff., see above note 102.

<sup>114</sup> ICC, "Code of Judicial Ethics", 19 January 2021, ICC-BD/02-02-21 (<http://www.legal-tools.org/doc/3e1x47/>). On the codes of judicial ethics: Bettina Julia Spilker, "Codes of Judicial Ethics: An Emerging Culture of Accountability for the Judiciary?", in Bergsmo and Dittrich (eds.), 2020, pp. 741 ff., see above note 32. On judicial ethics generally Sara Wharton, "Judges, the registry, and defence counsel", in deGuzman and Oosterveld (eds.), 2020, p. 211, see above note 67. On the meaning of the term 'integrity' in Article 36(3) of the ICC Statute, see Bergsmo and Dittrich, "Integrity as Safeguard Against the Vicissitudes of International Justice Institutions", in *id.* (eds.), 2020, p. 13, see above note 32; Hans Corell, "The Dag Hammarskjöld Legacy and Integrity in International Civil Service", in *ibid.*; Morten Bergsmo and Viviane E. Dittrich, "Integrity as Safeguard Against the Vicissitudes of International Justice Institutions", in *ibid.*, pp. 220 ff. On judicial integrity from the perspective of Islamic jurisprudence Adel Maged, "*Shari'ah* Sources and Reflections on Integrity", in *ibid.*, pp. 126 ff. From a comparative perspective, Juan Carlos Botero, "Multicultural Understanding of Integrity in International Criminal Justice", in *ibid.*, pp. 238 ff.

connection with the election of the Presidency.<sup>115</sup> They emphasized the Code's binding nature, and provided that certain ethical obligations continue to apply to former judges.<sup>116</sup>

Philippe Kirsch, former Chairman of the Conference, Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and former Judge and first President of the ICC, gave an overview of the particularly controversial topics at the Conference such as complementarity, the role of Prosecutor, of UN Security Council and universal jurisdiction (or whether States should give their consent). In this volume, these topics reappear. Finally, William R. Pace (one of the leading non-governmental organization ('NGO') figures at the Rome Conference,<sup>117</sup> Executive Director of the World Federalist Movement Institute for Global Policy, and Convenor of the Coalition for the International Criminal Court) emphasized that the creation of the ICC was a "golden moment in history". Pace addressed opportunities that he believed were missed at the Rome Conference: the lack of certain offences such as drug trafficking and terrorism; the lack of an advisory commission on the election of the Prosecutor; and the lack of more detailed rules about non-co-operation and arrest.

Today, there is a large body of literature on the Rome Conference.<sup>118</sup> This is not only because the Conference was indeed a historical event but also due to the lack of detailed official records of the Conference. Schabas has drawn attention to this in his recent description of the Conference:

the only official documents from the working groups are the amendments that were formally proposed, either by delegations or by the coordinator, and the final text upon which agreement had been reached. Despite the absence of any formal record of the debates in the working groups, there was no Chatham House Rule preventing those in attendance from reporting on discussions.<sup>119</sup>

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<sup>115</sup> The judges have also adopted Guidelines on the Procedure for the Election of the Presidency, as referred to in the ICC Code of Judicial Ethics.

<sup>116</sup> ICC, "ICC Judges amend Code of Judicial Ethics", 27 January 2021 (available on its web site).

<sup>117</sup> A detailed description of Pace's role during the ICC-negotiations can be found in Michael J. Struett, *The Politics of Constructing the International Criminal Court*, Palgrave Macmillan, New York, 2008, pp. 77–79.

<sup>118</sup> See the description and the references in Ambos, 2021, pp. 30–33, see above note 34.

<sup>119</sup> Schabas, 2020, p. 7, see above note 101.

This could serve as an explanation of a rather peculiar citation practice at the ICC: instead of referring to documents in the Official Records, the Chambers at the ICC often cite secondary literature, such as the Triffterer (now Ambos) commentary<sup>120</sup> or Roy S. Lee's "The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations",<sup>121</sup> to refer to preparatory work that led to the creation of the ICC Statute. This has produced unintended methodological consequences: first, the treatment of the Triffterer, and now Ambos, commentary merely as a support for historical arguments has led to the practice of citing older instead of the latest edition even when current issues are dealt with therein.<sup>122</sup> Second, the Chambers produced so-called 'blind citations', that is, references to secondary literature that, in fact, lacks the content Chambers claim to have.<sup>123</sup>

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<sup>120</sup> Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden, 1999; *id.*, 2nd. ed., C.H. Beck, Hart, Munich, Oxford, 2008; Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, 3rd. ed., C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden, 2016; Kai Ambos (ed.), *The Rome Statute of the International Criminal Court. A Commentary*, 4th. ed., C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden, 2022.

<sup>121</sup> Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999.

<sup>122</sup> To name a few examples: ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, ICC-01/04-02/06-1707, para. 35 with fn. 74 (<http://www.legal-tools.org/doc/2de239/>); *Prosecutor v. Laurent Gbagbo*, Dissenting Opinion of Judge Anita Usacka, 29 October 2013, ICC-02/11-01/11-548-Anx2, para. 9 with fn. 10 (<http://www.legal-tools.org/doc/23a518/>); *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 410 with fn. 525 (<http://www.legal-tools.org/doc/07965c/>); *Situation in Afghanistan*, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 5 March 2020, ICC-02/17-137-Anx, para. 20 with fn. 26 (<http://www.legal-tools.org/doc/ks0e86/>). The Appeals Chamber in *Ntaganda* cited the, at that time, latest edition but omitted Ambos as the co-editor: *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 15 June 2017, ICC-01/04-02/06-1962, para. 48 with fn. 113 (<http://www.legal-tools.org/doc/a3ec20/>).

<sup>123</sup> Schabas, 2020, pp. 7–8, see above note 101, provides an example:

[I]n Lubanga, the Appeals Chamber invoked the travaux préparatoires, noting 'concerns by some delegates' that the term 'recruiting' in Article 8 might be taken to prohibit recruitment campaigns addressed to children under 15 even though these might not be intended to have them begin military training immediately. To support its assertion, the Appeals Chamber referred to the second edition of the Triffterer Commentary, which in

### 2.3.5. Case Selection

The topic of case selection by the OTP was addressed extensively in a separate session.<sup>124</sup> Stephen J. Rapp, former US Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice, set the common theme for the panel: prosecutorial discretion – a topic that received considerable attention after the Nuremberg Forum in the already mentioned Afghanistan decisions by the PTC and AC.

Serge Brammertz, Prosecutor at the Mechanism for International Criminal Tribunals (‘MICT’), emphasized the importance of the debate around the question whether the OTP should investigate low-level, mid-level or high-level perpetrators first,<sup>125</sup> and opined that the OTP should always go after the ‘top leaders’. Brammertz’s comparisons between the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the

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turn cited the chapter by Herman von Hebel and Darryl Robinson in the volume edited by Roy Lee. But von Hebel and Robinson, both of whom were members of national delegations at the Rome Conference, did not cite any authority for their claim that ‘the word “recruiting” was replaced with “conscripting or enlisting”’. There is nothing in the Official Records of the Rome Conference to confirm this.

<sup>124</sup> A recent account of the issue can be found in Mark Kersten, “Taking the opportunity: prosecutorial opportunism and the International Criminal Court”, in deGuzman and Oosterveld (eds.), 2020, pp. 182 ff., see above note 67; with regard to the Africa-focus of the ICC, see Asad G. Kiyani, “Re-narrating selectivity”, in *ibid.*, pp. 309 ff. Sander examines practices that have “influenced the selection of prosecutorial targets in different institutional settings and the implications that have followed for the scope and content of the historical narratives constructed by international criminal courts in their judgments”, see Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts*, Oxford University Press, 2021, pp. 10 and 61 ff. And since Rob Cryer has a deserved place in the preface to this book: see his seminal work *Prosecuting International Crimes – Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, where he qualified universal jurisdiction as a right and not a duty, pp. 87, 89, 101 ff., 109, and developed criteria for prosecutorial discretion and especially case selection. See also the analysis by Elies van Sliedregt, “One rule for Them - Selectivity in International Criminal Law”, in *Leiden Journal of International Law*, 2021, vol. 34, no. 2, pp. 283–290.

<sup>125</sup> Following a shift in strategy that was introduced by the OTP’s Strategic Plan 2012–2015, and confirmed by the current Strategic Plan, in situations in which the OTP has limited investigative possibilities, this approach is meant to allow for “a strategy of gradually building upwards”, which means that the OTP will “first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible”, see ICC-OTP, “Strategic Plan 2012–2015”, 11 October 2013, para. 22 (<http://www.legal-tools.org/doc/954beb/>); also ICC-OTP, “Strategic Plan 2016–2018”, 16 November 2015, para. 34 (<http://www.legal-tools.org/doc/2dbc2d/>). See generally Kai Ambos, *Treatise on International Criminal Law: Vol. III*, Oxford University Press, 2016, p. 134.

ICC with regard to prosecutorial policies were especially insightful.<sup>126</sup> He encouraged the current Prosecutor of the ICC to be more communicative and not only speak publicly about achievements but also about problems the Office experiences. The OTP's communication is also part of this volume, dealt with by Shannon Fyfe in Chapter 21. Margaret M. deGuzman, Professor of Law at Temple University, criticized the OTP for its rather "legalistic" approach to Article 53 of the ICC Statute and for its narrow approach to the 'interests of justice' clause. She speculated that the motive behind such a narrow reading was for the OTP to appear as impartial and apolitical as possible, which deGuzman thought to be the wrong approach.<sup>127</sup> She opined that the OTP should embrace discretion instead and interpret the 'interests of justice' clause more broadly.<sup>128</sup> Her argument had a twofold basis: first, the primary goal of the ICC as "norm expression" ("versus an emphasis on victims" – this premise turned out to be particularly controversial and was rejected, for instance, by Fabricio Guariglia in the subsequent debate ("The Statute is victim-centered")).<sup>129</sup> Second, gravity as a primary criterion.<sup>130</sup> *Prima facie*, it seems that the PTC in the Afghanistan decision understood the 'interests of justice' clause in the way deGuzman understands it:

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<sup>126</sup> Many of his observations can also be found in Serge Brammertz, "Making Complementarity a Reality – The Experiences of the ICTY and IRMCT Office of the Prosecutor", in Carsten Stahn *et al.*, *Legacies of the International Criminal Tribunal for the Former Yugoslavia – A Multidisciplinary Approach*, Oxford University Press, 2020, pp. 31 ff. See also the insightful account of Richard J. Goldstone, "Prosecutorial Language, Integrity and Independence", in Bergsmo and Dittrich (eds.), 2020, pp. 1065 ff., see above note 32.

<sup>127</sup> Similarly and generally Cullen, Kastner and Richmond, 2021, p. 9, see above note 28 ("[P]aradoxically, the dominant discourses also reveal common expectations – or fears – of *political* effects from the same institutions that are supposed to be *apolitical*.", emphases in the original).

<sup>128</sup> deGuzman makes the same argument in her latest monograph: Margaret M. deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford University Press, 2020, pp. 130 and 134 ff. Review by Kerttuli Lingenfelter in *International Criminal Law Review*, 2021, vol. 21, 398 ff.

<sup>129</sup> *Ibid.*, pp. 13, 27 ff., 140 ff.

<sup>130</sup> See also Anni Poes, "Discretion and the Gravity of Situations at the International Criminal Court", in *Journal of International Criminal Law*, 2017, vol. 17, pp. 960–984; *id.*, *Prosecutorial Discretion at the International Criminal Court*, Hart, Oxford, 2020, pp. 15 ff.; see in more detail the analysis by Alexander K. A. Greenawalt, "Admissibility as a theory of international criminal law", in deGuzman and Oosterveld (eds.), 2020, pp. 81 ff., see above note 67.

In the absence of a definition or other guidance in the statutory texts, the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion *must be found in the overarching objectives underlying the Statute*: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.<sup>131</sup>

Yet, the Chamber failed to balance both its understanding and application of the clause against gravity and the interests of victims.<sup>132</sup> Even though the Chamber rightly points out at the beginning of its analysis (paragraphs 87 and following) that “the gravity of the crime and the interests of victims” have to be taken into account, the term ‘gravity’ does not appear again in the analysis, neither do considerations that could count as such.<sup>133</sup> Within the Chamber’s ‘interests of justice’ analysis, the interests of victims are only addressed in paragraph 96:

It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims’ expectations will not go beyond little more than aspirations. This, far from honouring the victims’ wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and there-

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<sup>131</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 89 (<http://www.legal-tools.org/doc/2fb1f4/>).

<sup>132</sup> As this author together with Kai Ambos pointed out in their *amicus curiae* observations, see ICC, *Situation in the Islamic Republic of Afghanistan*, Written Submissions in the Proceedings Relating to the Appeals Filed Against the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” Issued on 12 Apr, 14 November 2019, ICC-02/17-108 (<http://www.legal-tools.org/doc/5v8d2b/>) and Annex, para. 7 (<http://www.legal-tools.org/doc/7m3bj2/>).

<sup>133</sup> In the same vein, see Luca Poltronieri Rossetti, “The Pre-Trial Chamber’s Afghanistan Decision”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 3, pp. 597–598.

fore negatively impact its very ability to pursue credibly the objectives it was created to serve.

Not only can this section hardly demonstrate that the interests of victims have been taken into account, it is also overly paternalistic. Moreover, that “victims’ expectations will not go beyond little more than aspirations” is speculative. deGuzman’s broad reading of the ‘interest of justice’ clause is thus closely intertwined with the gravity criterion and not mirrored by the PTC’s ruling.

Richard Dicker, Director of the International Justice Program, Human Rights Watch, also agreed that gravity was the “essential criterion” for case selection. Dicker especially criticized the failure of the OTP to bring cases when more than one party is involved in an armed conflict. Unlike panelists before him, Dicker drew attention to the *Policy Paper on Case Selection and Prioritisation* that the OTP published in 2016,<sup>134</sup> and gave the paper an overall positive review, not without, however, criticizing the lack of a “holistic vision of what accountability means” (what he meant by that unfortunately remained unanswered).<sup>135</sup>

The ensuing debate revolved around the OTP’s lack of resources and the question of whether the Office should admit that political factors went into its case selecting decision. It thus predicted the main question the appeal proceedings in the declination of authorization decision by the PTC revolved around. It seems that a majority of *amici curiae* in the Afghanistan proceedings were sceptical about the use of political (or consequentialist) arguments to reject (the continuation of) an investigation. For what it is worth, this view seems to misinterpret both the interest of justice clause and the role of the Prosecutor in general. The descriptive nature of this chapter does not allow for a justification of the argument, a reference to the respective *amicus curiae* must suffice.<sup>136</sup>

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<sup>134</sup> For a detailed analysis of the paper, see Kai Ambos, “The International Criminal Justice System and Prosecutorial Selection Policy”, in Ackerman, Ambos and Sikirić (eds.), *Visions of Justice - Liber Amicorum Mirjan Damaška*, Duncker and Humboldt, Berlin, 2016, pp. 23, 36 ff.

<sup>135</sup> In a later paper, published in 2020, Dicker repeated some of his remarks with a broader context of the election of the next prosecutor, see Richard Dicker, “Time to Step up the ICC, The Promise Institute for Human Rights”, in *UCLA Law School*, 2020.

<sup>136</sup> ICC, *Situation in the Islamic Republic of Afghanistan* and Annex, 14 November 2019, see above note 132. A similar line of argumentation is followed by Chiara Fusari, “The decision authorising the investigation into the situation in Afghanistan. An unsought reshaping of the

### 2.3.6. The Length of Proceedings

#### 2.3.6.1. Managerial Judging and Abbreviated Proceedings at the Kosovo Specialist Chambers

In the panel on the Length of Proceedings, Judge Ekaterina Trendafilova, President of the Kosovo Specialist Chambers (‘KSC’), had given an insight into the KSC’s Rules of Procedure and Evidence (‘RPE’) and the way the procedural regime attempts to ensure that trials are both speedy and fair at the same time. Trendafilova mentioned Rule 85(3), clause 1, of the KSC RPE, according to which “[t]he Pre-Trial Judge and the Specialist Prosecutor may hold meetings during the investigation and prior to the confirmation of the indictment”. Status Conferences, Trial Preparation Conferences, a “Specialist Prosecutor’s Preparation Conference” and a “Defence Preparation Conference” to expedite proceedings are also provided for in Rules 86 and 116–119 KSC RPE. Moreover, the Pre-Trial Judge is entitled to “rule expeditiously on requests by the Specialist Prosecutor related to the conduct of the investigation” (Rule 85(2) KSC RPE). The presiding judge of a Trial Panel may issue “trial management orders” (Rule 116(4) KSC RPE).<sup>137</sup> Expedited proceedings are especially a tool when the alleged crime is not an international one but, for instance, obstruction of justice. In this context, the Special Prosecutor’s Office (‘SPO’) arrested Hysni Gucati (initial appearance: 29 September 2020)<sup>138</sup> and Nasim Haradinaj (initial appearance: 1 October 2020) for offenses against the administration of justice pursuant to Article 15(2) of the KSC Law.<sup>139</sup>

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proprio motu prosecutorial discretion before the International Criminal Court”, in *Diritto penale XXI secolo*, 2020, pp. 300 ff.

<sup>137</sup> See, in more detail, Alexander Heinze, “The Kosovo Specialist Chambers’ Rules of Procedure and Evidence”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 5, pp. 985, 1001–1005.

<sup>138</sup> Specialist Prosecutors Office, “Specialist Prosecutor’s Office Arrest Hysni Gucati”, press statement, 25 September 2020. Arrest Warrant: KSC, *Prosecutor v. Hysni Gucati*, Public Redacted Version of Arrest Warrant for Hysni Gucati, 24 September 2020, KSC-BC-2020-07/F00012/A01/RED. The appeal against Gucati’s arrest was rejected by the Panel of the Court of Appeals Chamber, see KSC, *Prosecutor v. Hysni Gucati*, Panel of the Court of Appeals Chamber, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, KSC-BC-2020-07.

<sup>139</sup> Specialist Prosecutors Office, “Specialist Prosecutor’s Office Arrests Nasim Haradinaj”, press release, 26 September 2020. Arrest Warrant: KSC, *Prosecutor v. Nasim Haradinaj*, Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj, 24 September 2020, KSC-BC-2020-07/F00012/A03/COR/RED.

Trendafilova also informed the audience that the KSC judges introduced specific deadlines for trial and appeal judgments. Furthermore, the Pre-Trial Judge is obliged to “set a target date” for his or her confirmation decision pursuant to Article 39(2) KSC Law, “which, subject to the specificities of the case, shall be no later than six (6) months from the filing of the indictment and all supporting material” (Rule 85(5) KSC RPE). On 24 September 2020, the SPO arrested Salih Mustafa, who was transferred to the Detention Facilities of the KSC in The Hague.<sup>140</sup> The arrest has been made on the basis of the arrest warrant issued on 12 June 2020 by Single Judge Nicolas Guillou.<sup>141</sup> The indictment, as confirmed, charges Salih Mustafa, under various forms of criminal responsibility, with: arbitrary detention, cruel treatment, torture and murder as war crimes committed in the context of and associated with a non-international armed conflict in Kosovo.<sup>142</sup> The initial appearance of Mustafa took place on 28 September 2020. On 26 October, the Pre-Trial Judge confirmed the indictment against former President of Kosovo, Hashim Thaçi, and three other senior politicians of Kosovo, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, charging them with 10 counts of war crimes and crimes against humanity. All four accused were arrested and transferred to the KSC’s Detention Facility in The Hague on 4 and 5 November and pleaded not guilty during their initial appearances before the Pre-Trial Judge.<sup>143</sup>

### 2.3.6.2. Disclosure

Fabricio Guariglia, Director of the Prosecutions Division of the ICC, drew attention to disclosure problems at the ICC that usually go unnoticed, such as the translation of documents for the accused to be able to read and understand them. He also stressed the challenge of complying with disclosure obligations in an ongoing armed conflict. On a side note, Guariglia took on the current Chamber’s Practice Manual – a best practices document that is useful but ineffective as long as the Chambers do not comply with it. Deci-

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<sup>140</sup> KSC, “Arrest and Transfer of Salih Mustafa”, press release, 24 September 2020.

<sup>141</sup> KSC, *Prosecutor v. Salih Mustafa*, Public Redacted Version of Arrest Warrant for Mr Salih Mustafa, 12 June 2020, KSC-BC-2020-05/F00009/A01/RED.

<sup>142</sup> KSC, *Prosecutor v. Salih Mustafa*, Public Redacted Version of ‘Submission of confirmed indictment’, filing KSC-BC-2020-05/F00011 dated 19 June 2020, Annex 1, 2 October 2020, KSC-BC-2020-05/F00011/RED/A01.

<sup>143</sup> KSC, *Prosecutor v. Thaçi, Veseli, Selimi and Krasniqi*, Submission of corrected and public redacted versions of confirmed Indictment and related requests, Annex 3, 4 November 2020, KSC-BC-2020-06/F00045/A03.

sions about the disclosure of evidence and information have figuratively become the morning routine of the ICC, and it exceeds the frame of this chapter to name all of those that have been rendered since the Nuremberg Forum.<sup>144</sup> The following compact selection<sup>145</sup> shall suffice.

### 2.3.6.2.1. Case File System

Recent developments in both disclosure and evidence law underline that the ICC promotes a case file system, albeit combined with a disclosure system that is tailored accordingly:<sup>146</sup> in the *Yekatom* case, PTC II rejected a request by the Defence to “not include any ex parte evidentiary material in the record of the proceedings when it transmits that record to the Presidency”.<sup>147</sup> The Chamber noted *inter alia* that Rule 129 ICC RPE “univocally points to the transmission of the record in its entirety and rules out that any discretion may be vested in the Chamber for the purposes of reducing, amending or otherwise intervening on the content of the record”.<sup>148</sup> In ad-

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<sup>144</sup> An instructive demonstration of how disclosure can be central in a case preparation, exemplified by the Krstić case, can be found in Andrew T. Cayley, “Decency as a Prerequisite to Integrity in International Proceedings”, in Bergsmo and Dittrich (eds.), 2020, 436 ff., see above note 32.

<sup>145</sup> In more detail: Alexander Heinze, “Disclosure: International Criminal Courts and Tribunals”, in *Max Planck Encyclopedia of International Procedural Law*, Oxford University Press, 2021.

<sup>146</sup> Alexander Heinze, “Falsa Demonstratio Non Nocet: The Record of the Proceedings at the ICC is a Case File—Now More Than Ever”, in *OpinioJuris*, 25 June 2020 (available on its web site); see also Robert Heinsch, “How to Achieve Fair and Expedient Trial Proceedings Before the ICC: Is it Time for a More Judge-Dominated Approach?”, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden and Boston, 2009, pp. 479–500, 488.

<sup>147</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Yekatom Defence Request not to include Ex Parte Evidentiary material in Record of the Proceedings, Defence, 10 March 2020, ICC-01/14-01/18-445, para. 1 (<http://www.legal-tools.org/doc/1qasoh/>); ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, Decision on Yekatom Defence Request not to include Ex Parte Evidentiary material in the Record of the Proceedings, 24 March 2020, ICC-01/14-01/18-463 (<http://www.legal-tools.org/doc/u23uyk/>).

<sup>148</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 11 March 2020, ICC-01/14-01/18-447, para. 38 (<http://www.legal-tools.org/doc/w3m0s0/>), emphasis added; further ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Presidency, 16 March

dition, some Chambers at the ICC, such as in *Ongwen*,<sup>149</sup> rejected the previous practice of deciding on admissibility issues at the moment of submission (admission approach) and promoted an alternative approach that deferred the admissibility decision “until the end of the proceedings” (submission approach).<sup>150</sup> The submission approach was recently adopted by TC X in the *Al Hassan* case<sup>151</sup> and by TC V in the *Yekatom and Ngaïssona* case.<sup>152</sup> This approach, combined with the transmission of the entire record to the TC, means that the record of the proceedings largely contains material that is treated as evidence by the mere means of submission (*vis-à-vis* admission). This fulfils the weight component of a case file and has a considerable impact on the disclosure regime.

### 2.3.6.2.2. In-Depth Analysis Chart

According to the *Bemba* PTC, “the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed *legal analysis* relating the alleged facts with the constituent elements corresponding to each crime charged”.<sup>153</sup> The nature and extent of this

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2020, ICC-01/14-01/18-451 (<http://www.legal-tools.org/doc/wcn4gy/>); in detail, see Alexander Heinze, 2020, see above note 146.

<sup>149</sup> ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Initial Directions on the Conduct of the Proceeding, 13 July 2016, ICC-02/04-01/15-497, paras. 24 *et seq.* (<http://www.legal-tools.org/doc/60d63f/>); ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 11 August 2016, ICC-02/04-01/15-520, para. 7 (<http://www.legal-tools.org/doc/c47593/>).

<sup>150</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37 (<http://www.legal-tools.org/doc/7b62af/>); in the same vein ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on Prosecution Requests for Admission of Documentary Evidence, 24 September 2015, ICC-01/05-01/13-1285, para. 9 (<http://www.legal-tools.org/doc/5a06b3/>); generally Fabricio Guariglia, “‘Admission’ v. ‘Submission’ of Evidence at the International Criminal Court”, in *Journal of International Criminal Law*, 2018, vol. 16, no. 2, pp. 315–39, 315 ff.

<sup>151</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber, Annex A to the Decision on the conduct of proceedings, 7 May 2020, ICC-01/12-01/18-789-AnxA, paras. 29 *et seq.* (<http://www.legal-tools.org/doc/jk54h9/>); Generally about trial management and disclosure in *Al Hassan*, see Chaitidou, see above note 59.

<sup>152</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras. 52–59 (<http://www.legal-tools.org/doc/jk54h9/>).

<sup>153</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July

analysis gave birth to the so-called in-depth analysis chart ('IDAC'),<sup>154</sup> also named "element-based chart".<sup>155</sup> In the *Al Hassan* case, the Single Judge decided not to order an IDAC, applying the criterion of proportionality: weighing the advantages of the IDAC against the disadvantages ("the burden the production of an IDAC of evidence would place on the parties, and especially on the Prosecution", possible postponement of the confirmation hearing), the Single Judge decided that ordering an IDAC would be "disproportionate".<sup>156</sup> The possibility of a postponement of the confirmation hearing was also used as a reason to reject the order of an IDAC in *Yekatom and Ngaïssona*.<sup>157</sup>

### 2.3.6.2.3. The Definition of 'Exculpatory Evidence'

Exculpatory evidence at the ICC is evidence that "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence" (Article 67(2) of the ICC Statute).<sup>158</sup> In 2020, the TC V ruled in the *Yekatom and Ngaïssona* case that the exculpatory nature of a statement does not change when it has incriminatory elements.<sup>159</sup>

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2008, ICC-01/05-01/08-55, para. 66, emphasis added (<http://www.legal-tools.org/doc/15c802/>).

<sup>154</sup> See, in more detail, William A. Schabas, Eleni Chaitidou, and Mohammed M. El Zeidy, "Article 61", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court – A Commentary*, 4th. ed., CH Beck et al., München et al., 2022, mn. 73 ff.

<sup>155</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber III, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, para. 40 (<http://www.legal-tools.org/doc/3637f7/>).

<sup>156</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Decision on the In-Depth Analysis Chart of Disclosed Evidence, 29 June 2018, ICC-01/12-01/18-61-tENG, para. 22 (<http://www.legal-tools.org/doc/d35cef/>).

<sup>157</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Second Decision on Disclosure and Related Matters, 4 April 2019, ICC-01/14-01/18-163, paras. 23–24 (<http://www.legal-tools.org/doc/35f5b8/>).

<sup>158</sup> See, for example, ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 59 (<http://www.legal-tools.org/doc/e6a054/>).

<sup>159</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595, para. 21 (<http://www.legal-tools.org/doc/i5kwrij/>).

#### 2.3.6.2.4. Documents and Tangible Objects

According to Rule 77 ICC RPE – identical to Rule 66(B) of the RPE of the ICTY and of the International Criminal Tribunal for Rwanda (‘ICTR’), and Rule 110(B) of the of the Special Tribunal for Lebanon (‘STL’) RPE – the Prosecution shall:

permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial [...].

As to the key part of this rule – “material to the preparation of the defence” – no explicit definition exists.<sup>160</sup> The ICC’s AC interprets the phrase broadly, suggesting that it refers to “all objects that are relevant for the preparation of the defence”.<sup>161</sup> This understanding of “material to the defence” seems widely accepted today. According to TC V in *Yekatom and Ngaïssona*, it even encompasses material such as requests for assistance submitted by the Prosecutor, although those requests are not expressly covered by the ICC’s disclosure regime in both the Statute and RPE.<sup>162</sup> TC IX in *Ongwen*, in a decision in 2020, ruled that it also encompasses “individual protection assessments”, “biographical security questionnaires”, and “psycho-social assessment[s]”.<sup>163</sup>

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<sup>160</sup> See also STL, *Prosecutor v. Salim Jamil Ayyash et al.*, Appeals Chamber, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge’s “Decision on Issues Related to the Inspection Room and Call Data Records”, 2 October 2013, STL-11-01/PT/AC/AR126.4, para. 21 (<http://www.legal-tools.org/doc/d7523b/>).

<sup>161</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras. 76, 77 (<http://www.legal-tools.org/doc/f5bc1e/>).

<sup>162</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions, 3 February 2020, ICC-01/14-01/18-315-Red, paras. 66 *et seq.* (<http://www.legal-tools.org/doc/f5bc1e/>).

<sup>163</sup> ICC, *Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, ICC-02/04-01/15-1734, para. 22 (*Ongwen*, 22 April 2020) (<http://www.legal-tools.org/doc/f5bc1e/>).

The Defence has to specifically identify evidence, material to the preparation of the Defence, which is being withheld by the Prosecutor.<sup>164</sup> The Defence fails to meet this ‘low’ threshold, as again TC IX decided recently in *Ongwen*, for instance, where it merely indicates that a “database ‘may potentially’ include information on alleged human rights violations”.<sup>165</sup> Contrary to Rule 76, Rule 77 does not include an obligation for the OTP to translate all the documents made available for inspection under that rule.<sup>166</sup>

### 2.3.6.2.5. ‘Pre-Interview Assessments’

Those assessments, which are conducted prior to taking a formal statement from a witness to decide whether or not he or she should testify,<sup>167</sup> do not count as proper witness statements, but may be disclosed as exculpatory evidence pursuant to Article 67(2) ICC Statute and Rule 77 ICC RPE.<sup>168</sup> TC V, in a recent decision, emphasized that while screening notes (that is, “notes prepared by the Prosecution on the basis of an initial contact or interview with a person in connection with an investigation”),<sup>169</sup> interview notes, or investigators’ notes may constitute a statement (screening notes only fall under Rule 76 if “witnesses are questioned about their knowledge of the case in the course of an investigation and they accept or adopt the

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<sup>164</sup> ICC, *Prosecutor v. Zejnil Delalić*, Trial Chamber, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, IT-96-21-PT, para. 11 (<http://www.legal-tools.org/doc/100f7a/>).

<sup>165</sup> *Ongwen*, 22 April 2020, para. 22, see above note 163.

<sup>166</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Public Redacted Version of the “Decision on the ‘Defence request for Remedy for Disclosure Violation’”, 3 June 2020, ICC-01/12-01/18-290-Red2-tENG, para. 27 (<http://www.legal-tools.org/doc/agns16/>).

<sup>167</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public Redacted version of ‘Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure’, 9 April 2010, ICC-01/05-01/08-750-Red, para. 31 (*Bemba*, 9 April 2010”) (<http://www.legal-tools.org/doc/f5bc1e/>); see also Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 355. The correct terminology is ‘pre-interview assessment’, even though Trial Chamber III changes it to “pre-assessment interview” in para. 31, adopted by Safferling, *ibid.* Yet, since Trial Chamber III uses “pre-interview assessment” throughout the decision, the change of terminology seems to be a mistake.

<sup>168</sup> ICC, *Bemba*, 9 April 2010, *ibid.*, para. 33 (<http://www.legal-tools.org/doc/b9ce0d/>).

<sup>169</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, Decision on the Yekatom Defence Motion for Disclosure of Screening Notes, 10 August 2020, ICC-01/14-01/18-618, para. 10 (<http://www.legal-tools.org/doc/8dpem6/>).

screening notes as their own”),<sup>170</sup> “not all items containing information obtained from a witness will necessarily constitute a ‘statement’ within the meaning of [Rule 76]”.<sup>171</sup>

#### 2.3.6.2.6. Language

According to Rule 76(3) of the ICC RPE, “[t]he statements of prosecution witnesses shall be made available in original *and* in a language which the accused fully understands and speaks” (emphasis added). In the *Yekatom and Ngaïssona* case, the Prosecution conducted interviews where the answers were translated immediately by the investigator from Sango into French, and subsequently only disclosed these French translations. Single Judge Schmitt, on behalf of TC V, found – albeit in an *obiter dictum*, since the Prosecution had not made a final determination of whom it would call to testify – that “the questions originally posed in Sango and the answers provided in response by the witness in Sango fall under the definition of ‘original’ pursuant to Rule 76(3)”.<sup>172</sup>

#### 2.3.6.2.7. Rolling Disclosure

Concerns about witness safety have also led the ICC to permit the so-called ‘rolling disclosure’ of the witness’s identity, namely, instead of disclosing the identities of all witnesses prior to trial, disclosure takes place witness by witness, in line with the respective witness interrogation.<sup>173</sup> TC II in *Katanga and Ngudjolo* stressed that rolling disclosure could only be granted exceptionally, namely where it proved to be “strictly necessary” and when the Defence had temporary access, “to either summaries of statements or

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<sup>170</sup> *Ibid.*, para. 12.

<sup>171</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions, 3 February 2020, ICC-01/14-01/18-315-Red, para. 39 (<http://www.legal-tools.org/doc/1jmj2i/>).

<sup>172</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, Decision on the Yekatom Defence Request for Disclosure of Witness Statements in their Original Language, Trial Chamber, 29 May 2020, ICC-01/14-01/18-535, para. 11 (<http://www.legal-tools.org/doc/gcaypj/>).

<sup>173</sup> Nancy A. Combs, “Evidence”, in William A. Schabas and N Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London and New York, 2011, pp. 323–333, 324; Kai Ambos, *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, pp. 539 ff.; Heinze, 2014, pp. 385–86, with further references, see above note 43.

redacted versions of the transcripts of [...] witnesses”.<sup>174</sup> However, Single Judge Prost, designated by TC X for the preparation of the trial against Al Hassan, recently expressed that it was generally “desirable for the disclosure of material to be made on a rolling basis”.<sup>175</sup>

Apart from serious concerns for witness safety, other circumstances involved COVID-19.<sup>176</sup> In the *Al Hassan* case, the Prosecution demonstrated serious obstacles to their investigation due to the temporary closure of the ICC premises and various measures by the Netherlands “that inevitably have an effect on the overall functioning of the Court”.<sup>177</sup> To minimize a detrimental effect to the rights of the accused, TC X reconsidered the disclosure deadlines and permitted rolling disclosure instead.<sup>178</sup>

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<sup>174</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 28 May 2009, ICC-01/04-01/07-1179-tENG, para. 34 (<http://www.legal-tools.org/doc/f07289/>).

<sup>175</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 8 (<http://www.legal-tools.org/doc/aj8m1n/>).

<sup>176</sup> As COVID-19 and the restrictions imposed on travelling, contacts, *et cetera*, have a considerable impact on the daily routine of domestic courts around the world (see, for instance, Christian Ritscher, “COVID-19 and International Crimes Trials in Germany”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 1077–80), it goes without saying that this also applies to the ICC (see, generally, Hira Abtahi, “The International Criminal Court during the COVID-19 Pandemic”, in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 1069–76). And since the daily routine involves, to a large extent, decisions about disclosure, the disclosure process at the ICC is subjected to restraints. For instance, in the case against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), instead of holding a status conference, the Single Judge Rosario Salvatore Aitala, acting on behalf of the Pre-Trial Chamber II, sought detailed observations from the parties in writing, see ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Pre-Trial Chamber II, Order seeking observations on disclosure and related matters, 3 July 2020, ICC-02/05-01/20-14, para. 8 (<http://www.legal-tools.org/doc/ekh6ay/>).

<sup>177</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677, para. 6 (<http://www.legal-tools.org/doc/5bz2ls/>).

<sup>178</sup> *Ibid.*, para. 10.

### 2.3.6.2.8. Witness Preparation<sup>179</sup>

TC X in *Al Hassan* confirmed the disclosure rules of the *Ntaganda-Protocol*:<sup>180</sup>

The calling party shall provide the non-calling party with a list of all materials that have been shown to the witness, and, if applicable, all of the information that is subject to the calling party's disclosure obligations, including:

- any clarifications, changes or corrections made by the witness to his or her previous statements and the reasons advanced by the witness, if any, to justify the change or correction;
- any new information obtained from the witness.

### 2.3.6.2.9. Disclosure Restrictions

When considering whether to authorize the non-disclosure of the identity of a witness pursuant to Rule 81(4) of the ICC RPE, taking into account the danger and proportionality of disclosure,<sup>181</sup> Chambers are asked to weigh the following factors:

- (i) the witness' personal circumstances; (ii) whether there are currently protection or security measures in place for the witness; (iii) the relevant security situation in the area where the witness or his/her family currently reside; (iv) whether the witness or his/her family members have received any threats on account of his/her (perceived) involvement with the Court; (v) whether the witness him/herself has undertaken any activi-

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<sup>179</sup> Generally Heinze, 2020, pp. 307–344, see above note 39. For the ICTY practice, see the instructive account by Teresa McHenry and Ann Marie Ursini, “Reflections on Integrity in the Prosecution of International Cases”, in Bergsmo and Dittrich (eds.), 2020, pp. 909–910 ff., see above note 32.

<sup>180</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber, Annex to Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652-Anx (<http://www.legal-tools.org/doc/04485d/>); recently ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, Witness preparation protocol, 17 March 2020, ICC-01/12-01/18-666-Anx, para. 32 (<http://www.legal-tools.org/doc/9ybzef/>).

<sup>181</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 23 February 2008, ICC-01/04-01/07-224-Anx, para. 67 and paras. 69–73 (<http://www.legal-tools.org/doc/884353/>); ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, Decision on the Prosecutor's Request to Use Anonymised Summaries of Witness Statements, 3 February 2020, ICC-01/14-01/18-261-Red2, para. 21 (<http://www.legal-tools.org/doc/544q2y/>).

ty to endanger his/her personal safety; and (vi) whether the witness consented that his/her identity be disclosed to the Defence (without prejudice to the Chamber's *proprio motu* assessment whether to disclose such identity).<sup>182</sup>

### 2.3.6.3. Cultural Elements in International Criminal Procedure

Xavier-Jean Keïta, Principal Counsel at the ICC's Office of the Public Counsel for the Defence, was probably – and expectedly – the most critical participant on the panel. His approach to the ICC's procedural regime was a cultural one. He rejected the common law elements in the RPE and opined that the implementation of more civil law elements would have been beneficial. As examples, he mentioned disclosure (“The DNA of a prosecutor is to prosecute. The investigation of both exculpatory and incriminating evidence is unrealistic”) and the interlocutory appeals (more concretely, the leave to appeals: “It is not in my nature to ask the judge whether I may appeal his decision.”). In a recent (empirical) study, covering 26 years (1993–2019) and 242 judges sitting in nine international criminal tribunals,<sup>183</sup> Powderly found that “the dominance of the civil law tradition is more pronounced on the ICC bench, with 26 of the 47 seats (approximately 55.3 percent) occupied by judges hailing from civil law jurisdictions”.<sup>184</sup> Of course, arguments in favour or against the existence of common law or civil law elements in the ICC Statute are as old as the Statute itself. I have demonstrated elsewhere that the debate is mostly overshadowed by a terminological misunderstanding and – at worst – misuse of the terms.<sup>185</sup> They lack clarity and definition and have proven to be of limited descriptive value. This does not render them ill-suited; on the contrary, they may, in fact, serve as a tool to gain a better understanding of why certain procedural approaches are selected over others. However, they need to be defined, refined, and complemented by other more precise topographies of power within international criminal jurisdictions.

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<sup>182</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, 1 October 2013, ICC-01/04-02/06-117-Red3, para. 34 (<http://www.legal-tools.org/doc/7e7e02/>); ICC, *Prosecutor v. Yekatom and Ngaïssona*, Pre-Trial Chamber II, Decision on the 'Prosecution's Urgent Request for the Non-Disclosure of Witness Identities', ICC-01/14-01/18-273-Red2, 3 February 2020, para. 27 (<http://www.legal-tools.org/doc/p18180/>).

<sup>183</sup> Powderly, 2020, pp. 15, 27 and passim, see above note 102.

<sup>184</sup> *Ibid.*, p. 53.

<sup>185</sup> Heinze, 2020, pp. 155–255, see above note 3.

As a reform proposal, Keita suggested the introduction of an investigative judge. He closed with a critique of the ICC's low budget by labelling the ICC's work as "Ryanair Justice".<sup>186</sup>

The length of the proceedings is certainly a neuralgic point in international criminal justice and especially at the ICC.<sup>187</sup> All panelists agreed on the – certainly controversial<sup>188</sup> – claim that victim participation was not

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<sup>186</sup> About the budget of international criminal tribunals, see Marieke Wierda and Anthony Triolo, "Resources", in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, 2012, pp. 113 ff.; M. Cherif Bassiouni, "The ICC's Twelfth Anniversary Crisis: Growing Pains or Institutional Deficiency?", in Charles C. Jalloh and Alhagi B. M. Marong (eds.), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa*, Brill Nijhoff, Leiden, 2015, pp. 93, 94. Romano, too, regards the costs of international criminal justice relatively low in comparison to the costs of other trials, projects or institutions, see Cesare P. R. Romano, "The Price of International Justice", in *Law and Practice of International Courts and Tribunals*, 2005, vol. 4, pp. 281, 303, who compares the costs of the *ad hoc* Tribunals to the costs of 'several high profile trials and investigations' such as the Lockerbie trial (USD 80 million), the Oklahoma City bombing investigation (USD 82.5 million), the Whitewater and Monica Lewinsky investigations USD 62.5 million), and others. See also the instructive overview in Daniel McLaughlin, *International Criminal Tribunals*, Leitner Center for International Law and Justice, New York, 2012, p. 77, who compares the costs of combined international criminal tribunals between 1993 and 2015 (including the ICTY, ICTR and ICC: USD 6,28 billion) with the Wall Street bonuses in 2011 (USD 20 billion), the London Olympics of 2012 (USD 15 billion), the U.S. Federal Court System budget of 2012 (USD 6 billion), the U.S. presidential election of 2012 (USD 6 billion), the sale of the Los Angeles Dodgers 2012 (USD 2 billion) and the Apple v. Samsung Verdict of 2012 (USD 1 billion).

<sup>187</sup> See the recent account of Annika Jones, "Measuring Performance and Shaping Identity", in *Journal of International Criminal Justice*, 2021, vol. 18, pp. 825–850.

<sup>188</sup> See, for instance, Christine Van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", in *Case Western Reserve Journal of International Law*, 2011, vol. 44, no. 1, pp. 475, 489: "[A] criminal trial, unlike, for example, a truth and reconciliation commission, is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding". In a similar vein, see John Ciorciari and Anne Heindel, "Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands", in *Virginia Journal of International Law*, 2016, vol. 56, no. 2, pp. 266, 301: "The impulse of some victims in the courtroom to express rage, distress, or the desire for revenge, or to offer information extraneous to the charges, not only lengthens the proceedings, but also potentially jeopardizes the impartiality of the courtroom atmosphere". Supporting the view of the panelists: Gaele Carayon and Jonathan O'Donohue, "The International Criminal Court's Strategies in Relation to Victims", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 567, 588: "Judges involved in the first trials have also spoken publicly and positively of victim participation in those cases, opining that the rights of victims and the defence can be balanced without greatly extending the length of the cases".

responsible for the lengthy trials at the ICC.<sup>189</sup> The topic is dealt with also in this volume. Furthermore, the Nuremberg Academy has been conducting a research project on the length of proceedings of the ICC with the aim to identify the main factors that affect the length of proceedings based on a detailed analysis of Court records and drawing on interview and survey data.

### 2.3.7. Victim Participation and Reparations

The theme of victim participation and reparations is central to this volume<sup>190</sup> and thus has been central during the Nuremberg Forum. Panel chair Michaela Lissowsky (Friedrich-Alexander-Universität Erlangen-Nürnberg) reminded the participants that there were not only founding fathers at the Rome Conference but also founding mothers.<sup>191</sup> Lissowsky did not open the panel with a question (as did the panel chairs before her) but – very fittingly – describing the fate of ‘victim 480’ who was abused and raped several times a day in front of her father. As a result, victim 480 was diagnosed with HIV. She eventually participated in the trial against Bemba and made the following remark: “I feel good. I feel liberated. I feel relieved because I’ve been able to express what I’ve been feeling for years. And I think that having had the chance to let this out, I feel good, I feel better”.<sup>192</sup>

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<sup>189</sup> Jones however, predicts that victim satisfaction will nevertheless suffer from a future emphasis on expeditiousness, Jones, 2021, p. 828 see above note 187:

Drawing from research into audit culture and the use of performance indicators in other fields, this article argues that despite recognizing fairness and victim access to justice as key goals of the Court, the ICC’s performance indicators will inevitably support the promotion of expeditiousness to the detriment of fairness and victim satisfaction with the Court’s proceedings.

<sup>190</sup> See Part II.C. in this volume. See also Chris Tenove, “International Criminal Justice and the Empowerment or Disempowerment of Victims”, in Bergsmo *et al.* (eds.), 2020, pp. 746 ff., see above note 3.

<sup>191</sup> Gender justice has of course – and rightfully so – reached the shores of the ICC, not only linguistically. See the recent study of Rosemary Grey, Kcasey McLoughlin and Louise Chappell, “Gender and judging at the International Criminal Court: Lessons from ‘feminist judgment projects’”, in *Leiden Journal of International Law*, 2021, vol. 34, no. 1, pp. 247–264. See also Powderly, 2020, pp. 56 ff., see above note 102; Juan Pablo Pérez-León-Acevedo, “The Contribution of Female Judges to the Victim Jurisprudence of the International Criminal Court”, in Freya Baetens (ed.), *Identity and Diversity on the International Bench – Who Is the Judge?*, Oxford University Press, 2020, pp. 366 ff.

<sup>192</sup> ICC, *Prosecutor v. Bemba*, Transcript, 8 June 2016, ICC-01/05-01/08-T-369-Red-ENG, p. 69, lines 7–9 (<http://www.legal-tools.org/doc/b8cd9c/>). For a recent and instructive analysis of sex and gender in international criminal law, Rosemary Grey and Louise Chappell, “Re-

There may be countless stories like this, certainly also after the recent conviction of Ongwen.<sup>193</sup> Victim participation and protection stands and falls with the persons involved. At the Forum, Philipp Ambach, Chief of the ICC's Victims Participation and Reparations Section ('Section'), gave a valuable insight into his work. He focused on the ICC's outreach, the problem of resources, and the right of victims to choose a legal representative (Rule 90(1) ICC RPE). Ambach clarified that his Section was actively engaging with victims, especially in the *Bemba* case, trying to explain "what the Statute is and what it is not". Ambach emphasized that victims generally support "what's happening in The Hague in the courtroom". With regard to the problem of resources, Ambach illustrated how "inventive" his Section sometimes had to be to overcome these shortcomings. Interaction with civil society is key. With regard to Rule 90(1) of the ICC RPE, Ambach stressed that his Section generally asks about the preferences of the victims in choosing their representative.<sup>194</sup> He also referred to the "Decision Establishing the Principles Applicable to Victims' Applications for Participation" in the *Al Hassan* case, where Single Judge Péter Kovács walked the victims step by step through the Rule 90 process.<sup>195</sup>

Klaus Rackwitz drew attention to a decision by PTC I in the Palestine Situation of 13 July 2018. In paragraph 10, the Chamber remarked:

The Chamber underlines that in accordance with the Court's legal framework, the rights of victims before the ICC are not limited to their general participation within the context of judicial proceedings pursuant to article 68(3) of the Statute. In this regard, it is worth recalling that victims also have the right to provide information to, receive information from and communicate with the Court, regardless and independently

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writing sex and gender in international criminal law", in deGuzman and Oosterveld (eds.), 2020, pp. 363 ff., see above note 67.

<sup>193</sup> See above fn. 48 ff. and main text.

<sup>194</sup> Ambach specifically refers to Human Rights Watch, "Who will stand for us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond", 29 August 2017.

<sup>195</sup> ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 24 May 2018, ICC-01/12-01/18-37-tENG, paras. 64 *et seq.* (<http://www.legal-tools.org/doc/50a479/>).

from judicial proceedings, including during the preliminary examination stage.<sup>196</sup>

Ambach answered Rackwitz's question, whether this meant that victims now enjoyed rights independent from any ICC proceedings, by a reference to footnote 17 in the quote, which in his view confirmed that the Chamber's remark was not constitutive but merely declaratory. In Ambach's view, victims already enjoyed certain rights independent from an investigation. The extent of victim participation and especially the quote cited by Rackwitz were revitalized in the appeal proceedings after the PTC's rejection to authorize the (continuation of) investigations in the Afghanistan situation.<sup>197</sup> More concretely, the quote was used to indicate that the interests of victims must play a role in the application of the interest of justice clause.<sup>198</sup>

After Pieter Willem de Baan (Executive Director of the ICC's Secretariat of the Trust Fund for Victims ('TFV')) specifically addressed the TFV's assistance mandate and repeatedly demanded a "systemic response" to questions of victim participation and reparation, Amanda Ghahremani, a Canadian lawyer, Co-Investigator in the Canadian Partnership for International Justice and a Research Associate at the Simone de Beauvoir Institute, criticized the tendency to instrumentalize victims for the achievement of other aims (such as "norm expression", promoted earlier by Margaret deGuzman). Ghahremani clarified what Judge Schmitt repeated in his closing remarks: without victims and survivors, there would not be an ICC. Ghahremani, therefore, suggested to prioritize restorative justice aims. In her critique of victim instrumentalization, Ghahremani especially took on the narrow understanding of victims as a source of information. Fiona McKay, Senior Managing Legal Officer at the Open Society Justice Initia-

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<sup>196</sup> ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018, ICC-01/18-2, para. 10 (<http://www.legal-tools.org/doc/242316/>).

<sup>197</sup> See already above Section 2.3.1.

<sup>198</sup> See, for instance, ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Observations by Queen's University Belfast Human Rights Centre as amicus curiae on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Rep, 15 November 2019, ICC-02/17-115, paras. 15 *et seq.* (<http://www.legal-tools.org/doc/8xlcik>). About victim participants and victims as parties (reparations claimants) in ICC appeals, see Juan Pablo Perez-Leon-Acevedo, "Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards", in *International Journal of Human Rights*, 2021 (advance article).

tive, mainly emphasized the importance of civil society for meaningful victim satisfaction. She listed three grounds for improvement in the ICC's engagement with civil society: first, she advocated for a realistic perception of civil society. In her view, civil society was especially not apolitical. Second, she stressed that civil society takes considerable risks when it works with the ICC. These risks include concerns for both security and reputation. Third, McKay warned against the fuelling of expectations. These expectations can lead to great disappointments.<sup>199</sup> Victim participants may be led astray by their own expectations or by the failure of the ICC or its representatives to be forthright about what it can and cannot provide.<sup>200</sup>

### 2.3.8. The Exercise of Jurisdiction and Complementarity Within the ICC Statute

“Exercise of Jurisdiction and Complementarity within the Rome Statute” was the topic of Panel V at the Forum. In his introductory remarks, chair Jens Meierhenrich, Associate Professor at the London School of Economics and Political Science, reiterated the importance of Article 17 of the ICC Statute – an “ingenious compromise solution” in his view – as a “cornerstone of the Statute”.<sup>201</sup> Meierhenrich applauded, “despite the criticism”, former ICC Prosecutor Moreno-Ocampo for creating the Jurisdiction,

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<sup>199</sup> This was also expressed in ICC, *Prosecutor v. Bemba*, 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’, Separate opinion Judge Van den Wyngaert and Judge Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2, para. 30 (<http://www.legal-tools.org/doc/c13ef4/>). See also Human Rights Center, “The Victim's Court?”, 2015, p. 4, which McKay is referring to; Mirjan R. Damaška, “The International Criminal Court between Aspiration and Achievement”, *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, no. 1, pp. 19, 20: “The gap between promise and achievement may disappoint their audiences and disillusion their friends, while providing argumentative ammunition to their enemies”.

<sup>200</sup> *Ibid.* This goes, after all, to the distinction between (immediate) purposes and (not necessarily achievable) goals at the ICC. See, in more detail, Alexander Heinze, “Bridge over Troubled Water – A Semantic Approach to Purposes and Goals in International Criminal Justice”, in Holly Cullen, Philipp Kastner and Sean Richmond (eds.), *The Politics of International Criminal Law*, Brill, Leiden, 2020, pp. 27–55.

<sup>201</sup> ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, para. 34 (<http://www.legal-tools.org/doc/44f5b3/>). See, in more detail, the analysis by Alexander K. A. Greenawalt, “Admissibility as a theory of international criminal law”, in deGuzman and Oosterveld (eds.), 2020, pp. 66 ff., see above note 67; Muiyiwa Adigun, “The Principle of Complementarity: A Reflection on Its Meaning, Origin and Types in International Criminal Law”, in *African Journal of International and Comparative Law*, 2021, vol. 29, pp. 82–94.

Complementarity and Cooperation Division (‘JCCD’)<sup>202</sup> as one of the operational divisions and “diplomatic wing” of the OTP. How this ‘wing’ works, was a question he asked Phakiso Mochochoko, Director of the JCCD. Mochochoko provided a brief look behind the curtain of the JCCD. That the role of the JCCD cannot be overstated demonstrates the fact that Mochochoko was later placed on the infamous ‘black list’ of persons on whom the US had imposed targeted economic sanctions.<sup>203</sup> The sanctions have later been lifted as announced by US Secretary of State Antony Blinken.<sup>204</sup>

Brenda J. Hollis, Prosecutor at the Residual Special Court for Sierra Leone (‘RSCSL’), chose a more legalistic approach to describe her work and provided an extensive analysis of the challenges of legal characterization and a lack of definition. After Almudena Bernabeu (Director of the Guernica 37 International Justice Chambers) demonstrated what the ICC-OTP could learn from Latin America and especially the use of transitional justice language, Christian Ritscher gave an empirical account of his work as German Federal Public Prosecutor and Head of the War Crimes Unit (which currently rests due to his appointment as the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD)). Ritscher portrayed the work of his office historically and institutionally. He briefly mentioned the *Rwabukombe* case<sup>205</sup> and the investigation against, prosecution and conviction.

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<sup>202</sup> In a similar vein, Pascal Kambale, “The ICC and Lubanga: Missed Opportunities”, in *African Futures*, 16 March 2012:

At the outset, the ICC prosecutor took concrete and positive steps demonstrating his willingness to make the best use of complementarity mechanisms provided for in the Rome Statute. He organized his office so as to give complementarity issues the prominence they deserve. In addition to the Investigations and Prosecutions Divisions, he created a Jurisdiction, Complementarity and Cooperation Division (JCCD), which was given the task, among other things, to look into issues of admissibility and advise him on the proper balance between national prosecutions and the role of the ICC.

<sup>203</sup> See above Section 2.3.1.

<sup>204</sup> US Department of State, “Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court”, press statement”, 2 April 2021.

<sup>205</sup> On 18 February 2014, after a three-year trial, the Higher Regional Court of Frankfurt am Main found Onesphore Rwabukombe, the former mayor of the northern Rwandan municipality of Muvumba on the Ugandan border, guilty of aiding the Rwandan genocide on the basis of his participation in a church massacre on 11 April 1994 in Kiziguro (around 100 kilometres north-east of Rwanda’s capital, Kigali), where 400 people were brutally murdered, noting in particular his lack of genocidal intent. Rwabukombe was sentenced to 14 years in prison (Higher Regional Court Frankfurt am Main, Judgment, 18 February 2014, 5-

tion of former leaders of the Forces Démocratiques de Libération du Rwanda ('FDLR').<sup>206</sup> The former judgment is final; in the latter case, the appeal hearing started on 31 October 2018.<sup>207</sup> The conviction of Musoni was upheld on 20 December 2018, the conviction of Murwanashyaka was only partially upheld:<sup>208</sup> it was quashed with regard to the count of aiding and abetting war crimes, since it could not be followed from the impugned decision to what extent Murwanashyaka actually fostered the commission of the main crimes.<sup>209</sup> The Third Senat of the Federal Court of Justice also criticized the lower court's (Higher Regional Court Stuttgart) justification of intent and the acquittal of crimes against humanity (paragraphs 160 and following). The case was referred back to the Higher Regional Court,

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3 StE 4/10 (<http://www.legal-tools.org/doc/8c79bc/>). In the appeal proceedings (Revision), the German Federal Court of Justice criticized the lower court's legal analysis and annulled the Higher Regional Court's judgment with its Decision of 21 May 2015 (Federal Court of Justice, Decision, 21 May 2015, 3 StR 575/14 (<http://www.legal-tools.org/doc/368fdd/>)). After a retrial, on 29 December 2015, the Higher Regional Court Frankfurt am Main gave Rwabukombe a life sentence for his participation as a co-perpetrator acting with the required genocidal intent, noting his particularly serious guilt (Higher Regional Court Frankfurt am Main, Judgment, 29 December 2015, 4-3 StE 4/10-4-1/15 (<http://www.legal-tools.org/doc/bd14c5/>)). This judgment is now final after the Federal Court of Justice dismissed a second appeal on 26 July 2016. About the Rwabukombe case in more detail, see Kai Ambos, "The German Rwabukombe Case – The Federal Court's Interpretation of Co-perpetration and the Genocidal Intent to Destroy", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 5, pp. 1221–1234.

<sup>206</sup> On 28 September 2015 the Higher Regional Court in Stuttgart handed down convictions in the trial of two Rwandan leaders of the Hutu militia group Forces démocratiques de libération du Rwanda ('FDLR') (Higher Regional Court Stuttgart, Judgment, 28 September 2015, 5-3 StE 6/10 (<http://www.legal-tools.org/doc/af8e31/>)). Ignace Murwanashyaka, President of the FDLR, and Straton Musoni, his Vice President, were on trial for committing grave breaches of international law in the eastern Democratic Republic of Congo in 2008/2009. They were sentenced to thirteen and eight years imprisonment, respectively. The main defendant Murwanashyaka was convicted of aiding war crimes and leadership of a foreign terrorist group (German Penal Code, Strafgesetzbuch [StGB], 13 November 1998, Federal Law Gazette, Bundesgesetzblatt, BGBl. vol. I p. 3322, last amended April 2021, Section 129b (<http://www.legal-tools.org/doc/ecd810/>)). His deputy Musoni was convicted of leadership of a foreign terrorist group. In detail, European Center for Constitutional and Human Rights ('ECCHR'), "Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law", 8 June 2016.

<sup>207</sup> See German Federal Court of Justice ('BGH'), press release, 20 December 2018.

<sup>208</sup> BGH, Judgment of 20 December 2018, in *Neue Juristische Wochenschrift*, 2019, vol. 72, pp. 1818 ff.

<sup>209</sup> See, in more detail, Kirstin Drenkhahn, Carsten Momsen, and Laura Farina Diederichs, "Organisationsdelikte und Beteiligungstrafbarkeit - Der Weg zum Münchener NSU-Urteil", in *Neue Juristische Wochenschrift*, 2020, vol. 73, pp. 2582–2587, 2583 ff.

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which, however, could not decide upon it anew due to the death of Murwanashyaka in April 2019.<sup>210</sup> The decisions also confirm a trend in the practice of national prosecutions of international crimes that has recently been criticized by the NGO TRIAL International: namely, the practice of charging suspects for or convicting accused of terrorist crimes instead of (participation in) core international crimes due to the existence of fewer evidentiary obstacles.<sup>211</sup>

With regard to current investigations, Ritscher especially mentioned the *Strukturverfahren* (background investigations) in the Middle East.<sup>212</sup> While early *Strukturverfahren* focused – among other things – on Rwanda and Congo, it is now to a great extent on Syria, Iraq and Sri Lanka.<sup>213</sup> At some point, those *Strukturverfahren* become cases and some of them go to trial. Three cases involving international crimes are currently in the main trial stage, two in the appeal stage and in one case the indictment needs to be confirmed.<sup>214</sup> The German practice of both investigating and trying suspects of international crimes attracted worldwide attention when members of the Assad regime in Syria were targeted.

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<sup>210</sup> See also Gerhard Werle and Florian Jeßberger, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2020, mn. 488.

<sup>211</sup> Trial International, *Universal Jurisdiction Annual Review*, 2020.

<sup>212</sup> German authorities carry out their investigations under the German Code of Crimes against International Law, *Völkerstrafgesetzbuch* ('VStGB'), 26 June 2002 (<http://www.legal-tools.org/doc/fa8c3f/>) as follows: they first systematically review all situations around the world that could be relevant from an international criminal law point of view by assessing numerous reports from the media, NGOs, blogs and reports by international organisations and then set up monitoring procedures. Where an initial threshold of suspicion is met, and the case has some link to Germany, the authorities will open a 'Strukturverfahren' or a background investigation. As the ECCHR, p. 7, see above note 206, describes:

[t]hese proceedings qualify as investigations as defined in the German Code of Criminal Procedure and can thus involve criminal justice mechanisms such as the hearing of witness testimony. They are comparable to 'situations' under scrutiny at the ICC. Over the course of these proceedings, individual suspects may be identified. Further investigations are then pursued against these suspects in separate proceedings.

<sup>213</sup> Cf. Christian Ritscher, "'Foreign Fighters' und Kriegsvölkerstrafrecht", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016, vol. 11, pp. 807 f.; Christian Ritscher, "Aktuelle Entwicklung in der Strafverfolgung des Generalbundesanwalts auf dem Gebiet des Völkerstrafrechts", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2019, p. 600; Kai Ambos, *Internationales Strafrecht*, 5th. ed., C.H. Beck, Munich, 2018, para. 6, mn. 40.

<sup>214</sup> See, in more detail, Alexander Heinze, "Private International Criminal Investigations and Integrity", in Bergsmo and Dittrich (eds.), 2020, pp. 615–738, 627 ff., see above note 32.

As the weekly magazine *Der Spiegel* reported on 8 June 2018, the German Federal Prosecutor issued an internationalized arrest warrant for Jamil Hassan, Head of Syria's Air Force Intelligence Directorate, on charges of war crimes and crimes against humanity.<sup>215</sup> On 29 October 2019, the German Federal Prosecutor announced that it charged two Syrians, Anwar R. and Eyad A., whom he believed to be former secret service officers, with crimes against humanity.<sup>216</sup> The European Center for Constitutional and Human Rights ('ECCHR'), by their own account an "independent, non-profit legal and educational organization",<sup>217</sup> supported witnesses whose testimony led, among other things, to the charging decision of the German Federal Prosecutor.<sup>218</sup> In a decision of 6 March 2020, the Higher Regional Court of Koblenz confirmed the charges and committed Anwar R. and Eyad A. for trial.<sup>219</sup> The start of the trial on 23 April 2020 was viewed by observers as a "historic step" towards accountability of perpetrators in Syria.<sup>220</sup> It should not be overlooked, though, that both the investigation, including the arrest warrant against Hassan, and the Koblenz trial against Anwar R. and Eyad A. are being criticized for the failure to include the alleged conduct of sexual violence (as crimes against humanity) in either the arrest warrant or the indictment;<sup>221</sup> for lack of witness protection;<sup>222</sup> and for

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<sup>215</sup> See Jörg Diehl, Christoph Reuter, and Fidelius Schmid, "Die Jagd", in *Der Spiegel*, 8 June 2018, pp. 40–42; Boris Burghardt, "Endlich! Erster Haftbefehl gegen einen ranghohen Vertreter des syrischen Assad-Regimes", in *Völkerrechtsblog*, 11 June 2018 (available on its web site).

<sup>216</sup> Generalbundesanwalt, "Anklage gegen zwei mutmaßliche Mitarbeiter des syrischen Geheimdienstes wegen der Begehung von Verbrechen gegen die Menschlichkeit u.a. erhoben", 29 October 2019. See also Philip Oltermann and Emma Graham-Harrison, "Germany charges two Syrians with crimes against humanity", in *The Guardian*, 29 October 2019.

<sup>217</sup> See ECCHR, "Who we are" (available on its web site).

<sup>218</sup> ECCHR, "With the Frist Criminal Trial Worldwide on Torture in Syria, German Courts to Set International Precedent", 29 October 2019 (available on its web site). See also in detail Beth van Schaack, *Imagining Justice for Syria*, Oxford University Press, New York, 2020, pp. 285 ff.

<sup>219</sup> Higher Regional Court of Koblenz (Oberlandesgericht Koblenz), Decision (Beschluss) of 6 March 2020, Case No. 1 StE 9/19.

<sup>220</sup> See, for instance, Amnesty International, "Syria: Torture trial in Germany a 'historic step' towards justice", 22 April 2020 (available on its web site). See the instructive comment of Elisabeth Baier, "A puzzle coming together – The henchmen of Assad's torture regime on trial in Germany", in *Völkerrechtsblog*, 23 April 2020 (available on its web site).

<sup>221</sup> ECCHR, "Executive Summary, Sexual and gender-based violence in detention facilities of the Air Force Intelligence in Syria: Criminal complaint to the German Federal Public Prosecutor" (available on its web site); Susann Aboueldahab, "Sexualisierte Kriegsgewalt vor deutschen Gerichten", in *Legal Tribunal Online*, 19 June 2020 (available on its web site);

a reluctance “to communicate the proceedings to a Syrian and Arabic-speaking audience”.<sup>223</sup> In February 2021, the Court in Koblenz decided to separate the cases, since the presentation of evidence in the case against Eyad A. (more precisely: the taking of evidence by the Court) had been concluded.<sup>224</sup> The verdict against Eyad A. was delivered on 24 February 2021: Eyad A. was convicted of aiding and abetting (*Beihilfe*) to torture and deprivation of liberty crimes against humanity (Sections 7 (1) Nos. 5 and 9 of the German Code of Crimes against International Law, *Völkerstrafgesetzbuch* (‘VStGB’), Section 27 of the German Penal Code, *Strafgesetzbuch* (‘StGB’)) in thirty cases and sentenced to four years and six months imprisonment.<sup>225</sup> The judgment is not final yet, since Eyad A.’s attorneys declared their intent to appeal it.<sup>226</sup>

The attention was also caused by the fact that German authorities relied heavily on evidence that had been collected by private individuals and entities: first, the photographs taken by ‘Caesar’, the code name of a former Syrian military photographer who brought over 50,000 photographs out of the country, 28,000 of which show detainees in Syrian prisons killed by torture, outright execution, disease, malnutrition or other ill-treatment.<sup>227</sup> Second, the assistance of the ECCHR, which provided the testimony from

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Julian Staib, “Mit Symbolcharakter”, in *Frankfurter Allgemeine Zeitung*, 11 January 2021, p. 4.

<sup>222</sup> Hannah El-Hitami, “Syrian Torture Trial In Germany: Insiders Without Protection”, in *Justiceinfo.net*, 27 July 2020 (available on its web site).

<sup>223</sup> Alexander Dünkelsbühler, Alexander Suttor and Lea Borger, “Universal jurisdiction without universal outreach?”, in *Völkerrechtsblog*, 13 January 2021 (available on its web site).

<sup>224</sup> Due to the lack of a primary source for case 1 StE 9/19, see the following media reports: Sabine am Orde, “Das Rädchen im Foltergetriebe”, in *Die Tageszeitung (taz)*, 19 February 2021, p. 7; Süddeutsche Zeitung, “Bald Urteil im Syrer-Prozess”, in *ibid*.

<sup>225</sup> Higher Regional Court of Koblenz, Judgment, 24 February 2021, 1 StE 3/21 (excerpts of the judgment are available on the Rhineland-Palatinate State’s web site). For a first detailed analysis, see Alexander Dünkelsbühler, Alexander Suttor and Lea Borger, “Universal Jurisdiction without Universal Outreach”, in *Völkerrechtsblog*, 13 January 2021 (available on its web site).

<sup>226</sup> Sabine am Orde, “Das Urteil lautet: Beihilfe zur Staatsfolter”, in *Die Tageszeitung (taz)*, 25 February 2021, p. 6.

<sup>227</sup> See Sara Afshar, “Assad’s Syria recorded its own atrocities. The world can’t ignore them”, in *The Guardian*, 27 August 2018; Ritscher, 2019, p. 600, see above note 213. The photographs are also being used in other countries as evidence, see Federica D’Alessandra and Kirsty Sutherland, “The Promise and Challenges of New Actors and New Technologies in International Justice”, in *Journal of International Criminal Justice*, 2021, p. 11 (advance article).

six survivors of torture in the Al Khatib detention centre in Damascus.<sup>228</sup> Third, the Commission for International Justice and Accountability (‘CIJA’), who provided documentary evidence against one of the two former secret service officers.<sup>229</sup> Nerma Jelačić, CIJA’s Director for Management and External Relations, announced on Twitter: “#CIJA is proud to have supported the #German prosecutor’s investigation and arrest of the first high-ranking Syrian regime official”.<sup>230</sup> Last but not least, the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (‘IIM Syria’) is said to have been providing valuable assistance to the German prosecutors.

As one of the investigative challenges, Ritscher addressed the investigations into sexual violence and the lack of experience of his Office with these kinds of investigations (the jurisdiction of the Federal Public Prosecutor General of Germany is usually limited to prosecuting serious offences against the State such as high profile terrorism cases).<sup>231</sup> Upon request by chair Meierhenrich, Ritscher gave valuable insights into the co-operation of his Office with the ICC’s OTP and positively evaluated the exchange of information and expertise, the “practical approach to investigations into core crimes” becomes a common theme of his presentation. Ritscher stressed the importance of co-operation between the national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes and spoke in high terms of the meetings of the European Genocide Network at the Eurojust level.<sup>232</sup>

### 2.3.9. State Engagement and Disengagement

In the panel on “State Engagement and Disengagement”, Carsten Stahn (Professor of International Criminal Law and Global Justice at the Leiden University) listed both “new forms of engagement” (the increase in self-

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<sup>228</sup> See Nick Cumming-Bruce, “Germany Arrests Syrian Intelligence Officers Accused of Crimes Against Humanity”, in *The New York Times*, 13 February 2019.

<sup>229</sup> See Diehl, Reuter and Schmid, 2018, p. 41, see above note 215.

<sup>230</sup> Nerma Jelačić, tweet @NermaJelacic, 13 February 2019 (last accessed on 18 June 2021).

<sup>231</sup> See Section 120 of the German Courts Constitution Act (Gerichtsverfassungsgesetz, GVG).

<sup>232</sup> For more information on the Genocide Network, see Eurojust, “European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes” (available on its web site).

referrals of States to the ICC that were not foreseen in Rome; Article 12(3) declarations; collective referrals) and “new forms of disengagement” (the ‘unsigning’ of the ICC Statute, State withdrawals, and backlash against the Court). As an overview: as of October 2021, the ICC has initiated formal investigations in 14 situations and 30 cases.<sup>233</sup> Five situations have been referred by States (Uganda, the Democratic Republic of the Congo (‘DRC’), Mali, and Central African Republic (‘CAR’) twice), two by the UN Security Council (Darfur (Sudan) and Libya). In Kenya, Côte d’Ivoire, Georgia, Burundi, Bangladesh/Myanmar and Afghanistan, the Prosecutor has initiated *proprio motu* investigations approved by the PTC.

### 2.3.9.1. Attacks on the ICC and Multilateralism

The panel started with Erika de Wet’s presentation of the relationship between the ICC and both African States and the African Union (‘AU’).<sup>234</sup> The Professor of International Constitutional Law at the University of Pretoria only briefly mentioned the many hostile acts of African States and the AU against the ICC and shifted the focus mainly to the reasons for that hostility. De Wet especially advocated for a better understanding of the “immense sensitivity about colonialization” on the African continent, not without, however, clarifying that this sensitivity was sometimes manipulated. It was this well struck balance between the resentments and affinities of stakeholders that made de Wet’s presentation very insightful. Three points received particular critical attention by de Wet: first, the lack of (financial) support of the UN Security Council once it referred a situation to the ICC (“cynical”); second, the sub-optimal timing of the arrest warrants against a sitting Head of State (de Wet referred to the *Al-Bashir* case); third, the missed opportunity of the Assembly of States Parties (she probably meant the States Parties)<sup>235</sup> to remove former Prosecutor Moreno Ocampo.<sup>236</sup> In

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<sup>233</sup> ICC, “Situations under investigations” (available on its web site).

<sup>234</sup> See, in more detail, Kai Ambos, “Expanding the Focus of the ‘African Criminal Court’”, in William Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law – Critical Perspectives*, Ashgate, Farnham, 2013, pp. 499–529; Jean-Baptiste Jeangene Vilmer, “The African Union and the International Criminal Court: counteracting the crisis”, in *International Affairs*, 2016, vol. 92, no. 6, pp. 1319 ff.; Sarah P. Nimigan, “Africa and the International Criminal Court: (Re)constructing the Narrative”, in *International Criminal Law Review*, 2021, vol. 21, pp. 203–41.

<sup>235</sup> The removal requires the affirmative vote of a majority of the States Parties, not the ASP, which means that at least half of the States that have ratified the Statute must approve the Prosecutor’s removal Article 46(2) of the ICC Statute. See also Heinze, 2014, p. 251, see above note 43.

reply to chair Stahn's remark that these deficiencies may well be solved from within the ICC Statute and the Court and do not warrant a State withdrawal, de Wet clarified that the resentments against the Court "go deeper" and are especially fuelled by a lack of communication between the Court and African States.<sup>237</sup> In the later discussion, Article 13(b) of the ICC Statute and the role of the UN Security Council re-entered the podium and was condemned by de Wet's slogan "The best use for Article 13(b) is no use for Article 13(b)".<sup>238</sup> The US perspective was presented by David Scheffer, first US Ambassador-at-Large for War Crimes Issues during President Bill Clinton's second term in office and currently Director of the Center for International Human Rights at Northwestern University. Scheffer led the US negotiating team during the Rome Conference.<sup>239</sup> Scheffer made recommendations of how the Rome system could be improved. He reiterated what he had already proposed at the ICC Forum of the UCLA School of Law: create a 'Select Committee of ICC State Party Representatives' that "would fulfill the critical function of communicating directly with non-party States and imminent break-away States Parties, as well as non-cooperating States Parties, to achieve the Court's membership, investigative, prosecutorial, and enforcement objectives".<sup>240</sup> As a positive recent

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<sup>236</sup> As is the position in respect of the judges, the Prosecutor or the Deputy Prosecutor can only be removed where he or she is found to have committed serious misconduct or a serious breach of his or her duties or is unable to exercise the functions required by the Article 46(1) of the ICC Statute. Such misconduct would include activities incompatible with official functions, abuse of office, or concealing information, which would have precluded the Prosecutor from taking office (Rule 24(1) ICC RPE). See also Heinze, 2014, p. 251, see above note 43. About possible misconduct by members of the ICC-OTP and Moreno-Ocampo, see Gunnar M. Ekeløve-Slydal, "Sir Thomas More and Integrity in Justice", in Bergsmo and Dittrich (eds.), 2020, pp. 151, 164 ff., see above note 32.; Juan Carlos Botero, "Multicultural Understanding of Integrity in International Criminal Justice", in *ibid.*, p. 229.

<sup>237</sup> An illuminating and very detailed analysis is provided by Rebecca J. Hamilton, "Africa, the Court, and the Council", in deGuzman and Oosterveld (eds.), pp. 261 ff., see above note 67.

<sup>238</sup> See also Erika de Wet, "Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials", in *American Journal of International Law Unbound*, 2018, vol. 112, pp. 33 ff.

<sup>239</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, Princeton University Press, 2012, pp. 347 ff.; *id.*, "The International Criminal Court", in William Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, pp. 67–68; Michael Matheson and David Scheffer, "The Creation of the Tribunals", in *American Journal of International Law*, 2017, vol. 110, no. 2, pp. 173, 186–187.

<sup>240</sup> Scheffer continues:

development, Scheffer welcomed the collective referral mentioned earlier. Scheffer addressed the previously mentioned attacks on the Court by the US administration,<sup>241</sup> from a meta-level: in his view, the attacks on the ICC were just symptoms of, what he called, a “mindset shift” towards anti-multilateralism.<sup>242</sup> In a nuanced account, Scheffer clarified that exceptionalism in itself was not intrinsically bad. However, the Trump administration “used exceptionalism destructively rather than constructively”. Finishing on a positive note, Scheffer pointed out that a large majority of US citizens supported the ICC.<sup>243</sup> Less than a year after Scheffer’s remarks, on 2 April 2019, the Foreign Ministers of Germany and France launched the Alliance for Multilateralism, “an informal network of countries united in their conviction that a rules-based multilateral order is the only reliable guarantee for international stability and peace and that our common challenges can only be solved through cooperation”.<sup>244</sup>

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the Select Committee would be elected every two years (maximum four year terms) by the Assembly of States Parties and would be comprised of, say, twenty States Parties whose senior foreign ministry and justice ministry officials and members of parliament would be on standby to convene and travel to relevant capitals for the purpose of engaging in dialogue with their counterparts in countries that are of interest and concern to the Court. The membership of the Select Committee would be subject to the will of the Assembly of States Parties, but there would be guidelines on the selection of committed governments and senior and knowledgeable officials and lawmakers to populate the Select Committee.

David Scheffer, “Improving Communication with States”, in Richard H. Steinberg (ed.), *The International Criminal Court: Contemporary Challenges and Reform Proposals*, Brill, Nijhoff, 2020, p. 368.

<sup>241</sup> See above Section 2.3.1.

<sup>242</sup> Burchard, less fatalistic, does not see the end of multilateralism but a trend towards nationalism, see Christoph Burchard, “(Völker-)Strafrecht im Zeichen der Erschütterung ordnungskonstitutiver Gewissheiten”, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2020, vol. 103, pp. 193.

<sup>243</sup> See David Scheffer and John Hutson, *Strategy for U.S. Engagement With the International Criminal Court*, 2008, p. 6 (available on the War Criminals Watch’s web site): the ICC has aroused neither broad public interest nor outrage among the American people. The ICC has occupied primarily the attention of the fraternity of international lawyers, law professors, and multilateralists supporting the court and some new sovereigntists, military veterans, and conservatives who passionately oppose it as well as many other international institutions. But occasional national polls show that large majorities (ranging from 68 percent to 74 percent) of Americans, when directly asked, support U.S. participation in the ICC, citing, *inter alia*, Chicago Council on Global Affairs, “Global Views 2006: The United States and the Rise of China and India: Results of a 2006 Multination Survey of Public Opinion”, 2006 (available on its web site). Whether this figure still seems valid today, seems questionable.

<sup>244</sup> See the Alliance’s ‘Multilateralism’ website.

Bakhtiyar Tuzmukhamedov, Vice-President of the Russian Association of International Law and ICTY-ICTR Judge presented Russia's position *vis-à-vis* the ICC, especially during the negotiations of the ICC Statute.<sup>245</sup> His presentation in its extended form has been turned into a chapter in this volume. The panel was closed by ZHU Dan, Professor of Law at Fundan University, who portrayed China's position towards the ICC. In a rather descriptive and probably too uncritical account, ZHU emphasized China's commitment to international criminal law and explained the reasons for the country's refusal to be part of the ICC project.

### **2.3.9.2. Waves of Internationalism: The Development of International Criminal Law**

It is worth bringing to mind that world history is not faced with nationalist and realist challenges for the first time. International human rights protections and the ensuing<sup>246</sup> international criminal law have developed in waves or – as Aksenova puts it – in cycles.<sup>247</sup>

In the seventeenth century, continental Europe was overrun by the Thirty Years' War, resulting in the famous Peace of Westphalia and "the birth of the modern, non-ecclesiastical nation-state".<sup>248</sup> Parliament and the King were at war in England, inspiring Thomas Hobbes and John Locke to "reconsider political philosophy and relocate man – natural man, frail but

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<sup>245</sup> See Chapter 23 in this volume.

<sup>246</sup> About the relationship between human rights law and international criminal law and further references: Heinze, 2018, pp. 365 ff., see above note 24; Heinze, 2020, pp. 651 ff., see above note 214. See also the edited volume by Paul de Hert, Stefaan Smis, and Mathias Holvoet (eds.), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law*, Intersentia, Cambridge, Antwerp, Portland, 2018.

<sup>247</sup> Aksenova rightly points out that international criminal law develops in cycles, each adding a layer of complexity and understanding to this constantly evolving discipline. However, the evolution is by no means linear, rather each moment in time when international criminal law takes a leap forward or backwards is defined by the accumulation of political will at the level of States, institutions and individual actors.

Marina Aksenova, "Substantive Law Issues in the Tokyo Judgment: From Facts to Law?", in Viviane E. Dittrich *et al.* (eds.), *The Tokyo Tribunal The Tokyo Tribunal: Perspectives on Law, History and Memory*, TOAEP, Brussels, 2020, p. 226 (<http://www.toaep.org/nas-pdf/3-dittrich-lingen-osten-makraiova>).

<sup>248</sup> Alan Sussman, "Why Human Rights Are Called Human Rights", in *Ethics and International Affairs Journal*, 2014, vol. 28.

ambitious – to the centre of the political and moral universe”.<sup>249</sup> Human rights, however, were generally considered to be a matter within the exclusive domestic sovereignty of States until 1945. The first significant conceptual revolution, a vague ‘internationalizing’ of human rights, came only with the UN Charter of 1945.<sup>250</sup> After World War II, the Allies set up the International Military Tribunal in Nuremberg (‘IMT’) to prosecute the “Major War Criminals”. The creation of both the IMT and the International Military Tribunal for the Far East (‘IMTFE’) were milestones in the development of international criminal law and international accountability for serious crimes.<sup>251</sup> The IMT was also a symbol of the universality of law.<sup>252</sup>

After this wave of idealism and universalism, its support reached a low with the Cold War. State leaders mostly ignored human rights violations, which were still marginalized issues in international relations. These leaders had little incentive to prevent and stop the gross violations of human rights by risking mutual respect for sovereignty. In a number of countries, the struggle over whether and how to limit the application of the concept of ‘universality’ in the post-war human rights regime went hand in hand with related limiting jurisdictional principles based on particularist notions of identity, such as nationality and ethnicity. Whereas offences at Nuremberg were prosecuted as ‘crimes against humanity’ on a universal basis, in the subsequent national trials of the 1950s and 1960s, these offences were prosecuted in terms of the collective.<sup>253</sup> The conflicts focused in particular on the conception of the State and the extent of its commitments to and agenda regarding economic security. Another wave of universalism and human rights protections came with the fall of the Berlin Wall,

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<sup>249</sup> *Ibid.*

<sup>250</sup> Douglass Cassel, “Does International Human Rights Law Make a Difference?”, in *Chicago Journal of International Law*, 2001, vol. 2, no. 1, pp. 121, 134.

<sup>251</sup> Madelaine Chiam, “Different Models”, in David A. Blumenthal *et al.* (eds.), *The Legacy of Nuremberg*, Martinus Nijhoff Publishers, Leiden, 2008, p. 205; Richard D. Heideman, “Legalizing Hate”, in *Loyola of Los Angeles International and Comparative Law Review*, 2017, vol. 39, pp. 5 ff.; Stefanie Schmahl, “Human Dignity in International Human Rights, Humanitarian and International Criminal Law: A Comparative Approach”, in Eric Hilgendorf and Mordechai Kremnitzer (eds.), *Human Dignity and Criminal Law*, Duncker and Humblot, Berlin, 2018, pp. 79, 101.

<sup>252</sup> Robert H. Jackson, “The Influence of The Nuremberg Trial on International Criminal Law” (available on the Robert H. Jackson Center’s web site).

<sup>253</sup> Guénaél Mettraux, *International Crimes, Volume 2: Crimes Against Humanity*, Oxford University Press, 2020, pp. 8 ff.

the end of the Soviet Union and, therefore, the end of the Cold War.<sup>254</sup> The 1990s marked the birth of the ‘age of accountability’, somewhat euphemistically announced by the UN Secretary-General at the ICC’s Kampala Review Conference, evoking the establishment of the ICTY and the ICTR in 1993 and 1994 and – eventually – the ICC in 1998. International human rights norms have now ‘gone global’ and the ICC Statute is seen by many as the constitution of international criminal justice. The ICC was established with the concept of universal jurisdiction in mind, although some of the parties who worked on the ICC Statute rejected the idea of universal jurisdiction.<sup>255</sup> The Preamble of the ICC Statute notes that the purpose of the ICC was to have jurisdiction over “the most serious crimes of concern to the international community as a whole”, and that the aim of the ICC is to “guarantee lasting respect for and the enforcement of international justice”.<sup>256</sup> The ICC Statute is not only the “culmination of international law-making”.<sup>257</sup> Rather, it codifies the customary international humanitarian laws,<sup>258</sup> and the jurisprudence of previously established international or internationalized tribunals such as the ICTY and ICTR.<sup>259</sup> Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognized human rights, “consolidated over a century’s worth of jurisprudence and customary law”, have been ‘constitutionalized’ by the ICC Statute.<sup>260</sup>

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<sup>254</sup> See Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, p. 334: “Seit dem Ende des Kalten Krieges drängt der Westen verstärkt auf die weitere Vollendung des Kantischen Projektes – der Errichtung einer Weltfriedensordnung”. In a similar vein Héctor Olásolo, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice*, Brill, Leiden, Boston, 2018, p. 3.

<sup>255</sup> See Hans-Peter Kaul and Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 1999, vol. 2, pp. 143–75.

<sup>256</sup> ICC Statute, Preamble, see above note 1.

<sup>257</sup> Marc Weller, “Undoing the Global Constitution: UN Security Council Action on the International Criminal Court”, in *International Affairs*, 2002, vol. 78, no. 4, p. 693.

<sup>258</sup> Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Edward Elgar Publishing, Cheltenham, 2010, p. 22.

<sup>259</sup> *Ibid.*

<sup>260</sup> Mendes, 2010, pp. 15, 21–22, see above note 258; Yvonne McDermott, “The Influence of International Human Rights Law on International Criminal Procedure”, in Philipp Kastner

### 2.3.10. *Quo Vadis, ICC? The ICC Within the Next Twenty Years*

The last panel served as a summary panel, named “*Quo vadis, ICC? The ICC within the next 20 Years*”, chaired by David Tolbert, Visiting Scholar at Duke University, who worked with the UN for almost 15 years, acting as a senior legal advisor, Deputy Chief Prosecutor and Assistant Secretary-General. Kamari Clarke (Professor of Global and International Studies, Law and Legal Studies at the Carleton University) brought a socio-political perspective into the debate around withdrawals of African States from the ICC Statute and recommended that States should pay closer attention to the actual effect of withdrawal and non-co-operation declarations (“What is the productive work of a declaration?”, “What does a declaration do?”, and “What does a pledge of non-co-operation do?”). She also advocated for “a more creative framework through which we can view the Court”. A completely new perspective was presented by Barbara Lochbihler: Lochbihler was a member of the European Parliament and introduced the European Union’s perspective to the debate. Her presentation, too, has made it into this volume as a separate and illuminating chapter.<sup>261</sup>

#### 2.3.10.1. *The Topic of the Quality of Judges Revisited*

The last two panelists of the conference were the well-known Judge Sang-Hyun Song (former President of the ICC) and Christian Wenaweser. Judge Song opined that the future of the ICC depended on two factors: first, how well the Court operated as a “court institution” and, second, how diligently States supported the Court. As to the first factor, Song especially criticized the judge selection procedure at the ICC.<sup>262</sup> Song drew on his experience as Judge and President of the Court when he emphasized the importance of trial experience for judges at the ICC. The way Song hinted at a low quality of previous ICC judges certainly raised some eyebrows in the audience. Song generally advocated for a better quality of ICC officials (legal officers included) and a better identification with the Court’s values. It goes to the point raised earlier<sup>263</sup> and Song’s demand is resonated by the establishment

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(ed.), *International Criminal Law in Context*, Routledge, London, New York, 2018, pp. 280–296, 282.

<sup>261</sup> See Chapter 22 in this volume. See also Jacopo Governa and Sara Paiusco, “Is the European Union an Unexpected Guest at the International Criminal Court?”, in Bergsmo *et al.* (eds.), 2020, pp. 569 ff., see above note 3.

<sup>262</sup> See already above Section 2.3.4.

<sup>263</sup> See above Section 2.3.4.

of the Advisory Committee on Nomination of Judges.<sup>264</sup> With regard to the second factor, Song condemned the lack of support by States and States Parties. In his view, it is not the Court's but the States' job to defend the Court. The Court (and its organs) itself must stay politically neutral. In that regard, Judge Song stood in opposition to panelists of the day before (such as Margaret deGuzman), who encouraged the OTP to embrace political factors in prosecutorial decision-making. In his critique, he included the UN Security Council and reminded the audience of the detention of four ICC staff members in Libya during the course of a privileged visit to Saif Al-Islam Gaddafi,<sup>265</sup> which brought him "26 sleepless days and nights" until he could reach an agreement to free the staff members.<sup>266</sup> The UN Security Council failed to provide support in the matter.

### **2.3.10.2. Alternative Mechanisms to Investigate Perpetrators of International Crimes**

The final word of all panelists went to Ambassador Christian Wenaweser (Permanent Representative of Liechtenstein, Mission of Liechtenstein to the United Nations), who advocated for an open-minded discussion of the ICC's future, including possible alternatives to the Court. As the last panelist, Wenaweser was the first panelist who touched upon the sensitive issue of questioning the existence of an ICC in the future. The advocacy for alternative mechanisms is hardly surprising, considering that Wenaweser is the "parent of the new IIIM Syria" (Tolbert). The topic has also been raised earlier by Michelle Jarvis, Deputy Head of the IIIM Syria.

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<sup>264</sup> In more detail, see ICC ASP, "Advisory Committee on nominations of judges of the International Criminal Court", 1 October 2020 (available on its web site). About the 2020 report of the Committee, see Owiso Owiso and Sharon Nakandha, "'Grading' the Nominees for the International Criminal Court Judges Election 2021–2030: The Report of the Advisory Committee on Nomination of Judges – Part I", in *OpinioJuris*, 9 October 2020, Parts I and II (available on its web site). About the Committee in general, see Jennifer Trahan, "The Assembly of States Parties", in deGuzman and Oosterveld (eds.), 2020, pp. 238 ff., see above note 67.

<sup>265</sup> ICC, "The four ICC staff members released in Libya", 2 July 2012 (available on its web site).

<sup>266</sup> Luke Harding and Julian Bogner, "Libya frees international criminal court legal team accused of spying", in *The Guardian*, 2 July 2012:

The deal to free Taylor was agreed late on Sunday, with the ICC's South Korean president, Sang-Hyun Song, flying to Tripoli on Monday and driving to the mountains to collect his four-person team. Taylor sat down with Song to a lunch laid on by her Zintani captors of chicken, fish, rice and a can of fizzy orange.

The IIIM Syria – the first of three investigative mechanisms of this kind<sup>267</sup> – is a subsidiary organ of the UN General Assembly and not a prosecutorial body but of a ‘quasi-prosecutorial’ nature. It is required to:

prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to mens rea and to specific modes of criminal liability.<sup>268</sup>

ISIL’s acts and their possible qualifications as international crimes resulted in the establishment of UNITAD. It was established pursuant to Security Council Resolution 2379 (2017)<sup>269</sup> by the UN Secretary-General, and appointed Karim Asad Ahmad Khan – now ICC Prosecutor – as the first Special Adviser and Head of the Team (effective 31 May 2018), succeeded by Christian Ritscher (effective 1 October 2021).<sup>270</sup> The latest re-

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<sup>267</sup> ‘Of this kind’ means that there have been or are similar investigative mechanisms in place in other contexts. Take, for instance, the Documentation Centre of Cambodia (‘DC-Cam’) that assisted the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’). As McDermott emphasizes, documents gathered by DC-Cam benefitted “from a (rebuttal) presumption of relevance and reliability”, see Yvonne McDermott, “The ECCC’s Approach to Evidence and Proof”, in *Journal of International Criminal Justice*, 2020, vol. 18, p. 753. Understanding ‘investigative mechanisms’ broadly, Le Moli counts 69 of those mechanisms that have been established between 1963 and 2020, see Ginevra Le Moli, “From ‘Is’ to ‘Ought’: The Development of Normative Powers of UN Investigative Mechanisms”, in *Chinese Journal of International Law*, 2020, vol. 19, pp. 629 ff. With regard to fact-finding mechanisms (Le Moli: mechanisms that have “powers about facts”), Le Moli maps the mechanisms into the following three categories: first, those that “gather facts”. Those that “[g]ather facts about a situation with a pre-characterization in the mandate”. And those that “[g]ather facts about a specific conduct with a legal pre-characterization in the mandate”, *ibid.*, pp. 633 ff.

<sup>268</sup> UN General Assembly, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/71/755, 19 January 2017 (<http://www.legal-tools.org/doc/a0cd85/>). See also Ingrid Elliott, “‘A Meaningful Step towards Accountability’: A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 239–256.

<sup>269</sup> Security Council Resolution 2379 (2017), UN Doc. S/RES/2379 (2017), 21 September 2017 (<http://www.legal-tools.org/doc/1510b4/>).

<sup>270</sup> See UNITAD, “Our Mandate” (available on its web site). In more detail, see Karim A. A. Khan and Jonathan Agar, “Integrity and Independence in the Delivery of Accountability: Harnessing International and Domestic Frameworks in Pursuit of Justice for ISIL Crimes”, in Bergsmo and Dittrich (eds.), 2020, pp. 811 ff., see above note 32.

port on the activities of UNITAD<sup>271</sup> illustrated the dimensions of both the investigations and the investigation teams: “With respect to its investigations into attacks against the Yazidi community, the Team has identified 1,444 potential perpetrators, of whom 469 have been identified as having participated in the attack on Sinjar and 120 in the attack on the village of Kojo” (para. 10 of the report); with regard to the “mass killing in Tikrit, June 2014”, 20 key persons of interest were identified (para. 15); the team has 176 staff members, a total of 216 personnel (para. 42), six field investigation units, specialized thematic units, and others (para. 128); UNITAD collaborates not only with Iraqi authorities but also with authorities abroad in different states (para. 78);<sup>272</sup> UNITAD completes what they call “in-depth thematic case files” (para. 129); the Council of Representatives in Iraq is currently preparing draft legislation that allows for the admission of evidence collected by UNITAD in criminal proceedings (para. 131).

The UN Human Rights Council (‘HRC’) created another investigative mechanism in Myanmar.<sup>273</sup> Human Rights Council Resolution 34/22 mandated the Mission:

to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property,

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<sup>271</sup> See UN Security Council, Letter dated 1 May 2021 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, S/2021/419, 3 May 2021 (<http://www.legal-tools.org/doc/0f00e4/>).

<sup>272</sup> See also Karolina Aksamitowska, “Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and The Netherlands”, in *Journal of International Criminal Justice*, 2021, p. 11 (advance article).

<sup>273</sup> Global Justice Center, “Statement on the Creation of the IIIM for Myanmar”, 27 September 2018 (available on its web site); International Commission of Jurists, “Myanmar: creation of UN mechanism a step toward accountability”, 27 September 2018 (available on its web site). See, generally, Neriah Yue, “The ‘Weaponization’ of Facebook in Myanmar: A Case for Corporate Criminal Liability”, in *Hastings Law Journal*, 2020, vol. 71, no. 3, pp. 816 ff.; Emma Palmer, *Adapting International Criminal Justice in Southeast Asia: Beyond the International Criminal Court*, Cambridge University Press, 2020, pp. 159 ff.; Derek Tonkin, “Mission Creep Untrammelled: The UN Fact-Finding Mission on Myanmar”, Policy Brief Series No. 102 (2020), TOAEP, Brussels, 2020 (<http://www.toaep.org/pbs-pdf/102-tonkin>).

with a view to ensuring full accountability for perpetrators and justice for victims.<sup>274</sup>

On 22 June 2020, the HRC established the Independent Fact-Finding Mission on Libya by Resolution 43/39 for a period of one year, to investigate violations and abuses of human rights throughout Libya by all parties since the beginning of 2016, with a view to prevent further deterioration of the human rights situation, and to ensure accountability.<sup>275</sup> On 6 October 2020, the HRC adopted Decision L.50,<sup>276</sup> which, along with the implementation of other HRC mandates that required postponement due to the current liquidity crisis affecting the UN Secretariat and the restrictions imposed due to COVID-19, extended the mandate of the Fact-Finding Mission until September 2021.

In general, at the UN level, the following measures have been taken to investigate international crimes: UN fact-finding missions (Libya, Venezuela), commissions of inquiry (Burundi, Syria), commissions on human rights (South Sudan), and the mentioned novel investigative mechanisms.<sup>277</sup> These bodies include investigators, legal advisers and coordinators.<sup>278</sup> With the approval of the establishment of a hybrid court in

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<sup>274</sup> Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018, para. 4 (<http://www.legal-tools.org/doc/0c0c69/>). See also United Nations, IIMM, “Mandate and establishment” (available on its web site). In more detail, see Alexander Heinze, “Private International Criminal Investigations”, in *Zeitschrift für internationale Strafrechtsdogmatik*, 2019, vol. 14, pp. 171–172; Marina Aksenova, Morten Bergsmo and Carsten Stahn, “Non-Criminal Justice Fact-Work in the Age of Accountability”, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, 2nd ed., TOAEP, Brussels, 2020, pp. 10 ff. (<http://www.toaep.org/ps-pdf/19-bergsmo-stahn-second>), with a list of “International Fact-Finding Mandates 1992-2020” at pp. 32–44. Generally about fact-finding by the Special Procedures of the Human Rights Council, Martin Scheinin, “Improving Fact-Finding in Treaty-Based Human Rights Mechanisms and the Special Procedures of the United Nations Human Rights Council”, in *ibid.*, pp. 75 ff. About the question whether information collected by human rights bodies and “human rights investigators” can generally be admitted as direct evidence at International Criminal Tribunals, see Lyal S. Sunga, “Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?”, in *ibid.*, pp. 409 ff.

<sup>275</sup> Human Rights Committee (‘HRC’), Resolution 43/39, Technical assistance and capacity-building to improve human rights in Libya, UN Doc. A/HRC/RES/43/39, 6 July 2020.

<sup>276</sup> HRC, Draft decision submitted by the President of the Human Rights Council, UN Doc. A/HRC/45/L.50, 2 October 2020.

<sup>277</sup> An instructive overview can be found on the UN Human Rights Council’s website.

<sup>278</sup> Sareta Ashraph and Federica D’Alessandra, “Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff (Part II)”, in *Opinio.Ju-*

South Sudan,<sup>279</sup> the Commission of Human Rights as a monitoring and/or fact-finding mechanism may soon have the assigned accountability institution. The latest commission of inquiry will carry out its work parallel to the ICC investigators and thus even has the ICC as possible accountability institution: on 27 May 2021, via Resolution S-30/1, the Human Rights Council established:

an ongoing independent, international commission of inquiry [...] to investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity.<sup>280</sup>

The ICC's temporal jurisdiction investigation covers crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation of Palestine since 13 June 2014 (the date to which reference is made in the Declaration Accepting the Jurisdiction of the International

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*ris*, 14 October 2020 (available on its web site). See also the project "Anchoring Accountability for Mass Atrocities" of the Oxford Institute for Ethics, Law and Armed Conflict (available on its web site, with links to a series of recent blog posts in *OpinioJuris* regarding the project). This project strives to map "the challenges currently confronted by mechanisms protagonist of the 'accountability turn'"; and to:

analyse and study a number of approaches for increasing investigative capacity, including the establishment of a permanent global investigative mechanism, the creation of a permanent investigative support unit to assist all mandated inquiries and mechanisms, or the development of special teams that could quickly be deployed to aid inquiries and mechanisms where needed.

<sup>279</sup> See the report by Nyagoah Tut Pur, "A Glimmer of Hope for South Sudan's Victims", in Human Rights Watch, 31 January 2021. See generally Joseph Geng Akech, "Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation", in *International Journal of Transitional Justice*, 2021, vol. 14, pp. 585 ff.; Kirsten Lavery, "South Sudanese Perceptions of Justice", in *Journal of International Criminal Justice*, 2020, vol. 18, pp. 278 ff.

<sup>280</sup> Human Rights Council, Ensuring respect for international human rights law and international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, and in Israel, UN Doc. A/HRC/S-30/1, 27 May 2021 (<http://www.legal-tools.org/doc/rii5o8/>).

Criminal Court<sup>281</sup>).<sup>282</sup> The territorial scope of the jurisdiction extends to Gaza and the West Bank, including East Jerusalem.<sup>283</sup>

On another level, private investigations around the world have now reached the level of international criminal justice, with the establishment of CIJA.<sup>284</sup> CIJA is collecting information that could eventually be used to hold perpetrators of international humanitarian law violations accountable. In this volume, there is a separate chapter analysing the work of CIJA from an empirical perspective.<sup>285</sup> In addition, I have addressed elsewhere the question of the role of integrity in CIJA investigations<sup>286</sup> and the admissibility of evidence collected by CIJA.<sup>287</sup>

### **2.3.10.3. Article 10: The Drafters' Invitation for Alternative Accountability Mechanisms**

Wenaweser's willingness to talk about alternatives to the ICC was refreshing. He warned against "sleepwalking through this discussion" and at the same time defended the Court as the "most vulnerable" of all international institutions due to the power it has. Here, Wenaweser closed the circle to the beginning of the panel and the demand to voice the support more resolutely and loudly – a demand that was reiterated by James Goldstein (Executive Director, Open Society Justice Initiative) and Anita Ušacka (former ICC Judge).

It indeed often seems that questioning the ICC's role in the development of international (criminal) law is equated with questioning the ICC itself. It is quite the opposite. The role of other accountability mechanisms beside the ICC has always been a matter of passionate debate and is – often

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<sup>281</sup> Mahmoud Abbas, President of the State of Palestine, "Declaration Accepting the Jurisdiction of the International Criminal Court", 31 December 2014 (<http://www.legal-tools.org/doc/60aff8/>).

<sup>282</sup> ICC, "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine", 3 March 2021.

<sup>283</sup> See above Section 2.3.3.2.

<sup>284</sup> In detail, Heinze, 2019, 173 ff., see above note 274; *id.*, 2020, pp. 615 ff., see above note 214.

<sup>285</sup> See Chapter 8 in this volume.

<sup>286</sup> Heinze, 2020, pp. 615 ff., see above note 214.

<sup>287</sup> Alexander Heinze, "Evidence Illegally Obtained by Private Investigators and its Use Before International Criminal Tribunals", in *New Criminal Law Review*, 2021, vol. 24, no. 2, pp. 212–253.

overlooked – built-in the ICC Statute: through Article 10, the only Article without a heading.<sup>288</sup>

Article 10 makes clear that the ICC Statute does (arguably) not reflect customary international law<sup>289</sup> or “is underinclusive”<sup>290</sup> and its definitions “retrogressive”.<sup>291</sup> It is the result of a certain ‘anxiety’ that the compromises reached during the negotiations of the ICC Statute might have a considerable effect on customary international law.<sup>292</sup> A reservation clause

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<sup>288</sup> In more detail, Heinze, 2022, mn. 11 ff., see above note 96.

<sup>289</sup> David Scheffer and Kaeb, C., “The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory”, in *Berkeley Journal of International Law*, 2011, vol. 29, no. 1, pp. 334, 348. See also United States Court of Appeals (Second Circuit), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Amicus Curiae Brief of William Aceves *et al.*, 582 F.3d 244, no. 09.1262, 2009, p. 17; Edna Chinyele Udobong, “Post-Kiobel: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations”, in *Liberty University Law Review*, 2016, vol. 11, no. 2, pp. 559, 589; Larissa van den Herik, “The Decline of Customary International Law as a Source of International Criminal Law”, in Curtis A. Bradley (ed.), *Custom’s Future - International Law in a Changing World*, Cambridge University Press, 2016, pp. 230, 240; Christopher Hale, “Does the Evolution of International Criminal Law End with the ICC - The Roaming ICC: A Model ICC for a State-Centric World of International Law”, in *Denver Journal of International Law and Policy*, 2007, vol. 35, no. 3, pp. 429, 468. See also United States Court of Appeals (D.C. Circuit), *Doe VIII v. Exxon Mobil Corporation*, Judgment, 8 July 2011, 654 F.3d 39, where the court rejected the Second Circuit’s focus on the ICC Statute in *Talisman* because the ICC Statute does not constitute customary international law (see in more detail Heinze, 2022, mn. 24, see above note 96). About this case and Article 10, see also Bryan W. Cox, “Confused Intent: A Critique of the Fourth Circuit’s Adoption of a Purpose Mens Rea Standard for Aiding and Abetting Liability under the Alien Tort Statute [*Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011)]”, in *Washburn Law Journal*, 2012, vol. 51, pp. 705, 723; Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court*, Brill Nijhoff, Leiden, Boston, 2018, pp. 63–64. For an overview of the positions taken as to question of whether the ICC Statute reflects customary international law, see Alexandre Skander Galand, “The Nature of the Rome Statute of the ICC (and its Amended Jurisdictional Scheme)”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 5, pp. 933, 934–935.

<sup>290</sup> Ooana A. Hathaway *et al.*, “What Is a War Crime”, in *Yale Journal of International Law*, 2019, vol. 44, no. 1, pp. 53, 77.

<sup>291</sup> Leena Grover, “Interpreting the Crime of Aggression”, in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary, Vol. I*, Cambridge University Press, 2017, pp. 375, 390.

<sup>292</sup> Hale, 2007, p. 469, above note 289. In general terms, Fragmentation of international law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 34 (‘ILC Koskenniemi Fragmentation Report’) (<http://www.legal-tools.org/doc/dda184/>): “Treaties and custom come about as a result of conflicting motives and objectives - they are ‘bargains’ and ‘package-deals’ and often result from spontaneous reactions to events in the environment”. About the

such as Article 10<sup>293</sup> is nothing unusual in international treaties and a direct result of codification.<sup>294</sup>

On the one hand, a codification increases certainty and awareness of prohibitions and thereby vindicates the rule of law and the possibility of achieving a preventive effect.<sup>295</sup> On the other hand, the ICC Statute illustrates very clearly that its articles represent a *minimum* amount of consent in many aspects. The ICC Statute has thus been described as a “self-contained system”.<sup>296</sup> It is *lex specialis* to (general) rules of international law.<sup>297</sup> Codification in international law is supposed to bring order and system to law. This requires a certain form of completeness.<sup>298</sup> That this completeness cannot be reached,<sup>299</sup> is the declaratory function of Article 10,

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ILC Report, see generally Tomer Broude, “Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law”, in *Temple International and Comparative Law Journal*, 2013, vol. 27, pp. 279–292; Sean D. Murphy, “Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project”, in *Temple International and Comparative Law Journal*, 2013, vol. 27, pp. 293–308; Heinze, 2022, mn. 2, see above note 96.

<sup>293</sup> In more detail, Heinze, 2022, mn. 7 ff., see above note 96.

<sup>294</sup> In more detail, Leena Grover, “A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the ICC”, in *European Journal of International Law*, 2010, vol. 21, no. 3, pp. 543, 570; Heinze, 2022, mn. 12, see above note 96.

<sup>295</sup> See, for instance, Hector Olásolo, *Estudios de derecho penal internacional*, Instituto Nacional de Ciencias Penales, 2010, pp. 61 ff.; Grover, 2010, p. 570 with further references, see above note 294. About ‘legal certainty’ as a goal of codification, see Heinze, 2014, pp. 107 ff. with further references, see above note 43.

<sup>296</sup> Leila N. Sadat, “ICC Statute Article 10”, in *Lexisus*, St. Luis, 2017 (film: <http://www.cilrap.org/cilrap-film/10-sadat/>, transcript: <http://www.legal-tools.org/doc/9da711/>); Galand, 2019, p. 939, see above note 289. See, however, Newton, who claims the opposite, albeit overlooking Article 10, Michael A. Newton, “How the ICC Threatens Treaty Norms”, in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, pp. 371, 419 (“[T]he Rome Statute does not create such an isolated (or self-contained) regime based on its text or its relationship to the general principles of international law”). Critical about the notion of ‘self-contained systems’ in international law, ILC Koskenniemi Fragmentation Report, paras. 123 *et seq.*, see above note 292.

<sup>297</sup> Günther Handl, “In Re South African Apartheid Litigation and beyond: Corporate Liability for Aiding and Abetting under the Alien Tort Statute”, in *German Yearbook of International Law*, 2010, vol. 53, pp. 425, 455.

<sup>298</sup> Hans-Michel Empell, “Die Martens’sche Klausel – grundlegende Norm des humanitären Völkerrechts oder Vorschrift ohne Wert?”, in *Humanitäres Völkerrecht – Informationsschriften*, 2009, vol. 22, pp. 145, 152.

<sup>299</sup> In a similar vein, referring to the ILC Koskenniemi Fragmentation Report, Newton, 2016, p. 421, see above note 296. See also ICTY, *Prosecutor v. Šainović et al.*, Appeals Chamber, Judgement, 23 January 2014, IT-05-87-A, para. 1648 (<http://www.legal-tools.org/doc/>

softening the *lex specialis effect expressis verbis* – while Article 21 of the ICC Statute lists the external treaty sources that may be consulted when elements of the text are interpreted. In a way, Article 10 saves the ICC Statute from being outdated and ineffective in the farther or nearer future; “it enables the regime to endure over time, to remain fluid”,<sup>300</sup> and to reduce “the danger of an ‘encrustation’” of international criminal law.<sup>301</sup>

It goes without saying, however, that the ICC Statute may have a developmental role in custom.<sup>302</sup> The ICTY TC emphasized in *Furundžija*:

In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not “limited” or “prejudiced” by the Statute’s provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.<sup>303</sup>

When the ICC had been created, the establishment of other tribunals and truth and reconciliation commissions was rendered expendable.<sup>304</sup> Today, it seems that *Realpolitik* has defeated these concerns. Many so-called ‘mixed’ or hybrid tribunals have been established in several States.<sup>305</sup> The

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81ac8c/): “The adoption of an international treaty, by itself, does not necessarily prove that states consider the content of that treaty to express customary international law”.

<sup>300</sup> Grover, 2017, p. 392, see above note 291.

<sup>301</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th. ed., Oxford University Press, 2020, p. 75 with mn. 193 and fn. 434.

<sup>302</sup> Robert Cryer, “International Criminal Law vs. State Sovereignty: Another Round?”, in *European Journal of International Law*, 2005, vol. 16, no. 5, pp. 979, 992. See in more detail Heinze, 2022, mn. 26, see above note 96.

<sup>303</sup> ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1, para. 227 (<http://www.legal-tools.org/doc/874381/>).

<sup>304</sup> Gerhard Werle and Andreas Zimmermann, “Foreword”, in *id.* (eds.), *The ICC in Turbulent Times*, T.M.C. Asser Press, Springer, The Hague, Berlin, 2019, p. ix.

<sup>305</sup> See in more detail with an analysis of the categories ‘mixed’, ‘hybrid’ or ‘internationalized’ and a list of tribunals including updated case law: Kai Ambos, *Internationales Strafrecht*, 5th. ed., Beck, Munich, 2018, para. 6 mn. 42 ff.; *id.*, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, 2016, pp. 30 ff. and

tribunals are either part of a transitional UN administration ('United Nations Mission in East Timor', UNTAET) or of a regional organization (the UNMIK and EULEX Chambers for Kosovo, now Kosovo Specialist Chambers), based on a bilateral agreement with the UN (Special Tribunal for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, STL) or a regional organization (for example, with the AU in the case of the Extraordinary African Chambers in the Senegalese Courts or with the EU in case of the KSC) or on legislative provisions adopted by an occupying power (Iraq), whereby in the latter case one should speak more precisely of an 'internationalized national tribunal'.<sup>306</sup> Purely national tribunals for international crimes were created in Bangladesh, Colombia, CAR and Uganda with the International Crimes Division in 2011.

Thus, a parallel existence of the ICC and other international criminal tribunals and mechanisms is possible, both conceptually (Article 10 of the ICC Statute) and practically. This also applies to other treaties besides the ICC Statute. Take, for instance, the initiative for a Crimes Against Humanity Convention, launched in 2010.<sup>307</sup> Delegations expressed concerns as to a conflict between an envisaged definition of crimes against humanity and the existing definition in Article 7 of the ICC Statute.<sup>308</sup> However, this con-

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*Volume I: Foundations and General Part*, 2nd. ed., Oxford University Press, 2021, pp. 62 ff. On case law, see also Anna Meijknecht, "Hague Case Law: Latest Developments", in *Netherlands International Law Review*, 2020, vol. 67, no. 3, pp. 581–583. For a detailed analysis of both governmental and managerial problems of these tribunals, see Sergey Vasiliev, "Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry", in Bergsmo *et al.*, 2020, pp. 483 ff., see above note 3.

<sup>306</sup> The systematization follows Ambos, *ibid.*

<sup>307</sup> See Crimes Against Humanity Initiative, "Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity", February 2012 (available on its web site).

<sup>308</sup> UN General Assembly, Official Records, seventy-second session, UN Doc. A/C.6/72/SR.18, 14 November 2017, para. 87 (delegation Australia):

His delegation welcomed the draft articles' contribution to complementing the legal framework set out in the Rome Statute of the International Criminal Court for dealing with crimes against humanity. Importantly, the definition of crimes against humanity in the draft articles was taken directly from the Rome Statute, and in the general commentary to the draft articles it was emphasized that the draft articles avoided any conflicts with States' obligations under the Rome Statute;

UN General Assembly, Official Records, seventieth session, UN Doc. A/C.6/70/SR.22, 23 November 2015, para. 130 (delegation Japan):

The current work should avoid any legal conflicts with the obligations of States arising under the constituent instruments of international courts or tribunals, including the In-

flict would be solved by Article 10. Strictly speaking, there is a double reservation clause, due to the inclusion of Article 2(3) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity: “This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law”.<sup>309</sup> This provision is similar to Article 1(2) of the 1984 Convention Against Torture, which provides: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”. The Comment of the International Law Commission stresses the similarity of the provision with Article 10.<sup>310</sup>

### **2.3.11. Achievements and Challenges – The Court’s Kantian Ideal and (Neo-)Grotian Tradition**

The mothers and fathers of the ICC promoted the idea of the progressive development of international criminal justice that may go beyond the ICC Statute. An open engagement with the Court’s achievements and challenges is thus warranted. It is the theme of this volume and was the topic of Judge Schmitt’s closing remarks at the Nuremberg Forum. His remarks are reproduced in this volume.<sup>311</sup> Schmitt connected the common themes of the Nu-

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international Criminal Court. Article 7 of the Rome Statute was an appropriate basis for defining crimes against humanity, considering that it had been accepted by more than 120 States parties to the Rome Statute.

See also Kai Ambos, “The Crime of Aggression after Kampala”, in *German Yearbook of International Law*, 2010, vol. 53, p. 463; *id.*, “Crimes Against Humanity and the ICC”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2011, pp. 279–304; Elies van Sliedregt, “Criminalization of Crimes Against Humanity under National Law”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 4, pp. 729–730.

<sup>309</sup> Report of the International Law Commission, seventy-first session (29 April–7 June and 8 July–9 August 2019), General Assembly Official Records, seventy-fourth session, Supplement No. 10, UN Doc. A/74/10, 2019, p. 13 (“Report of the International Law Commission, 2019”) (<http://www.legal-tools.org/doc/6335rp/>). See in more detail Marina Aksenova, “Solidarity as a Moral and Legal Basis for Crimes Against Humanity: A Durkheimian Perspective”, in Marina Aksenova et al. (eds.), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches*, Hart, Oxford et al., 2019, pp. 73, 79–81.

<sup>310</sup> Report of the International Law Commission, 2019, p. 46, see above note 309; General Assembly Official Records, seventieth session, UN Doc. A/C.6/70/SR.22, 23 November 2015, para. 31 (delegation New Zealand): “It noted that article 10 of the Rome Statute contained a similar provision and that the draft article did not attempt to elaborate a new definition of such crimes”. See generally Heinze, 2022, mn. 24, see above note 96.

<sup>311</sup> See Chapter 26 in this volume.

remberg Forum: on the one hand, the Grotian or Neo-Grotian tradition of solidarity between sovereign States, reflected by withdrawal declarations, co-operation,<sup>312</sup> the demand for State support and, of course, complementarity and Article 17. On the other hand, a Kantian promotion of the rule of law and the protection of rights.<sup>313</sup> After all: if the conception of the ICC is viewed as an expression of the intention to get the cycle of international universalist movements going (see above Section 2.3.9.2.), the current attacks against the Court and nationalist movements all over the world can be seen as another recession. In such times, it is worth looking back at those who first provided an exit strategy to the *perpetuum mobile* of hegemony and armed conflict, and Kant was one of them.

Schmitt forged a bridge between the beginnings of international criminal law and its future, between the mothers and fathers of the ICC Statute and those who are, in his view, the hope for a future Court: young generations of students who take part in ICC moot court competitions such as the Nuremberg Moot Court, where students all over the world participated.

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<sup>312</sup> The fact that States remain the key actors in co-operation in criminal matters reflects a Grotian solidarist international society, see Jason Ralph, “International Society, the International Criminal Court and American Foreign Policy”, in *Review of International Studies*, 2005, vol. 31, no. 1, pp. 27, 32.

<sup>313</sup> According to Kant:

[the] universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law [*Gesetz*], which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation;

Immanuel Kant, *The Metaphysics of Morals*, translation by Mary J. Gregor, Cambridge University Press, 1991, p. 56 (emphasis added). Furthermore,

if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then *nothing is more natural* than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves.

Immanuel Kant, “Perpetual Peace: A Philosophical Sketch”, in *ibid.*, 1991, pp. 93 ff. (p. 351), see above note 34, emphasis added. With this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an ‘international rule of law’, Wade L. Huntley, “Kant’s Third Image: Systemic Sources of the Liberal Peace”, in *International Studies Quarterly*, 1996, vol. 40, no. 1, pp. 45, 49; Alec Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe”, in *Global Constitutionalism*, 2012, vol. 1, no. 1, p. 58; Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, pp. 334, 345.

The final section of the chapter is reserved for a word on the Palestine decision of the ICC mentioned at the outset:<sup>314</sup> this is not the place to address the merits of the decision, others have already done this with analytic brilliance.<sup>315</sup> However, the methodology of the decision goes directly to the theme of the book and is overlooked in the comments on the decision: apart from some preliminary questions raised by *amici curiae* and addressed by the majority of the Chamber,<sup>316</sup> the Chamber was asked to answer the questions of “whether Palestine can be considered ‘[t]he State on the territory of which the conduct in question occurred’ within the meaning of article 12(2)(a) of the Statute (the ‘First Issue’)”; and what the “territorial jurisdiction of the Court in the present Situation (the ‘Second Issue’)” was.<sup>317</sup> As mentioned above, the majority of the Chamber clarified mantra-like that its decision was made for the purpose of the application of the ICC Statute only. I have demonstrated that the ICC Statute is a self-contained system, see Article 10. Thus, the interpretation of Article 12 is Janus-faced: backward-looking with regard to the interpretation of the term ‘State’; forward-looking with regard to the *effect* of the interpretation (with the result that the effect is limited to the ICC Statute). It is all too easy to fall into the methodological trap of treating both questions synonymously. From this trap there can be no escape, since it turns a question of interpretation into a political decision about statehood. And yet, it is the trap that defines the future of the ICC, since it is installed right in front of its doors. The temptation to turn the ICC into Atlas, who carries the world of anti-impunity, is hard to resist. Bemba’s acquittal on appeal was the latest proof of this temptation.<sup>318</sup> This temptation can be resisted through a better acknowledgment of the limits international criminal law poses on the numerous goals of the ICC – “deontic limits”, as Robinson named it.<sup>319</sup> And through

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<sup>314</sup> See above Section 2.3.3.2.

<sup>315</sup> Claus Krefß, “Der Internationale Strafgerichtshof hat sich für zuständig erklärt”, in *Frankfurter Allgemeine Zeitung*, 11 February 2021, p. 6; Ambos, 2021, see above note 93.

<sup>316</sup> ICC, *Situation in the State of Palestine*, Decision, 5 February 2021, paras. 53 *et seq.*, see above note 91.

<sup>317</sup> *Ibid.*, para. 87.

<sup>318</sup> See above note 44.

<sup>319</sup> Darryl Robinson, *Justice in Extreme Cases*, Cambridge University Press, 2020, p. 3 and *passim*. Thereto the book symposium on *OpinioJuris*: Carsten Stahn, “Justice in Extreme Cases Symposium: ‘One Must Imagine Sisyphus Happy’ – On the Liberating Potential of Robinson’s Coherentist Approach to International Criminal Justice”, in *OpinioJuris*, 30 March 2021 (available on its web site); Elies van Sliedregt, “Justice in Extreme Cases Symposium: A Response to Darryl Robinson”, in *OpinioJuris*, 30 March 2021 (available on its

an improvement of criminal law theory in the field of international criminal law.<sup>320</sup> The theme of this volume is the past, present and future of the ICC. Taking the Palestine decision and its reception as an example, all three elements are constitutive of this decision: thanks to the foresight of the drafters of the ICC Statute, it contains (sometimes technical) interpretation rules, source rules and reservation clauses that prevent observers and others from reading into a judgment some sort of binding force for international law.<sup>321</sup> That is the element ‘past’. The majority of PTC I has applied these rules.<sup>322</sup> This is the element ‘present’. Finally, when both elements are taken seriously upon the perception of the ICC and its mandate, its future will be bright.

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web site); Adejoké Babington-Ashaye, “Justice in Extreme Cases Symposium: When the Pendulum Swings the Wrong Way—A Coherentist Approach to Preventing Miscarriages of Justice”, in *OpinioJuris*, 31 March 2021 (available on its web site); Liana Minkova, “Justice in Extreme Cases Symposium: An Invitation to Think about the Way We Think in International Criminal Justice”, in *OpinioJuris*, 31 March 2021 (available on its web site); Harmen van der Wilt, “Justice in Extreme Cases Symposium: Some Observations on the ‘Genius of Command Responsibility’, as Understood by Darryl Robinson”, in *OpinioJuris*, 1 April 2021 (available on its web site); Saira Mohamed, “Justice in Extreme Cases Symposium: The Harms of the Derelict Commander”, in *OpinioJuris*, 1 April 2021 (available on its web site); Darryl Robinson, “Justice in Extreme Cases: Reflections by the Author”, in *OpinioJuris*, 2 April 2021 (available on its web site).

<sup>320</sup> I have called this ‘dogmatisizing’, see in detail Heinze, 2020, pp. 155–255, see above note 185.

<sup>321</sup> See above Section 2.3.10.3.

<sup>322</sup> ICC, *Situation in the State of Palestine*, 5 February 2021, paras. 88 *et seq.*, see above note 316.

**PART I:**  
**STOCKTAKING: LOOKING BACK**  
**AND LOOKING AHEAD**



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## Is Power or Reason the Way to Peace?

**Benjamin B. Ferencz\***

It was in Courtroom 600 of the Palace of Justice in Nuremberg that on 21 November 1945 Justice Robert H. Jackson, on leave from the United States ('US') Supreme Court, made the opening statement for the Prosecution:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>1</sup>

The Nuremberg defendants were, in fact, given the kind of trial, which they never gave to anyone. The International Military Tribunal ('IMT') held that "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil

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\* **Benjamin B. Ferencz** graduated from the Harvard Law School in 1943 and served during the Second World War as a combat soldier and war crimes investigator assigned to General Patton's Third Army headquarters. In 1947, he served as Chief Prosecutor for the United States in the *Einsatzgruppen* case, where 22 high-ranking German officers were convicted for murdering over a million innocent men, women, and children simply because they were Jews or others whom the Nazis considered undesirable. Mr. Ferencz's opening statement was emblematic of his life's work as an advocate for justice and the international rule of law: "Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law." He has lectured and written extensively on the need for a permanent international criminal court and outlawing the illegal use of force. Currently in his 101st year, he remains active in his pursuit of a more just and humane world under the rule of law. Further information is available on the BenFerencz.org web site.

<sup>1</sup> Opening Statement of the Prosecutor, Nuremberg, 21 November 1945, reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 - 1 October 1946, vol. 2, Nuremberg, 1947, p. 99 (<http://www.legal-tools.org/doc/3c08b1/>).

of the whole”.<sup>2</sup> It is common sense that crime is committed by individuals and the leaders who are responsible are the ones who should be held accountable in a court of law.

On 26 June 1945, the Charter of the United Nations (‘UN’) was signed. The declared goal of “We the People” was “to save succeeding generations from the scourge of war”.<sup>3</sup> In 1946, the US President and the first General Assembly of the UN affirmed the principles of the Nuremberg trials (“Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”)<sup>4</sup> and set in motion a number of committees designed to effectuate those principles.

The United Nations Security Council was entrusted with the responsibility to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to decide what action is required to maintain international peace and security.<sup>5</sup> Unfortunately, some of the permanent members of the Security Council were more concerned with protecting their own or national interests rather than world peace. The Council’s failure to do its job has cost the world dearly.

Nations that were allied in war became adversaries in peace. Progress toward a rational world order was put on ice by the Cold War. In what was known as the Mainau Declaration of 1955, 52 Nobel Laureates warned: “All nations must come to the decision to renounce force as a final resort. If they are not prepared to do this, they will cease to exist”.<sup>6</sup> The world paid no attention. Disputing States feared to submit themselves to outcomes they could not foresee or control.

Many UN declarations called for the protection of human rights on an international scale. What was declared in principle was often ignored in practice. There were many sceptics who believed that an International

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<sup>2</sup> International Military Tribunal, Nuremberg, Judgement, 1 October 1946, in *American Journal of International Law*, 1947, vol. 41, pp. 172–186 (<http://www.legal-tools.org/doc/45f18e>).

<sup>3</sup> UN Charter, 24 October 1945, Preamble (<http://www.legal-tools.org/doc/6b3cd5/>).

<sup>4</sup> Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, UN Doc. A/RES/95(I), 11 December 1946 (<http://www.legal-tools.org/doc/bb7761/>), in *Yearbook of the United Nations 1946–47*, New York, 1947, pp. 256 ff.

<sup>5</sup> Chapter VII, Article 39 of the UN Charter, see above note 3.

<sup>6</sup> Mainau Declaration, 15 July 1955, cited in Linus Pauling, “Science and Peace”, Nobel Lecture, 11 December 1963, reprinted in *The Center Magazine*, November-December 1965, p. 11.

Criminal Court ('ICC') was not necessary and would never, and should never, come into existence. It was only when tensions began to be reduced that progress toward an ICC became possible.

A conference held in Rome in June 1998 brought nations together in an effort to reconcile their many differences concerning a treaty creating such a Court. I addressed the assemblage before its opening, noting that I was speaking for those who could not speak: the victims. I confessed that I had no authorization except my heart.<sup>7</sup> The assembled delegations of more than a hundred nations, after much bickering and evasions, voted by a wild ovation of 120 in favour and seven against to accept a revised Statute. The United States was among the few major powers who opposed the Court.

Despite the overwhelming wish of almost all nations, those who oppose the rule of law have insisted upon new hurdles that must be overcome before the ICC can act on the crime of aggression. It is not difficult for good lawyers to find objections to clauses their clients do not wish to accept. Whether the ICC will ever be able to charge major powers with responsibility for the supreme crime remains very much an open question. Those opposed to the Court's aggression jurisdiction have seemingly found a problem for every proposed solution.

To overcome what has been an insurmountable obstacle for over 70 years, I have suggested that we add a new approach to deter aggressors. The Rome Statute of the International Criminal Court ('Rome Statute') has jurisdiction to try defendants for crimes against humanity. In addition to such offenses as murder, rape, and torture, the Rome Statute covers "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health".<sup>8</sup> Every war that is not in self-defense or authorized by the mandate of the Security Council is a crime against humanity and should be condemned as such. No prior approval by the Security Council is required. The recent practice by US immigration officers snatching little children away from their parents who lack requisite immigration permits is another crime against humanity that deserves condemnation.

In defiance of the sceptics, the ICC began functioning in The Hague in 2002. It is a prototype that is in its earliest stages and it is not surprising

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<sup>7</sup> Benjamin B. Ferencz, "Remarks in Rome, 1998", July 1998 (available on his web site).

<sup>8</sup> Rome Statute of the International Criminal Court, 17 July 1998, Article 7(1)(k) (<http://www.legal-tools.org/doc/7b9af9/>).

that it has encountered a number of problems. Many states are unwilling to co-operate with a court that seeks to hold accountable those national leaders that are responsible for atrocities. Investigators must know the local language and customs. Witnesses frequently fear to testify, and a host of similar legal and practical difficulties present challenges that the ICC must overcome in order to more effectively fulfill its mandate to help end impunity for the gravest crimes known to humankind.

It may be hoped that, in time, such problems will be overcome, as nations recognize that their own security may be jeopardized without the protective shield of an independent tribunal seeking to deter the crimes. Perfection should not be expected. You cannot kill an ideology with a gun. The heart and mind must reach out for a more humanitarian world.

I was 27 years old when I served as Chief Prosecutor at Nuremberg in the *Einsatzgruppen* trial.<sup>9</sup> When the ICC tried its first case, I was honoured to make the closing remarks for the Prosecution.<sup>10</sup> I was then 91 years old. War has been glorified for centuries and hallowed traditions do not change quickly.

I very much regret that the United States, which was in the forefront in creating the United Nations, the IMT at Nuremberg and the subsequent trials there, seems to have abandoned its respect for the rule of law. My supreme commander in World War II was General Dwight D. Eisenhower, who led the victorious allied forces. When he became US President, he warned, in 1958: “In a very real sense the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law”.<sup>11</sup>

The United States is a great democracy, and it is unavoidable and desirable that its citizens would have different opinions on war and peace. The political climate fluctuates. The vast majority is content to live in peace and harmony with a reasonable standard of living and time to enjoy sports, music and other diversions. Appealing to minority views can often make the difference between political victory and defeat. Voters are often swayed by slogans that appeal to their particular point of view. Politicians

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<sup>9</sup> US Military Tribunal at Nuremberg, *US v. Ohlendorf et al.* (Einsatzgruppen case), 10 April 1948, Case no. 9 (<http://www.legal-tools.org/doc/ca2575/>).

<sup>10</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Transcript, 25 August 2011, ICC-01/04-01/06-T-356-ENG, p. 50 ff. (<http://www.legal-tools.org/doc/01302c/>).

<sup>11</sup> Andrew Glass, “Eisenhower proclaims ‘Law Day’, May 1, 1958”, in *Politico*, 5 January 2012.

are quick to take advantage of a gullible public. Small percentages in the popular vote can have a huge impact on political outcomes; thus, divergent views on sensitive political matters can have a stifling effect.

The US policy regarding an ICC has fluctuated over time. After World War II, in which over 50 million people were killed, the idea of an ICC to hold the criminals accountable and ensure peace had great public appeal and support. With the passage of time and emergence of the Cold War, support for judicial settlements waned and nations went back to killing as usual. Nevertheless, the UN Charter ideals contained in the plan for a more tranquil world governed by law remain alive. The decisive Court is the Court of public opinion. It will be up to the new generations to build the institutions necessary to maintain peace.

Unfortunately, the current US position seems to prefer war to law. Some administrations supported the idea of an ICC, but were hesitant about taking a strong stand for fear of antagonizing those that were opposed. It should be recalled that no treaty is binding on the United States without approval by two-thirds of the US Senate, and such approval is not normally easily achieved unless there is broad political support.

Former US Senator Jesse Helms, a staunch conservative from North Carolina, and the chairman of the US Senate Foreign Relations Committee from 1995 to 2001, was determined to block any movement supportive of the ICC. Among his protégés was John Bolton. Helms is reputed to have referred to Bolton as “the kind of man with whom I would want to stand at the gates of Armageddon”. If it is Armageddon they want, undermining the rule of law in international affairs may well be a way to get there.

By contrast, Bill Clinton, US President from 20 January 1993 to 20 January 2001, was a proponent of the ICC. In one of his last official acts, he sent US Ambassador-at-Large for War Crimes Issues, David Scheffer, to sign the treaty by which the Court would be established. Despite the fact that the signature would not bind the US to the treaty without ratification by the Senate, and despite unresolved US concerns about how the Court might operate, Clinton felt the treaty signing was important:

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the 31 December 2000 deadline established in the Treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war

crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come. The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership.<sup>12</sup>

With the election of George W. Bush, the pendulum of US policy on the ICC swung dramatically in the opposite direction. On 6 May 2002, the Bush Administration repudiated the US signature to the ICC Statute. It was an unprecedented affront. The repudiation was effected by none other than John Bolton, at the time, Under Secretary of State for Arms Control and International Security, who sent a letter to the UN Secretary-General, Kofi Annan, stating that “the United States does not intend to become a party to the treaty”, and that, because of this, “the United States has no legal obligations arising from its signature on December 31, 2000”.<sup>13</sup>

On 10 September 2018, in a speech before the politically conservative Federalist Society in Washington, D.C., Bolton, who at that time served as the National Security Advisor of the United States, addressed the US policy toward the ICC. He denounced the Court as being “outright dangerous”, “fundamentally illegitimate”, and “an assault on the constitutional rights of the American people and the sovereignty of the United States”.<sup>14</sup> He declared: “We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us”.<sup>15</sup> He went on to declare that US President Trump “will not allow other nations to dictate our means of self-defense”, concluding that “in every decision we make, we will put the interests of the American People FIRST”.<sup>16</sup>

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<sup>12</sup> “Clinton’s Words: ‘The Right Action’”, in *The New York Times*, 1 January 2001.

<sup>13</sup> US Department of State, “International Criminal Court: Letter to UN Secretary General Kofi Annan”, 6 May 2002 (<http://www.legal-tools.org/doc/70cf17/>).

<sup>14</sup> The entire speech is available in Matthew Kahn, “National Security Adviser John Bolton Remarks to Federalist Society”, in *The Lawfare Blog*, 10 September 2018 (available on its web site).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

In short: the United States of America *über alles* (America over everything else)!

More recently, President Trump, by way of an Executive Order dated 11 June 2020 and supported by key cabinet members, demonstrated continuing contempt for the Court. It imposed travel and economic sanctions on several of its key personnel, including its Prosecutor, Fatou Bensouda. These sanctions were designed to cripple the effective functioning of the Court; thankfully, they have been withdrawn by the administration of President Joe Biden.

At Nuremberg, the esteemed American Prosecutor, Robert Jackson made clear that international law must be applied to all countries equally, including “those who sit here now in judgment”. The American people were proud to uphold rules of law which are vital to a civilized society. We should be ashamed of positions taken by the United States which fail to live up to our historically traditional support for the rule of law. International law, equally applied, is the way to world peace.

To have a peaceful society, three things are required: (i) laws to define what is permissible; (ii) courts to determine if the laws have been violated; and (iii) a system of effective enforcement. We have made good progress on the first two points, but the enforcement arm is still lacking. There must be a change of heart before there is a change of mind. It must be recognized that compromise is not cowardice and that co-operation and understanding of other points of view are essential components for peace in the world. In this age of new technology, the presence of cyberspace weapons is more a threat than a safeguard. We must learn to respect the Universal Declaration of Human Rights. There is an urgent need for new thinking on every level of education.

Is power or reason the way to peace? The American public has to decide whether to accept the rantings of those who demonstrate contempt for the rule of law or the advice of US President Dwight Eisenhower.



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# Justice without Fear or Favour? The Uncertain Future of the International Criminal Court

Leila Nadya Sadat\*

## 4.1. Introduction

On 17 July 1998, a Statute for a new, permanent, International Criminal Court ('ICC' or 'Court') was adopted by the international community in an emotional vote of 120 to seven, with 21 States abstaining.<sup>1</sup> The vote was, for many, unexpected, for the road to the establishment of the Court had been long. Indeed, when the Diplomatic Conference opened in Rome on 15 June 1998, it was unclear whether it would lead to a concrete outcome. Twenty-three years later, the Court has 123 States Parties, permanent premises have been built, dedicated, and occupied, multiple trials have been completed, and important appeals decisions have been handed down.

This chapter briefly explores the efforts that led to the Court's establishment in 1998, outlines the basic structure and operations of the Court, and elaborates upon some of the many challenges it faces as it begins its third decade. The chapter concludes that the Court is a relatively fragile institution operating in an increasingly difficult geopolitical environment. At the same time, the need for justice and the values embodied in its establishment, especially the Nuremberg Principles codified by the International Law Commission ('ILC') in 1950, remain critically important to humane

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<sup>1</sup> Leila Nadya Sadat and S. Richard Carden, "The New International Criminal Court: An Uneasy Revolution", in *Georgetown Law Journal*, 2000, vol. 88, no. 381, pp. 383–460. For a fuller treatment of the issues raised in this Chapter, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016; Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Brill, Ardsley, New York, 2002.

global governance and the maintenance of international peace, security, and the rule of law. These values are, like the Court itself, being challenged. Resurgent nationalism and the rise of authoritarian leaders opposed to the Court and the cosmopolitan vision of international law and global governance it represents are casting a shadow over the Court's future and may ultimately prevent the Court's prosecutors and judiciary from fulfilling their statutory obligations of independence "without fear or favor".<sup>2</sup> To avoid this result, the Court's Assembly of States Parties ('ASP') should continue to promote universal ratification of the Rome Statute and aggressively protect the independence of the Court's organs and personnel from external pressure, while, at the same time, undertaking necessary reforms of the Statute and the Court's operations.

## 4.2. The Road to Rome

### 4.2.1. Historical Development

The notion that a criminal court established by States could try individuals accused of committing crimes under international law was too radical for most statesmen – and even most scholars – in the early twentieth century. At the end of World War I, the Treaty of Versailles provided that a "special tribunal" would try Kaiser William II of Hohenzollern for the "supreme offence against international morality and the sanctity of treaties".<sup>3</sup> However, the American members of the commission established to ascertain responsibility for the war dissented and the Netherlands refused to extradite the Kaiser. Following the war, experts convened by the Committee of Jurists of the League of Nations, the International Association of Penal Law, and the International Law Association proposed the creation of a permanent international criminal court. These ideas did not immediately bear fruit, for some continued to maintain that the creation of a court to try individuals was an affront to State sovereignty, and to the 'right' to be judged under domestic law and by one's countrymen. They also argued that heads of state could not be liable to the international community but were accountable only to their own citizens, and noted that there was no international criminal code with which potential defendants could be charged. Fi-

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<sup>2</sup> ICC, "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the situation in Palestine", 3 March 2021 ('Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine').

<sup>3</sup> Treaty of Versailles, 28 June 1919 (<http://www.legal-tools.org/doc/a64206/>). See also William A. Schabas, *The Trial of the Kaiser*, Oxford University Press, 2018.

nally, arguments were raised suggesting that the Court might not only fail to prevent war, but make matters worse, as lawyers would “begin a war of accusation and counter accusation and recrimination”, preventing soldiers and sailors on opposite sides from shaking hands and settling matters peaceably.<sup>4</sup>

#### 4.2.2. The Nuremberg Precedent and Principles

It was only with the decision of the Allies to conduct trials after World War II that the international criminal court project developed momentum. The Allies announced their intention to hold trials in declarations issued at St. James in 1942 and Moscow in 1943, but convening a trial rather than simply executing captured Axis prisoners was not a foregone conclusion. Winston Churchill wanted the Nazi leaders executed, and President Roosevelt’s cabinet was divided. Morgenthau, Secretary of the Treasury, called for the execution of ‘German arch-criminals’; Stimson, Secretary of War, advocated for trials.<sup>5</sup> Stimson’s view prevailed, and the four allied powers negotiated and adopted, on 8 August 1945, the Charter of the International Military Tribunal at Nuremberg (‘IMT Charter’ or ‘Charter’).<sup>6</sup> The Charter provided for the trial of the “major war criminals of the Axis powers”, and Article 6 set out its jurisdiction over three offenses: crimes against peace, war crimes, and crimes against humanity.<sup>7</sup> Twenty-three men were indicted, 22 were tried, 19 were convicted, and three were acquitted. Twelve were sentenced to death and executed by hanging. The remainder received prison sentences ranging from 10 years to life.<sup>8</sup>

Although the proceedings were sometimes criticized as ‘victor’s justice’ given that only Germans stood trial before a bench of Allied judges,

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<sup>4</sup> International Law Association, “Report of the Permanent International Criminal Court”, 5–11 August 1926, p. 154 (‘ILC 1926 Draft Statute’); Leila Sadat, “The Proposed Permanent International Criminal Court: An Appraisal”, in *Cornell International Law Journal*, 1996, vol. 29, no. 3, p. 672 (formerly Wexler) (discussing the International Law Association draft of 1926).

<sup>5</sup> Whitney Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946*, Texas A&M University Press, 1999, pp. 9–24.

<sup>6</sup> *Ibid.*

<sup>7</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, Article 6 (‘IMT Charter’) (<http://www.legal-tools.org/doc/844f64/>).

<sup>8</sup> International Military Tribunal, Nuremberg, Judgement, 1 October 1946, in *American Journal of International Law*, 1947, vol. 41, no. 1, p. 333 (‘Nuremberg Judgment’) (<http://www.legal-tools.org/doc/45f18e>).

their relative procedural fairness, and the fact that 23 nations ultimately ratified the Nuremberg Charter, helped to ensure their continued importance and legacy.<sup>9</sup> Moreover, the ILC was asked to codify the core principles of the IMT Charter and judgment by the newly created United Nations ('UN') General Assembly in 1947.<sup>10</sup> These included responsibility under international law for crimes against peace, war crimes, and crimes against humanity; provided that neither internal law (Principle 2) nor official position as Head of State or responsible government official relieved an individual from criminal responsibility (Principle 3); and that superior orders did not provide a defense, provided a moral choice was in fact possible (Principle 4).<sup>11</sup>

#### 4.2.3. The Tokyo Trial

Following Japan's unconditional surrender, a tribunal similar to the IMT at Nuremberg was established by proclamation of the Supreme Commander of the Allied Powers, General Douglas MacArthur, as modified by the Far Eastern Council (on which the four Allied Powers as well as China, Australia, Canada, the Netherlands, the Philippines and New Zealand sat).<sup>12</sup> The Charter of the Tokyo Tribunal (also known as the International Military Tribunal for the Far East or the 'IMTFE') largely tracked the Nuremberg Tribunal, although the bench was enlarged to eleven members (the members of the Far Eastern Commission ('FEC') members as well as India).<sup>13</sup> The IMTFE tried 28 Japanese military and political leaders. Seven were sentenced to death, three died of natural causes or were found mental-

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<sup>9</sup> On questions of retroactivity and selectivity see Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in *European Journal of International Law*, 2010, vol. 21, no. 4, pp. 1085–1102.

<sup>10</sup> Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, UN Doc. A/RES/177(II), 21 November 1947 (<http://www.legal-tools.org/doc/57a28a/>). See also Principles of International Law Recognized in the Charter of Nuremberg and in the Judgment of the Tribunal, 1950 ('Principles of International Law Recognized in the Charter of Nuremberg and in the Judgment of the Tribunal, 1950') (<http://www.legal-tools.org/doc/5164a6/>).

<sup>11</sup> Principles of International Law Recognized in the Charter of Nuremberg and in the Judgment of the Tribunal, see above note 10.

<sup>12</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008, p. 17.

<sup>13</sup> National Diet Library (Japan), "Incoming Message to CINCAFPAC [MacArthur] from Washington (War), nr WCL 32355 [Communiqué of Moscow Conference, December 27, 1945]", 28 December 1945.

ly unfit, and 18 received prison sentences.<sup>14</sup> The proceedings resulted in a lengthy judgment and a stinging dissent by the Indian judge who objected to the exclusion of allied crimes and the lack of judges from the vanquished nations on the bench,<sup>15</sup> allegations that were compounded by the doubtful procedural fairness of the trial itself.<sup>16</sup> Thus, unlike the IMT, although the IMFTE impacted Japanese views of the war, it had little legacy effect in the West until recently.<sup>17</sup>

#### 4.2.4. The United Nations' Efforts to Establish the Court

Following the war, the UN embarked upon a codification and institution-building effort using the Nuremberg Charter as a guide. The Convention on the Prevention and Punishment of Genocide ('Genocide Convention') was adopted by the UN General Assembly in 1948, and the four Geneva Conventions relating to the conduct of war followed one year later, as well as the Nuremberg Principles (1950) referenced in Part 4.2.2 above. In a resolution accompanying its adoption of the Genocide Convention, the UN General Assembly invited the ILC to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes".<sup>18</sup> Thus instructed, the ILC embarked upon a 50-year odyssey, voting initially in 1950 to support the desirability and feasibility of creating an international criminal court, only to have the question of the court's establishment taken away from it by the General Assembly, which handed it over to a Committee on International Criminal Jurisdiction composed of representatives of Member States. Alt-

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<sup>14</sup> International Military Tribunal for the Far East, Judgment, 4 November 1948, pp. 586–588 (<http://www.legal-tools.org/doc/8bef6f/>).

<sup>15</sup> International Military Tribunal for the Far East, Judgment of The Honorable Justice Pal, Member from India, 1 to 374, 1 November 1948, pp. 17–28 (<http://www.legal-tools.org/doc/712ef9/>).

<sup>16</sup> Neil Boister, "The Tokyo Military Tribunal: A Show Trial?", in Morten Bergsmo and CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 16–19 (<http://www.toaep.org/ps-pdf/21-bergsmo-cheah-yi>).

<sup>17</sup> *Ibid.*, pp. 323–327. See also Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds.), *The Tokyo Tribunal: Perspectives on Law, History and Memory*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (<http://www.toaep.org/nas-pdf/3-dittrich-lingen-osten-makraiova>).

<sup>18</sup> Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN Doc. A/RES/260(III)B, 9 December 1948 (<http://www.legal-tools.org/doc/49794f/>).

though the Committee and a successor Committee produced drafts of a statute for a new international criminal court, their work was shelved as the Cold War made consensus impossible.<sup>19</sup>

In 1989, the question of an international criminal jurisdiction found its way back on the UN General Assembly's agenda with the collapse of the Soviet Union and the resulting thaw in East-West relations.<sup>20</sup> The ILC was again instructed to proceed and adopted a new version of a Draft Code of Crimes in 1991.<sup>21</sup> In 1992, the ILC established a Working Group, which produced a report laying out the basis for the adoption of an international criminal court. The UN General Assembly responded positively, and the Commission adopted a final draft statute in 1994 that served as the basic text upon which the provisions of the ICC were established.<sup>22</sup>

The ILC's 1994 draft included five categories (but not definitions) of crimes: genocide, crimes against humanity, war crimes, aggression and 'treaty crimes' that would be set forth in an annex.<sup>23</sup> It was premised on a new principle: the notion of 'complementarity', which meant that the proposed court would complement national criminal justice systems, which would have priority over cases that might otherwise come to the Court.<sup>24</sup> The 1994 draft conditioned all cases upon either the consent of the implicated State or the UN Security Council, except in cases of genocide over which the jurisdiction of the proposed court was automatic. Finally, the

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<sup>19</sup> For an analysis of the 1994 ILC Draft Statute, see Sadat, 1996, see above note 4.

<sup>20</sup> The General Assembly asked the ILC to address the "question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under the Draft Code of Crimes", International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes, UN Doc. A/RES/44/39, 4 December 1989 (<http://www.legal-tools.org/doc/32547a/>). The resolution was aimed at the illicit trafficking in narcotic drugs and other transnational crimes, *ibid*.

<sup>21</sup> Ninth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/435 and Add.1, 8 February 1991 (<http://www.legal-tools.org/doc/2e9c46/>).

<sup>22</sup> ILC, Draft Statute for an International Criminal Court, 1994 ('Draft Statute') (<http://www.legal-tools.org/doc/17ad09/>), in Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), UN Doc. A/49/10, 22 July 1994 (<http://www.legal-tools.org/doc/9596bb/>); James Crawford, "The ILC's Draft Statute for an International Criminal Tribunal", in *American Journal of International Law*, 1994, vol. 88, no. 1, pp. 140–152; Sadat, 1996, pp. 676–86, see above note 4.

<sup>23</sup> Draft Statute, Preamble and Commentary, Article 20, see above note 22.

<sup>24</sup> *Ibid.*, p. 44.

1994 draft suggested that the Prosecutor and Deputy Prosecutor could be elected on a ‘stand-by’ basis and that the judges – except for the President – would only be paid when actually sitting.<sup>25</sup>

The UN General Assembly convened an *ad hoc* committee to discuss the ILC 1994 draft, and subsequently established a Preparatory Committee to begin the difficult process – both technical and political – of developing a statute that would be acceptable to States and civil society. The Preparatory Committee, composed of representatives of UN Member States, held 15 weeks of meetings from March 1996 until April 1998,<sup>26</sup> including several inter-sessional sessions between the Committee’s six official meetings.<sup>27</sup> The text that emerged from these protracted and intense negotiations, which were closely followed by a global coalition of non-governmental organizations, was a complex document containing more than 1,300 ‘bracketed’ provisions, representing divergences of views between governments. When the Diplomatic Conference convened on 15 June 1998, it faced a herculean task: to bring the 165 States attending the conference to a consensus not only on the Court’s ultimate establishment, the desirability of which was far from unanimously agreed, but the principles under which it would operate, the crimes it would punish, and the jurisdictional reach and strength of the Court’s statute and its enforcement capabilities.

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<sup>25</sup> Sadat, 1996, pp. 695–696, see above note 4. The original concept was for a ‘stand-by’ court.

<sup>26</sup> Fanny Benedetti, Karine Bonneau and John Washburn, *Negotiating the International Criminal Court*, Brill Nijhoff, Leiden, 2014, p. 39.

<sup>27</sup> Sadat, 2000, p. 383, see above note 1. In addition to the six official meetings of the Preparatory Committee, several intersessional meetings took place, resulting in revised drafts of the Statute. See M. Cherif Bassiouni, “Historical Survey: 1919–1998”, in M. Cherif Bassiouni (ed.), *Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, New York, 1998, p. 24. The final intersessional meeting, held in Zutphen, the Netherlands, in January 1998, produced the Zutphen Intersessional Draft, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC-249/1998/L-13, 5 February 1998 (<http://www.legal-tools.org/doc/7ba9a4/>). For an excellent chronology of the Preparatory Committee process, as well as the Diplomatic Conference, see generally Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference”, in *Global Governance*, 1999, vol. 5, no. 1.

### 4.3. The Rome Diplomatic Conference of Plenipotentiaries

#### 4.3.1. Negotiations at the Rome Conference

In the summer of 1998, the text of what became the Rome Statute for the International Criminal Court ('Rome Statute') was negotiated and adopted. The Conference was held in the UN Food and Agricultural Organization building in Rome and was well-attended by States and non-governmental organizations ('NGOs'). The mood of the Conference alternated between anxiety and exhilaration as delegates took up the complex draft text that had been submitted to the Diplomatic Conference by the Preparatory Committee and attempted to achieve consensus.<sup>28</sup> The negotiations would undoubtedly have failed but for several propitious factors: first, the emergence of a group of approximately 60 'like-minded' States, which had started as a caucus in 1994 and emerged as a formal and powerful group of countries committed to the Court's ultimate establishment based upon certain core principles;<sup>29</sup> second, the emergence of a powerful NGO coalition – the Coalition for the International Criminal Court ('CICC') – which engaged in a tireless campaign in support of the Court and served a crucial information dissemination function during the Conference by providing information to small delegations that could not possibly cover the entire Conference in its various working groups, and by recounting on a daily basis in email, a newsletter, and on the radio the status of the negotiations; third, a strong commitment to the successful outcome of the Conference by key UN leaders, including then-Secretary-General Kofi Annan and Under-Secretary-General for Legal Affairs Hans Corell; fourth, the successful establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia ('ICTY') and for Rwanda ('ICTR'), which demonstrated the feasibility of conducting modern international criminal proceedings; fifth, the serendipitous good fortune of having able and experienced diplomats undertake the negotiations, most of whom had also participated in the Preparatory Committee meetings and understood each other and the issues well; and finally, generous support from the Italian government to host the

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<sup>28</sup> Author's notes. The author attended the Preparatory Committee, the Rome Diplomatic Conference and the Preparatory Commission following the Rome Statute's adoption on behalf of the International Law Association (American Branch), as Chair of the International Criminal Court Committee.

<sup>29</sup> Washburn, 2014, p. 65, see above note 26. Philippe Kirsch and John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process", in *American Journal of International Law*, 1999, vol. 93, no. 1, pp. 2–12.

Conference, cover its costs including a newly installed electronic-voting system, and ensure the Conference's successful organization.

During the negotiations, the 'complementarity principle' underlying the structure of the proposed new institution in the ILC's 1994 draft was quickly agreed upon. Less clear was whether jurisdiction would be 'inherent', meaning that States joining the treaty would automatically be subject to the proposed Court's jurisdiction; or whether they would have to opt-in to a particular case or situation before jurisdiction could attach. Many other issues faced the drafters as well, including whether the UN Security Council would act as a filter for cases coming to the Court (essentially giving the Permanent Members a veto over all future cases, which was a non-starter for most other UN Member States); whether war crimes in non-international armed conflicts and the crime of aggression would be included in the Statute; whether the Prosecutor would have independent powers of investigation or would require a referral from States or the Security Council prior to engaging the Court's investigative powers; what the organizational structure and trial procedures of the Court would be; how to accommodate the rights of victims and the interests of witnesses as well as those of defendants and the prosecution; and what the Court's relationship would be with the UN, given that it was to be created as a free-standing institution rather than as a UN organ created via an amendment to the UN Charter.<sup>30</sup> Some debates became so fractious that NGO representatives, who were generally allowed access to meetings, were asked to leave as the Conference leaders (the 'Bureau') endeavoured to achieve consensus.<sup>31</sup>

#### **4.3.2. Voting on the Statute and Its Final Adoption**

On 17 July 1998, after five weeks of difficult negotiations, the Bureau proposed a compromise text it hoped would accommodate the various positions represented at the Conference and allow the text of the Statute to be adopted by consensus. Although there was much agreement among delegates on the proposed Court's major features, a few sticking points remained. On the final day of the Conference, both India and the United States ('US') attempted to undo the Bureau's 'package' proposal by offering amendments; these were met with 'no-action' motions proposed by Ma-

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<sup>30</sup> Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results*, Springer, The Hague, 1999.

<sup>31</sup> Author's notes.

lawi and Norway, which carried overwhelmingly.<sup>32</sup> The US delegation had unsuccessfully maintained throughout the negotiations that the Statute should not permit trials of individuals without the consent of their State of nationality unless the UN Security Council referred the situation (thereby insulating any US nationals from prosecution before the Court). Not willing to accept the defeat of its amendments, the US then called for a vote on the Statute as a whole – which it lost, 120 in favour, seven opposed and 21 States abstaining.<sup>33</sup> China, Iraq, Israel, Qatar and, as indicated by various sources, Syria and Yemen joined the United States in opposing the Rome Statute. Delegates supporting the Statute – and NGO representatives – erupted in cheering and crying as the tensions of the past five weeks gave way to the realization that more than 75 years of hard work had finally borne fruit.<sup>34</sup>

#### **4.4. The Organizational Structure and Operational Features of the Court**

The negotiators of the Rome Statute created an institution almost breathtaking in its complexity and organizational structure. The Statute is divided into 13 Parts, each addressing some feature of the Court's establishment, jurisdiction or operation, in 128 articles.<sup>35</sup> The Statute is supplemented by important ancillary documents negotiated following the Rome Conference (but prior to the Statute's entry into force) including, importantly, the Elements of Crimes, the Court's Rules of Procedure and Evidence, a relationship agreement between the Court and the UN, an agreement on the privileges and immunities of the Court, and the rules of procedure for the Court's ASP that provide for the Court's management and oversight. The drafting of these ancillary documents was taken up by a Preparatory Commission composed of representatives of Member States that had signed the Final Act of the Rome Diplomatic Conference and other States which were

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<sup>32</sup> "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court", 21 July 1998, L/2889, p. 3 (<http://www.legal-tools.org/doc/458bd1/>).

<sup>33</sup> Bassiouni, 1998, pp. 31–33, see above note 27.

<sup>34</sup> Sadat, 2000, see above note 1. The vote was unrecorded, and some observers have suggested that Libya, not Syria, was the seventh 'no' vote.

<sup>35</sup> Rome Statute of the International Criminal Court, 17 July 1998, ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

invited to participate in the Rome Conference.<sup>36</sup> Like the Preparatory Committee that had prepared the draft Statute taken up in Rome, the Preparatory Commission was composed of State delegates, many of whom had represented their governments during the Preparatory Committee meetings and the Diplomatic Conference and were therefore familiar with each other and with the Rome Statute. This facilitated the work of preparing the Statute's entry into force. The Statute attained the requisite ratifications with the deposit of 11 ratifications in April 2002, bringing the total number of States Parties to 66,<sup>37</sup> and entered into force on 1 July 2002.

#### 4.4.1. Jurisdiction and Admissibility

Pursuant to Article 11(1), the Court has jurisdiction *ratione temporis* over crimes committed after the entry into force of the Rome Statute. Additionally, with respect to States ratifying the Statute after 1 July 2002, the Court has jurisdiction only over crimes committed after the entry into force of the Statute for that State, unless that State decides otherwise.

In terms of jurisdiction *ratione materiae*, although the negotiators of the Rome Statute contemplated adding many crimes to the Court's jurisdiction – including terrorism, drug trafficking, hostage-taking, and aggression – it was ultimately found preferable to begin with universal core crimes defined in treaties or customary international law rather than add treaty crimes, the universality of which could be questioned. Moreover, although there was little doubt that the crime of aggression was a 'core crime', and the Nuremberg judgment declared aggression to be "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole",<sup>38</sup> some States objected to its inclusion in the Statute.<sup>39</sup> Thus, the Rome Statute initially

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<sup>36</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10, 18 July 1998 (<http://www.legal-tools.org/doc/75f516/>).

<sup>37</sup> See Leila Nadya Sadat, "Summer in Rome, Spring in the Hague, Winter in Washington?: U.S. Policy Towards the International Criminal Court", in *Wisconsin International Law Journal*, 2003, vol. 21, no. 1, p. 575.

<sup>38</sup> Nuremberg Judgment, p. 186, see above note 8.

<sup>39</sup> Among the objectors were the United States at p. 115, Israel at p. 119, Morocco at p. 123, Turkey at p. 126 and Pakistan at p. 193: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/13, 15 June–17 July 1998 (<http://www.legal-tools.org/doc/656f32/>).

defined only three crimes: genocide (Article 6), crimes against humanity (Article 7) and war crimes (Article 8).

As a compromise between those desiring the inclusion of the crime of aggression and those opposing it, Article 5 listed aggression as one of the crimes within the Court's jurisdiction but specified that the Court could not exercise jurisdiction over aggression until it was defined by the ASP at a future time. In June 2010, the ASP held a Review Conference in Kampala, Uganda, during which a definition of aggression was agreed upon, and a new Article 8*bis* was added to the Rome Statute. However, pursuant to the text adopted, which includes two separate articles on the exercise of jurisdiction over the crime of aggression, Articles 15*bis* and 15*ter*, the Court could not exercise jurisdiction over the crime until the Kampala amendments entered into force for at least 30 States (namely, those States ratified the amendments) *and* the States Parties to the Rome Statute agreed to activate the Court's jurisdiction over aggression under the provisions of the Statute governing amendments. After difficult negotiations, the ASP activated the aggression amendments in December 2017, and they entered into force on 17 July 2018. As of this writing, 41 States have accepted them. Unlike the other crimes, however, unless the UN Security Council refers the situation to the Court, automatic jurisdiction over aggression is limited to crimes committed in the territories and by nationals of States that have ratified the amendments.<sup>40</sup>

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<sup>40</sup> The aggression amendments themselves have an 'opt-out' provision, allowing States to deprive the Court of jurisdiction over acts of aggression committed by it. Article 15*bis* (4) provides that the Court "shall not exercise its jurisdiction over the crime of aggression" in respect of a State *not* Party to the Rome Statute (Article 15*bis*(5)). When the Court's jurisdiction was activated in summer 2017, a debate ensued as to whether States Parties that have not specifically ratified the amendments *and* have not affirmatively opted out are subject to the Court's jurisdiction over the crime. As Jennifer Trahan explains, this was the position of France and the UK during the activation discussions and would require that both the aggressor and the victim State actively ratify the aggression amendments for jurisdiction to attach. Jennifer Trahan, "The Crime of Aggression and the International Criminal Court", in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful use of Force*, Cambridge University Press, 2018, pp. 319–320. Other States, led by Lichtenstein and Switzerland, argued that because the aggression amendments simply governed entry into force, which was already anticipated in Articles 12(1) and 5(2), *and* provided an explicit 'opt-out' procedure, the "default position is 'in'". See Stefan Barriga and Niels Blokker, "Entry into Force and Conditions for the Exercise of Jurisdiction: Cross Cutting Issues", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, p. 664; Dapo Akande and Antonios Tzanakopoulos, "The Crime of Aggression in the ICC and State Responsibility", in *Harvard International Law Journal*, 2017, vol. 58, pp. 33–36.

Finally, Resolution E of the Conference's Final Act provided that terrorism and drug crimes should be taken up at a future review conference, and proposals for their inclusion in the Statute have been taken up by working groups of the ASP.<sup>41</sup> However, they have never been included in the Court's jurisdiction and progress on this issue has been slow.<sup>42</sup>

#### 4.4.2. Preconditions on the Exercise of the Court's Jurisdiction

Some of the most difficult features of the Court's Statute to negotiate were the provisions on how the Court's jurisdiction could be activated, and when a case would be admissible before the Court. As noted above, some States wished to be able to opt out of the Court's jurisdiction in cases involving their nationals, or to require all cases to be filtered through the UN Security Council. Conversely, civil society and, eventually, the members of the like-minded Group of States wanted a Court with a simple and automatic jurisdictional regime rather than a Court *à la carte*.<sup>43</sup> The compromise is found in Articles 12–15, which set forth the 'pre-conditions' for the Court's exercise of its jurisdiction. These provisions allow referrals to be made either by a State Party, by the UN Security Council, or by the Prosecutor on their own initiative, using *proprio motu* powers. With the entry into force of the aggression amendments, the uniform jurisdictional regime of the Statute was impaired in all situations not involving referral by the Security Council, as States can opt-out of the aggression amendments if they wish, and at least some States believe they must affirmatively 'opt-in' to the Court's jurisdiction over the crime of aggression. Moreover, in situations brought to the Court by a State Party or initiated by the Prosecutor, the Court has no jurisdiction over the nationals or territory of non-party States (which was the desired US outcome at Rome with respect to all ICC crimes).<sup>44</sup>

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<sup>41</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, see above note 36.

<sup>42</sup> See, for example, the ICC ASP, "Report of the Working Group on Amendments", 9 December 2011, ICC-ASP/10/32, 2–4 (consideration of proposals on terrorism from The Netherlands and drug trafficking from Trinidad and Tobago and Belize). Progress on these amendments within the ASP has been limited to continued expressions of support by the proposing States. See "Statement by Senator The Honorable Dennis Moses, Minister of Foreign and CARICOM Affairs of the Republic of Trinidad and Tobago, at the General Debate of the Eighteenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court", 2 December 2019 (reaffirming Trinidad and Tobago's support for adding international drug trafficking to the jurisdiction of the Court).

<sup>43</sup> Sadat, 2000, p. 411, see above note 1.

<sup>44</sup> Rome Statute, Articles 15*bis*(4) and (5), see above note 35.

While there has been a great deal of discussion as to whether jurisdiction in the Statute is ‘universal’ or consent-based, it is undoubtedly the case that the prescriptive jurisdiction of the Statute is premised on the universality principle, which is why the Statute provides that the UN Security Council may refer a situation to the Court whether or not it involves crimes committed on the territory of a State Party or by a national of an ICC State Party.<sup>45</sup> However, the adjudicative jurisdiction of the Court is more limited. In cases involving a referral by either a State Party or the Prosecutor on his or her own initiative, although the universality principle does not disappear, layered upon it is a State consent regime based upon two additional principles, which are disjunctive. Under Article 12(2)(a) of the Statute, either the territorial State or the State of the accused’s nationality must be a party to the Statute or have accepted the jurisdiction of the Court. In case of a referral by the ICC Prosecutor using his or her *proprio motu* powers, an additional pre-condition is found in Article 15, which requires the Prosecutor to apply to a Pre-Trial Chamber for authorization to open an investigation before proceeding.

Two recent decisions have addressed interesting additional questions of the Court’s jurisdiction, both in response to the Prosecutor’s request. On 14 November 2019, Pre-Trial Chamber III authorized the Prosecutor to proceed with an investigation regarding the crimes against humanity of deportation and persecution allegedly committed in Myanmar, a non-State Party, against the Rohingya people because an element of those crimes had been committed upon the territory of Bangladesh, an ICC State Party. Interpreting Article 12(2)(a) of the Rome Statute, the Chamber found that the phrase “[t]he State on the territory of which the conduct in question occurred” did not require that all conduct must take place in the territory of a State Party. Rather, the Chamber found that the word ‘conduct’ described in a factual sense the *actus reus* element of the crime alleged, and, following customary international law and State practice, noted that States (and therefore the ICC) may assert jurisdiction over acts taking place outside their territory on the basis of the territoriality principle, assuming there is a link with their territory.<sup>46</sup> More recently, on 5 February 2021, Pre-Trial Cham-

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<sup>45</sup> *Ibid.*, Article 13(b).

<sup>46</sup> ICC, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic

ber I decided by majority that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. It also found that Palestine's accession to the Rome Statute – which was preceded by the adoption of Resolution 67/19 of the UN General Assembly according Palestine 'non-member observer State status' – rendered it a 'State Party' within the meaning of Articles 125(3) and 12(1) and (2) of the Statute and thereby able to confer jurisdiction upon the Court and refer situations to it.<sup>47</sup>

#### 4.4.3. Admissibility

In addition to jurisdiction, the Rome Statute requires that a case be admissible before the Court to proceed. Admissibility is linked to the principle of complementarity found in the Preamble and Articles 1 and 17 of the Statute. The ICC is envisioned as a Court of last, not first, resort, and may exercise jurisdiction only if: (i) national jurisdictions are 'unwilling or unable' to; (ii) the crime is of sufficient gravity; and (iii) the accused has not already been tried for the conduct on which the complaint is based by a State which has jurisdiction over it. Although the inclusion of the complementarity principle undoubtedly increased State support for the Court, it has made the Court's operation more difficult, and litigation regarding admissibility has complicated several of the Court's early cases and situations.

For example, in the Kenyan Situation, the ICC Prosecutor initiated his investigation under Article 15 of the Statute, claiming that Kenya was 'unwilling' (and presumably unable) to prosecute individuals who had perpetrated crimes during the post-election violence that wracked Kenya in the wake of the 2007 elections.<sup>48</sup> An investigation was authorized by Pre-Trial

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of the Union of Myanmar, 14 November 2019, ICC-01/19-27, paras. 42–62 (<http://www.legal-tools.org/doc/kbo3hy/>).

<sup>47</sup> ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021, ICC-01/18-143 (<http://www.legal-tools.org/doc/haitp3/>). Several States and scholars submitted amicus briefs on the jurisdiction question, which remains contested. ICC, *Situation in the State of Palestine*, Amicus Curiae Observations on Issues Raised by the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 16 March 2020, ICC-01/18-94 (<http://www.legal-tools.org/doc/6vqq49/>).

<sup>48</sup> ICC, Office of the Prosecutor ('ICC-OTP'), *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3 (<http://www.legal-tools.org/doc/c63dcc/>).

Chamber II in March 2010,<sup>49</sup> but nearly one year later, Kenya challenged admissibility before the ICC. Litigation ensued for several additional months. Both the Pre-Trial Chamber and the ICC Appeals Chamber ultimately concluded that the cases were admissible, finding that the Kenyan government had failed to provide sufficient evidence to substantiate that it was investigating the six suspects charged before the ICC for the crimes alleged against them.<sup>50</sup> The Appeals Chamber clarified the meaning of ‘inadmissibility’ by holding that for a case to be inadmissible under Article 17(1)(a) of the Rome Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>51</sup> For this reason, in the *Al-Senussi* case, involving the Situation in Libya, the Pre-Trial Chamber concluded that Libya was investigating Al-Senussi for the conduct with which he was charged at the ICC, and that Libya was neither unwilling nor unable to carry out the investigation. Thus, it concluded that his case was inadmissible before the ICC, although it recognized that the absence of defense counsel and the security concerns in Libya raised serious concerns about the fairness of the proceedings.<sup>52</sup> Indeed, Al-Senussi expressed a clear preference to have his

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<sup>49</sup> ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19 (<http://www.legal-tools.org/doc/338a6f/>).

<sup>50</sup> ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101 (<http://www.legal-tools.org/doc/dbb0ed/>); ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11-307 (<http://www.legal-tools.org/doc/ac5d46/>).

<sup>51</sup> ICC, *Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 31 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 39 (<http://www.legal-tools.org/doc/c21f06/>).

<sup>52</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red (<http://www.legal-tools.org/doc/af6104/>). The Appeals Chamber affirmed this decision, agreeing that Al-Senussi’s case was inadmissible, but that there might “be circumstances [...] whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice”, and therefore

case heard before the ICC, believing his trial would be fairer before an international court, and pointing out that his co-defendant, Saif Al Gaddafi, was to be tried before the ICC.<sup>53</sup> Applying the Court's prior jurisprudence, however, the Appeals Chamber affirmed Libya's admissibility challenge, leading to the result that defendants from the same situation may be tried in different fora, some at the ICC, others before national courts.

Two recent ICC situations have focused upon other aspects of admissibility. In the *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, a long dialogue between the Chambers of the Court and the Prosecutor has ensued regarding the meaning of 'gravity' in Article 17(1)(d) of the Rome Statute. On 14 May 2013, the Union of the Comoros referred the situation concerning a 31 May 2010 raid by Israeli forces on a Humanitarian Aid Flotilla bound for Gaza. In 2014, although finding that there was a reasonable basis to believe that war crimes may have been committed by Israeli forces in their interception and takeover of the *Mavi Marmara*, one of the flotilla vessels, the Prosecutor determined that the potential cases arising from the situation would not be of sufficient gravity to justify further action by the Court under Article 17(1)(d).<sup>54</sup> Comoros requested a review of the Prosecutor's decision. Pre-Trial Chamber I found the 2014 decision to be based upon a series of errors and asked the Prosecutor to reconsider the decision not to investigate.<sup>55</sup> After reviewing the evidence once more, the Prosecutor reit-

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deemed "inconsistent with an intent to bring the person to justice". ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, ICC-01/11-01/11-565, para. 3 (<http://www.legal-tools.org/doc/ef20c7/>).

<sup>53</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red (<http://www.legal-tools.org/doc/af6104/>).

<sup>54</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the "Application for Judicial Review by the Government of the Comoros", 16 September 2020, ICC-01/13-111, para. 2 (<http://www.legal-tools.org/doc/mqu8bo/>).

<sup>55</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34 (<http://www.legal-tools.org/doc/2f876c/>).

erated her position in 2017<sup>56</sup> and, again, ruling upon a request of the Comoros, the Chamber found that the Prosecutor had not properly complied with her obligations of reconsideration.<sup>57</sup> In 2019, the Appeals Chamber corrected several elements of the Pre-Trial Chamber's decision and directed the Prosecutor to again reconsider her 2014 decision, taking into account the Appeals Chamber's Judgment.<sup>58</sup> The Prosecutor did so, reaffirming her position in December 2019, and the Comoros again requested a review. In 2020, the Pre-Trial Chamber found once again that the Prosecutor's assessment of the gravity of the situation contained various errors, among them that she had not *genuinely* reconsidered her decision by failing to assign appropriate weight to the question of whether the investigation would encompass the persons who may bear the greatest responsibility for the crimes.<sup>59</sup> It also held that where the "facts are difficult to establish, information is unclear and conflicting accounts exist [...] the Prosecutor is obliged to open an investigation in order to properly assess the facts".<sup>60</sup> The Chamber found that the impact of the alleged crimes on the lives of the people in Gaza should have been taken into consideration in assessing gravity, as well as the international concern triggered by the events, and reiterated the Appeals Chamber's finding that the gravity requirement of Article 17(1)(d) is not "a criterion for the *selection* of the most serious situations and cases [...] but a requirement for the *exclusion* of (potential) cases of *marginal gravity*".<sup>61</sup> At the same time, the Chamber did not request

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<sup>56</sup> ICC-OTP, "Statement of ICC Prosecutor, Fatou Bensouda, on the Situation on registered vessels of the Union of the Comoros et al.", 30 November 2017 (<http://www.legal-tools.org/doc/10518f/>).

<sup>57</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", 15 November 2018, ICC-01/13-68 (<http://www.legal-tools.org/doc/a268c5/>).

<sup>58</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", 02 September 2019, ICC-01/13-98 (<http://www.legal-tools.org/doc/802549/>).

<sup>59</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the "Application for Judicial Review by the Government of the Comoros", 16 September 2020, ICC-01/13-111, para. 45 (<http://www.legal-tools.org/doc/mqu8bo/>).

<sup>60</sup> *Ibid.*, para. 61.

<sup>61</sup> *Ibid.*, para. 96.

reconsideration as it felt constrained by the Appeals Chamber's instruction not to direct the Prosecutor to come to a particular conclusion.<sup>62</sup>

In another ongoing admissibility review, in December 2020, the OTP closed the Preliminary Examination into the Situation in Iraq/United Kingdom ('UK') that it had begun in 2014. Like the Comoros Situation involving the attack on the *Mavi Marmara*, the Office announced that there was a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed.<sup>63</sup> However, it found that UK authorities were not unwilling *genuinely* to carry out relevant investigative inquiries and/or prosecutions under Article 17(1)(a) or that decisions not to prosecute in specific cases resulted from unwillingness *genuinely* to prosecute (Article 17(1)(b)). Although the Prosecutor expressed concern that no prosecutions had resulted from the UK's investigations, the Report concluded that the question presented in assessing admissibility is not whether the Prosecutor or a Chamber of the Court would have come to a different conclusion than the UK authorities, but "whether the facts, on their face, demonstrate an intent to shield persons from criminal responsibility" within the meaning of Article 17(2) of the Statute.<sup>64</sup>

#### 4.4.4. Immunities

As this chapter notes, the Rome Statute traces its heritage directly to the establishment of the Nuremberg and Tokyo Tribunals following World War II, the establishment of the *ad hoc* Tribunals by the UN Security Council, the 'Constitution' of the international legal order codified in the UN Charter,<sup>65</sup> and the Nuremberg Principles adopted by the ILC in 1950.<sup>66</sup> The Statute rests upon the fundamental premise that the four crimes codified therein are established and defined by international law *stricto sensu* (Nuremberg Principle 6), that "protect fundamental values of the international

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<sup>62</sup> On situation selection more generally, see Alette Smeulers, Maartje Weerdesteijn and Barbara Hola, "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance", in *International Criminal Law Review*, 2015, vol. 15, pp. 1–39.

<sup>63</sup> ICC-OTP, "Situation in Iraq/UK: Final Report", 9 December 2020.

<sup>64</sup> *Ibid.*, para. 10. Human rights groups were dismayed by the closure. See, for example, Clive Baldwin, "The ICC Prosecutor Office's Cop-Out on UK Military Crimes in Iraq", *Human Rights Watch*, 18 December 2020 (available on its web site).

<sup>65</sup> See, for example, Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, Brill, Leiden, 2009.

<sup>66</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, see above note 10.

legal community as a whole” and articulate a “*ius puniendi*” of that community.<sup>67</sup> Additionally, the Rome Statute states that all defendants are equal before it. Article 27(1) (Irrelevance of Official Capacity) provides:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

This provision codifies the customary international law rule that whatever immunities an official might have under international law before national courts cannot be pled as a bar or a defense to criminal responsibility before the ICC, *ratione materiae*. It is complemented by Article 27(2), which removes procedural immunities as well. Article 27 has been referred to as the “most profound article ever to be written into a multilateral treaty”,<sup>68</sup> and echoes the famous statement of the Nuremberg Judgment, codified in Nuremberg Principle 3, that:

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares [quoting the language] [...] *the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the*

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<sup>67</sup> Claus Kieß, “International Criminal Law”, in *Max Planck Encyclopedia of Public International Law*, 2009. See also Antonio Cassese, *International Criminal Law*, 2nd. ed., Oxford University Press, 2008; J. Paust *et al.*, *International Criminal Law: Cases and Materials*, 4th. ed., Carolina Academic Press, Durham, 2013, pp. 6–22; G. Werle and B. Burghardt, *Principles of International Criminal Law*, 3rd. ed., Oxford University Press, 2014, p. 10 (“Today there is no doubt that the Nuremberg Principles are firmly established as customary international law”).

<sup>68</sup> Prince Zeid Ra’ad Zeid Al-Hussein, “For Love of Country and International Criminal Law”, *American University International Law Review*, 2008, vol. 24, no. 4, pp. 647–664, 656.

*authority of the state if the state in authorizing action moves outside its competence under international law.*<sup>69</sup>

Although the text of Article 27 was readily agreed upon during the Statute's negotiation,<sup>70</sup> the indictment of former Sudanese President Omar Al-Bashir by the Prosecutor led to a spate of litigation and scholarly work asserting that because Sudan was not a Party to the Rome Statute, his investigation, the arrest warrant against him, and his surrender to the Court by any State, even an ICC State Party, violated customary international law due to his immunity as a Head of State. Arguments to this effect were advanced by several ICC States Parties, including Malawi, Chad, the Democratic Republic of the Congo, South Africa, and Jordan, countries to which President Al-Bashir travelled, and which refused to arrest him.<sup>71</sup> Scholars also debated whether he could be indicted and turned over to the Court, some arguing that he could but only because the UN Security Council had referred the Situation of Sudan,<sup>72</sup> others contending that even that could not serve as a basis to waive his immunity.<sup>73</sup> A third group of writers, including

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<sup>69</sup> Nuremberg Judgment, p. 221, see above note 8 (emphasis added).

<sup>70</sup> Per Saland, "International Criminal Law Principles", in Lee (ed.), 1999, pp. 189–216, p. 202, see above note 30.

<sup>71</sup> Leila Nadya Sadat, "Heads of State and other government officials before the International Criminal Court: The Uneasy Revolution Continues", in Margaret Deguzman and Valerie Oosterveld (eds.), *The Elgar Companion to the International Criminal Court*, Edward Elgar Publishing, Cheltenham, 2020.

<sup>72</sup> See, for example, Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, pp. 333–352; cf. Jean-Marc Thouvenin, "Heads of State and other Officials and the International Criminal Court: A Commentary on Article 27 of the Rome Statute of the International Criminal Court", in *Kazan University Law Review*, 2016, vol. 1, no. 1, pp. 58–75: ("the struggle against impunity for crimes that shock the conscience of humanity [...] Is a hopelessly lost cause that cardinal principle of modern international criminal law", p. 68, but also suggesting that article 27 only removes substantial immunities, not procedural (personal) immunities before the Court, without more).

<sup>73</sup> Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, pp. 315–332 (arguing that although the "ICC arrest warrant is a lawful coercive act against an incumbent head of state", because Sudan has not waived the immunities of Al-Bashir, "states parties to the Statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it"); Asad Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity", in *Chinese Journal of International Law*, 2013, vol. 12, no. 3, p. 467; Dov Jacobs, "The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015; Dire Tladi, "The ICC Decisions on Chad and Malawi: On Coopera-

this author, argued that his arrest in spite of his status as a Head of State was lawful under customary international law and the Rome Statute.<sup>74</sup> In May 2019, the ICC Appeals Chamber found that Jordan was indeed required to arrest then-Sudanese President Omar Al-Bashir when he travelled to Jordan in 2017, concluding that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court”.<sup>75</sup>

The Appeals Chamber’s judgment in *Al-Bashir* settled the application of Article 27 before the ICC. However, it has not quelled continuing efforts to move the ICC’s legal regime away from the Nuremberg Principles, particularly as regards the applicability of the law and procedure of the Statute to nationals of non-States Parties to the Court. For example, when the US argued in 1998 that the Court could not exercise jurisdiction over the nationals of non-States Parties during the treaty’s negotiation,<sup>76</sup> few agreed.<sup>77</sup> More recently, however, several countries took up the mantle of the US in the litigation involving the question of jurisdiction over the

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tion, Immunities, and Article 98”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, pp. 199–221.

<sup>74</sup> Sadat, 2020, see above note 71; see also ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Written [sic] observations of Professor Claus Kreß as *amicus curiae*, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in ICC, The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir, 18 June 2018, ICC-02/05-01/09-359 (<http://www.legal-tools.org/doc/85f44c/>); ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn, 18 June 2018, ICC-02/05-01/09-362 (<http://www.legal-tools.org/doc/681f50/>); see also *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Amicus curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in “The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’” of 12 March 2018, 18 June 2018, ICC-02/05-01/09 OAA, p. 3 (<http://www.legal-tools.org/doc/4c3a69/>).

<sup>75</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 113 (<http://www.legaltools.org/doc/0c5307/>).

<sup>76</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/13, 15 June–17 July 1998, p. 322 (‘Diplomatic Conference of Plenipotentiaries’) (<http://www.legal-tools.org/doc/253396/>); David Scheffer, “U.S. Policy and the International Criminal Court”, in *Cornell International Law Journal*, 1999, vol. 32, no. 3.

<sup>77</sup> *Ibid.*

State of Palestine.<sup>78</sup> Many have advanced theories of ‘delegated jurisdiction’ as a constraint on the Rome Statute’s application,<sup>79</sup> suggesting that any limits on the exercise of jurisdiction by States are transmitted to the ICC during any transfer of sovereignty to the Court.<sup>80</sup> Yet, it is not typical for the jurisdiction of international courts and tribunals to be described in this manner. Even US authors asserting that international courts exercise a form of delegated power<sup>81</sup> appear focused not on delegations of *jurisdiction* but of *authority*, defining delegation as “grants of authority by two or more states to an international body to make decisions or take actions”.<sup>82</sup>

In *Prosecutor v. Tadić*, the ICTY Appeals Chamber stated that it was not exercising a form of delegated jurisdiction or power conferred by the UN Security Council.<sup>83</sup> Rather, the establishment of the tribunal was the creation of a judicial system.<sup>84</sup> Relying on the idea of ‘incidental’ or ‘inherent’ jurisdiction, the Appeals Chamber noted that:

in international law, every tribunal is a self-contained system (unless otherwise provided) [...] Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its ‘judicial character’ [...] [s]uch

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<sup>78</sup> See, for example, Israel Ministry of Foreign Affairs, “The International Criminal Court’s lack of jurisdiction over the so-called ‘situation in Palestine’”, 20 December 2019; ICC, *Situation in the State of Palestine*, Observations by the Federal Republic of Germany, 16 March 2020, ICC-01/18-103 (<http://www.legal-tools.org/doc/8bwxc0/>) (focusing upon the question of Palestinian statehood).

<sup>79</sup> See for example, Talita de Souza Dias, “The Nature of the Rome Statute and the Place of International Law before the International Criminal Court”, in *Journal of International Criminal Justice*, 2019, vol. 17, pp. 507–535. The theory of ‘delegated jurisdiction’ in the Rome Statute appeared in an Article in 2001 supporting the views of the U.S. delegation to Rome that had argued the Court could not, consistent with international law, hear cases involving the nationals of Non-States Parties. Madeline Morris, “High Crimes and Misconceptions; The ICC and Non-Party States”, in *Law and Contemporary Problems*, 2001, vol. 64, no. 1, pp. 13–66.

<sup>80</sup> Beth Van Schaack, “Can the Int’l Criminal Court Try US Officials? The Theory of ‘Delegated Jurisdiction’ and Its Discontents (Part II)”, in *Just Security*, 09 April 2018 (available on its web site).

<sup>81</sup> Curtis A. Bradley and Judith G. Kelley, “The Concept of International Delegation”, in *Law and Contemporary Problems*, 2008, vol. 71, no. 1, pp. 1–36.

<sup>82</sup> *Ibid.*

<sup>83</sup> ICTY, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (<http://www.legal-tools.org/doc/80x1an/>).

<sup>84</sup> *Ibid.*, paras. 11, 38.

limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.<sup>85</sup>

The *Tadić* Appeals decision seems logical. If international courts and tribunals could exercise only powers and procedures expressly or implicitly delegated to them by their Member States and had no independent rule-making or competences of their own, those courts and tribunals would be hard-pressed to function adequately and their independence would be severely constrained. As the *Tadić* Appeals Chamber noted, *la compétence de la compétence* (or *Kompetenz-Kompetenz*) is a core principle of international adjudication for courts and tribunals established on an *ad hoc* basis or as subsidiary organs of international organizations.<sup>86</sup> This is undoubtedly true of the ICC. The Rome Statute established the Court as an autonomous international organization<sup>87</sup> endowed with “international legal personality”.<sup>88</sup> It is an “independent permanent” jurisdiction<sup>89</sup> whose judges and Prosecutor are required to be independent in the performance of their functions,<sup>90</sup> performing their statutory functions “without fear or favour”.<sup>91</sup> States objecting to Al-Bashir’s lack of immunity, or of jurisdiction over the nationals of non-States Parties accused of committing crimes on the territories of States Parties, appear to envisage the ICC – and the regime of international criminal law more generally – as a mere facility for States Parties to the Rome Statute to use (and subject to their control) if they are not exercising jurisdiction themselves.<sup>92</sup> Yet this was precisely the conception rejected at Rome in favour of a fair, effective and independent Court.<sup>93</sup>

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<sup>85</sup> *Ibid.*, para. 11.

<sup>86</sup> *Ibid.*, para. 18; Laurence Boisson de Chazournes, “The Principle of *Compétence de la Compétence* in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals”, in Mahnouch H. Arsanjani *et al.* (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman*, Martinus Nijhoff, Leiden, 2010, pp. 1027–1064.

<sup>87</sup> See, for example, Jan Klabbers, “Transforming Institutions: Autonomous International Organisations in Institutional Theory”, in *Cambridge International Law Journal*, 2017, vol. 6, no. 2, pp. 105–121. See also Rome Statute, Article 19(1), see above note 35 (“The Court shall satisfy itself that it has jurisdiction in any case brought before it.”).

<sup>88</sup> *Ibid.*, Article 4(1).

<sup>89</sup> *Ibid.*, Preamble, clause 9, see above note 35.

<sup>90</sup> *Ibid.*, Articles 40 and 42(1).

<sup>91</sup> Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, see above note 2.

<sup>92</sup> Douglas Guilfoyle recently suggested something along these lines when he reverted to the pre-Rome ILC idea of making the Court’s judiciary temporary and shifting its focus to serv-

While it is not possible to take up this issue in all its complexity, the discussion about the power and authority of the ICC is reminiscent of discussions about the legitimacy and authority of international law more generally. Alain Pellet has observed that we are “so deeply impregnated with the voluntarist analysis of international law that our natural reflex is to say that where there is State will, there is international law: no will, no law”.<sup>94</sup> Yet as the ICC Appeals Chamber implied in *Al-Bashir*, the regime of international criminal law as customary law preceded the Court’s establishment and infused the provisions of the Rome Statute with meaning. This customary international law provided the *Al-Bashir* Appeals Chamber with the grounds for its decision: law that is consensual in its formation, but binding even upon States that later come to disagree with it. If, as M. Cherif Bassiouni,<sup>95</sup> Gerhard Werle, and Florian Jeßberger<sup>96</sup> have persuasively argued, it is beyond question that the Nuremberg Principles represent customary international law, efforts to change their content or avoid their application represent an effort to change that custom.<sup>97</sup> I return to this point in Section 4.7. below.

#### 4.4.5. Organizational Structure

##### 4.4.5.1. Overview

The Court’s organizational structure is much more complex than predecessor international tribunals. The four organs of the Court are the Presidency, the judiciary (composed of three divisions: Appeals, Trial, and Pre-Trial Divisions), the Office of the Prosecutor and the Registry. In addition, the ASP established by Part 11 of the Statute oversees the operations of the

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ing as a “mechanism for assisting the creation of special chambers in national legal systems with international elements [...] with a small standing court attached”. Douglas Guilfoyle, “Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the adults in the room?”, in *EJIL:Talk!*, 8 May 2019 (available on its website).

<sup>93</sup> Diplomatic Conference of Plenipotentiaries, see above note 76. See also the web site of the Coalition for the International Criminal Court.

<sup>94</sup> Alain Pellet, “The Normative Dilemma: Will and Consent in International Law-Making”, in *Australian Yearbook of International Law*, 1988–1989, vol. 12, pp. 22–53.

<sup>95</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003, p. 73; M. Cherif Bassiouni, “Nuremberg: Forty Years After”, in *American Society of International Law Proceedings*, 1980, vol. 80, pp. 59–65.

<sup>96</sup> Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd. ed., Oxford University Press, 2014, p. 10.

<sup>97</sup> Sadat, 2020, see above note 71.

Court (including adopting its budget) and the Trust Fund for Victims, established by a decision of the ASP under Article 79. The Trust Fund administers funds and other forms of assistance for the benefit of victims of crimes within the jurisdiction of the Court. It advocates for victims and mobilizes individuals and institutions with resources and the goodwill of those in power for the benefit of victims and their communities.<sup>98</sup> As of this writing, the Court's annual budget is just short of 148 million EUR, 11.8 million of which are allocated to the Judiciary, 47 million to the Office of the Prosecutor and 75.8 million to the Registry.

#### 4.4.5.2. The Court's Judiciary

The Court has 18 judges, nominated and elected by secret ballot by the ASP. Each judge must be a national of an ICC State Party and a person of "high moral character, impartiality and integrity" who possess the qualifications required in their respective States for appointment to the highest judicial office of that State.<sup>99</sup> In choosing, Article 36(8) of the Statute requires the ASP to "take into account" the need for gender balance, equitable geographical representation, and the representation of the principal legal systems of the world. Each judge serves one non-renewable nine-year term, and at least nine of the judges must have established competence and experience in criminal law and procedure. Five must have competence and experience in relevant areas of international law.<sup>100</sup> The judges organize themselves into Divisions upon their election, and elect the members of the Presidency,<sup>101</sup> who serve for a term of three years.<sup>102</sup> Five judges sit as members of the Appeals Chamber, which decides upon a presiding judge for each appeal. Three judges sit in each Trial Chamber and Pre-Trial Chamber, although the functions of the Pre-Trial Chamber may be carried out by a single judge if the Statute so provides. The Pre-Trial Chamber oversees the initiation of a case until confirmation of the charges against

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<sup>98</sup> Trust Fund for Victims, "About us" (available on its web site).

<sup>99</sup> Rome Statute, Article 36(3)(a), see above note 35; Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (<http://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

<sup>100</sup> Rome Statute, Article 36(8), see above note 35; ICC, "The Judges of the Court" (available on its web site).

<sup>101</sup> Code of Judicial Ethics, 19 January 2021, ICC-BD/02-02-21 (<http://www.legal-tools.org/doc/3e1x47/>).

<sup>102</sup> Rome Statute, Article 36(9)(b), see above note 35; ICC, "The Presidency" (available on its web site).

the accused, after which time the accused is committed to a Trial Chamber for trial.

#### 4.4.5.3. Procedural Inefficiencies and the Independent Expert Review

It was initially thought that the addition of the Pre-Trial Chamber would assist with the streamlining of cases by preparing them for trial and avoiding some of the procedural delays experienced at the *ad hoc* international criminal tribunals, which averaged three years between arrest and judgment.<sup>103</sup> Thus far, however, the addition of the Pre-Trial Chamber has not had this effect: in the *Lubanga* case, for example, the accused was transferred to The Hague on 16 March 2006, the decision confirming the charges was issued in January 2007, but the trial did not begin until two years later, and the decision was not issued until 14 March 2012, six years after arrest. Likewise, the *Katanga* case took nearly seven years between arrest and judgment.<sup>104</sup> Moreover, there has been some confusion about the respective roles of the Pre-Trial and Trial Chambers, perhaps because the functions and operation of the divisions are spread throughout the Statute and difficult to discern, and because the addition of this preliminary phase of the proceedings is new to international criminal justice. In contrast, the first case before the ICTY took less than a year to try, and the trial judgment was rendered two years following the accused's transfer to the Tribunal. For this and other reasons, in particular a series of controversial judgments by the Court's Chambers,<sup>105</sup> in December 2019, the ASP commissioned an Independent Expert Review ('IER') tasked with making "concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Stat-

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<sup>103</sup> ICTY, "Weekly Press Briefing", 15 January 2003 (available on its web site) (noting that a typical ICTY trial is 16 months); see also Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2009/247, 14 May 2009 (stating that the average length for a trial at ICTR is from two to four years).

<sup>104</sup> Information on the length of the proceedings is available on the ICC website. See, for example, ICC, "Katanga Case".

<sup>105</sup> Sergey Vasiliev, "Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part I)", in *EJIL:Talk!*, 19 April 2019 (available on its web site); Sergey Vasiliev, "Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part II)", in *EJIL:Talk!*, 20 April 2019 (available on its web site).

ute system as a whole”.<sup>106</sup> The IER was chaired by Justice Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR, and composed of eight additional experts from different ICC States Parties. The IER submitted a comprehensive report (‘Final Report’) on 30 September 2020 containing 384 recommendations focusing upon systemic issues rather than individual actors, and avoided for the most part recommendations requiring either significant budget increases or amendments to the Rome Statute.<sup>107</sup> The IER’s Final Report was taken up at the nineteenth session of the ASP and a Review Mechanism was established to address, as a matter of priority, the 76 recommendations contained in Annex I of the Final Report that the IER felt should be prioritized.<sup>108</sup>

#### 4.4.6. The Office of the Prosecutor

Like the judges of the Court, the ICC Prosecutor is elected by the ASP, and serves one non-renewable nine-year term.<sup>109</sup> Karim Khan was recently elected Prosecutor and will assume his functions in June 2021.<sup>110</sup> Although the Prosecutor and Deputy Prosecutor(s) must be of different nationalities, unlike the judges they need not be nationals of an ICC State Party. It is the ICC Prosecutor who drives the caseload of the Court, and it is thus not surprising that during the Statute’s negotiation both during and prior to Rome, defining the powers of the Prosecutor was highly contentious. One innovation of the Rome Statute is that the Prosecutor can initiate cases on their own initiative, using their *proprio motu* powers set forth in the Statute, and subject to the jurisdiction and admissibility requirements of the Statute. As a response to concerns about the potential for overreach, the Statute contains extensive checks on the Prosecutor’s power, including a requirement that the Pre-Trial Chamber authorize any investigation brought on the Prosecutor’s own initiative only if it independently determines that a ‘rea-

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<sup>106</sup> ICC ASP, Review of the ICC and the Rome Statute System, 6 December 2019, ICC-ASP/18/Res.7 (<http://www.legal-tools.org/doc/d1fyfk/>).

<sup>107</sup> ICC ASP, “Independent Expert Review of the International Criminal Court and the Rome Statute System”, 30 September 2020, paras. 17, 23 (‘IER Final Report’) (<http://www.legal-tools.org/doc/cv19d5/>).

<sup>108</sup> ICC ASP, Review of the International Criminal Court and the Rome Statute System, 18 December 2020, ICC-ASP/19/Res.7.

<sup>109</sup> Rome Statute, Article 42, see above note 35.

<sup>110</sup> Michelle Nichols and Stephanie van den Berg, “Britain’s Karim Khan Elected International Criminal Court Prosecutor”, in *Reuters*, 12 February 2021.

sonable basis' exists that crimes within the jurisdiction of the Court have been committed.<sup>111</sup>

#### 4.4.7. The Court's Registry

The Registry is the administrative organ of the Court for non-judicial matters. A full-time member of the Court, the Registrar, is elected by the judges for a five-year term and exercises their functions under the authority of the President of the Court.<sup>112</sup> Although the Statute has very little to say about either the Registrar or the Registry, this organ is by far the largest at the Court with a great deal of control over the Court's operations. The Registry is responsible for initiating staff regulations governing the court's personnel, and for the establishment and operation of the Victims and Witnesses Unit. It also carries out outreach activities, is responsible for information technology, and perhaps most importantly, creates and maintains the list of defense counsel from whom an accused may choose if counsel is to be provided and otherwise supports the defense in its work.<sup>113</sup> Of the approximately 900 staff now employed at the Court over 500 are with the Registry,<sup>114</sup> which also receives 51 percent of the Court's annual budget.<sup>115</sup>

#### 4.5. The Court's Current Caseload

As of this writing, the Court has 14 investigations and eight preliminary examinations on its docket, involving 30 cases. Although the Court's initial work centred upon investigations in African nations, five of which referred their situations to the Court (Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, and Uganda), the Court subsequently took on investigations in Georgia, State of Palestine, Bangladesh/Myanmar, and Afghanistan. Two situations, Darfur, Sudan and Libya, were referred to the ICC by the UN Security Council in 2005 and 2011,

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<sup>111</sup> Rome Statute, Article 15, see above note 35.

<sup>112</sup> *Ibid.*, Article 43.

<sup>113</sup> ICC ASP, "Report of the Committee on Budget and Finance on the work of its thirty-third session", 13 November 2019, ICC-ASP/18/15 ('Report of the Committee on Budget and Finance').

<sup>114</sup> ICC, "Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court", 31 August 2016, p. 39 (<http://www.legal-tools.org/doc/cbc6cc/>).

<sup>115</sup> Report of the Committee on Budget and Finance, p. 62, see above note 113.

respectively.<sup>116</sup> Five situations, Afghanistan, Bangladesh-Myanmar, Burundi, Georgia, and Kenya, were brought by the Prosecutor *proprio motu*, pursuant to Article 15 of the Statute. In addition to the situations currently on its docket, the Office of the Prosecutor is currently conducting preliminary examinations in several situations, including Bolivia, Colombia, Guinea, Nigeria, Ukraine, Republic of the Philippines, and Venezuela. ICC judges have issued 35 arrest warrants and nine summonses to appear. Seventeen individuals have been surrendered, 13 remain at large, and three have died. Nine individuals have been convicted and four acquitted.<sup>117</sup>

## 4.6. Challenges and Future Prospects

### 4.6.1. The ICC and the United States

The ICC has faced significant challenges during its first two decades,<sup>118</sup> one of which was a punishing campaign waged by the US during the first term of President George W. Bush that explicitly advocated for it to “wither and collapse”.<sup>119</sup> It involved the adoption of anti-ICC legislation by the US Congress, the negotiation of bilateral immunity agreements covering US persons (and allies) between the US and more than 100 countries, the extraction of concessions in UN Security Council resolutions on peace-keeping exempting non-State party peace-keeping missions from the ICC’s jurisdiction and, perhaps most famously, the sending of a letter attempting to ‘un-sign’ or nullify the US signature of the Statute that had taken place in the final days of the Clinton administration.<sup>120</sup> The punishing treatment from Washington notwithstanding, membership in the ICC grew due to the unceasing work of civil society, particularly the members of the CICC, the successful work of the *ad hoc* Tribunals, the Extraordinary Chambers in the Courts of Cambodia, and the Special Court for Sierra Leone, and increasing support from regional organizations.

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<sup>116</sup> UNSC Resolution 1593 (2005), U.N. Doc. S/RES/1593 (2005), 31 March 2005 (<http://www.legal-tools.org/doc/4b208f/>); UNSC Resolution 1970 (2011), U.N. Doc. S/RES/1970 (2011), 26 February 2011 (<http://www.legal-tools.org/doc/00a45e/>)

<sup>117</sup> ICC, “About the Court” (available on its web site).

<sup>118</sup> Leila Nadya Sadat, “Politics, Procedure and Law: Three Continuing Challenges for the ICC in its Third Decade”, in *ICC Forum*, 17 July 2018.

<sup>119</sup> Paula R. Kaufman, *Bolton is on Duty as America’s Sentry, Insight on the News*, 22 July 2002, p. 3639 (quoting Bush administration official John Bolton).

<sup>120</sup> US Department of State Archive, “International Criminal Court: Letter to UN Secretary General Kofi Annan”, 6 May 2002; *Human Rights Watch*, “United States ‘Unsigning’ Treaty on War Crimes Court”, 6 May 2002.

The Obama administration took a more positive view of the Court, sending a high-level US delegation to ASP meetings, cooperating to the extent possible given the anti-ICC legislation adopted by Congress in assisting with arrests and more generally adopting a constructive posture towards the Court and its activities.<sup>121</sup> Although it did not submit the treaty to the US Senate for ratification, the administration's policy was to 'engage' with States Parties to the Rome Statute on issues of concern and support the prosecution of cases that advanced US interests and values.<sup>122</sup> The Trump administration reverted to the negative practice of the Bush years, revoking the Prosecutor's visa in 2019,<sup>123</sup> and, in 2020, issuing an Executive Order declaring the Court a threat to US national security<sup>124</sup> and imposing punishing and unprecedented sanctions upon its chief Prosecutor Fatou Bensouda and Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division.<sup>125</sup> The sanctions were lifted on Friday, 2 April 2021, following the filing of two lawsuits challenging the legality of the Executive Order<sup>126</sup> and considerable pressure from US allies and civil society.<sup>127</sup>

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<sup>121</sup> Author's notes and observations. See also Megan A. Fairlie, "The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage", in *Berkeley Journal of International Law*, 2011, vol. 29, no. 2, pp. 528–576.

<sup>122</sup> See Obama White House Archives, "National Security Strategy", May 2010.

<sup>123</sup> Marlise Simons and Megan Specia, "U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes", in *New York Times*, 5 April 2019; Human Rights Watch, "U.S. Sanctions International Criminal Court Prosecutor", 2 September 2020.

<sup>124</sup> US, *Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court*, 11 June 2020, No. 13928 (<http://www.legal-tools.org/doc/dfkvpn/>).

<sup>125</sup> U.S. Department of State, "Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court", 2 September 2020.

<sup>126</sup> "Sadat v. Trump – Complaint", in *ACLU* (available on its web site); "Federal Judge Sides with Human Rights Lawyers over Trump Administration's ICC Ban", *Open Society Justice Initiative*, 4 January 2021.

<sup>127</sup> "Joint Statement by UN Security Council Members that are States Parties to the Rome Statute of the International Criminal Court (Belgium, the Dominican Republic, Estonia, France, Germany, Niger, Saint Vincent and the Grenadines, South Africa, Tunisia and the United Kingdom)", 10 June 2020; "Statement by Ambassador Christoph Heusgen on behalf of 74 States Parties to the Rome Statute in support of the International Criminal Court on the occasion of the ICC Report to the General Assembly", 2 November 2020; "Sadat v. Trump – Brennan Center for Justice's Amicus Brief in Support of Plaintiffs' Motion for Preliminary Injunction", in *ACLU* (available on its web site); Human Rights Watch, "Oppose Trump Administration Measures against the International Criminal Court", 11 June 2020; American Bar Association, "Statement of ABA President Patricia Lee Refo Re: U.S. sanctions on In-

#### 4.6.2. The ICC and Africa

The US has not been the Court's only opponent. The leaders of many African Union Member States have challenged the ICC on the basis that it has targeted Africa. These objections increased over the years, centring first upon the Prosecutor's decision to issue an arrest warrant directed to Sudanese President Omar Al-Bashir, which resulted in efforts to get the UN Security Council to use Article 16 to defer the proceedings against him as well as a proposal to extend the possibility of deferral (for ongoing cases) to the General Assembly.<sup>128</sup> Subsequently, with the election of ICC indictees Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya, respectively, the ICC ASP yielded to political pressure and amended the ICC's Rules of Procedure and Evidence to permit them to be absent from their trials (subject to judicial approval) to perform "extraordinary public duties".<sup>129</sup> Although most of the African situations currently before the Court were referred by African States themselves, the African Union's anger at the ICC and threats of a mass withdrawal of African States Parties posed a significant threat to the Court's real and perceived legitimacy and public support.<sup>130</sup>

#### 4.6.3. The Challenge of Universality

The challenges from the African Union highlighted another difficulty that the ICC faces – the need for universal ratification and support from the 70 States, which are currently outside the Rome Statute system and which represent approximately three-fifths of the world's population. This includes China, India, Russia and, as mentioned, the US. The absence of three permanent members of the Security Council is particularly damaging to the

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international Criminal Court staff", 17 September 2020; New York City Bar, "Statement Condemning the Implementation of Sanctions against Senior Staff of the International Criminal Court", 30 November 2020.

<sup>128</sup> The Economist, "Braced for the Aftershock", 7 March 2009, p. 67 (citing efforts pushing for the deferral from African-Arab groups at the UN); Franklin Graham, "Put Peace Before Justice", in *New York Times*, 3 March 2009, p. A27 (stating that deferral by the U.N. is necessary for encouraging peace in Sudan).

<sup>129</sup> ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 135*quater* (<http://www.legal-tools.org/doc/a6a02b/>); Michael Plachta, "African Union Requests Deferral of Trial by the International Criminal Court", in *International Enforcement Law Reporter*, 2014, vol. 30, no. 1, pp. 29–32; See also AllAfrica, "Kenya's 'Victory' At Assembly of States Parties Meeting", 28 November 2013.

<sup>130</sup> See generally Charles Chernoh Jalloh and Ilias Bantekas (eds.), *The International Criminal Court and Africa*, Oxford University Press, 2017.

Court's effectiveness and credibility as those States have the power to block or refer situations that might be heard by the Court, such as the civil war in Syria or the situation in North Korea or Myanmar.

#### 4.6.4. Procedural, Organizational and Financial Challenges

The Court also has challenges of a more mundane nature – financing, public outreach, streamlining trial procedures, arresting the accused. These challenges were extensively discussed in the IER Final Report, which addressed Court-wide matters including governance, human resources, ethics, budget and external relations, as well as organ-specific matters involving the Presidency, efficiency of the judicial process and fair trial rights, development of processes and procedures to promote coherent and accessible jurisprudence, OTP situation and case selection strategies, OTP quality control, defense and legal aid, and victim participation and reparations.<sup>131</sup> Of particular note, the IER focused on the need to, *inter alia*, improve the system for nominating judges to the Court to reduce politics in the process and enhance the calibre of the Court's judges;<sup>132</sup> reducing the number of situations under investigation by OTP by applying a higher gravity threshold to avoid it being stretched too thin;<sup>133</sup> reducing preliminary examinations to two years;<sup>134</sup> developing a special operations fund for tracking and arresting fugitives and a rewards system to encourage their surrender;<sup>135</sup> and creating a new defense office to redress “what could have been perceived as an institutional imbalance regarding the defense”.<sup>136</sup>

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<sup>131</sup> IER Final Report, see above note 107.

<sup>132</sup> *Ibid.*, paras. 961–977, Recommendations 371–380, pp. 324–325. The IER Panel included a chapter in its report on this priority although the ASP had not included it in its terms of reference, as the Panel took note of relevant calls for action issued by NGOs: for example, Parliamentarians for Global Action, “Urgent Call for Action: Parliamentarians Must Support the Integrity of the International Criminal Court (ICC) and Stand-Up for a Meritocratic Judicial Election Process”, 20 February 2020 (available on its web site).

<sup>133</sup> *Ibid.*, paras. 642–650 (see Recommendation 227, p. 213).

<sup>134</sup> *Ibid.*, Recommendation 257, p. 232.

<sup>135</sup> *Ibid.*, paras. 767–774.

<sup>136</sup> *Ibid.*, Recommendation 327, p. 266.

#### 4.6.5. The Shadow of the Court: Victim and Perpetrator Responses

Anecdotal evidence suggests that the Court and the idea of a potential prosecution loom large in the minds of many leaders.<sup>137</sup> Likewise, interviews with victims of atrocity crimes suggest that they may have unrealistic expectations of the ICC and its power.<sup>138</sup> This was also true with respect to the *ad hoc* Tribunals, where victim communities in the former Yugoslavia and in Rwanda believed that those tribunals had much more power than they did. It is probably worth observing that national criminal justice systems tend to disappoint victims, with their clinical approach to criminal justice, and their emphasis on conviction rather than rehabilitation of the offender or restoration of the community. These problems are magnified at the international level. International criminal justice is harsh medicine, and while it may be necessary, it is only part of a response that must be much broader and holistic, especially in cases of mass atrocities. Removing perpetrators from communities so those communities are safe is important, but the ICC can only take a handful of cases. National systems must be able to act to pick up the slack, or, in some cases, perhaps regional or hybrid tribunals may be required.

#### 4.6.6. Additional Transitional Justice Modalities

In addition to addressing the problems of perpetrators, the need for truth may require the establishment of a truth commission in addition to formal

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<sup>137</sup> Benjamin J. Appel, “In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations”, in *Journal of Conflict Resolution*, 2018, vol. 62, no. 1, pp. 3–28; Stuart Ford, “Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention”, in *Loyola Louisiana International and Comparative Law Review*, 2020, vol. 43, no. 2, pp. 101–123; Courtney Hillebrecht, “The Deterrent Effects of the International Criminal Court: Evidence from Libya”, in *Empirical and Theoretical Research in International Relations*, 2016, vol. 42, no. 4, p. 616; James Meernik, “The International Criminal Court and the Deterrence of Human Rights Atrocities”, in *Civil Wars*, 2015, vol. 17, no. 3, p. 318; Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?”, in *International Organization*, 2016, vol. 70, no. 3, pp. 443–475. On anecdotal evidence, see Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*, Zed Books, London, 2006; Leila Nadya Sadat, “Exile, Amnesty, and International Law”, in *Notre Dame Law Review*, 2006, vol. 81, no. 3, p. 955.

<sup>138</sup> Marieke de Hoon, “The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s Legitimacy”, in *International Criminal Law Review*, 2017, vol. 17, no. 4, pp. 591–614; Payam Akhavan, Sareta Ashraph, Barzan Barzani and David Matyas, “What Justice for the Yazidi Genocide? Voices from Below”, in *Human Rights Quarterly*, 2020, vol. 42, pp. 1–47.

criminal accountability.<sup>139</sup> Reparations need to be sufficient, and the Trust Fund for Victims may not have the resources.<sup>140</sup> Communities must be rebuilt, and survivors will need medical treatment, adequate food, clean water, and psychological counselling to heal. David Luban once referred to crimes against humanity as “politics gone cancerous”.<sup>141</sup> If international criminal justice is necessary to target the cancer and impede its spread, other healing modalities must accompany justice mechanisms to address the deep wounds of a community that has been afflicted by trauma and violence.

#### **4.6.7. Enhancing Positive Complementarity by Continuing to Build National and Regional Infrastructure for the Prosecution of International Crimes**

It bears repeating that the ICC Statute is premised on the doctrine of complementarity, meaning that national systems need to take up the task of international criminal justice for it to be effective. Only when national systems are unable or unwilling to act is a case admissible before the Court. One important lesson drawn from the experience of the ICTY was its profound catalytic effect on national systems in the former Yugoslavia. As Diane Orentlicher notes in her recent book, *Some Kind of Justice*, “one of the Tribunal’s signal achievements [was] its role in catalyzing domestic war crimes prosecutions, a function no one anticipated when the ICTY was launched”.<sup>142</sup> Universal jurisdiction remains an important tool,<sup>143</sup> independent investigative mechanisms may need to be established,<sup>144</sup> regional

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<sup>139</sup> Cf. Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007; Martha Minow, “The Hope for Healing: What can Truth Commissions Do?”, in Robert I. Rotberg and Dennis F. Thompson (eds.), *Truth v. Justice*, Princeton University Press, 2000.

<sup>140</sup> For a discussion of some of the problems regarding reparations, see the IER Final Report, pp. 293–311, see above note 107.

<sup>141</sup> David Luban, “A Theory of Crimes Against Humanity”, in *Yale Journal of International Law*, 2004, vol. 29, pp. 85, 90.

<sup>142</sup> Diane Orentlicher, *Some Kind of Justice: The ICTY’s Impact in Bosnia and Serbia*, Oxford University Press, 2018, p. 6.

<sup>143</sup> Civitas Maxima, “Gibril Massaquoi” (available on its web site); Thierry Cruvellier, “Universal Jurisdiction: The Finnish Revolution”, in *JusticeInfo*, 1 February 2021 (available on its web site).

<sup>144</sup> International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 21 December 2016 (<http://www.legal-tools.org/doc/fecaf0/>); Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc. A/HRC/RES/39/2, 27 September 2018

courts may offer a new venue,<sup>145</sup> and internationalized domestic courts or hybrid courts may prove useful as well.<sup>146</sup>

#### 4.7. Conclusion

The shadow of the ICC looms large in the mind of victim groups, civil society advocates, governmental officials, rebel leaders, the media, and even in the decisions of other national courts. The annual meeting of the Court's ASP provides an opportunity to bring together States, NGOs, and other stakeholders to discuss not only matters of importance to the ICC itself, but global justice, peace, and security more generally. At the international level, the presence of an institution focused upon global justice with a seat at the table when discussing conflicts or human rights abuses has changed the equation in a way that is hard to quantify but is deeply significant. At the national level, the ICC has inspired national systems to create courts and bring cases, an example of 'positive complementarity' inspired by the Rome Statute system as well.

International organizations and institutions like the ICC are established to fulfill specific societal needs. There is scant evidence that the problems that the ICC was established to address – the needs of victims for justice; the need for peace and security; and the moral imperative of an international legal order that is both just and fair – are less pressing than they were in 1998. Indeed, recent events and the ICC's burgeoning docket suggest that "the mission of the Court is as crucial as ever".<sup>147</sup> What the evidence does suggest is that the ASP and other internal and external stakeholders should embrace the kinds of targeted reforms that the IER proposed in 2020. It must reform its culture and procedures and engage in much more extensive outreach to explain its activities and engage in public diplomacy to earn public support and trust. A return to the sovereigntist approach seen in the battle over immunities or jurisdiction over the nationals

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(<http://www.legal-tools.org/doc/0917d7/>); Resolution 2379 (2017), UN Doc. S/RES/2379 (2017), 21 September 2017 (<http://www.legal-tools.org/doc/1510b4/>).

<sup>145</sup> See, for example, African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), 27 June 2014 (<http://www.legal-tools.org/doc/05252d/>). As of this writing, however, no State has ratified the Malabo Protocol.

<sup>146</sup> See, for example, Chambre Africaine Extraordinaire d'Assises, *Ministère Public c. Hissène Habré*, Judgment, 30 May 2016 (<http://www.legal-tools.org/doc/98c00a/>); Kosovo Specialist Chambers and Specialist Prosecutor's Office, "Background" (available on its web site).

<sup>147</sup> IER Final Report, paras. 17, 20, see above note 107.

of non-States Parties misses the point. Instead, as I have argued elsewhere, scholars and political leaders should *lean in* to the work needed to bring about these reforms, and do so in a constructive manner that has the potential to strengthen the Court.<sup>148</sup>

The Court alone cannot change the political framework within which it operates, and much of the criticism it receives stems from the fact that it “is working”.<sup>149</sup> The Prosecutor’s determination to investigate atrocities within her mandate “without fear or favour”, and the judicial decisions authorizing those investigations, have angered powerful global stakeholders. As the shadow of authoritarian rule grows longer, and criticisms of the Court become more insistent, the achievements of the Court and the Rome Conference are often obscured. Lacking support from some major powers and criticized by others in a manner that challenge its independence,<sup>150</sup> the Court today remains a fragile institution, whose future is uncertain. Civil society and ICC States Parties must redouble their efforts to realize the potential of the Rome Statute to “put an end to impunity for the perpetrators” of “grave crimes [that] threaten the peace, security, and well-being of the world”.<sup>151</sup>

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<sup>148</sup> Leila Nadya Sadat, “Reforming the International Criminal Court: ‘Lean in’ or ‘Leave’”, in *Washington University Journal of Law and Policy*, 2020, vol. 62, pp. 51–76.

<sup>149</sup> William Pace, “Remarks”, Dedication Ceremony for the Permanent Premises of the Court, 19 April 2016, The Hague (author’s notes).

<sup>150</sup> Conservative Friends of Israel, “Prime Minister Boris Johnson Confirms UK Opposition to ICC Investigation into Israel”, 13 April 2021 (letter attached to press release).

<sup>151</sup> Rome Statute, Preamble, see above note 35.



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## The Way Forward for the International Criminal Court and Its Stakeholders: Focus Inward

Christopher R.F. Hale\*

### 5.1. Introduction: The Quandary

A Google search of the ‘International Criminal Court’ (‘ICC’ or ‘Court’) produces remarkable results. Virtually every conflict in the world, from massive ones in Syria and Yemen to relatively lesser known disputes inside Zambia, India, and Nicaragua (to name just a few), has spurred calls for ICC involvement.<sup>1</sup> There have been pleas for the ICC to intervene in conflicts that have spanned generations, such as India and Pakistan’s fight over Kashmir,<sup>2</sup> recently uncovered deaths of indigenous children in Canada,<sup>3</sup> as well as the multistate dispute over control of the South China Sea.<sup>4</sup> Advo-

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<sup>1</sup> Mark Kersten, “Calls for Prosecuting War Crimes In Syria Are Growing. Is International Justice Possible?”, in *The Washington Post*, 14 October 2016; French Press Agency, “ICC called on to investigate war crimes committed by UAE in Yemen”, in *Daily Sabah*, 27 November 2017; Mian Abrar, “Over 200 NGOs demand India be tried in ICJ for Kashmir genocide”, in *Pakistan Daily Today*, 1 January 2019; “Ortega accused of crimes against humanity”, in *Gulf Times*, 19 November 2018; “ZNBC should be reported to international criminal court”, in *Zambian Watchdog*, 8 July 2020.

<sup>2</sup> Aamir Latif, “Pakistan mulling going to ICC over India’s Kashmir move”, in *Anadolu Agency*, 6 August 2019; Zamir Ahmed Awan, “International Criminal Court and India”, in *Modern Diplomacy*, 29 August 2019.

<sup>3</sup> Meghan Grant, “International Criminal Court called on to investigate Kamloops residential school findings”, in *CBC News*, 3 June 2021.

<sup>4</sup> Ana P. Santos, “Did China commit ‘crimes against humanity’ in the South China Sea?”, in *Deutsche Welle*, 25 March 2019.

cates filed a complaint at the ICC for alleged crimes perpetrated by Chinese authorities against Muslim Uighurs minorities held in re-education camps, generating global headlines.<sup>5</sup> Even the COVID-19 pandemic has spawned complaints filed at the ICC against Chinese and Brazilian leaders.<sup>6</sup>

Hundreds of governments and non-governmental organizations (‘NGOs’) have dedicated substantial time and energy following the work of the ICC. A community of ICC journalists and commentators now exists, spilling much ink on the Court, debating the issue *du jour*. Universities the world over have begun offering a plethora of ICC and international criminal law coursework, and numerous academics have dedicated years to the study of the Court and the field generally (to the point of overstudying it).<sup>7</sup> Even a few major television series and a feature film have revolved around the ICC.<sup>8</sup>

This extensive attention demonstrates a yearning for ‘justice’ with respect to the (perceived or actual) commission of genocide, crimes against humanity, and war crimes (‘atrocities’).<sup>9</sup> It is not coincidental that the most searched term on the Internet in 2018 was ‘justice’.<sup>10</sup> Over the past 27 years of modern international criminal justice, the concept that the international community can hold high-ranking individuals accountable for the worst human behaviours has, to a large extent, embedded itself into our

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<sup>5</sup> Marlise Simons, “Uighur Exiles Push for Court Case Accusing China of Genocide”, in *The New York Times*, 6 July 2020.

<sup>6</sup> Joseph Young, “Bombshell ICC Complaint Sues China Over Alleged Coronavirus ‘Bio-weapon’”, in *CCN.com*, 2 April 2020; Omkar Khandekar, “Why this Mumbai lawyer sued China for \$2.3tn over the coronavirus outbreak”, in *LiveMint*, 22 April 2020; Nadia Rubaii and Julio José Araujo Junior, “Brazil’s Bolsonaro has COVID-19 – and so do thousands of Indigenous people who live days from the nearest hospital”, in *The Conversation*, 8 July 2020.

<sup>7</sup> Elies Van Sliedregt, “International Criminal Law: Over-Studied and Underachieving?”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, pp. 1–12.

<sup>8</sup> Ben Allen, “Rwanda, genocide and the ICC: Hugo Blick explains the true story behind Black Earth Rising”, in *Radio Times*, September 2018; Melanie O’Brien, “The ICC in Film: The Hitman’s Bodyguard”, in *Opinio Juris*, 9 June 2018 (available on its web site); Kevin Jon Heller, “The Problem with ‘Crossing Lines’”, in *Opinio Juris*, 24 June 2013 (available on its web site); Jennifer Lind-Westbrook, “Handmaid’s Tale’s New Waterfolds Twist is One of the Most Horrific Yet”, in *Screenrant*, 6 June 2021 (available on its web site).

<sup>9</sup> See generally, David Scheffer, “Genocide and Atrocity Crimes”, in *Genocide Studies and Prevention: An International Journal*, 2006, vol. 1, no. 3, pp. 229–250.

<sup>10</sup> Amy P. Wang, “‘Justice’ is Merriam-Webster’s Word of the Year, Beating Out ‘Lodestar’ and ‘Nationalism’”, in *The Washington Post*, 17 December 2018.

collective conscience and lexicon.<sup>11</sup> Not only does the ICC's existence stand as a manifestation of this sea change in international relations, but it is also telling that atrocity accountability is now a fixture of diplomatic and popular discussions on conflict resolution.<sup>12</sup> Hardly a conflict occurs without governments and civil society demanding that senior leaders stand trial at the ICC or another competent tribunal. Only a generation ago this notion would have been utter fantasy in most foreign policy circles.

More concretely, this yearning for justice has expressed itself in widespread support among civil society – and, to a lesser extent, among governments – for a raft of new ICC casework. Strong support for accountability in Palestine, Afghanistan, Iraq, and Georgia has buoyed the Court's willingness to intervene into these conflicts despite it raising alarms in the capitals of the United States ('US'), Russia, Israel, and even in the United Kingdom ('UK'), a prominent ICC State Party.<sup>13</sup> Similar support helped push ICC interventions in other atrocity hotspots like the Philippines, Myanmar, and Venezuela, the latter triggered in part by the unprecedented multilateral referral by six fellow ICC States Parties.<sup>14</sup>

However, even though a Google search may reveal broad interest in the Court, the ICC's relatively high profile has not translated into unwavering and deep political support for the Court as an institution, nor for inter-

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<sup>11</sup> Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?", in *International Organization*, 2016, vol. 70, no. 3, pp. 443–75; Geoff Thomas Dancy, "The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data", in *Leiden Journal of International Law*, 2021, vol. 34, no. 3, pp. 729–747. To be clear, there is a difference between 'international justice' or the 'International Criminal Court' being embedded in the social conscience and lexicon and a proper understanding of how the ICC works. Certainly, the latter is still very much lacking in the 'general public' given the persistent misunderstanding and misconceptions that exist in social discourse and mass media with respect to the ICC and international criminal justice generally.

<sup>12</sup> Geoff Thomas Dancy, "Searching for Deterrence at the International Criminal Court", in *International Criminal Law Review*, 2017, vol. 17, no. 4, pp. 625–55; Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, New York, 2015.

<sup>13</sup> See "The Battle Against Impunity Goes On", in *The Economist*, 29 October 2015; Owen Bowcott, "Rising Nationalism Leaves International Criminal Court at Risk", in *The Guardian*, 29 December 2016; Somini Sengupta, "As 3 African Nations Vow to Exit, The International Criminal Court Faces Its Own Trial", in *The New York Times*, 26 October 2016.

<sup>14</sup> Ernesto Londoño and Marlise Simons, "Neighbors Refer Venezuela to Criminal Court in 'Historic' Rebuke", in *The New York Times*, 26 September 2018; International Federation for Human Rights, "First Inter-State Referral to the ICC on Venezuela: An Important but Insufficient Precedent Set", 10 October 2018 (available on its web site).

national criminal justice generally. The first 22 years of the Rome Statute of the ICC ('Rome Statute' or 'Statute') and 18 years of the Court's operations has a mixed record in terms of political support. While 123 nations are States Parties to the ICC (far more States than the number who accept the compulsory jurisdiction of the International Court of Justice despite being around for decades longer), powerful countries such as the United States, Russia, China, and India are not.<sup>15</sup> While most ICC requests for co-operation and assistance are fulfilled by States,<sup>16</sup> there are glaring examples where States have feigned co-operation while undermining the Court surreptitiously (for example, Kenya),<sup>17</sup> opposed it outright at every turn (for example, Sudan, Myanmar),<sup>18</sup> and even authorized criminal and financial sanctions on the Court, its staff and Court supporters if certain cases proceed further (for example, United States).<sup>19</sup>

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<sup>15</sup> ICC Assembly of States Parties ('ICC ASP' or 'Assembly'), "States Parties to the Rome Statute" (available on the ICC ASP's web site); Rome Statute of the International Criminal Court, 17 July 1998 ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>); Shaun Walker and Owen Bowcott, "Russia Withdraws Signature from International Criminal Court Statute", in *The Guardian*, 16 November 2016.

<sup>16</sup> Fatou Bensouda, "Lessons from Africa: International Conference: 10 Years Review of the ICC. Justice for All? The International Criminal Court – Introductory remarks", 15 February 2012; "Kata Kata's Exclusive Interview with the ICC Chief Prosecutor Dr. Fatou Bensouda (Part I)", in *KataKata*, 4 December 2018 (available on its web site).

<sup>17</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer" Motions), 3 June 2014, ICC-01/09-01/11-1334 (<http://www.legal-tools.org/doc/128ce5/>); Laurence R. Helfer and Anne Showalter, "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC", in *International Criminal Law Review*, 2017, vol. 17, no. 1, pp. 1–46; Open Society Justice Initiative, "Witness Interference in Cases before the International Criminal Court", November 2016 (available on its web site); Tristan McConnell, "How Kenya Took on the International Criminal Court", in *Public Radio International*, 25 March 2014.

<sup>18</sup> Stephanie Nebehay, "Sudan Should Prosecute Darfur Crimes, Pursue ICC Arrest Warrants: U.N.", in *Reuters*, 1 November 2018; Reuters Staff, "Myanmar says the International Criminal Court has no jurisdiction in Rohingya Crisis", in *Reuters*, 7 September 2018.

<sup>19</sup> United States ('US'), *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, 11 June 2020, No. 13928, signed by President Donald J. Trump (<http://www.legal-tools.org/doc/dfkvpn/>); Adam Smith, "Dissecting the Executive Order on Int'l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs", in *Just Security*, 15 June 2020 (available on its web site); Susan Akram and Gabor Rona, "Why the Executive Order on the ICC is Unconstitutional and Self-Defeating", in *Opinio Juris*, 13 August 2020 (available on its web site); BBC News, "John Bolton threatens ICC with US sanctions", 11 September 2018.

The ICC has had several cases collapse on weak investigations that were, in part, caused by lack of State co-operation.<sup>20</sup> Indeed, it is axiomatic that State compliance is not a given for any international criminal tribunal, most acutely for the ICC.

Geopolitically, the ICC has become a popular punching bag. On the one hand, even some of the most supportive States Parties and NGOs seemingly spend most of their time raising ‘concerns’ about the ICC rather than trumpeting successes and keeping most of their criticisms for closed-door engagements. While the Court should not be insulated from criticism – and critiques from supporters can be quite on point – persistent friendly fire gives ammunition to less discerning or outright hostile parties.<sup>21</sup> It also paints an over-simplistic and unwarranted narrative, particularly among the mainstream media, that the Court is failing.<sup>22</sup>

On the other hand, it would be an understatement to say that some governments and other detractors have dedicated significant resources to

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<sup>20</sup> Kenyans for Peace with Truth and Justice, “Impunity Restored?: Lesson Learned from the failure of the Kenyan cases at the International Criminal Court”, November 2016 (available on its web site); see Shehzad Charania *et al.*, “The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State”, in *Chatham House*, 11 March 2015, p. 3 (available on its web site) (“whether the ICC can conduct effective investigations will hinge on the levels and forms of cooperation in the states concerned”), see below note 109.

<sup>21</sup> Yossi Kuperwasser Dan Diker, “Legal Assault: How the ICC Has Been Weaponized Against the U.S. and Israel”, 5 May 2020; “Bipartisan Letters Urge Pompeo to Call for Halt to ICC Investigations of U.S., Israel”, in *Jewish Virtual Library*, 13 May 2020 (available on its web site); American Center for Law and Justice, “ACLJ Fights or Us Soldiers Under Attack at International Criminal Court”, 4 November 2019; Kevin Jon Heller, “Did ACLJ/ECLJ Lie to the Appeals Chamber?”, in *Opinio Juris*, 6 November 2019 (available on its web site); Steven Groves, “Biden Must Protect U.S. Citizens from International Criminal Court”, in *The Heritage Foundation*, 3 May 2021 (available on its web site).

<sup>22</sup> See, for example, “After the Gbagbo trial: What future for the International Criminal Court?”, in *Yahoo News*, 18 January 2019; Jessica Hatcher-Moore, “Is the world’s highest court fit for purpose”, in *The Guardian*, 5 April 2017; Caroline Schmitt, “13 years, 1 Billion Dollars, 2 Convictions: Is the International Criminal Court Worth It?”, in *Deutsche Welle*, 27 January 2016; Margaret M. deGuzman *et al.*, “Do We Need the International Criminal Court?”, in *The New York Times*, 11 December 2014; Phillip Adams, “Is the ICC a failure?”, in *Late Night Live*, 17 June 2020; Ritula Shah, “Has the International Criminal Court failed?”, in *BBC News*, 5–6 April 2019. In some ways, failure and crisis talk is predictable, given the crisis orientation of international criminal law as a whole. Hilary Charlesworth, “International Law: A Discipline of Crisis”, in *The Modern Law Review*, 2002, vol. 65, no. 3, pp. 377–92; Joseph Powderly, “International Criminal Justice in an Age of Perpetual Crisis”, in *Leiden Journal of International Law*, 2019, vol. 32, no. 1, pp. 1–11; Mark Kersten, “Yes, the ICC Is in Crisis. It Always Has Been”, in *Justice in Conflict*, 24 February 2015 (available on its web site).

destabilize the ICC. The spectrum of broadsides (often unfair or malicious) has been well-documented: anti-African, one-sided, too political, corrupt, too expensive, too slow, to name a few.<sup>23</sup> Although the merits of these attacks are best debated elsewhere, the political effect on the Court is clearly negative. Proof is not hard to find; listen to any public statement or speech by an ICC principal, and it becomes clear that the Court remains in a defensive crouch (and justifiably so).<sup>24</sup>

Taking flak from both sides then, the Court finds itself politically isolated and embattled. From a purely legal posture, there is a tremendous amount of truth to a comment by the ICC Prosecutor that “[b]ecause of the nature of our work, because we are challenging the status quo because we will exercise our jurisdiction without fear or favour, we will expect this pushback”,<sup>25</sup> or as the ICC President said, the ICC’s purpose is to be a ‘pain in the neck’ of the powerful.<sup>26</sup> Nonetheless, politically, there is nothing advantageous about a cross-section of States irritated with the Court. The far preferable posture is to be politically supported with most gripes kept out of the public domain.

In presenting its recommendations, this chapter first discusses the practical difficulties faced by the Court in both being a well-known beacon of justice yet simultaneously a politically outgunned target in geopolitical affairs. To navigate this conundrum, this chapter then encourages the ICC to become even more inward, specifically to focus squarely on accomplishing its judicial mandate in the most efficient and effective manner possible. Thereafter, this chapter’s first recommendation is to prioritize arrests with tailored recommendations to the ICC, the Assembly of State Parties (‘ASP’ or ‘Assembly’), and the United Nations (‘UN’) on how more fugitives can

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<sup>23</sup> Lisa Bryant, “Hague Tribunal Remains Deeply Controversial After 20 Years”, in *VOA News*, 4 March 2018; Simon Allison, “African Revolt Threatens International Criminal Court’s Legitimacy”, in *The Guardian*, 26 October 2016; David Davenport, “International Criminal Court: 12 Years, \$1 Billion, 2 Convictions”, in *Forbes*, 12 March 2014; Kai Ambos, “The ICC’s Disappointing Track Record”, in *Der Spiegel*, 14 December 2011 (available on its web site).

<sup>24</sup> The tenor and tone of recent speeches by ICC principals shows how much time they must spend defending the Court. ICC President, Judge Chile Eboe-Osuji, “Remarks at the opening of the 17th Session of the Assembly of States Parties to the Rome Statute”, 5 December 2018 (‘ICC President ASP Statement’); ICC Prosecutor, Mrs. Fatou Bensouda, “17th Session of the Assembly of States Parties: Opening Plenary, Remarks”, 5 December 2018.

<sup>25</sup> Salem Solomon, “Facing US Sanctions, ICC Prosecutor Pledges to Continue ‘Without Fear or Favor’”, in *VOA News*, 17 June 2020.

<sup>26</sup> ICC President ASP Statement, p. 4, see above note 24.

be apprehended. The second recommendation is to build a culture of professional development of all professional staff, and how the ICC and the ASP can do so properly and appropriately. Finally, this chapter's third recommendation is for both the Court and the Assembly to forge long-term budget resolution, explaining that the current annual budgetary process is an undue hindrance on all involved.

## **5.2. Practical Impact of the Quandary**

### **5.2.1. Juxtaposition on Display in 2018**

Look no further than the December 2018 ICC ASP for evidence of the strange juxtaposition of the ICC's being highly visible and of great interest to many yet subjected to waning political support from States Parties. Going into the 2018 edition of the ICC States Parties' annual meeting, it is fair to say that the ICC's profile on the international stage was incredibly high, perhaps its highest to date. In September 2018 and a few months prior to this ASP, a withering attack by Ambassador John Bolton in his first speech as US National Security Advisor – accentuated by a proclamation that the Court was 'dead to us' – elevated the ICC to front page news around the world.<sup>27</sup>

After Bolton's speech, some ICC followers commented that the outcome of his second campaign against the ICC may backfire like his first one during the first term of US President George W. Bush; the logic being that it unnaturally raises the ICC's exposure and creates a rallying point for those opposed to US foreign policy, be it specifically on the ICC or generally.<sup>28</sup> Initial evidence coming out of the 2018 ASP was that Bolton's tirade had indeed backfired. A strong collective ASP statement as well as encouraging interventions from individual governments before and during the Assembly – including from some of the US' strongest allies, such as the UK

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<sup>27</sup> "Full text of John Bolton's Speech to the Federalist Society", in *Al Jazeera*, 10 September 2018.

<sup>28</sup> Adam Taylor, "John Bolton Hates the International Criminal Court. That Might Make Other Countries Love It", in *The Washington Post*, 10 September 2018; Matt Apuzzo and Marlise Simon, "US Attack on ICC Is Seen as Bolstering World's Despots", in *The New York Times*, 13 September 2018; Thierry Cruvellier, "Why the ICC Should Rejoice When America Attacks It", in *The New York Times*, 16 September 2018.

and France – rejected the American position and stood firmly behind the Court.<sup>29</sup>

This positive news was complemented by other encouraging developments during the 2018 ASP. On application from the Office of the Prosecutor (‘OTP’), the ICC Pre-Trial Chamber approved limited jurisdiction over atrocity crimes in Myanmar *vis-à-vis* Bangladesh’s status as an ICC State Party.<sup>30</sup> In addition to it engendering positive international news,<sup>31</sup> there was uniform support for this decision from States and civil society at the 2018 ASP.<sup>32</sup>

Against these positive developments, the 2018 ASP also demonstrated the harsh reality of ICC’s political support in the ASP writ large. The starkest evidence of fading support was the *de facto* decrease of the ICC budget by the ASP despite a ballooning caseload. As the then Permanent

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<sup>29</sup> ICC ASP, *Strengthening the International Criminal Court and the Assembly of States Parties*, 12 December 2018, ICC-ASP/17/Res.5 (<http://www.legal-tools.org/doc/iv4khz/>) (‘ASP 2018 Resolution’); ‘Statement on behalf of the European Union and its Member States at the International Criminal Court Seventeenth Session of the Assembly of States Parties’, 5 December 2018; ‘Statement of the Republic of France at the Seventeenth Session of the Assembly of States Parties to the Rome Statute’, 5 December 2018; ‘Assembly of States Parties to the Rome Statute of the International Criminal Court Seventeenth Session - The United Kingdom of Great Britain and Northern Ireland General Debate Statement’, 5 December 2018 (‘UK ASP Statement, 2018’); Alex Morehead and Alex Whiting, ‘Countries Reactions to Bolton’s Attack on the ICC’, in *Just Security*, 18 September 2018 (available on its web site); Human Rights Watch, ‘Human Rights Watch Briefing Note for the Seventeenth Session of the International Criminal Court Assembly of States Parties’, 21 November 2018.

<sup>30</sup> ICC, *Request under Regulation 46(3) of the Regulations of the Court*, Pre-Trial Chamber I, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, 6 September 2018, ICC-RoC46(3)-01/18-37 (<http://www.legal-tools.org/doc/73aeb4/>).

<sup>31</sup> Azeem Ibrahim, ‘This may be Aung San Suu Kyi’s last chance to do the right thing for the Rohingya’, in *The Washington Post*, 6 September 2018; Shirin Ebadi and Tawakkol Karman, ‘Imprisonment, torture and rape: Why Myanmar must be referred to the ICC’, in *CNN*, 18 September 2018; Steven Feldstein, ‘Why the ICC Investigation of Forced Displacement in Myanmar Is a Big Deal’, in *Just Security*, 1 November 2018 (available on its web site).

<sup>32</sup> See for example, ‘Statement by H.E. Sheikh Mohammed Belal, Ambassador of the People’s Republic of Bangladesh to the Kingdom of The Netherlands, at the Seventeenth Session of the Assembly of States Parties to the Rome Statute’, 6 December 2018; ‘Statement of Canada by Mr. Alan Kessel, Assistant Deputy Minister, Legal Affairs and Legal Adviser, Global Affairs Canada, 17th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court’, December 2018; ‘Sweden: Statement by Ambassador Elinor Hammarskjöld, Director-General for Legal Affairs, Ministry for Foreign Affairs, at the General Debate, 17th Session of the Assembly of States Parties to the Rome Statute’, 5 December 2018.

Representative of The Netherlands to the ICC said, “[t]he budget is an important signal, because you put your money where your mouth is”.<sup>33</sup> Ignoring the Court’s request for a modest 2.4 percent increase as well as the ASP’s own Committee on Budget and Finance’s (‘CBF’) recommendation of a 0.6 percent increase, the ASP finalized a 0.49 percent increase to approximately 148 million euros, a budget that will likely not keep up with inflation rates.<sup>34</sup> This development is startling because zero growth in the ICC’s budget, let alone a decrease, has been routinely opposed by a ‘silent majority’ of States Parties since 2010–11.<sup>35</sup>

Numerous countries expressed further concern about the ICC for a variety of reasons, including the UK’s statement lambasting ICC judges for being more concerned about their salaries than their performance in court.<sup>36</sup> One commentator noted how ‘flat’ this ASP felt and lacked the ‘drama’ of prior ASPs, hypothesising (*accurately*, as it turned out) that this was the calm before the anticipated geopolitical storm that full ICC investigations in Afghanistan or Palestine would cause if and when triggered.<sup>37</sup>

### 5.2.2. A Change in 2020–2021?

Fast-forward to 2020–2021 and the intervening year and a half appears to have produced a noticeable uptick in stakeholder support for the ICC, most noticeably from States Parties. This apparent trend started in April 2019 when four former ASP Presidents amplified calls for a thorough evaluation of the ICC. Stating that “an effective ICC is more important than ever” and that “[t]he sheer existence of the ICC has had a strong positive impact”, these eminent voices lamented that “the powerful impact of the Court’s central message is too often not matched by its performance as a judicial

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<sup>33</sup> Janet Anderson, “Money Matters at the ICC”, in *JusticeInfo.net*, 14 December 2018 (available on its web site).

<sup>34</sup> ICC ASP, *Resolution of the Assembly of States Parties on the Proposed Programme Budget for 2019, the Working Capital Fund for 2019, the Scale of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2019 and the Contingency Fund*, 12 December 2018, ICC-ASP/17/Res.4 (‘ASP Budget Resolution 2018’) (<http://www.legal-tools.org/doc/obysgj/>); Valerie Oosterveld, “ICC Assembly of States Parties 2018: Final Day”, in *IntLawGrrls*, 12 December 2018 (available on its website).

<sup>35</sup> Coalition for the ICC, “Victims to lose out with states’ double-standard on ICC budget”, 21 November 2016 (available on its website); Peter Cluskey, “Funding May Curb International Criminal Court”, in *The Irish Times*, 9 February 2017; Robbie Corey-Boulet, “Concerns over ICC Funding”, in *Inter Press Service News*, 28 September 2011.

<sup>36</sup> UK ASP Statement, 2018, see above note 29.

<sup>37</sup> See Mark Kersten, tweet @MarkKersten, 9 December 2018 (last accessed on 12 May 2021).

institution”. As such, this “is why we think an independent assessment of the Court’s functioning is needed”.<sup>38</sup>

Heeding this call, the Assembly adopted a resolution in December 2019 that created an Independent Expert Review (‘IER’) to conduct a full appraisal of the Court and its operations, and simultaneously appointed nine distinguished experts to the IER (‘Experts’), chaired by the eminent Justice Richard Goldstone.<sup>39</sup> These Experts organized hundreds of consultations that engaged with dozens of stakeholders of various stripes, all of which resulted in the IER’s Report of more than 300 pages submitted to the ASP on 30 September 2020 (‘IER Report’).<sup>40</sup> Surely, the ASP’s willingness to arrange such a wide review speaks to the desire of States Parties for the Court to work and work well. Given the overlap in content between the IER Report and this chapter, a clarification is appropriate. A complete draft of this chapter was submitted for publication almost a year before the IER was established and approximately a year and ten months before the IER Report was published.

Nevertheless, while the IER Report has undoubtedly put forward worthwhile recommendations that should start the Court on the path towards renewal, the IER’s mandate reveals that the necessary political will to improve the ICC is still missing. It is beyond the purview of this chapter to delve into this matter fully, but it is conspicuous that the IER’s mandate left out a proper, in-depth review of the ASP, its operations, as well as issues of diplomatic import such as the ICC’s relationship with the United Nations and its Security Council. Given that a symbiotic and strong relationship between the Court and the Assembly is an absolute necessity for the Rome Statute system to work, let alone excel, the lack of self-scrutiny on the part of the ASP does not evince a deep desire for the type of change needed. Further, if suspicions are true, that certain States Parties’ interest in

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<sup>38</sup> Prince Zeid Raad Al Hussein *et al.*, “The International Criminal Court needs fixing”, in *The Atlantic Council*, 24 April 2019.

<sup>39</sup> ICC ASP, *Review of the ICC and the Rome Statute System*, 6 December 2019, ICC-ASP/18/Res.7 (<http://www.legal-tools.org/doc/d1fyfk/>).

<sup>40</sup> ICC ASP, “Independent Expert Review on the International Criminal Court and the Rome Statute System - Interim Report”, 30 June 2020; ICC ASP, “Assembly President O-Gon Kwon Welcomes the final report of the Group of Independent Experts”, 30 September 2020, ICC-ASP-20200930; ICC ASP, “Independent Expert Review on the International Criminal Court and the Rome Statutes System - Final Report”, 30 September 2020 (‘IER Report’) (<http://www.legal-tools.org/doc/cv19d5/>).

supporting the IER is to neuter an increasingly pesky ICC, then real support for the ICC's mandate is surely lacking with these States.<sup>41</sup>

Returning to the positive, however, the current standoff between the US and the ICC was another apparent indication that political support for the ICC was stronger than previously thought. In response to developments in the OTP's proposed investigations in Afghanistan and Palestine,<sup>42</sup> the Trump administration in June 2020 authorized the US government to levy financial and other punitive measures on the ICC, its staff, their families and any individuals or entities that give material support to the Court (punitive measures that Ambassador Bolton had previously threatened),<sup>43</sup> potentially even Americans.<sup>44</sup> The announcement of these potential sanctions followed a public threat a few months earlier to sanction two named senior OTP officials and their families<sup>45</sup> and bipartisan letters from both the US House and Senate that urged the State Department to explore punitive actions against the ICC for possibly investigating Americans and Israelis.<sup>46</sup> For its part, the Israeli government has thrown its full support behind the Trump administration's anti-ICC efforts and made threats of their own; in fact, there are good grounds to believe that Israel co-ordinated, if not pushed, the US to take such a harsh stance.<sup>47</sup>

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<sup>41</sup> Liz Evenson and Esti Tambay, "The US Should Respect the ICC's Founding Mandate", in *Just Security*, 19 May 2021 (available on its web site).

<sup>42</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 (<http://www.legal-tools.org/doc/x7kl12/>); ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12 (<http://www.legal-tools.org/doc/clur6w/>).

<sup>43</sup> See above note 27.

<sup>44</sup> Diane Marie Amman, "I Help Children in Armed Conflict. The President Is Forcing Me to Stop", in *Just Security*, 29 June 2020 (available on its web site); Leila Sadat, "First They Came for Me and My Colleagues. The US Attack on the Int'l Criminal Court.", in *Just Security*, 29 June 2020 (available on its web site).

<sup>45</sup> US Department of State, "Secretary Michael R. Pompeo's Remarks to the Press", 17 March 2020.

<sup>46</sup> "Bipartisan Letters Urge Pompeo to Call for Halt to ICC Investigations of U.S., Israel", *Jewish Virtual Library*, 13 May 2020 (available on its web site).

<sup>47</sup> Noa Landau, "Netanyahu Calls to Impose Sanctions Against International Criminal Court", in *Haaretz*, 21 January 2020; "Netanyahu Will Fight ICC's Investigation into Israel's War Crimes", in *Middle East Monitor Online*, 18 May 2020; Zachary Keyser, "Israel Coordinated US Sanctions Against ICC with Trump Administration-Report", in *The Jerusalem Post*,

While these authorized sanctions remained ‘naked’ or unexecuted for a number of months, Secretary of State Michael Pompeo announced on 2 September 2020 that the ICC Prosecutor, Fatou Bensouda, and Head of the OTP’s Jurisdiction, Complementarity and Cooperative Division, Phakiso Mochochoko, were to be placed on the Specially Designated Nationals List of the Treasury Department’s Office of Foreign Asset Control. These Court officials, their families and anyone who “materially assisted” the ICC Prosecutor now face various possible financial sanctions.<sup>48</sup> On 1 April 2021, the Biden administration revoked Executive Order 13928 that provided the legal basis for the sanctions.

These sanctions were unprecedented in two respects: one, no country has ever directed such an attack towards an international criminal tribunal, especially for the reason that the Court and its staff were simply carrying out their work in furtherance of their legal and ethical duties to do so; and two, the US government has only used this type of punitive action against, *inter alia*, traffickers of many types, mass human rights abusers, nuclear proliferators, cyber-criminals, not judicial professionals seeking to hold alleged mass criminals accountable under the law.<sup>49</sup>

Thanks to these unprecedented attacks from a country with a justifiably positive (but withering) reputation on the rule of law and human rights, the ICC’s visibility around the world again reached new heights. Yet, far from suppressing the Court and its stakeholders as intended, these attacks were met with an unprecedented outpouring of support for the ICC (to clarify, condemnations came after both the announcement of the Executive Order itself and the announcement of sanctions against two Court officials). On top of a litany of public statements from States Parties, universities, bar

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12 June 2020; Jack Parrock, “‘Profound Regret’: ICC Prosecutor on Being Hit with US Sanctions over Afghanistan War Crimes Probe”, in *Euronews*, 29 June 2020.

<sup>48</sup> US Department of State, “Secretary Michael R. Pompeo at a Press Availability”, 2 September 2020; US Department of Treasury, “Blocking Property of Certain Persons Associated with the International Criminal Court Designations”, 2 September 2020.

<sup>49</sup> William Burke-White, “The Danger of Trump’s New Sanctions on the International Criminal Court and Human Rights Defenders”, in *Brookings Institution*, 11 June 2020 (available on its web site); Adam M. Smith, “Dissecting the Executive Order on Int’l Criminal Court Sanctions: Scopes, Effectiveness, and Tradeoffs”, in *Just Security*, 15 June 2020 (available on its web site); Jennifer Trahan and Megan Fairlie, “The International Criminal Court is Hardly a Threat to US National Security”, in *Opinio Juris*, 15 June 2020 (available on its web site); Rob Berschinski, “Trump’s ICC EO Will Undercut All U.S. Sanctions Programs—Is That Why Treasury Isn’t Conspicuously on Board?”, in *Just Security*, 16 June 2020 (available on its web site).

associations, civil society organizations and global icons defying the Trump administration,<sup>50</sup> 67 States Parties – virtually all being US allies – issued a joint statement opposing the sanctions and supporting the Court.<sup>51</sup>

This outpouring of support for the ICC included strong statements from: sitting members of Congress;<sup>52</sup> former and current US high-ranking officials; former American chief prosecutors at international tribunals;<sup>53</sup> 175 plus American international law and national security experts and scholars, and; US bar associations including the American Bar Association’s adoption of new policy urging all governments to refrain from such attacks.<sup>54</sup> These numerous statements vigorously argued that these sanc-

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<sup>50</sup> To review the large number of statements in support of the ICC and against US sanctions, it is best to consult these Twitter threads that contain links to the statements. Maria Elena Vignoli, tweet @me\_vignoli, 11 June 2020 (last accessed on 12 May 2021); Sergey Vasiliev, tweet @sevslv, 11 June 2020 (last accessed on 12 May 2021).

<sup>51</sup> Permanent Mission of France to the United Nations in New York, “Statement in support of the International Criminal Court (ICC) following the release of the US Executive Order of 11 June 2020”, 23 June 2020.

<sup>52</sup> See, for example, Rep. Jamie Raskin, tweet @RepRaskin, 3 September 2020 (last accessed on 12 May 2021); House Foreign Affairs Committee, tweet @HouseForeign, 2 September 2020 (last accessed on 12 May 2021); Rep. Jim McGovern, tweet @RepMcGovern, 2 September 2020 (last accessed on 12 May 2021); Bernie Sanders, tweet @SenSanders, 2 September 2020 (last accessed on 12 May 2021); House Foreign Affairs Committee, tweet @HouseForeign, 2 September 2020 (last accessed on 12 May 2021); Sen. Patrick Leahy, tweet @SenatorLeahy, 2 September 2020 (last accessed on 12 May 2021); Joaquin Castro, tweet @JoaquinCastrotx, 2 September 2020 (last accessed on 12 May 2021); Rep. Ted Deutch, tweet @RepDeutch, 3 September 2020 (last accessed on 12 May 2021); Rep. Ilhan Omar, “Statement on Administration’s Announcement of Sanctions Against ICC Officials”, 2 September 2020.

<sup>53</sup> US Senator Patrick Leahy, “Reaction To The White House Announcement Of Sanctions Against Employees Of The International Criminal Court”, 11 June 2020; Ambassador David Scheffer, “The Self-Defeating Executive Order Against the International Criminal Court”, in *Just Security*, 12 June 2020 (available on its web site); Ambassador Clint Williamson, “Amb. Williamson: Trump Administration’s Actions Towards ICC Damages U.S. Global Standing”, in *Arizona State University IRLS Program Newsletter*, 12 June 2020 (available on its web site); David Crane, “Wrong Side of History – the United States and the International Criminal Court”, in *Jurist*, 13 June 2020 (available on its web site); General Wesley K. Clark, “The United States Has Nothing to Fear From the ICC”, in *Foreign Policy*, 2 July 2020; Benjamin B. Ferencz, “Nuremberg Prosecutor’s Warning on Trump’s War on the Rule of Law”, in *The Daily Beast*, 19 July 2020; see Todd Buchwald *et al.*, “Former Officials Challenge Pompeo’s Threats to the International Criminal Court”, in *Just Security*, 18 March 2020 (available on its web site).

<sup>54</sup> American Bar Association, “ABA President Judy Perry Martinez Statement Re: US Sanctions of International Criminal Court Personnel”, 12 June 2020; International Criminal Justice Today, “ABA Adopts Policy Condemning Threats Against the ICC and its Officers”, 3

tions were appalling in nature, a betrayal of American values and principles and unwise – if not unconstitutional – policy.<sup>55</sup> Notably, literally none of this pushback included any significant disagreement with the ICC pursuing investigations in Afghanistan and Palestine.

However, without taking away from the real positives in seeing the widespread and vocal support for the Court in its time of need, this support has not yet translated into a tangible stiffening of the ASP's political and diplomatic resolve in defense of the Court and its work. To be sure, there is plenty of time for such resolve to materialize; ICC cases take time and many developments could occur in the intervening months and years that will spur on a new level of States Parties' support. Yet, until then, there really is only reason to be sceptical that States will push back hard against the US.

To explain, this widespread ICC support did not grow organically but rather coalesced around the extraordinary steps taken by a bombastic American presidency that was, at the time, increasingly weak within the US and wildly unpopular outside of it. Additionally, States Parties had not taken additional steps beyond their statements of disapproval. For instance, although there may be strategic reasons for keeping matters behind closed doors for now, there has not been one European government that has publicly floated the idea of a European Union ('EU') blocking statute to protect the ICC from US sanctions. The UK and France had not called for a United Nations Security Council ('UNSC' or 'Council') meeting to challenge the US. Even though such a meeting is unlikely to occur, let alone net tangible results, at the very least it would buoy the Court further and inch closer to generating something of a diplomatic cost on the US for attempting to undermine the Court so brazenly. Most disturbingly, even the staunchest State supporters of the ICC have not called for an increase of the ICC's budget to help it defend itself from US sanctions, such as to supplement investigative monies to get around US measures or to pay the legal fees of any ICC staff members who may be sanctioned.

So, taking a step back, the foregoing events from 2018 until 2020 illustrate the quandary the Court faces today: there is enough political sup-

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August 2020; New York City Bar, "City Bar Voices Opposition to Executive Order Authorizing Sanctions on Persons Working with or for the International Criminal Court", 29 July 2020.

<sup>55</sup> See above notes 50-54.

port for the ICC's existence and relevance to continue, but not enough to do its job optimally. Looking ahead to the next 20 years and beyond, the question for the Court is clear: 'how to get out of this political predicament?'

### **5.2.3. Time to Look Inward**

This chapter proposes and discusses three tangible recommendations to the Court, the Assembly, and/or other core stakeholders on how the ICC can escape this political quandary. It is vital, however, to state up front that the ICC's political predicament cannot be primarily solved through better political decisions, or said differently, through means too attenuated from the judicial process itself. It is not the object of this chapter to define what is meant by 'political' and the term's many aspects; nevertheless, there are some important points about 'political' to mention here, starting with what is not meant.

Of course, it is hard to argue with the fact that everything, in one shape or another, is inherently political. For example, to have the rule of law and a functioning judiciary – thus stripping political entities of certain powers – is itself a political decision. Further to the point, the Court often has no choice but to intervene in politicized situations and thus cannot avoid outright politicization, yet such a quandary is not the equivalent to showing political bias in its decisions or in its judgments. However true these points may be, it does not help us get closer to what is meant by 'political', especially when noting that further, thanks to the aforementioned global recognition that the Court and the field of international criminal justice have achieved, the ICC will always be viewed as a political actor acting in political ways by some, if not many. Nothing can change this reality. Nevertheless, while again hard to argue with this valid point, it also does not get us closer to a working definition of 'political'.

To say that the 'political' should not be the central way that the ICC escape this conundrum is to proclaim that what the Court (and the ASP by extension) does outside of its proverbial judicial walls does not matter as much as what it does within them. How well the ICC performs (and the ASP supports it) in executing its judicial mandate – from investigation to appeal – is the key to change its fortunes.

To be clear, this sentiment should not be taken out of context to say that the halls of diplomacy and politics are irrelevant or otherwise of little importance. The Court is duty bound to do its level best to understand and

absorb the political and diplomatic terrain it operates in (be it in a country where an investigation is ongoing to the UNSC) so to advance its institutional remit.<sup>56</sup> To do otherwise would not only be a dereliction of its organizational responsibilities but would also harm its ability to execute that very remit.

Moreover, for a Court whose enforcement powers necessitate States' consent and co-operation, the ICC must engage in political and diplomatic forums robustly and ingeniously, some of which form the very points made in the recommendations discussed below. For instance, to get more fugitives arrested or suspects to comply with summons requires the creation of new political and diplomatic levers.

Yet, to engage in such forums is to do so in the furtherance of judicial goals, not to compromise, for instance, a judicial mandate for political purposes or ends. It would be a serious error for the ICC to make organizational strategies based upon political consensus or to refrain permanently from following the facts and law in any given case out of political expediency. To warm up to the desires of global powers, to go only after easy cases, and/or to alter preliminary examinations so not to offend States is foolish. At best, doing so simply swaps out the ICC's current problems for new ones, or at worse, just adds new problems onto the pile.

There are two good reasons for the ICC to avoid the temptation of politics.

First, regardless of how hard some try to portray the ICC as just another actor on the geopolitical stage, it is undeniably unique in comparison to others, be it sovereigns, other international institutions, or international NGOs. What makes the Court unique is its mandate as a permanent institution to investigate and prosecute individuals for atrocity crimes, and more importantly, its resulting responsibilities to maintain independence and impartiality; core factors to its credibility, legitimacy, and potential effectiveness. It is fundamental that courts do not rely on the political thinking *du*

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<sup>56</sup> In arguing that the Court should be 'political', Allen Weiner defined political as "showing sensitivity to promoting the institutional well-being of the court in light of the prevailing geopolitical context". This definition is a good one and, fundamentally, this chapter does not argue against a position like Weiner's. His argument is that the ICC must be cognizant of its political surroundings when making strategic decisions, or as said later in this chapter, the Court should not operate in a political vacuum. Allen Weiner, "Prudent Politics: International Criminal Court, International Relations, and Prosecutorial Independence", in *Washington University Global Studies Law Review*, 2013, vol. 12, no. 3, p. 549.

*jour* or otherwise run the risk of undermining their entire purpose and mandate. It may be true that the ICC is not above fighting for its relevance and reputation, but it cannot resort to partisan politics or political whims to win that fight.

Second, on many levels, any court (most especially the ICC) can never properly engage in politics. Sparing a massive influx of money and a radical realignment of priorities, the core of any court's budget must go to lawyers and judges, not political advisors and publicists, all of which puts courts at a distinct disadvantage. Even if the Court had a very generous budget for public relations, it would be no match for the sophisticated operations and extensive resources that governments and wealthy actors have at their disposal (two actors often seeking to evade ICC scrutiny).<sup>57</sup> Requirements of the judicial process – for example, the confidentiality of investigations, rights of the accused and victims and sanctity of judicial verdicts – further limit the Court's ability to engage in geopolitical affairs in the way other non-judicial actors can.

To emphasize, none of the above means the Court does or should work in a political vacuum. There is nothing wrong with the Court being politically savvy and conscious provided the legal dictates of the Rome Statute are fully respected. Sequencing the phases and focuses of an investigation is an oft cited, good example of ways a court like the ICC can be politically shrewd yet legally principled.<sup>58</sup>

Instead, it is a fool's errand to debate whether the ICC just did 'this' or did 'that' on the geopolitical stage – had a better communications strategy, engaged with States more, wrote more editorials, or even avoided certain cases – then the Court's political situation would greatly improve. Politics will never be the Court's strong suit and focusing too outward will only plunge the Court into a game it cannot win. States, NGOs and other stakeholders must occupy this political role on behalf of, and in concert with, the Court, not the other way around.

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<sup>57</sup> Michael S. Greco, "Smells like self-interest", in *The Hill*, 13 January 2016 (available on its web site); Dayo Olopade, "Who's Afraid of the International Criminal Court", in *The New Republic*, 9 March 2013 (available on its web site).

<sup>58</sup> See Leslie Vinjamuri, "The ICC and the Politics of Peace and Justice", in Carsten Stahn (ed.), *The Law and Practice of International Criminal Court, Oxford Companion to International Criminal Justice*, Oxford University Press, 2015, p. lxxxvi; Bartłomiej Krzan, "International Criminal Court Facing the Peace vs. Justice Dilemma", in *International Comparative Jurisprudence*, 2017, vol. 2, no. 2, pp. 82, 86–87.

Rather, the Court (and, again, by extension, the ASP with respect to their oversight and quasi-legislative powers) must focus its efforts on what is squarely in its domain – namely, the law, facts and judicial process – and let the politics play out as they will. If the Court and the ASP look inward to the ICC’s judicial functions and do a better job at making these functions run smoothly and without undue hindrance, the ICC’s chances of greatly enhancing its present and future become far more promising.

### 5.3. Inward Looking Recommendations

This chapter’s three concrete proposals<sup>59</sup> for the Court and the ASP as its quasi-legislative supervisory body are:<sup>60</sup> prioritize arrest; create a culture of professional and institutional development; and forge a long-term budget.

Before diving into the substance, it is worth making a brief mention of the themes of this book that these recommendations tie into, namely the making of the Rome Statute, length of proceedings, exercise of jurisdiction and State engagement and ‘*quo vadis?*’.

With respect to the promise of the Rome Statute (ostensibly, independent and impartial accountability for atrocity crimes in a just court of law with redress for victims provided), the ICC’s mandate is fundamentally a judicial one, yet the Court operates in a highly politicized geopolitical environment where bias of all kinds is rife. It stands to reason that the ICC and its stakeholders should focus on what the Court can control, and that is making the Court the best functioning tribunal it can be. Accordingly, the best way for the Court to deliver on this promise is to focus on the practical as opposed to getting distracted by international politics or dragged into spending excessive time on erudite issues that have limited impact on im-

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<sup>59</sup> It is necessary to state that these recommendations assume a level of collaboration between the ICC and State Parties that is currently lacking. For instance, any recommendation that seeks to improve the execution of arrest warrants, by definition, requires the ICC and States to work in closer concert. It is thus fair to say that this chapter will not delve fully into how the Court, States Parties, and the Assembly itself can forge a far deeper meeting of the minds, if not a closer working relationship. At its core, the issue is how to persuade the ICC’s political stakeholders to act apolitically – or as close to apolitically as possible – when it comes to the best interest of the Court. Certainly, some much-needed leadership within the ASP would be required, specifically strong State support for international criminal justice even at the expense of political expediency. However, it should be stated that these recommendations could be considered the initial means by which an improved working relationship could be built, or at least done in parallel to other relationship-building measures.

<sup>60</sup> Some components of these recommendations are directed at the UN Security Council as it interacts with the ICC and ASP on judicial matters.

proving its functionality, such as Head of State immunity or impunity for global powers.

To this end, one issue this chapter's practical suggestions directly address is the length of ICC proceedings. Lack of arrests, lack of professional development and institutionalized knowledge, and uncertainty over budget are some of the most obvious contributing factors that underpin the criticism that the ICC is too inefficient and too ineffective. These recommendations, if pursued at some level, would bring about marked improvements in this department, namely by having defendants to prosecute (as opposed to having hibernated cases with at-large fugitives), enhancing the speed and functionality of proceedings *vis-à-vis* developing the competencies of ICC professionals, and improving judicial performance through the injection of greater resources in a more reliable fashion.

Likewise, a central reason that State support, co-operation and engagement with the ICC has been inconsistent is that the judicial performance of the Court has been itself inconsistent. To date, inconsistent State co-operation and support are relatively risk-free; the perception being that chances are low that the Court will bring its cases to fruition. While not exclusively caused by either the Court or States Parties, this dynamic exists because these two partners are not focused on the right concrete steps to enhance the ICC's judicial operation. Ultimately, with greater ICC judicial functioning that these recommendations are built to remedy comes greater State support and engagement, because States focus their resources on institutions that are thriving and operating optimally. States are also more likely to co-operate with the ICC if the Court is viewed as thoroughly competent and effective in discharging its mandate. Otherwise, they risk negative repercussions.

Finally, if we are to ask where the ICC is headed, there is good reason to argue that in these times of turbulent State support for international criminal justice, the best advice is to 'put one's head down and work'. The ICC and its States Parties should be solely focused on what can be controlled, namely making the Court a well-functioning court of law. This is the best hope to address lofty geopolitical debates that dominate ICC commentary and criticism; enhancing the Court's performance will drown out much of the noise that sidetracks the Court and its supportive stakeholders.

### 5.3.1. Prioritize Arrest of Fugitives

The importance of arrests in international criminal law cannot be overstated. Nothing is more debilitating to a criminal court than an inability to arrest fugitives.<sup>61</sup> At the international level, the Special Tribunal for Lebanon exemplifies how a lack of arrests can lead to irrelevance, among other problematic consequences.<sup>62</sup> Additionally, the many positive byproducts that international criminal justice promises society at-large as well as to affected communities – be it, for example, security, economic growth, fairer government<sup>63</sup> – are purely theoretical if the accused remain at-large.

Arrests are also likely a better measure of a court's health than the oft-discussed conviction rates.<sup>64</sup> The number of guilty verdicts says nothing about the justice dispensed by a tribunal. Plenty of corrupt courts around the world have high conviction records<sup>65</sup> and surely there are divergent opinions on what is a 'good' conviction rate (for example, a prosecutor, a

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<sup>61</sup> The issue of arrest and its ties to the Court's effectiveness, credibility, and legitimacy has engendered much discussion, further underscoring its importance. See Henry M. Jackson School of International Studies, Task Force 2013, "The International Criminal Court: Confronting Challenges on the Path to Justice", 2013 ('Washington Task Force Report') (available on its web site); Catherine Gegout, "The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace", in *Third World Quarterly*, 2013, vol. 34, no. 5, pp. 800–818; David Kaye, "Who's Afraid of the International Criminal Court?", in *Foreign Affairs*, June 2011; ICC Forum, "Invited Experts on Arrests Question", February 2014–January 2015 (available on its web site).

<sup>62</sup> See Michael Young, "The Special Tribunal for Lebanon: Playing it Safe has Achieved Nothing", in *The National*, 19 September 2018.

<sup>63</sup> There is much scholarship of the correlation between international criminal justice and positive societal impacts. See, generally, Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W.W. Norton & Company, New York, 2011; Jo and Simmons, 2016, pp. 443–475, see above note 11; Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions", in *American Journal of International Law*, 2017, vol. 111, no. 3, pp. 689–723; Benjamin J. Appel, "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?", in *Journal of Conflict Resolution*, 2018, vol. 62, no. 1, pp. 3–28; Courtney Hillebrecht, "The Deterrent Effects of the International Criminal Court: Evidence from Libya", in *International Interactions*, 2016, vol. 42, no. 4, pp. 616–43; Jane E. Stromseth, "Is the ICC Making a Difference?", in *Just Security*, 6 December 2017 (available on its web site).

<sup>64</sup> See, for example, Hatcher-Moore, 2017, see above note 22; Rebecca Kheel and Morgan Chalfant, "Five things to know about the International Criminal Court", in *The Hill*, 10 September 2018.

<sup>65</sup> Marc Bennetts, "Russian conviction rate is higher than under Stalin", in *The Times*, 14 August 2017; Terrence McCoy, "China scored 99.9 percent conviction rate last year", in *The Washington Post*, 11 March 2014.

defense attorney and a judge would have quite different assessments). Additionally, the appropriate unpredictability of trials further underscores why arrests are a better gauge of a judicial system's health.

Against this backdrop, the ICC needs help. Not long ago, ICC commentators raised the alarm that, without new arrests, the Court was in danger of having no trials after the then-current slate were completed.<sup>66</sup> Even though a string of arrests in 2018 diminished this immediate concern, the Court still has a sizable gap in arrests.<sup>67</sup> Fourteen out of the 45 individuals subject to an ICC arrest warrant (over 31 percent) remain at large.<sup>68</sup> Putting aside the organic, democratic transformation in Sudan that helped lead to the 2020 arrest of a Sudanese militia leader possible,<sup>69</sup> most of the recent ICC arrests can hardly be seen as signs of things to come; arresting rebels with little political sway does not signify that the ICC has pierced the shield protecting higher-profile ICC fugitives like Sudan's Omar al-Bashir and Libya's Saif Gaddafi or General Mahmoud Al-Werfalli.<sup>70</sup> Of course, all arrests in the realm of international criminal justice are noteworthy and help build a culture of future compliance, but there remains room for significant progress.

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<sup>66</sup> See, for example, Mark Kersten, "The International Criminal Court is Set to Investigate Alleged U.S. War Crimes in Afghanistan", in *The Washington Post*, 8 December 2017; Alex Whiting, "Difficult Days Ahead for the Int'l Criminal Court", in *Just Security*, 19 December 2016 (available on its web site).

<sup>67</sup> ICC-OTP, "Statement of ICC Prosecutor, Fatou Bensouda, following the recent arrests of suspects concerning the situation of Central African Republic: 'Our investigation into the conduct of all sides to the conflict continues'", 14 December 2018; ICC-OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the transfer of suspect, Alfred Yekatom: 'The cause of justice in the Central African Republic has been strengthened by today's surrender'", 17 November 2018; ICC-OTP, "Statement of ICC Prosecutor, Fatou Bensouda, following the arrest and transfer of Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, a suspect in the Mali situation: 'We remain steadfast in the pursuit of our mandate under the Rome Statute'", 31 March 2018.

<sup>68</sup> See ICC, "Defendants at large" (available on its web site).

<sup>69</sup> ICC-OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of alleged militia leader, Ali Muhammad Ali Abd-Al-Rahman, also known as Ali Kushayb, to the Court", 9 June 2020.

<sup>70</sup> For example, prior to being overthrown by democratic transition in the country, the relative freedom of Sudan's President Bashir to travel despite having an ICC arrest warrant exemplifies the continued political difficulty in securing his arrest to stand trial. See, Tom White, "States 'Failing to Seize Sudan's Dictator Despite Genocide Charge'", in *The Guardian*, 21 October 2018.

As is well-known in international criminal law, arrests lay at the feet of States given that any international criminal tribunal relies on national authorities to carry out the tribunal's arrest warrants.<sup>71</sup> At the granular level, this arrest regime means that the relevant ICC judicial body issues a lawful arrest warrant and communicates it through proper channels to the appropriate domestic authorities, who thereafter execute the arrest warrant in coordination with ICC personnel back in The Hague and/or who are allowed into the jurisdiction to assist.<sup>72</sup> Somewhere within this process, however, politics get involved and arrests grind to a halt.

Needless to say, the Court will not get its own police force anytime soon. Until there is a tectonic shift in international norms, the State co-operation model of arrest is here to stay. Therefore, in the meantime, the only feasible options available to improve the ICC arrest record are to develop new tools that can leverage the existing infrastructure of multilateral co-operation. Put simply, the system needs 'teeth'. The venues to pursue judicial progress in arrests are the Court itself, the Assembly, and the UN. Using these venues as a framework, recommendations for each will be discussed below in turn.

### **5.3.1.1. Recommendation on Arrests for the ICC**

For the Court, the sole recommendation put forward here is to establish and resource a tracking unit in the OTP akin to the one established in the Prosecutor's office at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). By way of background, the ICTY OTP in 1999 created a specialized group of investigators, analysts, and other professionals tasked with serving as a focal point for countries on intelligence relevant to fugitives, cultivating sources, monitoring local authorities' effort to arrest fugitives, and operating as a hub of information among disparate public authorities.<sup>73</sup>

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<sup>71</sup> ICC, "Arresting Suspects at Large: Why it Matters. What the Court Does. What States can Do", January 2019, pp. 13–18.

<sup>72</sup> *Ibid.*

<sup>73</sup> It should be highlighted that the title 'tracking' for this unit is somewhat of a misnomer given that figuring out the whereabouts of a fugitive was only one segment of its mandate. Serge Brammertz, "Arresting Fugitives from International Justice and Other Aspects of State Cooperation: Insights from ICTY Experience", 16 November 2012, pp. 5–11 ('Brammertz, Speech') (available on the ICC ASP's web site).

At the 2012 ASP, the ICTY Prosecutor, Serge Brammertz, spoke before the Assembly, proclaiming, “[d]id the Tracking Unit concept work? Overall, we think it is fair to say that it was very successful”.<sup>74</sup> Along with EU conditionality placed on candidate States like Serbia,<sup>75</sup> the tracking unit was deemed pivotal in a great many ICTY arrests, including some of its most high-profile ones.<sup>76</sup> This assessment was shared by journalist Julian Borger in his authoritative book on the trials and tribulations of the ICTY’s hunt for fugitives:

Small, underfunded and scrappy as it was, the tracking unit proved itself a far better value for money than leviathan Western intelligence agencies involved in the pursuit. [...] it had inherent advantages when it came to gathering intelligence. Would-be informants were generally more willing to pass on tips to investigators from an UN-sponsored tribunal than to spies from a foreign government. The flow of information gave [ICTY Prosecutors] ammunition when they confronted [...] recalcitrant governments [...]. Having an in-house intelligence agency allowed the prosecutors to judge whether they were being taken for a ride by top officials and the security services. It helped them distinguish between truth and obfuscation, genuine effort and pantomime.<sup>77</sup>

The recent high-profile arrest of Félicien Kabuga while hiding out in France – wanted for 26 years by the International Criminal Tribunal for Rwanda (‘ICTR’) and its successor the International Residual Mechanism for Criminal Tribunals (‘MICT’), that is also the successor of the ICTY – was yet another success story that supports the utility of a tracking unit.<sup>78</sup> It is noteworthy that the MICT tracking unit developed with the times, crediting the arrest of Kabuga with a move away from a network of informants to a *modus operandi* of analysing large amounts of relevant data:

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<sup>74</sup> *Ibid.*, p. 11.

<sup>75</sup> See below note 92 and accompanying text.

<sup>76</sup> *Ibid.*; Julian Borger, *The Butcher’s Trail: How the Search for Balkan War Criminals Became the World’s Most Successful Manhunt*, Other Press, New York, 2016 (‘Butcher’s Trail’).

<sup>77</sup> *Ibid.*, p. 397.

<sup>78</sup> International Residual Mechanism for Criminal Tribunals, “Searching for the Fugitives” (available on its web site); Adam Ciralsky, “How a High-Tech Dragnet Nabbed the Alleged Financier of the Rwandan Genocide—After He’d Spent 26 Years on the LAM”, in *Vanity Fair*, 22 May 2020.

[W]e tried to change this reactive way of investigating [that is, informant] to become proactive, focusing on analysis and collection. We started assembling and analyzing telephone data, financial and immigration records, travel plans and so on. As we became more data driven, it allowed us to concentrate our investigation on Western Europe.<sup>79</sup>

Of course, the transferability of the ICTY or MICT tracking unit's success to the ICC-OTP is complicated by a range of factors. For instance, the ICTY had primary jurisdiction in a single region, so they did not have to contend with the complexities of complementarity and could dedicate more time and resources to understanding and being in the region. Much of the above description of the ICTY tracking unit includes duties already covered by the existing Jurisdiction, Complementarity and Cooperation Division ('JCCD') of the ICC OTP,<sup>80</sup> although at a more diplomatic level and with co-operation (for example, arrest issues) only being one part of the Division's enormous portfolio.

The OTP has subsequently established such a unit at some point in 2018 under the name "Suspects-At-Large Tracking Team". This development comes as no surprise given the emphasis placed on such improvements under Prosecutor Fatou Bensouda, who has already done much to effectuate positive change in the OTP.<sup>81</sup>

However, the above mentioned IER Report of 2020 made clear that resource restraints are hampering efforts to realize the potential of the Suspects-At-Large Tracking Team:

The OTP set up a Suspects-At-Large Tracking Team (SALTT) in 2018. At the time of writing it has two full-time members of staff, both from the Investigations Section (IS) of the [Investigative Division]. Two JCCD cooperation advisers are affiliated with the SALTT on a part-time basis, aside their main tasks at the JCCD. Based on interviews carried out by the Experts, the Unit is under-resourced and cannot fulfil all the tasks required for sufficient tracking, analysis and coordination of co-operation. In this context, the Experts take note of the OTP's

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<sup>79</sup> *Vanity Fair*, 22 May 2020, see above note 78.

<sup>80</sup> ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 7 (<http://www.legal-tools.org/doc/a97226/>).

<sup>81</sup> See Sam Shoamanesh, "Institution Building: Perspective from within the Office of the Prosecutor of the International Criminal Court", in *International Criminal Law Review*, 2018, vol. 18, no. 3, pp. 489–516.

statement that its limited resources rule out ‘some of the more ambitious means employed by the tracking units of other international criminal tribunals’.<sup>82</sup>

The IER Report further noted that, “[i]mportantly, the tracking and arrest team has no budget assigned to it within the Court.”<sup>83</sup> For the tracking unit concept to work as it did for the *ad hoc* Tribunals, the Suspects-At-Large Tracking Team requires monies to recruit seasoned operatives who would be focused squarely on the apprehension of fugitives. Adding resources and capacity to the Suspects-At-Large Tracking Team could also feed on-the-ground information into the existing ASP’s diplomatic procedures on non-co-operation as well as its regional focal points (both discussed below), which could prove pivotal in bringing about the necessary political pressure to effectuate arrests.

Indeed, the proper resourcing of a tracking unit is not free, and the OTP already fights for every Euro in its sparse budget. However, the IER Report has put the ASP on notice that it is a hurdle to an OTP-led initiative to secure arrests; surely bad optics all-around. Further, as already mentioned, the ICTY tracking unit proved to be a tremendous value in the ICTY’s overall budget, all of which strengthens the ICC-OTP’s case for properly supporting the Suspects-At-Large Tracking Team before the Assembly.

### **5.3.1.2. Recommendation on Arrests for the Assembly of States Parties**

With respect to the ASP’s role, the Rome Statute states that “the Assembly shall consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation” with any and all ICC judicial orders including, but not limited to, arrest warrants.<sup>84</sup> The appropriate chamber would be responsible for making a finding pursuant to Article 87 and then referring the matter to the ASP for consideration, which the judges have done so on a number of occasions, most notably in the Sudan situation but also with respect to Kenya and Libya cases.<sup>85</sup>

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<sup>82</sup> IER Report, see above note 40.

<sup>83</sup> *Ibid.*, para. 772.

<sup>84</sup> Rome Statute, Article 87(5)(7), see above note 15.

<sup>85</sup> ICC ASP, “Non-cooperation” (available on its web site).

In response to these referrals of non-co-operation, the Assembly has acted. A review of its webpage specifically dedicated to non-co-operation<sup>86</sup> shows that the ASP has adopted specific diplomatic procedures for addressing various situations of non-co-operation,<sup>87</sup> established a system of focal points to facilitate regional communication among State Parties on non-co-operation,<sup>88</sup> and created a practical Toolkit for States on how best to keep apprised of, and publicly respond to, instances of non-co-operation.<sup>89</sup>

Yet, the ASP can and should do much more if arrests are truly a high priority.<sup>90</sup> These measures, while helpful, only amount to better communication at the diplomatic level. Improved communication is crucial, but it does little when the hurdle to arrest is politically unco-operative States.<sup>91</sup> For these situations, arrests only occur when leverage is applied, much like how the EU conditioned membership of former Yugoslavian republics on their compliance with ICTY judicial orders, most notably arrest warrants.<sup>92</sup> Without pressure points that either negatively or positively motivate intransigent States, it is all too easy for such States to simply ignore executing ICC arrest warrants, especially given that it is often politically expedient to do so.

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<sup>86</sup> *Ibid.*

<sup>87</sup> ICC ASP, “Assembly procedures relating to non-cooperation”, 20 December 2011, ICC-ASP/10/Res.5, Annex (<http://www.legal-tools.org/doc/fl5c3c/>).

<sup>88</sup> *Ibid.*, para. 16.

<sup>89</sup> ICC ASP, “Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation”, 16–24 November 2016, ICC-ASP/15/31/Add.1 (<http://www.legal-tools.org/doc/e4be82/>).

<sup>90</sup> A review of almost any Assembly resolution is replete with references as to how important the execution of arrest warrants is to the fulfilment of the ICC’s mandate. The ASP’s 2018 resolutions are no exception. ASP Budget 2018 Resolution, paras. 21–35, see above note 34.

<sup>91</sup> The University of Nottingham Human Rights Centre Experts Workshop, “Cooperation and the International Criminal Court Report”, 18–19 September 2014, para. 15 (‘Nottingham Cooperation Report’).

<sup>92</sup> European Union, Committee on Industry, Research and Energy, “Towards a new framework for Electronic Communications infrastructure and associated services: The 1999 Communications Review”, 10 November 1999, in European Bulletin No. 5–1999, COM (1999) 539; Council of the European Union, “Council conclusions on conditionality governing the development of the European Union’s relations with certain countries of south-east Europe”, 29 April 1997, in European Bulletin No. 4–1997; Butcher’s Trail, 2016, p. 721, see above note 76; Carole Kenney and John Norris, “International Justice on Trial? Taking Stock of International Justice Over the Past Quarter Century”, in *Center for American Progress*, 28 March 2018, para. 156 (‘American Progress IJ Report’); Brammertz, Speech, p. 13, see above note 73.

As for how the Assembly can generate leverage, one suggestion is to create an optional arrest protocol, as originally proposed by Ambassador David Scheffer, the first US Ambassador at-large for War Crimes Issues.<sup>93</sup> Ambassador Scheffer's proposal consisted of a draft international compact open to all States – not just ICC States Parties – and potentially international organizations, like Interpol and the African Union, that would create a mechanism for the efficient deployment and operations of an 'ICC Protocol Team' specifically assembled for the arrest and transfer of ICC fugitives. In Ambassador Scheffer's very detailed draft protocol, the ICC Protocol Team would be made up of skilled professionals from member States and the ICC itself – such as the above recommended tracking unit/SALTT – whose operations would be closely supervised by political and tactical oversight, and subject to numerous provisions to ensure notice and preapproval.<sup>94</sup> Yet, the compact retains a tight focus on the apprehension of fugitives and what such operations need to be successful.

Using Ambassador Scheffer's proposal as the foundation, the Assembly could present this optional compact to ICC States Parties to test the concept out and, if successfully implemented, it could be opened to non-States Parties and international organizations. If the ASP were to demonstrate its investment into this framework, it would make it more attractive for other States and international organizations to get involved. Most importantly, given its optional nature, the arrest protocol would provide a forum for committed States Parties to band together and exhibit leadership that other States Parties might follow (not to mention the benefit of improved logistics and on-the-ground intelligence sharing necessary to make arrests happen).

However, this optional arrest protocol should be expanded – either as a part of or as a separate optional compact – to include an Economic Benefits and Sanctions Committee.<sup>95</sup> Such an admittedly progressive concept

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<sup>93</sup> David Scheffer, "Proposal for an International Criminal Court Arrest Procedures Protocol", in *Northwestern Journal of International Human Rights*, 2014, vol. 12, no. 3, pp. 229–252.

<sup>94</sup> *Ibid.*, pp. 234–249.

<sup>95</sup> Again, economic pressure has been identified as uniquely useful in executing international arrest warrants. American Progress IJ Report, para. 156, see above note 92. Unlike recommended elsewhere, however, a subsidiary committee of the ASP itself could not harness the economic power of States like a separately negotiated EBSC could. At best, such a subsidiary body could probably only make recommendations as opposed to issue economic benefits or sanctions. Nottingham Cooperation Report, para. 40, see above note 91; see Washington Task Force Report, pp. 38, 43, see above note 61 (highlighting how UNSC sanctions would

would require even more scholarly attention than what Ambassador Scheffer put into his draft arrest protocol. Yet, the core of the additional proposal would be to create a mechanism for willing States Parties to use their collective leverage to incentivize or compel compliance with ICC arrest warrants; ‘teeth’, in other words. Harnessing leverage points such as trade, finance, development aid, or even military sales, States Parties and any other States that may be offered membership to the Economic Benefits and Sanctions Committee would create various ‘carrot and stick’ measures that often lead to arrests.<sup>96</sup>

Building from the lessons learned with respect to EU conditionality and the execution of ICTY arrest warrants, the Economic Benefits and Sanctions Committee could collectively create the same type of leverage by offering preferred trade status, better interstate loan terms, or increased development aid for States that demonstrate tangible assistance in the apprehension of ICC fugitives. The Economic Benefits and Sanctions Committee could also pool resources to replicate the US Rewards for Justice program that has successfully used monetary rewards to incentivize the arrest of international fugitives, including those from the UN *ad hoc* Tribunals (and which was expanded in 2013 to include ICC fugitives).<sup>97</sup> Likewise, this leverage could be negatively operationalized, such as stripping any benefits previously offered by the Economic Benefits and Sanctions Committee from States found to be non-co-operative by ICC judges and/or the ASP itself, or administering punitive measures like asset freezes and travel bans for fugitives or governmental leaders harbouring them.<sup>98</sup>

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help combat States who do not co-operate with ICC judicial orders, like arrest warrants); David Kaye *et al.*, Irvine School of Law International Justice Clinic, “The Council and the Court: Improving Security Council Support of the International Criminal Court”, May 2013, p. 3 (‘Irvine Council and Court Report’) (discussing how the UN Security Council support of ICTY and ICTR helped effectuate its judicial work).

<sup>96</sup> Nothing in the Rome Statute or ASP governance rules prohibits such an initiative.

<sup>97</sup> US, Department of State Rewards Program Update and Technical Corrections Act of 2012, H. R. 4077, 17 February 2012; US Department of State, “War Crimes Rewards Program” (available on its web site); Butcher’s Trail, pp. 413 and 535, see above note 76; Mark Kersten, “A Big Day for the US and the ICC: Rewards for Justice Program Extended”, in *Justice in Conflict*, 8 January 2013 (available on its web site).

<sup>98</sup> For national examples of such an idea, the UK flirted with this very concept. Kitty Donaldson, “Johnson Moves to Block U.K. Courts Deciding Cases of Genocide”, in *Bloomberg*, 8 February 2021 (available on its web site); Shao Jiang, “Why did UK government and Tory majority parliamentarians block prevention of genocide clause o trade Bill?”, in *Amnesty International UK*, 10 February 2021 (available on its web site).

Of course, the proposed Economic Benefits and Sanctions Committee's effectiveness (or for that matter, the arrest protocol) would depend wholly on the States Parties that joined it. The details of how an Economic Benefits and Sanctions Committee functions and makes decisions would be of paramount importance in attracting members as well. Yet, if the Economic Benefits and Sanctions Committee could get off the ground by the leadership of committed States Parties,<sup>99</sup> there is every reason to predict that most EU States (if not the EU itself), the South American bloc of ICC States Parties, Japan, and South Korea would eventually join, forming a formidable force behind ICC arrest warrants. Further, while it may be hard to imagine considering the current state of US-ICC relations, the Economic Benefits and Sanctions Committee as well as the arrest protocol could also serve as attractive, intermediate steps for States (like the US) that typically support the Court and its work but cannot yet become member because of political opposition.

### **5.3.1.3. Recommendations on Arrests for the United Nations Security Council**

With the powers of Chapter VII of the UN Charter, the UNSC has broad powers available to it so to “maintain international peace and security”.<sup>100</sup> To this end, the Council has employed its authority both in the creation of international criminal tribunals and, almost as important, in helping enforce judicial orders. As such, the Council has been credited with helping these international tribunals secure arrests of elusive fugitives.<sup>101</sup>

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<sup>99</sup> For example, the 50 plus States Parties behind a separate initiative to create a multilateral treaty on mutual legal assistance and extradition in domestic prosecution of atrocity crimes shows there is a general willingness of States Parties to form ancillary agreements that will help the mandate of the ICC, in this instance complementarity. These States Parties would be fertile territory to push for an arrest protocol and/or Economic Benefits and Sanctions Committee protocol. ICC ASP, “Joint Statement of States Parties supporting an International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes”, 20–28 November 2013.

<sup>100</sup> Charter of the United Nations, 24 October 1946, Chapter VII (<http://www.legal-tools.org/doc/6b3cd5/>).

<sup>101</sup> Irvine Council and Court Report, p. 3, see above note 95; Nottingham Cooperation Report, paras. 30–31, 35, 48, see above note 91; Washington Task Force Report, p. 159, see above note 61.

Given that the ICC is independent of the UN altogether,<sup>102</sup> yet the Rome Statute conferred the Council with the power to refer atrocities in any country for investigation,<sup>103</sup> the relationship between the two entities has many yet undefined features. One feature that has elicited great frustration with the ICC and its supporters has been the Council's failure to support situations it has referred to the Court.<sup>104</sup> To date, the UNSC has referred two situations – Darfur, Sudan, and Libya – to the ICC for investigation, yet those referrals were unfunded mandates,<sup>105</sup> and most exasperating, the Council has failed to take measures to help the Court with its investigations despite a drumbeat of pleas for assistance from the ICC Prosecutor.<sup>106</sup>

This lack of assistance is particularly harmful because UNSC referrals have pertained (and will likely only pertain) to countries that are not States Parties. Therefore, these countries are likely to be most uncooperative, and so the Council's support is a crucial counterweight to such reticence.<sup>107</sup> The UNSC's responsibility over its own ICC referrals and the support necessary to see these cases through – such as sanctions, travel bans, and other coercive measures at its disposal – has been amply covered by numerous scholars<sup>108</sup> and commentators.<sup>109</sup> These recommendations

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<sup>102</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, Article 2 (<http://www.legal-tools.org/doc/9432c6/>).

<sup>103</sup> Rome Statute, Article 13(c), see above note 15.

<sup>104</sup> Irvine Council and Court Report, pp. 5–7, see above note 95; Nottingham Cooperation Report, paras. 26–40, see above note 95; Washington Task Force Report, p. 159, see above note 61.

<sup>105</sup> Irvine Council and Court Report, pp. 6–7, see above note 95; Washington Task Force Report, p. 160, see above note 61.

<sup>106</sup> See for example, ICC-OTP, “Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)”, 20 June 2018:

After thirteen years and twenty-seven reports, the victims of grave crimes which prompted this Council to refer the Darfur situation to the ICC are yet to see those alleged to be most responsible for such crimes face justice. The question begs asking: how many more years and how many more reports will be required for this Council to be galvanised into taking tangible action? How much longer should victims of the alleged atrocity crimes in Darfur suffer in silence or wait to have their torment acknowledged through concrete results?

<sup>107</sup> Dapo Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 299.

<sup>108</sup> See, for example, Jennifer Trahan, “The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices”, in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 466–67; Nada Ali, “Bringing the Guilty to Justice: Can the

should be pursued by the Council posthaste for a bevy of reasons. Most notably, it is not just the ICC's reputation and legitimacy that is on the line.

Outside of these coercive measures, the Council and its subsidiary bodies should consider creating fora – whether formal or informal – whereby the ICC and the UN institutionally, as well as countries that are both States Parties and UNSC members, can engage on arrest issues in meaningful ways. For instance, establish ICC liaisons on the UN Sanctions Committees for both Libya and Sudan so to exchange useful information on relevant fugitives.

By way of background, the UNSC often establishes subsidiary committees to oversee sanction regimes relevant to Council's Chapter VII resolutions<sup>110</sup> and these committees are typically made up of the Council members and a panel of experts.<sup>111</sup> Although the UN and ICC liaise officially on formal requests for assistance through the UN Office of Legal Affairs, a more direct line of communication between the ICC and the relevant sanctions committees would be most instrumental if arrests are the goal.

Such a liaison would increase the likelihood that these committees would target ICC fugitives with sanctions as well as helping streamline any legal and/or logistical issues that may arise once an arrest is made and the accused is transferred.<sup>112</sup> As noted by Judge Navanethem Pillay, former international judge and UN High Commissioner for Human Rights, “this practice could pave the way for the establishment of an official UN Sanctions Committee ICC fugitive and/or indicted list, just like its terrorists list, which would automatically levy travel bans and other sanctions against

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ICC Be Self-Enforcing”, in *Chicago Journal of International Law*, 2014, vol. 14, no. 2, pp. 417–18.

<sup>109</sup> See generally, Irvine Council and Court Report, see above note 95; Nottingham Cooperation Report, see above note 91; Washington Task Force Report, see above note 61; Charania, 2015 see above note 20; International Peace Institute, “The Relationship Between the ICC and the Security Council: Challenges and Opportunities”, March 2013 (available on its web site); Hemi Mistry and Deborah Ruiz Verduzco, “The UN Security Council and the International Criminal Court”, Chatham House and Parliamentarians for Global Action, 16 March 2012 (‘Chatham PGA Report’).

<sup>110</sup> UN Security Council, “Sanctions” (available on its web site).

<sup>111</sup> UN Security Council, “Security Council Affairs Division Roster of Experts” (available on its web site).

<sup>112</sup> Irvine Council and Court Report, p. 19, see above note 95.

those on the list”.<sup>113</sup> Or, as an intermediate step, ICC liaisons could be established for non-UNSC referred situations that happen to have UN Sanctions Committees set up as well, such as Mali, the Democratic Republic of Congo, and the Central African Republic.<sup>114</sup>

Another recommendation is for the UNSC and/or the ASP to consider creating a regular mechanism for interstate dialogue on ICC arrests issues between countries that are both State Parties and members of the UNSC. Considering that at any given time, the majority of UNSC members are also ICC State Parties – including permanent Council members France and the UK – there are plenty of incentives to create a stable means of communication and collaboration between these countries.<sup>115</sup> With France and the UK always there to ensure logistical and substantive continuity, these countries could be briefed on sensitive information with respect to ICC fugitives and use that material to inform both their Council activity and deliberations. For instance, such a forum could provide these States with late-breaking information pertaining to a Libyan fugitive, which in turn could be used by these countries collectively to push for the Council and/or UN Libya Sanctions Committee to levy timely sanctions against this individual. Arrests of international fugitives have often resulted from this level of co-ordination.

The beginning of such an organized endeavour to communicate and co-ordinate on ICC issues within the UNSC is already in existence,<sup>116</sup> yet this effort needs to be properly formalised by the appropriate parties (the ASP and UN itself) and enhanced in line with the recommendations found herein. Relatedly, a tandem and reinforcing measure that the ASP and UN should undertake together is to enhance the ICC’s New York Liaison Office and make the Secretariat of the ASP less part of the ‘Hague bubble’.<sup>117</sup>

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<sup>113</sup> Navanethem Pillay, “Encouraging UN Security Council Support of ICC Cases Starts with Practical Steps”, in *International Criminal Justice Today*, 10 December 2015.

<sup>114</sup> Irvine Council and Court Report, p. 19, see above note 95; Nottingham Cooperation Report, para. 62, see above note 91; Chatham PGA Report, pp. 10–11, see above note 109.

<sup>115</sup> At the writing of this chapter, 10 out of the 15 members of the UNSC – Estonia, France, Ireland, Kenya, Mexico, Niger, Norway, Saint Vincent and the Grenadines, Tunisia and the United Kingdom – were also ICC States Parties. UNSC, “Current Members” (available on its web site); ICC ASP, “States Parties to the Rome Statute” (available on its web site).

<sup>116</sup> Belgium UN New York, tweet @BelgiumUN, 8 December 2020 (last accessed on 12 July, 2021); Belgium UN New York, tweet @BelgiumUN, 10 December 2020 (last accessed on 12 July, 2021).

<sup>117</sup> Amnesty International and T.M.C. Asser Instituut, “The Rome Statute at 40”, May 2021.

New York is the epicentre of international diplomacy and politics as well as home to official presences of all 123 ICC State Parties – compared to only 79 with representation in The Hague; so, reorientating and bolstering its presence in New York would have the double benefit of empowering the ICC to better understand and communicate effectively within the geopolitical environment that it exists in while also providing added insulation to the Court’s operations in The Hague to go about its work with less outside interference.

### **5.3.2. Build a Culture of Professional and Institutional Development**

Among the least appreciated facets of international criminal tribunals are their operations and professional staff. What does the practice of international criminal law look like exactly? What type of professionals work at a tribunal like the ICC? What is the average workday like? What are the everyday demands on those who practice at the ICC? Aside from the rare outsider who is deeply engaged with the Court’s practical challenges, there is little familiarity with the internal realities of international criminal tribunals.

There are two common misconceptions about tribunals like the ICC: one, their institutionalized depth of knowledge about how best to practice international criminal law; and two, the acumen of those who practice at the tribunals. Specifically, the perception by laypeople and even astute ICC commentators is that those who work at international criminal tribunals are ‘the best of the best’, and that there is sophisticated knowledge inside these tribunals (or within the international criminal bar) on how best to investigate, prosecute, defend, and adjudicate atrocity crimes that has been accumulated after careful study of lessons learned.

Unfortunately, the reality is humbler. While many who work at the ICC or like institutions are genuinely some of the best in their respective fields, there are too many practitioners and professional staff who fall short. Whether it is an issue of competence, drive, a preoccupation with inner-office politics or a combination thereof, the ICC and other international criminal tribunals have more underperforming staff members than senior officials like to admit (and some of those senior officials fall into this category as well). Although the combination of the good with the bad may average things out (as is often the case in other industries), everyone who works at the ICC should be far above average. Its noble and indispensable mandate deserves better.

This failure is especially frustrating when it is less an issue of limited potential, but more an issue of failing to identify and develop talent. For a variety of reasons that are both controllable and uncontrollable,<sup>118</sup> the staffing infrastructure of tribunals produces situations where too many talented individuals are underdeveloped (or outright overlooked) and too many underperforming (if not wholly problematic) staff are sidelined but often not eliminated. This predicament is doubly negative in that the right staff are not empowered and the wrong staff remain employed.<sup>119</sup>

Likewise, while there is an impressive level of individual expertise and know-how at the ICC and other tribunals, there is a woeful lack of institutionalized knowledge.<sup>120</sup> This expertise is held almost exclusively by individual professionals who gained such insight prior to and during their ICC tenures, yet because of a lack of infrastructure and emphasis on capturing and building institutional knowledge (and being able to call upon that knowledge subsequently, whether on a staffer's initiative or in trainings, for instance), this expertise leaves when they leave for other jobs. This problem is further exacerbated by the transient nature of this field of law. Former ICC and other tribunal professionals do not typically leave for jobs nearby in The Hague where they can be easily consulted (a feat none-

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<sup>118</sup> Such reasons include, but are not limited to, matters that are not completely in the control of managers (for example, international labour law and contractual limitations with underperforming staff) and matters that are in the control of managers, but nevertheless very hard to address properly (for example, the incredible burden of atrocity crimes litigation does not often permit taking the time to develop staff; the demands to 'get the job done' is often too intense). Altogether, some of these issues are understandable but nonetheless unfortunate and in need of systemic change.

<sup>119</sup> There is good reason to believe that recruitment is to blame for these situations, not just a system of human resources that does not properly develop staff. Recruitment is too big of an issue to address here, yet it is important to consider that systems of recruitment should be a proper balance of onboarding the most competent individuals (regardless of their nationality or other characteristics) and individuals from under-represented demographics. Most definitely, these two categories are not mutually exclusive and are often one and the same. Yet, high-performing tribunals must be able to recruit the best people (wherever they are found) and have robust development programs that raise the competence of all individuals, regardless of seniority.

<sup>120</sup> The phrase 'institutional knowledge' refers to proven practices and know-how that is organizationally codified in various forms (be it instruction manuals, training courses, or uniform policies, for example) so that such knowledge is passed on easily and freely to new as well as seasoned practitioners. Such knowledge can be built up by a broad range of measures, such as internal workshops, lessons learnt exercises, exchange of expertise with outside practitioners, online repositories of information, confidential forums for soliciting advice, among others.

theless), but rather in Geneva, Nairobi, Phnom Penh, New York, Buenos Aires, or back home in jurisdictions across the globe.<sup>121</sup>

The net effect is that the proverbial wheel is consistently reinvented at these tribunals, among other similar problems. Efficiency suffers when old problems that were previously understood and solved gain new life when no one remembers the old solution, or different units within the same organ utilize contradictory approaches when confronted with the same practical challenge. As will be discussed below, there are good explanations as to why such institutionalization was not properly done, yet it does not excuse the shortcoming. For the ICC to achieve the desired and necessary sophistication of a high-calibre judicial institution, more must be done in this department.

In concluding that “the ASP, the CBF and the leadership of the Court [should] give serious consideration to strengthening the training and development function of the Court”, the IER Report of 2020 concurred that there is a problem with both the building up of, and easy access to, institutional knowledge:

training [of staff] will only be fully effective if there is a proper Court-wide knowledge management strategy, so that the trainers have a clear idea exactly what the new recruits need to know. Such a strategy would also facilitate internal and external mobility initiatives and allow the application of tenure, since there would be less concern that critical knowledge is leaving the Court with the transfer or retirement of a staff member.<sup>122</sup>

### **5.3.2.1. Deficiency Is Explainable but Not Excusable**

Misconceptions about the ICC’s operations and staffing are understandable because most people assume – and rightly so – that the legal profession<sup>123</sup>

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<sup>121</sup> Elena A. Baylis, “Tribunal-Hopping with the Post-Conflict Justice Junkies”, in *Oregon Review of International Law, Symposium Issue*, 2008, vol. 10, pp. 371–72, 382; See Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, 2017.

<sup>122</sup> IER Report, para. 231, recommendation 99, see above note 40.

<sup>123</sup> Throughout this section of this chapter, the term ‘legal profession’ or like terms is a reference to prosecutors, lawyers, judges, and any other legal professional who receive a legal education and/or legal licensing of some sort. It is recognized that being a lawyer, a prosecutor, a judge, *etcetera*, in certain jurisdictions (typically civil law) can involve completely different educational and career paths whereas in other jurisdictions (typically common law), there are more similarities in education and licensing.

everywhere adheres to rigorous standards, especially at the world's only permanent international criminal tribunal. Typically absorbed from generalized knowledge about the practice of law in their domestic jurisdiction, most people know about the standardization of legal education, licensing, and disciplinary safeguards in place and how this helps ensure a level of reliability in the competence and capacity of legal practitioners. Further, there is likely some familiarity that relevant practitioners undergo continuing legal education and other forms of professional development so they stay on top of new trends and skills. In addition, employers, be it in the private or public sectors, routinely invest in the continued development of their legal professionals (including judges), through expert workshops and training seminars. These employers also invest in having their policies, practices, and overall operations analysed, vetted, and codified into items such as bench books, training manuals and courses, online learning platforms, and electronic repositories.

Unfortunately, not all of the characteristics of a developed national jurisdiction are shared by those at the international level.<sup>124</sup> To be clear, some of these deficiencies are no fault of institutions like the ICC. For instance, the ICC cannot pass judgment on the legal education and licensing practice of different countries by preferring applicants from North American and European jurisdictions. The only real option is to accept applicants provided they have a legal degree and are licensed attorneys in their home jurisdictions.<sup>125</sup> Many of the other attributes of a sophisticated judiciary,

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<sup>124</sup> Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge*, Oxford University Press, 2007; Gideon Boas *et al.*, *International Criminal Procedure*, Cambridge University Press, 2011, p. 337 (quoting former ICTY Judge David Hunt); Rosemary Byrne, "Drawing the Missing Map: What Socio-Legal Research Can Offer to International Criminal Trial Practice", in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 995; Michael Bohlander, "Article 36", in Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 4th. ed., Beck, Hart, Nomos, 2021, mn. 3 ff.

<sup>125</sup> Michael Bohlander, "Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts", in *New Criminal Law Review*, 2009, vol. 12, no. 4, p. 532; Kai Ambos, "Witness Proofing Before the International Criminal Court: A Reply to Karemaker, Taylor and Pittman", in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, p. 915, fn. 22; Ruth Mackenzie *et al.*, *Selecting International Judges*, Oxford University Press, 2010, pp. 19 ff., 49 ff., 66 ff., 102 ff., 173 ff.; Kai Ambos, "Book Review: International Courts and Their Judges, Ruth Mackenzie *et al.*, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press)", in *Criminal Law Forum*, 2012, vol. 23, no. 1–3, pp. 223–228; Fabiano O. Raimondo, "For Further Research on the Relationship Between Cultural Diversity and International

however, are inadequate or altogether missing at international criminal tribunals. For example, professional development<sup>126</sup> at the ICC leaves much to be desired.<sup>127</sup> The budget for training is paltry.<sup>128</sup> When trainings do occur, it is *ad hoc* rather than part of a holistic development regime. In domestic jurisdictions, training may be mandatory, but it is nonetheless embraced as good by practitioners, most acutely by judges. At the ICC, however, many see training as beneath them or something that may expose their weaknesses rather than as a resource for professional betterment.<sup>129</sup> Even the word ‘training’ is discouraged by some insiders for these very reasons.

The lack of professional development or institutionalized knowledge at international criminal tribunals is explainable, however. The nature of earlier international criminal tribunals, for example, ensured that these internal professional needs were not properly addressed. The UN *ad hoc* and hybrid tribunals were temporary ventures with time pressures to get their

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Criminal Law”, in *International Criminal Law Review*, 2011, vol. 11, no. 2, pp. 308 f.; Mia Swart, “Book Review: Selecting International Judges: Principle, Process, and Politics (Oxford University Press)”, in *Leiden Journal of International Law*, 2011, vol. 24, no. 3, pp. 789 ff.

- <sup>126</sup> The term ‘professional development’ is used broadly. It includes, but is not limited to, a range of capacity-building measures such as training incoming young staff on fundamentals, continuing legal education, training on new trends and skills, roundtable and other forums of expertise building, rehearsals through mock situations, and others.
- <sup>127</sup> The Registry of the ICC has produced an extensive document that states that one of human resources’ focuses is the ‘[i]mplementation of strategic learning and training plans and induction programmes across the organs;’. This document discusses, in part, various training programs offered to ICC staff on numerous issues, such as witness protection, court services, language, substantive legal issues, legal research, e-court, victims’ participation and reparations, and security of staff and facilities. While these training programs are valuable and necessary, none of these trainings would squarely focus on the practice of law, and more importantly, how best to practice law at the *sui generis* Registry, see ICC, Registry, “Behind the Scenes”, 2010, pp. 11, 14–17, 21, 25, 34, 43, 52, and 62 (providing quote) (available on its web site).
- <sup>128</sup> It should be highlighted that this budget line for training comes from the CBF report, not the ASP resolution that passes the final budget; the latter does not fully break down monies into line items. As such, and until further calculation by the Court, the most recent budget line for training at the time of writing was from the CBF report. CBF, “Report of the Committee on Budget and Finance on the work of its thirty-first session”, 5–12 December 2018, ICC-ASP/17/15, Annex IV (‘2018 CBF Report’) (<http://www.legal-tools.org/doc/34xy2r/>).
- <sup>129</sup> As laid out throughout in the IER Report, there is a clear belief within the Court that training is not meant for senior staff when, in reality, training is most needed for this audience, most notably Judges. See, for example, IER Report, para. 74, see above note 40.

work done as quickly and cheaply as possible.<sup>130</sup> These Tribunals were not formally or informally interconnected in any substantial way either, so their practices developed on separate islands rather than as a cohesive whole. As such, there was little incentive to build professional development regimes or value placed on recording relevant know-how for future consumption. By the time the permanent ICC became operational in 2002, a culture that undervalued professional development and the like had already taken root in the practice of international criminal law.

In addition, the complexities and breadth of atrocity crime cases further exacerbate this problem. With millions of perpetrators and victims and even more pieces of evidence on crimes that stretched large swaths of land and covered months if not years of criminality (not to mention the difficulty of obtaining linkage evidence that incriminates often rich, powerful, insulated individuals), the casework at international criminal tribunals is overwhelming, to say the least.<sup>131</sup> Add insufficient staffing, resources, and funding, and it is easy to understand why professional growth of staff and the development of institutional knowledge were low on the list of tribunal priorities.

This very issue was laid out in the IER Report of 2020. When discussing ‘Staff Training and Development’, the Experts noted:

that the Court is an unusual creature in the firmament of international bodies, with a unique structure and operations and programmes that are challenging and extremely complex, carried out in a variety of countries around the world. It follows that almost all of the staff recruited to it lack the knowledge

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<sup>130</sup> See generally, Gabriël Oosthuizen and Robert Schaeffer, “Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL”, in *Hague Justice Journal*, 2008, vol. 3, no. 1, pp. 48–67; Jens Dieckmann and Christina Kerll, “UN Ad Hoc Tribunals Under Time Pressure – Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence”, in *International Criminal Law Review*, 2008, vol. 8, no. 1–2, pp. 87–108; Daryl A. Mundis, “The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals”, in *American Journal of International Law*, 2005, vol. 99, no. 1, pp. 142–158.

<sup>131</sup> See generally, Stuart Ford, “The Complexity of International Criminal Trials Is Necessary”, in *George Washington International Law Review*, 2015, vol. 48, no. 1; Stuart Ford, “Complexity and Efficiency at International Criminal Courts”, in *Emory International Law Review*, 2013, vol. 29, no. 1, pp. 1–69; Alex Whiting, “In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered”, in *Harvard International Law Journal*, 2009, vol. 50, no. 2, pp. 323–364.

and experience to be able to slot straight into a position and perform up to expectations.<sup>132</sup>

Yet, the unique complexity of atrocity crimes cases is also a central reason why professional development and institutionalizing knowledge is so crucial. The ICC, like predecessor tribunals, is oddly asked to undertake the most daunting criminal cases but with little external ASP or internal ICC emphasis on professional development or taking the time to take stock of what practices work and what do not. This inadequacy results in recurring problems and suboptimal performance of the judicial process, not to mention a drain on the budget.

Such casework demands getting the absolute most out of judges, lawyers and other Court professionals *vis-à-vis* harnessing their full potential. Moreover, the fact that the ICC's jurisdiction requires it to intervene simultaneously in multiple atrocities in divergent places around the globe necessitates a dynamic workforce as well as a keen ability for the Court as an institution to learn from past cases. To do the above requires robust professional development strategies and internal processes that place value on capturing and codifying best practices.

To their credit, the ICC and ASP have made substantial strides in addressing issues of competence that have plagued the Court (and which hampered the performance of precursor tribunals as well). One good example is the calibre of judges. International chambers have long been criticized for being filled with good diplomats and academics, but too few seasoned judges.<sup>133</sup> With judges unfamiliar with courtrooms and balancing the competing interests of a judicial process, efficiency suffered. For example, judges took objections under advisement because they were uncomfortable making quick decisions in court, thus leaving the parties without finality

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<sup>132</sup> IER Report, para. 231, see above note 40.

<sup>133</sup> Michael Bohlander, "The International Criminal Judiciary Problems of Judicial Selection, Independence and Ethics", in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, pp. 325–390; Patricia M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court", in *Washington Journal of Law and Policy*, 2001, vol. 5, no. 1, pp. 94–95; Afua Hirsch, "System for Appointing Judges 'Undermining International Courts'", in *The Guardian*, 8 September 2010; Nienke Grossman, "Shattering the Glass Ceiling in International Adjudication", in *Virginia Journal of International Law*, 2017, vol. 56, no. 2, p. 340; Sara Dezalay, "Weakness as Routine in the Operations of the International Criminal Court", in *International Criminal Law Review*, 2017, vol. 17, no. 2, p. 281.

needed to properly proceed with the hearing. Their inability to manage expansive casefiles led to delays, and their failure to stay on top of evidence during lengthy trials resulted in drawn-out deliberations and confusing, overly lengthy written decisions.

To combat this problem, the ASP instituted a more rigorous vetting process for candidate judges to be elected by the Assembly, which in turn put pressure on State Parties to nominate better candidates.<sup>134</sup> Thus far, the Court has seen an uptick in the quality of recently elected judges thanks to this improved process.<sup>135</sup> Likewise, the ICC-OTP and Registry have also set higher standards for recruitment and improved quality control of staff that are ultimately hired, a practice that has also borne fruit.<sup>136</sup> These developments are encouraging, but improvements on the intake side must be complemented with a comprehensive infrastructure of professional improvement that continually trains employees and empowers them with a wealth of institutional knowledge on how best to practice international criminal law. It only makes sense to improve the quality of those recruited as well as their quality once on staff.

### **5.3.2.2. Focus on Building Staff and Institutional Capacity**

#### **5.3.2.2.1. Recommendations to the Assembly of States Parties**

To address this problem, the first recommendation is for the ASP to increase the training budget of the Court substantially. Fundamentally, the ASP should have the understanding that professional development and the building of institutional knowledge are central to budget efficiency. More specifically, the two biggest drivers of cost in the ICC budget are court proceedings and OTP investigations,<sup>137</sup> both being judicial undertakings that are best improved if staff are performing better and processes are streamlined. To accomplish as much, the ICC's training and best practices regime must be well-resourced.

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<sup>134</sup> ICC ASP, "Report of the Bureau on the Establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court", 2011, ICC-ASP/10/36 (<http://www.legal-tools.org/doc/3ye7a6/>).

<sup>135</sup> See Coalition for the ICC, "ASP Committee: All 12 ICC Judicial Candidates Pass the Test – Six are Particularly Well Qualified", 11 October 2017 (available on its web site).

<sup>136</sup> See generally Shoamanesh, 2018, see above note 81.

<sup>137</sup> See Osvaldo Zavala, "The Budgetary Efficiency of the International Criminal Court", in *International Criminal Law Review*, 2018, vol. 18, no. 3, p. 466.

Unfortunately, the current training budget at the ICC is insufficient. The approved 2019 ICC budget provides roughly one million Euros of a 148 million Euros budget for training.<sup>138</sup> This line item is the smallest in the entire ICC budget aside from monies for hospitality and short-term consultants. In comparison, three times as much is set aside for furniture and supplies. Taking into further consideration that staffing cost is by far the largest expenditure in the ICC's budget (and justifiably so), it stands to reason that the ASP would invest more in harnessing the full potential of the ICC's most valuable commodity.

This deficiency is made starker when reviewing the Court's proposed budget and seeing the complexity, variety and fast-moving nature of work being performed by Court professionals.<sup>139</sup> From the Gender and Children's Unit and Forensic Science Section to the Language Services Section and Victims Participation and Reparations Section, the ICC has numerous specialized departments along with more traditional ones (like the Prosecutions Division) all of which require constant training to stay on top of a dynamic field of law and relevant professional pursuits. One million Euros simply cannot fill the training need that this vast array of professionals requires.

In addition to increasing the Court's training budget, it is also recommended that the Assembly should adopt strong language in the next ASP meeting mandating the Court to start building a more robust professional development and institutional knowledge regime for all staff, most acutely judges. Doing so would send a compelling message that enhanced efficiency and overall savings in the ICC's budget are largely achieved by improving the performance of the Court's greatest asset: its professional staff. While the ASP should defer to the Court on how best to build such a culture, the ASP's leadership would be vital in setting it as a Court-wide priority.

As mentioned below, the IER Report of 2020 provides the ASP with the perfect opportunity to send such a message to the Court. The Experts made abundantly clear that the Court must institute a stout infrastructure that properly onboards new professionals and develops their professional

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<sup>138</sup> 2018 CBF Report, Annex IV, see above note 128.

<sup>139</sup> ICC ASP, "Proposed Programme Budget for 2019 of the International Criminal Court", 1 August 2018, pp. 31–126 (covering the range of highly technical and diverse professional departments in the ICC-OTP and Registry).

capacities thereafter,<sup>140</sup> and they also honed in on the induction and training of judges as priority recommendations among the hundreds made in the Report.<sup>141</sup> The ASP should make its voice clear in this regard.

Such a move by the ASP would also complement its improved judicial candidacy process, as mentioned above. Improving the performance of judges, particularly ones new to such an environment, would be pivotal to improving the ICC's judicial process in terms of speed and fairness. Given their centrality to the process overall, well-trained and well-prepared judges are arguably the best way to enhance the performance of the Court as a whole; in other words, the training of 18 individuals may represent the greatest return on investment.

#### **5.3.2.2.2. Recommendations to the ICC**

Following on these suggestions to the ASP, it is recommended that the Court invest heavily in building up an ICC-wide policy and apparatus on professional development and institutional knowledge. Much more than just organizing more trainings or conferences, ICC leadership should set out to foster a culture that expects regular training for all (including busy, senior staff) as well as the regular development of best practices. In other words, replicate the ethos of professional and institutional development that exists in advanced national jurisdictions. By prioritizing these professional issues, the Court leadership would arguably establish the ICC's most important internal legacy, one that would contribute to its long-standing success and consistent high-performance.

A critical aspect of this recommendation is that this culture must be self-created and self-driven, not imposed in detail by the ASP or any other external actor. This is not to say that the initiative itself cannot be spurred on by the ASP or supported by outside partners; to the contrary, external assistance will be essential. Rather, the objectives, contours and substance of a comprehensive professional development and institutional knowledge program must come from the Court leadership and professionals. Not only are they best placed to make such determinations, but they must buy into the program. Only then can the desired culture be cemented as axiomatic to the Court itself.

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<sup>140</sup> IER Report, paras. 172–75, 231–33, see above note 40.

<sup>141</sup> *Ibid.*, Annex I, p. 337.

However, by way of suggestion, the Court should consider several ways to develop such a culture. For starters, with respect to institutional knowledge building, internal ‘Lesson Learnt’ exercises should become the norm across the Court, not the exception. To date, these stocktaking initiatives have been limited to judicial self-reflection of a few early ICC cases.<sup>142</sup> Instead, all teams, units and sections of the Court should set aside time after certain self-determined milestones to deliberate collectively over past actions and pen reflections on what worked and what did not. The results of these multiple lessons learned initiatives at the micro level could then feed into an annual or bi-annual period of best practices development led by the organs and/or the entire Court itself.

Further, the outcomes of this Court-wide stocktaking should help edify and collaborate with the numerous external best practices initiatives organized by NGOs and other non-profit entities, such as one run by the International Nuremberg Principles Academy and another by the International Criminal Justice Consortium.<sup>143</sup> These external projects are often led by former tribunal practitioners who provide unique perspectives and are not overly shackled by confidentiality and similar restrictions. As such, where appropriately constructed, informal yet regular exchanges between former and current practitioners on both the substance of internal ICC stocktaking in combination with material developed by such outside initiatives could form the foundation of comprehensive, institutionalized knowledge about the practice of international criminal law.

Developing the best practices of atrocity crime litigation in a systematic manner will help ensure the longevity and utility of such knowledge for decades. This knowledge would not only serve the ICC but also domestic jurisdictions contemplating or undertaking complementarity proceedings. Many national judicial systems worry that their lack of knowledge on atrocity crimes casework will prevent national prosecutions,<sup>144</sup> so sharing

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<sup>142</sup> See Philipp Ambach, “The “Lessons Learnt” process at the International Criminal Court – a suitable vehicle for procedural improvements?”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016, vol. 11, no. 12, pp. 854–867.

<sup>143</sup> See, for example, American Bar Association, “Task Forces” (available on its web site); International Nuremberg Principles Academy, “Focus Areas” (available on its web site).

<sup>144</sup> See ICC, *Situation in the Central African Republic II*, Presidency, Annex 1 to Decision Assigning the Situation in the Central African Republic II to PTC II, 18 June 2014, ICC-01/14-1-Anx1 (<http://www.legal-tools.org/doc/9304eb/>); ICC ASP, “Strengthening the International Criminal Court and the Assembly of States Parties”, 10 December 2010, ICC-ASP/9/Res.3 (<http://www.legal-tools.org/doc/1b2785/>); ICC ASP, Review Conference of the

the insight gained by the Court from actual litigation would be quite instrumental in other jurisdictions.

With respect to the training of ICC judges and staff, there are several steps that the ICC could take. While the precise substance would need to be developed by Court staff on a rolling basis, the three organs of the Court should assemble regular training retreats each year (from one to three annually), most notably for the judges.<sup>145</sup> Such retreats need not be at lavish locations at a great distance from the ICC but could take place within the walls of the Court, in The Hague, other locales in The Netherlands, or otherwise nearby. These retreats would set aside the requisite time and distance from the demands of casework to focus on enhancing certain skillsets, learning new ones and addressing other performance challenges. The three organs of the Court could also co-ordinate with one another to cut cost (that is, focus trainings on similar topics or take place at the same rented locations). Additionally, once regular trainings and retreats become normalized for all professional staff, the perception that these exercises are beneath more senior staff, or designed to expose weaknesses, will slowly fade.

To help jumpstart a robust program such as this one, the Court should engage and partner with organizations in the international legal community with extensive training experience, such as bar associations, legally-focused academies and universities. These groups could provide helpful guidance on developing a Court-wide, regular training regime, and where welcomed, could help furnish *pro bono* trainings, provide *gratis* locations for training, and/or engage in other ways to ensure a high calibre of trainings.

### 5.3.3. Forge Long-Term Budget Resolution

If all Court staff as well as diplomats who work on ICC issues were polled on the most frustrating ICC issue, it would be thoroughly unsurprising if the Court's budget topped the list. The result would likely be the same in a poll of ICC-focused civil society representatives. Like clockwork, this shared consternation plays out at the annual ASP, with the budget dominating much of the public and private debate.

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Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, Official Records, paras. 29–35 (<http://www.legal-tools.org/doc/146df9-1/>).

<sup>145</sup> International Nuremberg Principles Academy, “Event: Nuremberg Academy Hosts ICC Judges’ Retreat”, 19–20 June 2015 (available on its web site).

The budget frustration has many facets. From the Court's perspective, there is tremendous exasperation as to why most States Parties cannot support an increased budget as the Court's caseload increases (most acutely because of referrals) and overall global interest in the ICC and its work grows as well. This exasperation has deepened as the ICC and its defenders believe they have shown the Court's value, especially after numerous cost-efficiency measures have been implemented internally.<sup>146</sup> Against this backdrop, the continued push by the ASP for little to no growth in the Court's budget comes across as insulting at best and undercutting or manipulative at worst.

While near impossible to condense the views of 123 States Parties, it would be fair to say that the Assembly, as a collective, is disquieted by the fact that the Court has already received over one billion Euros in total funding and yet remains subject to near constant critiques on its effectiveness and efficiency.<sup>147</sup> This perception makes it hard for States Parties to strengthen their investment in the Court. Moreover, putting aside the mere fact that certain States do not have flexible budgets, there appears a common belief within the ASP that the Court should not receive more funding until its performance improves with the budget it currently has. The economic repercussions stemming from the COVID-19 pandemic likely solidify the ASP's position in this regard.

On top of the frustration that this issue engenders on both sides, the most unfortunate byproduct is that it separates the ICC and the ASP when they should be inseparable. The Court and its States Parties should share a close partnership that is mutually reinforcing; the ASP protects and sup-

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<sup>146</sup> See ICC ASP, "Proposed Programme Budget for 2018 of the International Criminal Court", 11 September 2017, ICC-ASP/16/10, annex X (<http://www.legal-tools.org/doc/ac4e16/>); ICC, "Chamber Practice Manual", 29 November 2019 (<http://www.legal-tools.org/doc/dh0zyq/>); ICC, "ICC judges hold second retreat to improve efficiency and effectiveness of judicial proceedings", 31 October 2016, ICC-CPI-20161031-PR1249 (<http://www.legal-tools.org/doc/d8209e/>); ICC, "ICC Judges publish Chambers Practice Manual", 1 February 2016, ICC-CPI-20160201-PR1185 (<http://www.legal-tools.org/doc/e5ad39/>); ICC ASP, "Enhancing the Court's efficiency and effectiveness - a top priority for ICC Officials", 24 November 2015 (<http://www.legal-tools.org/doc/b99fa5/>); ICC, "Remarks by Judge Silvia Fernández de Gurmendi, ICC President, to the Assembly of States Parties in relation to Cluster I: Increasing the efficiency of the criminal process", 24 November 2015.

<sup>147</sup> Dov Jacobs, "Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law", in *Leiden Journal of International Law*, 2015, vol. 28, no. 1, pp. 1–11; ICC Forum, "Questions on Performance", July 2017–February 2018 (available on its web site).

ports the Court as the Court consistently proves the wisdom of the ASP's faith. Instead, there is an unhealthy tension between the two, stemming in large part from the adversarial (and likely inherent) nature of budgetary infighting.

In discussing the problems of the budgetary process, the IER Report of 2020 found that there was a troubling deficit of trust between the parties to the process:

The budget process is one instance where it is apparent that the trust relation between the Court and the ASP (including its subsidiary bodies) can and should be improved. On the one hand, some States Parties believe that the Court could and should be able to deliver more with the resources it has available. On the other hand, there seems to be a perception within some quarters of the Court that States Parties are using the budget process to interfere with the Court's cases. Increased transparency, efficiency and enhanced dialogue between the Court, CBF and ASP should improve relations between stakeholders on this topic. Increased trust would also reduce the perceived need to micromanage the budget.<sup>148</sup>

While this author may have more sympathy with the ICC's position – in particular after looking at the ICC's budget relative to the aggregate of governmental spending – there is much more to say about which side of the budget debate has the stronger case. Rather, for purposes here, it is more fruitful to explore options that can mitigate this unnecessary tension. To this end, amending the budgetary process altogether should be strongly considered for a variety of reasons, most notably because this annual test of endurance may be the greatest source of friction between the Court and its States Parties.<sup>149</sup>

### **5.3.3.1. A Costly Budget Process**

Taking almost a full calendar year, budget negotiations routinely sap the energy of all involved and crush any momentum that the Court may be ex-

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<sup>148</sup> IER Report, para. 330, see above note 40,

<sup>149</sup> Stuart Ford, "How Much Money Does the ICC Need?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 84 ff.; Jonathan O'Donohue, "Financing the International Criminal Court", in *International Criminal Law Review*, 2013, vol. 13, no. 1, pp. 269–296.

periencing.<sup>150</sup> There are entire segments of the Court’s labour force as well as numerous State Party delegations that spend most of their annual ICC work on the budgetary process, especially with respect to the reporting requirements placed on ICC staff and the Committee on Budget and Finance (‘CBF’).<sup>151</sup>

While incalculable, the energy and additional resources that are committed to just the process itself – including flights between The Hague and New York where budget discussions take place as well as any meetings that occur in State capitals around the world – are significant. The process is not only costly in and of itself, but the opportunity cost is even more profound: what if all the time and money spent on annual budgets fights were available for other pressing matters, such as arrests or even routine yet mandatory administrative matters?

The late Hans-Peter Kaul, who helped draft the Rome Statute as a diplomat and was elected as an ICC judge thereafter, succinctly captured, in 2014, the pains inflicted by this yearly budget marathon:

Yes, budget preparations, financial control and proper budget implementation – this matters. In the past decade, those involved had to learn in a difficult process of trial and error that a good budgetary process and proper budgetary means are not self-understood. Even today, the process of the preparation of the Court’s annual draft budget absorbs, years after year, too much work, too much time, and often the patience of too many officials, in particular if competing priorities arise.<sup>152</sup>

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<sup>150</sup> See Zavala, 2018, pp. 469–473, see above note 137; Niklas Jakobsson, “ICC Budget Leaves a Lot to be Desired”, in *Justice Hub*, 1 December 2015 (available on its web site) (including discussion the difficulty of budget negotiations that includes redrafting of entire budgets and the strain this has on all involved); Coalition for the ICC, “Election of budget experts key to independence of ICC”, 18 October 2017 (available on its web site) (discussing how “complicated” and “politically fraught” the annual budget process is).

<sup>151</sup> The demands placed on the Court by the budgeting process are quite significant. In addition to procedures on the process itself, the budgeting process includes the need to evaluate contingency funds, governance, and human resources issues. While a budgeting process must understandably be thorough, it is also reasonable to expect the process to be streamlined and not overly burdensome. ICC ASP, CBF, “Policy and Procedures Manual”, 2011, ASP/2011/CBF/012, Sections III-VI.

<sup>152</sup> Hans Peter Kaul, “The International Criminal Court of the Future”, in William A. Schabas (ed.), *The Cambridge Companion to International Criminal Law*, 2nd. ed., Cambridge University Press, 2016, p. 337.

In the intervening six plus years since Judge Kaul wrote these words, not much has changed, as evidenced by the passage above from the IER Report of 2020. If anything has evolved, it is a perceived capitulation by the Court to stop requesting more money given the unfortunate futility of doing so.

It is worth underscoring Judge Kaul's point that the budget does matter. It has real-world consequences. The ICC has delayed or deprioritized investigations,<sup>153</sup> and had other cases fail,<sup>154</sup> in large part because of financial shortfalls. It is likely that certain preliminary examinations have not reached a conclusion – whether steps toward a full investigation or the closure of preliminary examination itself – also because of inadequate funding. Those who ultimately bear the brunt of these budget fights are the victims. The affected communities are left the most aggrieved as cases stagnate or collapse altogether, and the truth about responsibility for mass criminality and what happened to loved ones remains unaccounted. Any reparations that could be furnished by the Court and Trust Fund for Victims are also complicated or made remote.<sup>155</sup>

### 5.3.3.2. Budget Reality

Before any possible solutions to these budgetary woes can be discussed, however, there first must be a reckoning with one fact: the ICC's budget is woefully insufficient. Without a shared understanding of this point, the annual budgetary impasse and alarming knock-on effects will never cease. The quandary will persist, leaving all stakeholders (most notably, victims) further frustrated, if not irreversibly cynical. As such, it is in the interest of all ICC stakeholders to change course on the budget situation.

The evidence demonstrating the inadequacy of the ICC's budget is compelling. A comprehensive 2012 report by Fordham Law School found that the totality of the actual and at-the-time pledged funding by *all* States to *all* international criminal tribunals from 1993 to 2015 amounted to 6.28

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<sup>153</sup> Elizabeth Evenson and Jonathan O'Donahue, "The International Criminal Court at Risk", in *Open Global Rights*, 6 May 2015 (available on its web site).

<sup>154</sup> Stuart Ford, "What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach", in *Washington University Global Studies Law Review*, 2017, vol. 16, no. 1, p. 66 ('Ford Comparative Study').

<sup>155</sup> Wairagala Wakabi, "Bemba's Acquittal Raises Concerns on Reparations to Victims in the Central African Republic", in *International Justice Monitor*, 18 July 2018 (available on its web site).

billion US Dollars. By way of comparison, the report noted that the 2012 Olympics in London alone cost 15 billion US Dollars; the 2012 US presidential election cost six billion US Dollars.<sup>156</sup> At the 2018 ASP, the President of the ICC, Chile Eboe-Osuji, made a like comparison when he observed that the entirety of the ICC’s budget over the last sixteen years “is still less than the programme cost of \$2.1 billion for a single B-2 Spirit military aircraft – known popularly as the ‘Stealth Bomber’”.<sup>157</sup>

The insufficiency of the Court’s budget is made even plainer when compared to its national counterparts. Focusing on investigation resources, Stuart Ford conducted an extensive inquiry in 2017 of resources given by States to investigate notable mass atrocity crimes domestically, such as, but not limited to, the 1988 Lockerbie bombing, 2011 shootings and bombings by Anders Breivik in Norway, 2014 targeting of Malaysian Air’s MH-17, and the 2015 Paris attacks. Ford concluded that:

[...] national governments are willing to devote vastly more resources to domestic mass atrocity investigations. In fact, states faced with mass atrocity crimes have been willing to devote *dozens to hundreds of times more resources* to those investigations than the ICC is able to devote to its own investigations. This disparity is startling and highlights how the ICC has tried to investigate some of the most serious crimes imaginable with meager resources.<sup>158</sup>

To deny that the ICC’s budget needs and deserves significant increases is simply disingenuous unless a hamstrung Court is the goal or an acceptable outcome. The apt conclusion is simple: if there is to be progress made on this issue, something must give and that ‘something’ is a uniform agreement and understanding on the realities of the ICC’s budget and an attendant belief that substantially more monies are needed.

### **5.3.3.3. Recommendation on the Budget for the Assembly of States Parties**

Working from this starting point, the recommendation to the ASP is both familiar and novel: approve a dramatic rise in the ICC’s annual budget, such as doubling its current budget; and change to a multi-year budget,

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<sup>156</sup> Daniel McLaughlin, “International Criminal Tribunals: A Visual Overview”, Fordham Law School Leitner Center for International Law and Justice, 2012, p. 78.

<sup>157</sup> ICC President ASP Statement, p. 9, see above note 24.

<sup>158</sup> Ford Comparative Study, p. 4, see above note 154 (emphasis added).

such as a two to five-year budget. Of course, what is a ‘dramatic rise’ in the annual budget and what is an acceptable number of years for a long-term budget are best left for the Assembly to determine in close co-ordination with the Court. A major review conference that utilizes internal and external expertise to determine these precise details would be one good option, among other plausible mechanisms.

With respect to the familiar part of this recommendation, there are clear benefits of a better resourced ICC that need not be rehearsed here.<sup>159</sup> Rather, it is more appropriate to discuss the advantages of the novel part of this recommendation, the multi-year budget.<sup>160</sup> Moving to such a funding model would create the predictability and stability that the ICC needs to undertake its lofty mandate while also improving ICC-ASP relations. Further, with the budgetary clash no longer annual, there will be far more bandwidth available for both parties (individually and collectively) to focus on the range of pressing, substantive issues before them.<sup>161</sup>

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<sup>159</sup> There are clear reasons why the ASP should strongly consider increasing the size of the budget, some of which are worth mentioning. The most obvious advantage would be a better resourced Court that could more appropriately address its current and future docket, most acutely by not hibernating investigations or deprioritizing cases because of lack of resources and staff. Of course, the Court will always have to make difficult strategic decisions even with an unlimited budget. An enhanced budget, however, would greatly reduce what the OTP described as “the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the Office’s mandate, or constantly stripping ongoing activities of critical resources so as to staff the highest prioritized activities” , ICC ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor”, 17 September 2015, para. 3 (<http://www.legal-tools.org/doc/b27d2a/>). As Professor Ford further found, investments in the Court’s budget *vis-à-vis* investigative resources would greatly enhance its ‘outcomes’ (Ford Comparative Study, p. 4, see above note 154):

increasing the ICC’s investigative resources would be an important step in improving the Court’s outcomes. The comparison between domestic and international investigations suggests that the ICC would be more successful if it had the resources to conduct investigations more like those carried out in response to domestic mass atrocity crimes. Given that most states agree that a successful ICC is desirable, it follows that most states should support increasing the ICC’s investigative resources because doing so would be in their own interest.

<sup>160</sup> As said elsewhere in this chapter, there are many issues not discussed that would need to be covered in a more in-depth proposal for a multi-year budget, such as periodic review during the lifespan of the budget and caveats for major, unforeseen developments in the world economy or the Court’s workload.

<sup>161</sup> As a side note, it is stressed that a *de jure* rather than *de facto* multiyear budget is at the core of this recommendation, given that distinct advantage of the former is that it tables the annual budgetary process that is too demanding and cumbersome as well as the cause of addi-

Before discussing, however, it is necessary to note that instituting a long-term ICC budget would admittedly be a challenge. A long-term budget would be extraordinary considering that it appears rare,<sup>162</sup> although six international or regional tribunals do operate on multi-year financial periods.<sup>163</sup> Moreover, governments typically operate on annual budgets, including their investments in international organizations, so it would be quite difficult to run counter to the global funding infrastructure that is built around a yearly cycle.

Yet, the reasons for doing so with respect to the ICC are themselves extraordinary. Simply put, the ICC's unique mandate deserves unique financing, particularly financing that insulates it from political interference (unintentional or otherwise). In comparison, the large majority of intergovernmental institutions have agendas pushing facially political ends (for instance, the World Trade Organization promotes "open trade for the benefit of all" as opposed to a protectionist agenda)<sup>164</sup> or mandates to provide a service or good in need (for instance, the Universal Postal Union "ensure a truly universal network of up-to-date products and services").<sup>165</sup> As such, shifts in policy that affect these organizations' budgets result in more or less deliverables, modelling, or the like. Using the examples above, budget fluctuations at the World Trade Organization means more or less ability to promote free trade, or at the Universal Postal Union, more or less programs on postal co-operation.

By contrast, the ICC's mandate is not quintessentially political: the only permanent international organization that is a criminal court of law charged with investigating, prosecuting and adjudicating atrocity crimes pursuant to law, without fear or favour. Even the slightest budget change

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tional issues, like constant and fruitless discussions on the correlation of budget and performance.

<sup>162</sup> However, it is noteworthy that the European Commission, a far more sprawling and resource intensive organization than the ICC, has a multiyear budget. European Commission, "EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends", 2 May 2018. Further, States Parties do commit to multiyear giving to the ICC Trust Fund for Victims, so they are not reticent to the concept or unable to participate in multiyear commitments to an international organization. Trust Fund for Victims, "Sweden contributes Close to €1million to the Trust Fund for Victims as Part of Multi-annual Funding Arrangement", 19 January 2019 (available on its web site).

<sup>163</sup> IER Report, para. 348, fn. 216, but see fn. 215, see above note 40.

<sup>164</sup> World Trade Organization, "Overview" (available on its web site).

<sup>165</sup> Universal Postal Union, "About UPU" (available on its web site).

translates into the Court denying much-deserved accountability to oftentimes large communities of victims who do not have alternative recourse for redress, not to mention allowing organizers and perpetrators of atrocity crimes freedom to carry out more criminality. Further, as this chapter previously laid out, the demands on Court intervention is only increasing with time. It does not take a conniving politician to see the obvious opportunities to interfere with the Court's casework *vis-à-vis* its budget.

Surely, all such entities are political in some respect. For example, the ICC is 'political' to the extent an international judiciary upholding the laws punishing individuals for the commission of atrocity crimes is a political choice made by the Rome Statute framers. Nevertheless, the ICC's mandate to operate a permanent, impartial and independent criminal court of law that can strip individuals of their freedom, among other like unique facets, distinguishes the ICC from other international organizations. There are few, if any, direct parallels to the ICC, particularly in the peace and security space. Being a rare institution, the ICC justifies unique treatment by its funders, most importantly to protect the integrity of the Court's judicial purpose.

There is an even better reason to treat the ICC and its budget differently: not only is it the only permanent international criminal court of law, but also, the Court must function in an overtly political global landscape that has operated as such for centuries. Unlike representative governments with judiciaries that historically play an independent legal role in national affairs, political power is the key ordering principle of international relations. The existence of the term 'realpolitik', or pragmatic geopolitics devoid of ideological notions like 'justice', demonstrates the historical dominance of politics and partisanship on the international stage.<sup>166</sup> As such, there is much to insulate the ICC from, including, as mentioned, the potential politicization of its funding mechanism.<sup>167</sup>

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<sup>166</sup> Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction", in *Foreign Affairs*, 2001, vol. 80, no. 4, pp. 86–96; John Bew, *Realpolitik: A History*, Oxford University Press, 2015.

<sup>167</sup> Jonathan O'Donohue, "Financing the International Criminal Court", in *International Criminal Law Review*, 2013, vol. 13, no. 1, p. 274; Sarah Kendell, "Commodifying Global Justice: Economies of Accountability at the International Criminal Court", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 121; Elizabeth Evenson and Jonathan O'Donohue, "States Shouldn't Use ICC Budget to Interfere with its Work", 23 November 2016 (available on the Amnesty International's web site).

#### 5.3.3.4. Reforming the Budgetary Process Benefits All

The Court's most ardent supporters in the Assembly should recognize these pitfalls and their consequences, and take steps to protect the Court, starting with taking a multi-year budget seriously. There are great advantages to doing so.

First, the predictability of a set budget for a term of years would be beneficial to the Court and its work. Considering that atrocity crime cases are understandably complex and lengthy,<sup>168</sup> as well as the unparalleled expansiveness of the Court's jurisdiction, the benefit for the ICC is manifest. All organs of the Court – especially the OTP as its engine – could better tackle their current and future demands if their budgets were not only increased but also preset for a course of years.

For example, if the OTP was better resourced and had budgetary certainty for years in advance, the Office would be better situated to initiate investigations of warranted situations while also handling ongoing cases. Specifically, the influx of additional resources mixed with a better understanding of the OTP's financial outlook means it will be better placed to, *inter alia*, push for the completion of preliminary examinations and move quicker towards investigations (again, where legally warranted), as opposed to slow rolling preliminary examinations due to financial constraints imposed by existing investigations and cases or uncertainty around finances for the next year.

Moreover, the OTP could also make wise investments in maintaining and acquiring new expertise, such as hiring professionals on new forms of evidence, building up greater field presence in prioritized situation countries, carrying out needed training modules, and onboarding valuable technological tools to help with investigations, analysis, forensics, and witness protection.<sup>169</sup> Such investments would also help short and long-term budgetary and judicial efficiency.

Two fairly recent Court initiatives to help streamline the budgetary process substantiate the benefits that a multi-year budget (and/or the attendant financial predictability) would bring: the ICC's concept paper of the Court on multi-year project funding of 2013, and the OTP's Basic Size Report of 2015.

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<sup>168</sup> See above note 131.

<sup>169</sup> ICC ASP, "Report of the Court on the Basic Size of the Office of the Prosecutor", paras. 35–37, see above note 159.

In the concept paper on multi-year funding, the Court argued that the constraints of annual budgeting do not comport with the essential work of a permanent international criminal tribunal:

Providing funds through regular programme budget [that is, annual budget] does not afford the flexibility to move the funds from one period to a subsequent financial period [...]. This limits the capacity of the project manager to manage the planned activities over several years and such limitation on timing when managing multi-year projects is counterproductive to the continuing nature of the operations. The regular programme budget is suitable mainly for recurrent expenditure of a routine nature and not for project operations, particularly those which are larger in scale.<sup>170</sup>

In putting forward the idea of a separate, multi-year fund, the ICC made the benefits of this approach clear:

When a project spans more than one financial year, a multi-year funding mechanism can improve the allocation and effectiveness of funding. In this context, multi-year funding is seen as a useful tool because it increases predictability, generates lower administration costs and allows States Parties and the Court to develop a more strategic vision of projects requiring an implementation period of more than one year.<sup>171</sup>

This last point should be highlighted given that the recent IER Report of 2020, when discussing needed changes to the Assembly's handling of the budgetary process, stated that 'ASP meetings tend to be dominated, in recent years, by technical, budgetary discussions, at the expense of strategic policy discussions.'<sup>172</sup> Enlarging the period of years that the ICC's budget covers would make room for stakeholders to better focus on these strategic issues, an improvement that many would welcome.

The benefits of predictability were also substantiated by the OTP in its Basic Size Report. Prepared so to provide the ASP with greater detail about its budgetary needs, this document focused in large part on how greater and more reliable resourcing would enhance the OTP's operations. While this report did not advocate for a multi-year budget, its unwritten

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<sup>170</sup> ICC ASP, "Concept Paper of the Court on Multi-Year Project Funding", 4 June 2013, ICC-ASP/12/22, paras. 8–9.

<sup>171</sup> *Ibid.*, para. 11

<sup>172</sup> IER Report, para. 346, see above note 40.

assumption was that more reliable forecasting of their resources would make the OTP – and, by extension, the Court – more efficient. As the report found, “having the basic resources in place, allowing for timely planning of activities, reducing the need for a stop-start approach will already have long term efficiency gains.”<sup>173</sup>

Second, reaching finality on the budget debate for longer than the few months between the end of one fight and the beginning of another will be of great benefit to both the ICC and ASP. Said directly, by eliminating the annual budget showdown, a thorn in the side of ICC-ASP relations would be removed. This point of frustration for all involved would, at the very least, be tabled for a duration of years. In this sense, a long-term ICC budget would be addition by subtraction.

This benefit would extend beyond merely suspending the budget fight itself for another time. It would also table the seemingly endless discussion about the connection between the Court’s budget and its performance. Too much time and energy are spent demonstrating a somewhat uncontroversial point that greater resources would improve the Court’s performance.<sup>174</sup> This is not to say that the examination of the ICC’s performance would or should be sidelined if a multi-year budget was approved. To the contrary, the Court’s effectiveness and efficiency should always be open to scrutiny, because when done well, criticism helps the Court improve. Rather, the point is that resources devoted to fights between the ASP and ICC over the correlation between funding and performance are not well spent.

Furthermore, civil society organizations dedicate significant energies advocating that the Court should be better resourced.<sup>175</sup> Significant resources are also spent by the Court itself in making the case that more money will translate into improved effectiveness and efficiency. The aforementioned Basic Size report is such an example. This document was

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<sup>173</sup> ICC ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor”, para. 31(a), see above note 159.

<sup>174</sup> See Elizabeth Evenson and Jonathan O’Donahue, “Still falling short – the ICC’s capacity crisis”, in *Open Democracy*, 3 November 2015 (available on its web site).

<sup>175</sup> For instance, Human Rights Watch, Amnesty International, Open Society, International Federation for Human Rights (FIDH), International Bar Association, to name a few, spend significant resources following the CBF process all year, analysing the process so to produce robust recommendations before the ASP, participating in the ASP to view final budgetary developments, and then generating follow-up material to comment on the final budget.

the product of a time-consuming, OTP-wide undertaking that required a huge number of hours to complete. It is not a stretch to conclude that these resources could have been better used on more substantive matters directly related to the Court's work.

The other benefit of budget finality and predictability is that it creates opportunity. A multi-year budget would free up time and energy that would otherwise go to the cumbersome and challenging annual budgetary process, allowing the Court's limited bandwidth to be directed to areas of greater need. The making of such decisions on allocation that are best left to the Court; however, there are many options where the Court could apportion its newfound attention, such as further improving hiring practices, spending more time analysing the unique complexities of situation countries, building greater relations with States Parties and non-States Parties on areas of mutual interest, having more capacity to study lessons learned so to streamline court practices, diverting more energy to victims outreach, and allocating more resources to educating important constituencies about the ICC.

Of course, a multi-year budget does present challenges, on top of the hurdles already mentioned. It is possible that Court-Assembly negotiations over a multi-year budget could be even more contentious than their yearly counterparts, given that larger finances would be at stake. Further, the IER Report of 2020 stated that yearly budgets allow for "improved budgetary precision, more flexibility to respond to changes between budget periods, and possibility to work with more up to date estimates". In casting doubt on the advisability of a multi-year financial period, the Experts stated that they were "not convinced that increasing the budgetary duration would lead to a substantial reduction of resources involved in the budget process".<sup>176</sup>

Although these comments have some merit, the IER Report devoted only two cursory paragraphs to the concept of a multi-year financial period; hardly enough to decipher if substantial thought went into this idea, let alone to determine if the Experts scrutinized a full-fledged proposal.

Yet, in evaluating these comments and related issues, there are clear problems with the Experts' analysis as well as ways to get around the perceived problems with an elongated financial period. First, the Experts only conceptualized 'resources' in terms of Euros. Putting aside that the Experts

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<sup>176</sup> IER Report, paras. 347–48, see above note 40.

did not substantiate their claims with any hard numbers,<sup>177</sup> there was zero discussion or apparent consideration given to how a multi-year budget would reduce others cost, such as alleviating the deficit of trust created by the current budgetary process (that the Experts themselves noted as a significant problem) or cutting out the aforementioned opportunity cost again created by this flawed process.

Second, it is hard to imagine that ‘up to date estimates’ cannot be predicted or accounted for with better budgetary modelling, especially if a multi-year budget policy is set by the ASP. Likewise, concerns that an enlarged financial period would hamper the ASP’s ability to respond to changing circumstances are also quite manageable, if not an overblown fear. To date, significant upticks in the Court’s caseload, for example, has not resulted in a significant uptick in the Court’s finances. If sizable changes in the Court’s core work did not necessitate changes, it is hard to envision what will.

As this chapter put forward, the benefits of a multi-year budget are best leveraged with a tremendous increase in the overall budget as well. Admittedly, while such an increase is hard to imagine in today’s landscape, there would be no need to adapt to changing circumstances were the Court’s budget increased to a level that the ICC could overcome most, if not all, changed circumstances. Even without a massive increase in the overall budget, there are plenty of mechanisms that could be devised to permit the ASP and/or the ICC to revisit the budget if need be, such as provisions in an ASP resolution that would trigger new budgetary negotiations if certain conditions were met.

It is simply the case that the best solvent to the many problems that stem from the ICC’s current budgetary process is to shelve the regularity of the process itself yet do so to the satisfaction of all stakeholders. Of course, steps to build in better transparency and other initiatives meant to bring the parties to the budgetary process closer together (and, ultimately, drive consensus) should also be pursued.<sup>178</sup> However, these approaches only attack the peripheries and not the core of the problem which is that the budgetary process is always a delicate matter that will engender strong opinions, and

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<sup>177</sup> It is problematic that the Experts did not substantiate their claims that underpinned their lack of being ‘convinced’. It is very hard to believe that the cost of travel alone of so many Court and diplomatic officials would not be significant cost-savings for the ICC and other stakeholders, and monies better spent on the core operations of the Court or other line items.

<sup>178</sup> IER Report, paras. 340–345, see above note 40.

by extension, positions. It is time to pursue a different path, one that can be best charted using a multi-year budget.

#### 5.4. Conclusion

For better or worse, the latter part of 2018 and well into 2020–2021 provided many reminders of how the Court’s performance drives the perceived legitimacy of the Court. From high-level discussions among stakeholders to headlines in mainstream media;<sup>179</sup> from the acquittals of Central African Republic’s *Bemba* and Côte d’Ivoire’s *Gbagbo* to a critical IER Report laying out hundreds of recommendations, all contributed to the conventional wisdom that the ICC – and, in particular, the OTP – is failing.

True, only those deeply familiar with the details of these cases can say whether this critique is fair. Maybe acquittals were the just outcome. So, far from being a sign of faltering, acquittals in such circumstances would be a strong sign that the system of fairness and impartiality is working, both of which are important factors that drive legitimacy.

Further, the wisdom of the IER Report, lack thereof, or a combination of both, will surely come to light as the Court and Assembly sift through the Experts’ findings. At first blush, it appears that some recommendations are quite on point and will make the Court a better functioning institution (if implemented) whereas others seem to mirror work that is already being done at the Court or contemplated. Still others reflect grievances and office politics rather than scientifically arrived at conclusions. It is also odd that the Report spent zero substantial time discussing what is working, which would be critical information to prevent the Assembly and the Court from undermining (inadvertently or otherwise) the good. The improved legitimacy of the Court depends on both actors getting the next steps right.

But legitimacy is also driven by perception. Accordingly, the above pragmatic recommendations start the conversation about how the Court, the Assembly, and other stakeholders can best ‘put their heads down and work’, and in so doing, start changing opinions.

As laid out as the first recommendation in this chapter, prioritizing the arrest of fugitives has the greatest potential of demonstrating the improved health of the ICC and the Court’s transition into a well-oiled judi-

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<sup>179</sup> Sean O’Neill, “‘Bullies and Sex Pests’ Rule at the International Criminal Court”, in *The Times*, 7 October 2020.

ary. With more and more fugitives facing trial (and, by extension, an enhanced likelihood of more convictions), the negative perceptions of the Court held by a variety of external stakeholders will have to be re-examined.

The second recommendation on building up a vibrant culture of professional development along with a healthy repository of international criminal law best practices and like institutionalized knowledge is a hallmark of a strong judicial establishment, not to mention a prerequisite of more effective and efficient proceedings. Making substantial strides in the professionalism of the ICC's internal training and development regime will further demonstrate that the Court is a serious institution that is similarly serious in changing external views of the Court as well as its judicial track record.

Finally, freeing the Assembly and the Court from its annual battle over financing, as laid out in this chapter's third recommendation, is a crucial step in getting the ICC's proverbial house in order. More than simply providing the Court more funds to do its work (which is certainly essential if the goal is to improve its functioning and the attendant improvement in the Court's optics), converting to a multi-year financial model will allow the ASP and ICC to take a collective sigh of relief, put aside tension, and start putting their energy and resources to tackling the myriad of pressing issues – such as arrests and judicial efficiency – that are likewise critical to changing global perceptions of the ICC.

Altogether, such inwardness is the best way to strengthen the Court's perceived and actual legitimacy, and get ever closer to fulfilling its lofty, yet much needed mandate to end impunity for the worst that humanity has on offer. Now it is time for the Assembly, Court and important partners to consider these recommendations and get to work.



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# The Relevance of the Nuremberg Principles as a Source of Law for Decision Making of Subsequent International Criminal Judiciary

Katarína Šmigová\*

## 6.1. Introduction: Historical Context of the Nuremberg Trial and the Subsequent Development of International Criminal Law

The end of the twentieth and the beginning of the twenty-first century could be described as the flourishing of international criminal law.<sup>1</sup> It was an unprecedented development, which was enabled by the end of the so-called Cold War and the hope of real co-operation between States and, unfortunately, the horrors of wars and ethnic cleansing, which were no longer expected among ‘civilized nations’. However, the international community had already had experience from which to learn and take an example of how to resolve the controversy over the choice between justice and peace. After the First World War, the international community considered prosecution of Wilhelm II of Hohenzollern and finally achieved in bringing to justice at least some of German war criminals in front of the Supreme Court in Leipzig.<sup>2</sup> After the Second World War, it was a solution to the situation, which culminated in the Nuremberg Trial. Its essence was the criminal prosecution at an international level, a trial that was in the sight of the pro-

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<sup>1</sup> Antonio Cassese *et al.*, *Cassese’s International Criminal Law*, 3rd. ed., Oxford University Press, 2013, p. 4.

<sup>2</sup> Compare the Versailles Treaty, 28 June 1919, Articles 227–230 (<http://www.legal-tools.org/doc/a64206/>).

fessional and lay public and which was and still is the subject of research from various points of view.<sup>3</sup>

Today, law students learn in their first classes of public international law that unlike according to the so-called traditional international law, it is also possible to consider an individual as a subject of international law, although only within some of its parts.<sup>4</sup> One of them is international criminal law, which regulates the criminal liability of an individual at the international level.<sup>5</sup> It was the post-war Nuremberg Trial that gave this term its real fulfilment. To understand the specific innovation of this approach, it is helpful to study the materials of that era, which presented the views dividing both politicians and academics. Despite the fact that even before the Nuremberg Trial it was possible for a State to prosecute and punish individuals who committed war crimes under international law,<sup>6</sup> the exclusivity of the position of States was still emphasized.<sup>7</sup> However, as the International Court of Justice later explicitly explained, the specificity of the position of States does not mean that there can be no other subjects of international law than a State, albeit with different parameters.<sup>8</sup>

The Nuremberg Trial seems to be such an integral part of international law today that it is difficult to realize that it was not as obvious as it currently seems. It has even been described as an experiment or even an improvisation.<sup>9</sup> It was a process, the result of which came gradually and the

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<sup>3</sup> See, for example, testimony from media: Joe J. Heydecker, Johannes Leeb, *Norimberský proces*, Ikar, Bratislava, 2007. For legal and policy issues see, Dominic McGoldrick, Peter Rowe, and Eric Donnelly (eds.), *The Permanent International Criminal Court*, Hart Publishing, Oxford, 2004. See also Charles Anthony Smith, *The Rise and Fall of War Crimes Trials*, Cambridge University Press, 2012.

<sup>4</sup> Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, 2011, p. 36 ff.

<sup>5</sup> *Ibid.*, p. 229 ff.

<sup>6</sup> Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", in *California Law Review*, 1943, vol. 31, no. 5, p. 536.

<sup>7</sup> Lassa F. L. Oppenheim, *International Law*, 6th. ed., Longmans, Green and company, London, 1940, p. 455.

<sup>8</sup> Compare International Court of Justice ('ICJ'), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, p. 178 (<http://www.legal-tools.org/doc/f263d7/>).

<sup>9</sup> Richard Overly, "The Nuremberg Trials: International Law in the Making", in Philippe Sands (ed.), *From Nuremberg to the Hague. The Future of International Criminal Justice*, Cambridge University Press, 2003, p. 2.

form of which was influenced by several factors,<sup>10</sup> including the influence of prominent personalities.<sup>11</sup> Originally three countries, the United States, the United Kingdom and the Soviet Union, which were later joined by France, adopted a declaration on 17 December 1942,<sup>12</sup> that they intended to hold Germany and Nazi leaders responsible for the atrocities committed during the war, but what this really meant was still a matter of discussion. Although a solution was finally adopted to establish the criminal responsibility of individuals in court proceedings, even after the unconditional surrender of Germany on 8 May 1945, it was not yet entirely clear how this objective would be achieved. The result of the whole process of negotiation was the adoption of the London Convention on 8 August 1945 ('London Convention'),<sup>13</sup> which was annexed by the Charter of the International Military Tribunal ('Nuremberg Charter').<sup>14</sup> From 20 November 1945 to 1 October 1946, the International Military Tribunal ('Nuremberg Tribunal') held court in Nuremberg, which was a symbol of the annual conventions of the Nazi Party.<sup>15</sup>

The Nuremberg Trial and the Nuremberg Judgment on major war criminals ('Nuremberg Judgment')<sup>16</sup> resonated with the professional and

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<sup>10</sup> See, for example, Mahmoud Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 28 ff.

<sup>11</sup> John Q. Barrett, "The Nuremberg Roles of Justice Robert H. Jackson", in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, pp. 511–525. See also Hans-Peter Kaul, "The Nuremberg Legacy and the International Criminal Court - Lecture in Honor of Whitney R. Harris, Former Nuremberg Prosecutor", in *Washington University Global Studies Law Review*, 2013, vol. 12, no. 3, pp. 637 ff.; Whitney R. Harris, Henry T. King Jr., Benjamin B. Ferencz, "Nuremberg and Genocide: Historical Perspectives", in *Studies in Transnational Legal Policy*, 2009, vol. 40, no. 1, pp. 17 ff.; Philippe Sands, Twin Peaks, "The Hersch Lauterpacht Draft Nuremberg Speeches", in *Cambridge Journal of International and Comparative Law*, 2012, vol. 1, no. 1, pp. 37–44.

<sup>12</sup> United Kingdom, "Joint Declaration by Members of the United States", Commons Sitting Series 5, vol. 385, 17 December 1942.

<sup>13</sup> United Nations, London Agreement of August 8th, 1945, 8 August 1945 (<http://www.legal-tools.org/doc/844ff64/>).

<sup>14</sup> Charter of the International Military Tribunal, 8 August 1945 (<http://www.legal-tools.org/doc/64ffdd/>).

<sup>15</sup> Christoph J. M. Safferling, "Judging Nuremberg: The Laws, the Rallies, the Trials: Conference 17 July–20 July 2005 in Nuremberg, Germany", in *German Law Journal*, 2005, vol. 6, p. 1045.

<sup>16</sup> International Military Tribunal, *International Military Tribunal v. Martin Borman et al.*, Nuremberg Judgment against Major War Criminals, 1 October 1946 ('Nuremberg Judgment') (<http://www.legal-tools.org/doc/45f18e/>).

lay public and was even influential outside of the area of international criminal law.<sup>17</sup> This chapter focuses on the affirmation of the principles recognized in the Nuremberg Charter as principles of international law by a United Nations ('UN') General Assembly resolution<sup>18</sup> and their formulation by the UN International Law Commission ('Commission').<sup>19</sup> It is submitted that as important as they are, the Nuremberg Principles can be considered to be a material source of law, not a formal one for the international judicial bodies that have been established since then.

Although the formulation of the Nuremberg Principles took place in a relatively short time, further developments within the Commission and the international community were no longer in favour of the development of international criminal law.<sup>20</sup> This attitude was related to the so-called Cold War,<sup>21</sup> so even though the Commission had already adopted the Draft Code of Crimes against the Peace and Security of Humanity in 1954,<sup>22</sup> the UN General Assembly postponed it *ad acta*.<sup>23</sup> Nevertheless, it was not the relieving of political tensions in 1989 but rather another experience of mankind with the horrors of war that made it possible to renew a more proactive approach of the international community and to mark another historical milestone in the development of international criminal law. The Balkan conflict was too close to the Western powers to go unnoticed in terms of

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<sup>17</sup> See, for example, Philippe Kirsch, "Applying the Principles of Nuremberg in the International Criminal Court", in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, p. 502.

<sup>18</sup> The Crime of Genocide, UN Doc. A/RES/96(I), 11 December 1946 ('General Assembly Resolution 95(I)') (<http://www.legal-tools.org/doc/3cf0ce/>).

<sup>19</sup> "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" ('ILC Nuremberg Principles 1950'), in Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1950/Add.1, 29 July 1950, vol. II ('Yearbook of the International Law Commission, 1950') (<http://www.legal-tools.org/doc/003223/>).

<sup>20</sup> See, for example, Christoph J. M. Safferling, "A World of Peace under the Rule of Law: The View from Europe", in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, p. 681.

<sup>21</sup> For considering the United Kingdom as the greatest opponent of the further development of international criminal law see, for example, David Matas, "From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials", in *Gonzaga Journal of International Law*, 2006–2007, vol. 10, pp. 18 ff.

<sup>22</sup> Yearbook of the International Law Commission, 1950, vol. II (<http://www.legal-tools.org/doc/003223/>).

<sup>23</sup> Draft code of Offences against the Peace and Security of Mankind, UN Doc. A/RES/897(IX), 4 December 1954 (<http://www.legal-tools.org/doc/1e2bbe/>).

perceptions of threats to international peace and security, and the Rwandan genocide was too harrowing for the international community to leave it only to a weakened Rwandan civil society. The means chosen by the international community can be criticized,<sup>24</sup> but the *ad hoc* international criminal tribunals set up by the UN Security Council<sup>25</sup> were undoubtedly a demonstration of the ability to intervene other than militarily,<sup>26</sup> as well as of the ability to help to restore or maintain peace by its linking to justice.

The aspect of justice is significantly present in international criminal law in both its criminal and international law aspects. Justice renders to everyone his due<sup>27</sup> – whether it is a punishment for an ordinary individual or the highest representative of the State. This approach is a particular challenge for *pro futuro* cases as prosecution can affect representatives of any state. However, the political situation at the international level at the end of the twentieth century was at such a stage that it was possible to adopt an international treaty establishing a permanent International Criminal Court (‘ICC’)<sup>28</sup> to investigate and prosecute perpetrators of the most serious crimes under international law.

The outlined milestones<sup>29</sup> of the development of international criminal law are the essence of the examination of this chapter, which aims to analyse whether the Nuremberg Principles formulated by the Commission on the basis of the Charter and the Judgment of the Nuremberg Tribunal might be considered a formal source of international criminal law. It has

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<sup>24</sup> See, for example, José Enrique Alvarez, “Nuremberg Revisited: The Tadic Case”, in *European Journal of International Law*, 1996, vol. 7, no. 2, pp. 245–264.

<sup>25</sup> The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was established by the Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by Security Council Resolution 827 (‘ICTY Statute’) (<http://www.legal-tools.org/doc/b4f63b/>) and the International Criminal Tribunal for Rwanda (‘ICTR’) was established by the Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by Security Council Resolution 955 (‘ICTR Statute’) (<http://www.legal-tools.org/doc/8732d6/>).

<sup>26</sup> See Charter of the United Nations, 26 June 1945, Article 41 (<http://www.legal-tools.org/doc/6b3cd5/>). Nico Krisch, “Article 41”, in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 3rd. ed., Oxford University Press, 2012, pp. 1319 ff.

<sup>27</sup> “*Iustitia suum cuique distribuit*”, Marcus Tullius Cicero, *De Natura Deorum*, vol. III.

<sup>28</sup> Rome Statute of the International Criminal Court, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>29</sup> Apart from the *ad hoc* Tribunals and the permanent International Criminal Court there are also other international criminal courts or tribunals, for example, mixed tribunals, nevertheless, these will be mentioned only in case if a difference is to be stressed within an analysed context.

been submitted that despite being an invaluable legacy for the subsequent international criminal institutions they have not been a normative phenomenon within judicial decision making. The chapter will therefore aim to explore the possibilities of the application of the Nuremberg Principles by the international judiciary in relation to their status as international custom. Moreover, the position of the Nuremberg Charter and the Nuremberg Judgment will also be analysed since first, they were the source for the Commission while formulating the Nuremberg Principles themselves, and second, according to Article 38 of the Statute of the International Court of Justice ('ICJ Statute'), as for the Nuremberg Judgment, judicial decisions might be used subsidiarily to determine the rules of law.<sup>30</sup> Nevertheless, such an approach might be disputable in the case law of judicial bodies that have been established as institutions separate from their predecessor on a completely different legal basis.

## **6.2. The Nuremberg Principles Adopted by the United Nations International Law Commission and their Status**

The Commission was able to formulate seven principles deriving from the Nuremberg Charter and the Nuremberg Judgment.<sup>31</sup> If there was a requirement to formulate only one principle derived from Nuremberg, that basis would be the first Nuremberg principle, individual criminal responsibility on the international level,<sup>32</sup> as the foundational principle from which other principles originate. When the responsibility of an individual for a crime under international law is discussed, national law cannot be decisive (the second principle is thus the corollary of the first principle).<sup>33</sup> Moreover, when the first principle establishes the responsibility of every individual for the commission of a crime under international law, it also includes top

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<sup>30</sup> See ICJ Statute, 26 June 1945, Article 38 para. 1 letter d) (<http://www.legal-tools.org/doc/fdd2d2/>).

<sup>31</sup> ILC Nuremberg Principles 1950, Part III, paras. 95–127, see above note 19.

<sup>32</sup> *Ibid.*, paras. 98–99: "Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable for punishment". For more detailed analysis see, for example, Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012; Albin Eser, "Individual Criminal Responsibility", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, 2002.

<sup>33</sup> *Ibid.*, paras. 100–102: Principle II: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

officials who cannot rely on their position, which is often associated with their immunity from prosecution (the third principle),<sup>34</sup> as well as those who ‘only’ fulfil the orders of their superiors (paraphrase of the fourth principle),<sup>35</sup> or those who ‘only’ helped commit this crime (paraphrase of the seventh principle).<sup>36</sup> Furthermore, when analysing the responsibility of an individual for committing crimes under international law, one has to define what a crime under international law is (see the sixth principle).<sup>37</sup> At the same time, it must be taken into consideration that the responsibility of prosecuting an individual for committing a crime under international law must be proven by a fair trial (the fifth principle).<sup>38</sup>

The UN General Assembly affirmed the Nuremberg Principles as principles of international law recognized by the London Charter of the Nuremberg Tribunal and the judgment itself of the Nuremberg Tribunal in its resolution.<sup>39</sup> Although there were only fifty-five UN Member States at that moment, the whole trial expressed the strong belief that the Nuremberg Principles presented not only concepts known at the national level transferable and applicable at the international level comparable to general principles of law but, despite various opposite opinions,<sup>40</sup> was also evidence of (general) practice accepted as law.<sup>41</sup> It is generally expected to present *usus longaevus* of an undefined length besides *opinio iuris* to prove existence of an international custom.<sup>42</sup> Nevertheless, in spite of general scepticism in

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<sup>34</sup> *Ibid.*, paras. 103–104: “Principle III: The fact that a person who committed an act which constitutes a crime under international law, acted as Head of State or responsible Government official, does not relieve him from responsibility under international law”.

<sup>35</sup> *Ibid.*, paras. 105–106: “Principle IV: The fact that the person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”.

<sup>36</sup> *Ibid.*, paras. 125–127: Principle VII: Complicity in the commission of a crime against peace, a war crime or a crime against humanity as set forth in Principle VI is a crime under international law.

<sup>37</sup> *Ibid.*, paras. 110–124: Principle VI sets out crimes that are punishable as crimes under international law.

<sup>38</sup> *Ibid.*, paras. 107–109: Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

<sup>39</sup> General Assembly Resolution 95(I), 11 December 1946, see above note 18.

<sup>40</sup> Boris Krivokapić, “On the Issue of So-Called “Instant” Customs in International Law”, in *Acta Universitatis Danubius*, 2017, vol. 9, no. 1, pp. 81–98.

<sup>41</sup> Compare Article 38(1)(b) of the ICJ Statute, see above note 30.

<sup>42</sup> ICJ, *Federal Republic of Germany/Denmark (North Sea Continental Shelf)*, Judgment, 20 February 1969, para. 77 (<http://www.legal-tools.org/doc/38274a/>).

relation to a so-called instant custom, it is submitted that the Nuremberg Trial and its result have provided a unique change of paradigm of international law, and therefore a so-called Grotian moment.<sup>43</sup> It is exactly this unique change of a particular area of international law that accelerates the crystallization of an international custom.<sup>44</sup> As for the Nuremberg Principles, not merely their legacy but namely their status as customary law has been confirmed not only by national courts<sup>45</sup> but also by international judicial bodies.<sup>46</sup> Furthermore, several international documents have stated this status as a fact while considering other issues.<sup>47</sup>

Having said that, it is important to examine how the Nuremberg Principles have or could have been applied by international criminal tribunals. As it is widely accepted, Article 38 of the ICJ Statute is not only important as a list of applicable law for the ICJ itself, it is, in general, perceived as a list of primary and subsidiary sources of international law, despite various criticism.<sup>48</sup> If the Nuremberg Principles are considered to be part of international custom, their normative status would be expected to be assessed in the case law of international criminal tribunals. However, as it is analysed in the following sub-section, it is really not the case.

### **6.3. The Nuremberg Principles in the Statutes and Case Law of the *Ad Hoc* Tribunals**

First of all, it was mainly the case law of the Nuremberg Tribunal and its establishing Nuremberg Charter that was taken into consideration by the *ad hoc* Tribunals, namely the International Criminal Tribunal for the former Yugoslavia and for Rwanda ('ICTY' and 'ICTR'), not the Nuremberg Prin-

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<sup>43</sup> Michael P. Scharf, "Accelerated Formation of Customary International Law in Time of Fundamental Change", in *ILSA Journal of International and Comparative Law*, 2014, vol. 2, pp. 305–341.

<sup>44</sup> *Ibid.*, pp. 306–307.

<sup>45</sup> Supreme Court of Israel, *Attorney General of Israel v. Eichmann*, 11 December 1961, 40/61 (<http://www.legal-tools.org/doc/ih8p9l/>).

<sup>46</sup> European Court of Human Rights, *Kolk and Kislyiy v. Estonia*, Decision on Admissibility, 17 January 2006, Application no. 24018/04 (<http://www.legal-tools.org/doc/cc2998/>).

<sup>47</sup> Report of the UN Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 35 ('Report of the UN Secretary General 1993') (<http://www.legal-tools.org/doc/c2640a/>).

<sup>48</sup> Hugh Thirlway, *The Sources of International Law*, in Malcolm D. Evans (ed.), *International Law*, 2nd. ed., Oxford University Press, 2006, p. 119.

ciples themselves.<sup>49</sup> It is understandable since the Nuremberg Principles, as such, were prepared as a formulation of the principles of international law recognized by the London Charter of the Nuremberg Tribunal and the Judgment itself of the Nuremberg Tribunal.<sup>50</sup> Therefore the status of the London Charter and the Judgment of the Nuremberg Tribunal are to be analysed as well. The London Charter as an international treaty has established an international judicial body with a precisely determined jurisdiction that was limited – geographically, temporarily, and personally – after the Second World War. A more relevant question might be asked regarding whether the Nuremberg Judgment, that was adopted by the Nuremberg Tribunal established by this treaty, has created a precedent within international criminal law. As for the precedential system on the international level, taking into consideration Article 38(1)(d) of the ICJ Statute as a list of subsidiary sources of law, it is generally accepted that precedents are not applied by the ICJ since its judgments are legally binding only upon the parties to the dispute.<sup>51</sup> Nevertheless, although not formally bound, the ICJ follows its previous decisions because of the consistency needed to settle its jurisprudence.<sup>52</sup> However, the question remains, was the Nuremberg Judgment a precedent that is to be followed by the subsequent international criminal tribunals?

According to the general theory of precedents, these are a source of law, that is, they are law-making acts.<sup>53</sup> That is the main source of its binding nature for following similar decisions. If a decision just applies pre-existing substantive law, and therefore does not create new law, it is not a law-making act but an act of interpretation or, rather to say, an act of application.<sup>54</sup> The Nuremberg Tribunal has stated several times that it has not

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<sup>49</sup> For a list of judgments of international judicial bodies considering Nuremberg Charter, Nuremberg Judgment or Nuremberg Principles as such see, for example, “List of Authorities”, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Closing Brief of Mr. Jean-Pierre Bemba Gombo, Annex B, 22 April 2016, ICC-01/05-01/08-3121-AnxB (<http://www.legal-tools.org/doc/d6b92c-1/>).

<sup>50</sup> General Assembly Resolution 95(I), see above note 18.

<sup>51</sup> See Article 59 of the ICJ Statute, see above note 30.

<sup>52</sup> Ian Brownlie, *Principles of Public International Law*, 7th. ed., Oxford University Press, 2008, p. 21.

<sup>53</sup> Hans Kelsen, *General Theory of Law and State*: translated by Anders Wedberg, The Lawbook Exchange, Clark, 2007, p. 149.

<sup>54</sup> Compare Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?”, in *International Law Quarterly*, 1947, vol. 1, no. 2, p. 154.

created new law but applied law adopted by the international community and individual States before its establishment.<sup>55</sup> That was one of the reasons why, for example, the crime of genocide was not included in the London Charter although it has become a firm component of all the establishing documents of the subsequent criminal bodies on the international level as a core crime within the system of international criminal law.<sup>56</sup> Nevertheless, at the time of the adoption of the London Charter, there was no international legal norm prosecuting genocide and it was only in 1948 that the Convention on the Prevention and Punishment of the Crime of Genocide was adopted. However, although the Nuremberg Tribunal stated that it was only applying the pre-existing law, there were several disputed matters especially in relation to crimes against peace. Even if it might be that it was not the Nuremberg Tribunal itself that has created the new law, such a law-making act might be declared by the adoption of the London Charter.<sup>57</sup> Either way, the Nuremberg Judgment was not a precedent to be legally followed, rather the principles embodied in the Nuremberg Judgment and Nuremberg Charter and formulated by the International Law Commission.

Another reason for not referring to the Nuremberg Principles as such might be the wording of the Statutes of these *ad hoc* Tribunals themselves. The Statutes of the *ad hoc* Tribunals include all the Nuremberg Principles. Article 7 of the ICTY Statute contains almost all seven principles nearly identically if compared to the Nuremberg Principles. The Nuremberg Trials and its result, including the formulation of the Nuremberg Principles, were a material background, which the drafters of the ICTY Statute regarded while preparing the Statute.<sup>58</sup> As it was indicated in the report of the UN Secretary-General for the UN Security Council that included the ICTY Statute as an annex, virtually all the written comments received by the Secretary-General had suggested that the Statute should include a provision regarding individual criminal responsibility, irrelevant of official capacity and obedience to superior orders.<sup>59</sup> Moreover, the report itself mentioned

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<sup>55</sup> Nuremberg Judgment, p. 52, see above note 16.

<sup>56</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, p. 36. Compare Article 5 of the Rome Statute, see above note 28.

<sup>57</sup> Kelsen, 1947, p. 154 ff., see above note 53.

<sup>58</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, p. 123.

<sup>59</sup> Report of the UN Secretary General 1993, para. 55, see above note 47.

the Charter and Judgment of the Nuremberg Tribunal, although expressly only in relation to crimes against humanity<sup>60</sup> and violations of the laws and customs of war.<sup>61</sup> Therefore, there was no reason to refer to the Nuremberg Principles themselves although they – as a gold-mouthed formulation of principles embodied in the Charter and the Judgment of the Nuremberg Tribunal – were one of the main sources for the bodies drafting the ICTY Statute.<sup>62</sup> The ICTY in its case law refers first of all to its Statute although it was only a framework document especially in relation to practical work and had to be interpreted very intensively.<sup>63</sup>

Nevertheless, the *ad hoc* Tribunals had to consider the previous experiences of the international community when dealing with perpetrators of the most serious crimes under international law expressly when the Defence referred to it.<sup>64</sup> The ICTY has thus analysed the value that is owed to judicial decisions as well-established sources of international law.<sup>65</sup> It has followed the position considering judicial decisions as a subsidiary means for the determination of rules of law.<sup>66</sup> It could not hold it as a distinct source of law in international criminal adjudication since a doctrine of binding precedent presupposes, for example, a certain degree of a hierarchical system that is missing between the *ad hoc* Tribunals and the Nuremberg Tribunal.<sup>67</sup> The situation is, of course, different in relation to the even hierarchical system between the ICTY Trial Chambers and Appeal Chamber. In this case, the system of precedents is to be applied, which has also been confirmed by the ICTY itself because of the need of assurance of certainty and predictability.<sup>68</sup> Moreover, according to the ICTY, the right to a

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<sup>60</sup> *Ibid.*, para. 47.

<sup>61</sup> *Ibid.*, para. 42.

<sup>62</sup> Cryer *et al.*, 2010, p. 123, see above note 58.

<sup>63</sup> Alex Whiting, “The ICTY as a Laboratory of International Criminal Procedure”, in Bert Swan, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 83 ff.

<sup>64</sup> ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 95 ff. (<http://www.legal-tools.org/doc/80x1an/>).

<sup>65</sup> ICTY, *Prosecutor v. Kupreškić*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 540 (‘*Kupreškić case*’) (<http://www.legal-tools.org/doc/5c6a53/>).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgment, 24 March 2000, IT-95-14/1-A, para. 113 (<http://www.legal-tools.org/doc/176f05/>).

fair trial that includes a right of appeal needs coherence, especially in the area where the legal norms are developing what the area where the ICTY has been operating is.<sup>69</sup> Nevertheless, it is not a precedential system per se since the Appeal Chamber should follow its previous decisions but should depart from them for cogent reasons in the interests of justice.<sup>70</sup> Finally, as for the Trial Chambers themselves, their decisions are not of a binding nature on one another, although they might be followed if they are persuasive.<sup>71</sup>

Nevertheless, the ICTY Trial Chamber has pointed out other possibilities to look at the decisions taken by other international criminal tribunals, including the Nuremberg Tribunal.<sup>72</sup> First, they may constitute evidence of an international custom or a general principle of international law.<sup>73</sup> Second, they may provide persuasive authority that the decision taken by the ICTY concerning the existence of a legal norm was a correct interpretation of existing law.<sup>74</sup> To summarize, according to the ICTY, all the international criminal courts have to be very careful when analysing and referring to decisions of other courts before relying on their authority as to existing law.<sup>75</sup> Nevertheless, their experience is of invaluable importance for the determination of existing law.<sup>76</sup> It is especially the case of the Nuremberg Tribunal that functioned under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into an international custom.<sup>77</sup>

Similarly, the situation with the ICTR Statute and its case law follows the discussed approach of the ICTY, especially, because their establishing documents are very similar and, also, they shared the same Appeals Chamber. Thus, the ICTR Statute contains the provision covering individual criminal responsibility and all the relevant Nuremberg Principles relating to it, that to say no immunity for State officials, superior order defense, fair trial, and jurisdiction *ratione materiae* specifically determined by the situa-

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, para. 107.

<sup>71</sup> *Ibid.*, para. 114.

<sup>72</sup> *Kupreškić* case, para. 540, see above note 65.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, para. 542.

<sup>76</sup> *Ibid.*, para. 541.

<sup>77</sup> *Ibid.*

tion that was supposed to be dealt with, namely the Rwandan genocide.<sup>78</sup> Moreover, the Appeals and Trial Chamber(s) of the ICTR often referred to the Nuremberg Charter or the Nuremberg Judgment, especially at the beginning of the tribunal's life.<sup>79</sup>

The only Nuremberg principle that has not expressly become a part of the Statutes of the *ad hoc* Tribunals is the second principle that indicates that the fact that there is no punishment at the national level for an act that is a crime under international law does not relieve an individual from his responsibility under international law. This principle is actually a confirmation of precedence of international law over national law.<sup>80</sup> Although there is a clear affirmation of the principle of non-intervention into domestic matters of States according to the UN Charter, the power of the UN Security Council to adopt binding measures under Chapter VII has provided the UN Security Council the competence to establish international judicial bodies because of the threat to peace.<sup>81</sup> As for the Statutes of the *ad hoc* Tribunals, this principle of precedence of international law has been realized by the system of concurrent jurisdiction.<sup>82</sup> Such a system gives priority to an international level of crime prosecution since the situation in the country of conflict has created a state of public affairs that was unable or unwilling to deal with the challenge of prosecution of offenders of the most serious crimes under international law.

#### **6.4. The Nuremberg Principles in the Rome Statute and the Case Law of the International Criminal Court**

As for the Nuremberg Principles and their legal status, the ICC has been a different case, although based on the same reasoning. First, the Rome Statute has included all the Nuremberg Principles, namely the principle of individual criminal responsibility on the international level (Article 25), irrelevance of immunity for State officials (Article 27), obedience of superior order (Article 28), jurisdiction *ratione materiae* (Article 5) or fair trial for defendants (Article 67). Second, the ICC was established on the basis of an international treaty, which is comparable to the source of the creation

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<sup>78</sup> Article 8 of the ICTR Statute, see above note 25.

<sup>79</sup> See, for example, ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, ICTR-96-4-T, 2 September 1998, para. 486, 526, 550, 563 (<http://www.legal-tools.org/doc/b8d7bd/>).

<sup>80</sup> ILC Nuremberg Principles 1950, para. 102, see above note 19.

<sup>81</sup> Krisch, 2012, p. 1319 ff., see above note 26.

<sup>82</sup> See Article 9 of the ICTY Statute and Article 8 of the ICTR Statute, see above note 25.

of the Nuremberg Tribunal. Nevertheless, its jurisdiction *ratione temporis* is directed towards future possible cases, not a single past situation. Similar differences are present in relation to other limited aspects of jurisdiction (namely *personae* and *loci*). Furthermore, the relation between the ICC and national courts is built upon the principle of complementarity that might first indicate predominance of national law. Nevertheless, it is the competence of the ICC itself to decide whether the national court is unable or unwilling to deal with a particular case under specific conditions (*compétence de la compétence*).<sup>83</sup>

Furthermore, if compared to the Nuremberg Charter and the Statutes of the *ad hoc* Tribunals, the Rome Statute is a much more detailed and elaborated document. In relation to the focus of this chapter, it is important to point out that the Rome Statute expressly addresses the issue of applicable law before the ICC. However, there is no such provision either in the Nuremberg Charter or in the Statutes of the *ad hoc* Tribunals.<sup>84</sup> Article 21 of the Rome Statute precisely determines the law that the ICC shall apply. First of all, any interpretation and application of the law must be consistent with internationally recognized human rights and without any discrimination.<sup>85</sup> Only within this area the principal legal framework for the functioning of the ICC might be applied. Whereas the Rome Statute itself, Elements of Crimes and Rules of Procedure and Evidence are primary sources of applicable law.<sup>86</sup> It means that the ICC is expressly instructed to follow first and foremost this troika of legal norms. Only where appropriate, applicable treaties and the principles and rules of international law are applied in the second place. One may ask whether the Nuremberg Principles or the Nuremberg Judgment might be found somewhere in these options of law application by the ICC.

As it has already been presented, the Nuremberg Principles are included in the Rome Statute itself, even though not expressly mentioned as Nuremberg Principles. Moreover, they are considered to be an international

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<sup>83</sup> ICJ, *Liechenschein v. Guatemala (Nottebohm Case)*, Judgment, 6 April 1955, p. 119 (<http://www.legal-tools.org/doc/8b5b07/>).

<sup>84</sup> Gilbert Bitti, “Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC”, in Carsten Stahn, Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Nijhoff, Leiden, 2009, p. 412 ff.

<sup>85</sup> Compare Article 21(3) of the Rome Statute, see above note 28.

<sup>86</sup> Compare Article 21(1) of the Rome Statute, *ibid*.

custom, so it means that if there is a gap in the highest hierarchical group of applicable legal norms, rules of international law are applied, that is, customary rules as well. A different reasoning is to be used in relation to previous decisions of other international criminal bodies. Article 21 sets forth only the applicability of principles and rules of law as interpreted in the previous decisions of the ICC itself.<sup>87</sup> Moreover, the use of previous decisions in its decision-making is discretionary, not a legal duty. Therefore, formally speaking, even though there has been a hierarchical system of Trial Chambers and the Appeal Chamber established,<sup>88</sup> there is no system of precedents applied within the system created by the Rome Statute. Nevertheless, the case law of the ICC has already indicated that it usually follows its previous decisions, probably because of the necessary legal certainty that it provides.<sup>89</sup> On the other hand, as it has already been proved in the *Bemba* case, Article 83(2) has already been applied,<sup>90</sup> although controversially, and the Appeals Chamber has reversed the Trial Chamber decision and acquitted a person accused of war crimes and crimes against humanity.<sup>91</sup>

As for the previous decisions of other international courts, Article 21 of the Rome Statute does not mention them at all. Insofar as the Rome Statute provides applicable law, there is no reason to refer to the jurispru-

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<sup>87</sup> Compare Article 21(2) of the Rome Statute, *ibid*.

<sup>88</sup> Leaving aside Pre-Trial Chambers that have a different function within the functioning of the established ICC system. Compare Part 5 and Part 6 of the Rome Statute, especially Article 57 and Article 64, *ibid*.

<sup>89</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 6 (<http://www.legal-tools.org/doc/257c48/>).

<sup>90</sup> See the beginning of Article 83(2) of the Rome Statute: if the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may: (i) reverse or amend the decision or sentence; or (ii) order a new trial before a different Trial Chamber.

<sup>91</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, ICC-01/05-01/08-3636-Red (<http://www.legal-tools.org/doc/40d35b/>).

dence of other tribunals.<sup>92</sup> However, the ICC does not exist in isolation within the system of international criminal law.<sup>93</sup> Therefore, the ICC, similar to the *ad hoc* Tribunals, might be inspired by the case law of other international criminal tribunals and might identify principles and rules of international law while analysing the jurisprudence of other courts and tribunals.<sup>94</sup> Overall, the language of Article 21 of the Rome Statute does not provide many opportunities to go back to the Nuremberg Principles as a formal source of law despite the fact that the first President of the ICC pointed out the importance of their legacy.<sup>95</sup> It is, in general, an approach within all the courts and tribunals that have been established in the area of international criminal law since the Nuremberg Trial and are independent separate judicial bodies, their function is to apply law set forth by their establishing legal texts.<sup>96</sup> Nevertheless, no one would doubt that the Nuremberg Principles have been an invaluable source of law from a material point of view. Its legacy has been relevant for all the subsequent bodies that have been established since the Nuremberg Trial.<sup>97</sup>

Finally, to complete the picture of applicability of previous judicial decisions of international criminal tribunals, despite their formal non-legally binding position, the Defence, the Office of the Prosecutor and the ICC itself refer to the decisions of *ad hoc* Tribunals.<sup>98</sup> The best example is

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<sup>92</sup> ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 1 April 2010, ICC-01/09-19-Corr, para. 29 (<http://www.legal-tools.org/doc/f0caaf/>).

<sup>93</sup> *Ibid.*, para. 30.

<sup>94</sup> *Ibid.*

<sup>95</sup> Kirsch, 2007, p. 502 ff., see above note 17.

<sup>96</sup> ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, ICC-01/09-19-Corr., para. 29 (<http://www.legal-tools.org/doc/f0caaf/>).

<sup>97</sup> Werle and Jessberger, p. 10, see above note 56; Roberto Bellelli, “The Establishment of the System of the International Criminal Justice, in Roberto Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, Routledge, London, 2010, p. 12.

<sup>98</sup> See, for example, Stewart Manley, “Referencing Patterns at the International Criminal Court”, in *European Journal of International Law*, 2017, vol. 27, no. 1, p. 191 ff. See also Aldo Zammit Borda, “The Direct and Indirect Approaches to Precedent in International Courts and Tribunals”, in *Melbourne Journal of International Law*, 2013, vol. 14, no. 1, p. 1 ff. or Volker Nerlich, “The Status of ICTY and ICTR Precedent In Proceedings Before the ICC”, in Carsten Stahn, Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Nijhoff, Leiden, 2009, pp. 305–325.

probably provided in relation to the judgment in the *Tadić* case. As for the *Lubanga* case, Pre-Trial Chamber I had to analyse the concept of an armed conflict since it was relevant for the fulfilment of the facts of the crime according to Article 8(2)(b)(xxvi) of the Rome Statute, namely the war crime of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. Pre-Trial Chamber I realized that the definition of an armed conflict is neither included in the Rome Statute nor in the Elements of Crimes (nor in the Rules of Evidence and Procedure). Therefore, in the second place, it had to apply Article 21(1)(b) according to which the ICC shall apply, where appropriate, applicable treaties, which was not the case, and the principles and rules of international law, including the established principles of the international law of armed conflicts. It practically meant that the ICC had to refer to the important ICTY Appeal Chamber decision in the *Tadić* case in which the ICTY provided an accepted definition of an armed conflict.<sup>99</sup> The same approach was taken by the Trial Chamber.<sup>100</sup>

As it has already been submitted, the previous decisions of *ad hoc* Tribunals might also be helpful in the interpretation of the Rome Statute. The best example in this is probably an arrest warrant of the Pre-Trial Chamber in the *Al-Bashir* case, which had to deal with a definition of the crime of genocide.<sup>101</sup> Despite the same definition of the crime of genocide in the establishing documents of the international criminal tribunals since the Convention on the Prevention and Punishment of the Crime of Genocide, the problem of this interpretation was a contextual element that is a part of the definition of the crime of genocide in the Elements of Crimes and that is not present in the definition of the crime of genocide included into the Rome Statute.<sup>102</sup> Although according to Article 9(3) of the Rome

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<sup>99</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para. 208 ff. (<http://www.legal-tools.org/doc/b7ac4f/>).

<sup>100</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 533 (<http://www.legal-tools.org/doc/677866/>).

<sup>101</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 123 ff. (*'Al-Bashir case'*) (<http://www.legal-tools.org/doc/e26cf4/>).

<sup>102</sup> Compare ICC, Elements of Crimes, 11 June 2010 (<http://www.legal-tools.org/doc/3c0e2d/>), to Rome Statute, Article 6, see above note 28.

Statute, the Elements of Crimes have to be consistent with the Rome Statute, such a difference had to be analysed. Nevertheless, thanks to the case law of the *ad hoc* Tribunals, the Pre-Trial Chamber concluded that there is not an irreconcilable contradiction between the definition in the Elements of Crimes and the one in the Rome Statute.<sup>103</sup>

## 6.5. Conclusion

When studying international criminal law, one profoundly gets acquainted with the Nuremberg Trial and the Nuremberg Principles formulated by the International Law Commission. One of the reasons might be the historical development within which the Nuremberg Tribunal and its Judgment have an unmistakable place. However, its legacy is much more than just a pure historical one. Despite all the critical comments, the Nuremberg Trial and its result are a legacy that is celebrated by all the witnesses and supporters of the idea of prosecution of crimes under international law on the international level.<sup>104</sup> Nevertheless, although one cannot doubt the material force of this historical and legal milestone, as for the formal legal status of the Nuremberg Principles formulated on the basis of the London Charter and the Nuremberg Judgment, it is submitted that it has a secondary role either as a subsidiary source for determination of the existing law or as a source that inspires and assures subsequent international criminal courts and tribunals when determining or interpreting their operational instruments that have established them. Since there is no formal hierarchy between the Nuremberg Tribunal and the *ad hoc* Tribunals or the ICC, there is no formal precedential system that takes into account previous judicial decisions but the own ones. However, the wording of the establishing documents sometimes even cites the wording of the formulation of the Nuremberg Principles that are principles of international law.

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<sup>103</sup> *Al-Bashir* case, para. 128, see above note 101.

<sup>104</sup> See, for example, Whitney R. Harris, “The Legacy of Nuremberg”, in *Studies in Transnational Legal Policy*, 2008, vol. 39, pp. 23–32; Richard Goldstone, “Historical Evolution – From Nuremberg to the International Criminal Court”, in *Penn State International Law Review*, 2007, vol. 25, no. 4, pp. 763–771; Benjamin B. Ferencz, “A World of Peace under the Rule of Law: The View from America”, in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, pp. 551–566; Christian Tomuschat, “The Legacy of Nuremberg”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 830–844; Kaul, 2013, see above note 11.

**PART II:**  
**CONTEXT AND CONSTRAINTS**



**SECTION A:**  
**PROSECUTORIAL POLICY AND PRACTICE**



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# Prosecuting ‘The Most Responsible’: The Law and Politics of the Expectation and Strategy

Fannie Lafontaine and Claire Magnoux\*

## 7.1. Introduction

### 7.1.1. ‘The Most Responsible’ as a Core Foundation of the International Criminal Justice Project

The beginnings of international criminal justice are often thought to be embodied in the Allied Powers’ determination to prosecute Wilhelm II, at the end of World War I, for “supreme offence against international morality and the sanctity of treaties”, as reflected in Article 227 of the 1919 Versailles Treaty.<sup>1</sup> This chapter also lays out the characteristics of the institution that would try the accused, that is, a special tribunal composed of five judges, one appointed by each of the Allied Powers. Although the project was never carried out,<sup>2</sup> it exhibits some of the organic traits of contemporary institutions of international criminal law, namely the creation of judicial bodies that are international by virtue of their composition, for the purpose of prosecuting the perpetrators of a number of specific crimes qualified as “affecting the international community as a whole”. However, the most fundamental dual characteristic that is observable in these initial steps

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<sup>1</sup> Treaty of Versailles, 28 June 1919 (<http://www.legal-tools.org/doc/a64206/>).

<sup>2</sup> The Netherlands refused to extradite Wilhelm II.

of the international criminal justice system – and that continues to be part of the DNA of its current manifestations – is the probe for individual criminal responsibility, combined with the intent to prosecute those perpetrators that are uppermost in the hierarchy.

This brought into being the original sin of the international criminal justice system: ostensibly tying its effectiveness to prosecuting the most high-ranking individuals deemed to be bearing the greatest level of responsibility. This concern is verifiable when we break down the statutes of the first international judicial bodies. For example, Article 1 of the Charter of the International Military Tribunal ('IMT'), included in the London Agreement<sup>3</sup> concerning the Nuremberg International Military Tribunal, stipulates that the institution's role will be to try "the major war criminals of the European Axis" and Article 7 establishes the principle of the irrelevance of officialdom. More recent institutions have also included in their founding charters considerations regarding the perpetrators of the crimes that they were established to try. These considerations differ from one statute to another and refer either to a specific rank or generically to "the individuals most responsible" or "individuals bearing the highest level of responsibility".<sup>4</sup> Moreover, even if no specific wording appears in the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda ('ICTY' and 'ICTR'), prosecution of the most responsible, as it will be discussed, constituted a key tool in their prosecutorial and completion strategy.

### **7.1.2. 'The Most Responsible' as a Multi-Layered Component of the ICC**

In contrast, the wording of the Rome Statute of the International Criminal Court<sup>5</sup> ('the Court' or the 'ICC' and the 'Rome Statute') makes no mention

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<sup>3</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 (<http://www.legal-tools.org/doc/844f64/>).

<sup>4</sup> This was the case with the Statute of the Special Court for Sierra Leone, which provided for the prosecution of "persons who bear the greatest responsibility": Statute of the Special Court for the Sierra Leone, 14 August 2000, Article 1(1) (<http://www.legal-tools.org/doc/aa0e20/>). The Law on the Establishment of the Extraordinary Chambers stated that the purpose thereof was to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [...]: Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, Article 1 (<http://www.legal-tools.org/doc/9b12f0/>).

<sup>5</sup> Rome Statute of the International Criminal Court, 17 July 1998 ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

of the concept of senior leaders or individuals bearing the highest level of responsibility. However, it is important to look at the subtle considerations pertaining to the perpetrators that are contained in the founding text of the ICC to understand its spirit in this regard.

At the heart of the Preamble lies the fight against impunity as a two-fold founding purpose, that is, “the most serious crimes of concern to the international community as a whole must not go unpunished”<sup>6</sup> and the need to “put an end to impunity for the perpetrators of these crimes”.<sup>7</sup> This underlies the original mission undertaken by the international criminal justice project, namely the intention for its institutions to effectively prosecute the perpetrators of the most heinous crimes, regardless of who they are. This intent is implemented both through Article 5, which outlines the Court’s *ratione materiae* jurisdiction, listing crimes that are serious in essence by the nature of the acts that they cover and the degree of organization that they require,<sup>8</sup> and Article 27, specifying the irrelevance of official capacity. This is also confirmed as one of the Nuremberg Principles, namely Principle 3.<sup>9</sup>

In addition, the modes of liability covered in the Rome Statute reveal the drafters’ intention to target the responsibility of high-ranking perpetrators. This is evident from the modulations in Article 25, which allow for the investigation of the individual responsibility of individuals who were far from the crime scene,<sup>10</sup> and from Article 28, which concerns the responsibility of commanders and other superiors.

Finally, the criteria listed in Article 53, which guide the selection process carried out by the Office of the Prosecutor (‘OTP’ or ‘Office’), also

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<sup>6</sup> *Ibid.*, Preamble, para. 4.

<sup>7</sup> *Ibid.*, Preamble, para. 5.

<sup>8</sup> We may note here the obligation to prove the *dolus specialis* as a requirement for genocide (Article 6), a widespread or systematic attack for crimes against humanity (Article 7), and the following indication for war crimes: “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Article 8).

<sup>9</sup> Rome Statute, Article 27(1), see above note 5. See also International Law Commission, “Formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”, UN Doc. A/CN.4/W.12, 31 May 1949 (<http://www.legal-tools.org/doc/0d1ffe/>).

<sup>10</sup> Rome Statute, see above note 5. See, for example, Article 25(3)(a) providing for the liability for a crime committed through another person, Article 25(3)(b) for liability for ordering, soliciting, or inducing the commission of a crime, and 25(3)(d) concerning the commission of a crime by a group of persons acting with a common purpose.

entail considerations of who to prosecute. The admissibility criteria laid out in Article 17, that is, complementarity and gravity, are incorporated in this process.<sup>11</sup> The evaluation of the former criterion requires considering, among other things, the willingness of the State concerned to investigate and prosecute the perpetrators. This condition enables the ICC to act in situations where the perpetrators of crimes may be protected by States, potentially due to their high-ranking position in the State structure. The requirement that the situation or case be of sufficient gravity also implies an evaluation of the role of perpetrators in the commission of the crimes. Similarly, the interests of justice,<sup>12</sup> that are to be used as a weighting criterion, raise issues related to the timing of a prosecution by the Court, including, possibly, peace negotiations or amnesties that may affect individuals bearing the highest level of responsibility.<sup>13</sup>

This quick glance at the Rome Statute brings to light the fact that, albeit lacking in the wording of the Statute, the prosecution of a particular type of perpetrator is one of the pillars supporting the spirit of the institution. Nevertheless, however central to the international criminal justice project, the concept of individuals bearing the greatest responsibility is also conspicuous by the absence of a consensus about its definition. There is no agreement between victims, authors, and institutional actors on a framework of interpretation and a strict meaning that would lead to effortlessly draw the perpetrators' profile.

### 7.1.3. 'The Most Responsible' as a Pillar of Prosecutorial Strategies

The concept of the most responsible individuals results in a more or less conscious association between the hierarchical position of the perpetrator and his or her level of responsibility within a bureaucratic type of analysis of the structures of responsibility.<sup>14</sup> This association was seeded in the origins of the international criminal justice system with the idea that its very purpose is to make possible the prosecution of all individuals who have

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<sup>11</sup> *Ibid.*, Articles 53(1)(b) and 53(2)(b).

<sup>12</sup> *Ibid.*, Articles 53(1)(c) and 53(2)(c).

<sup>13</sup> Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", in *European Journal of International Law*, 2003, vol. 14, no. 3, p. 481.

<sup>14</sup> Xabier Agirre Aranburu, "Prosecuting the Most Responsible for International Crimes: Dilemmas of Definition and Prosecutorial Discretion", in Joaquim Gonzales (ed.), *Protección Internacional de Derechos Humanos y Estado de Derecho*, Grupo Editorial Ibañez, Bogotá, 2009, p. 9.

committed international crimes, in particular Heads of State. Yet, this view of the structures of responsibility as being clearly established and static is at odds with the vast majority of conflicts within which international criminal justice operates. This observation echoes a study dedicated to the perception that the perpetrators have of their role in the commission of crimes and of the manner in which international courts characterize their behaviour legally,<sup>15</sup> showing that the accused feel that the legal concepts applied to determine their responsibility fail to reflect the reality of their role.

From an institutional point of view, prosecutors have developed their own understanding of the notion of the most responsible and have gradually moved away from equating those who are most responsible with those having the highest standing in the hierarchy, although this continues to be the prevailing reading template. The broader category of the most responsible is a practical argumentation tool used to adapt their prosecution policies to the realities on the ground. In the ICTY and ICTR, for example, faced with the organizational diversity of the actors concerned, the prosecutors identified a number of profiles corresponding to said category: individuals who are considered as being high up in the hierarchy, *de jure* or *de facto*, but also individuals whose prosecution is necessary in order to set an example because of the scale or systematic nature of the crimes they committed.<sup>16</sup>

Finally, the importance of reflecting on those who are most responsible takes its full meaning when considering the issue from the perspective of victims of international crimes. Taking their point of view into consideration, literature has shown how, because of the extremely limited number of perpetrators who are tried and the symbolic character of prosecutions before an international court, the process of selecting situations and cases becomes a significant exclusion process, whether in terms of the possibility for victims' to find remedy, in terms of the peripheral role that international prosecutions seem to assign to them or with respect to who is or should be considered the most responsible in a given situation.<sup>17</sup>

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<sup>15</sup> Damien Scalia, "Expérience de justice internationale pénale: perception de domination par d'anciens dominants", in *Revue Québécoise de Droit International*, special edition, 2015, p. 15.

<sup>16</sup> Carla del Ponte, "Prosecuting the Individuals Bearing the Highest Level of Responsibility", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 517.

<sup>17</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2018, p. 132: "Immediate victims of crime often wish to see their neighbour tried as

In light of these thoughts, how does the concept of individuals bearing the highest level of responsibility play out in practice at the ICC?

Identifying the persons bearing the greatest responsibility is intrinsically tied to the question of the scope of the Prosecutor's discretionary power. This topic has been extensively analysed in the literature,<sup>18</sup> namely because it has been shown that the Prosecutor's work impacts the legitimacy of the institution,<sup>19</sup> in particular in the context of his or her assessment of gravity. This chapter explores a particular facet of the exercise of this discretionary power through the interpretation of the concept of persons bearing the highest level of responsibility. The concept is addressed both from a policy or political perspective, as a central element of prosecutorial policy, and from a legal perspective, by exploring its legal interpretation as part of the selection criteria laid out in the Rome Statute. Prosecuting the persons bearing the greatest responsibility then appears as a fundamental cross-cutting component of the ICC's work and one that encompasses some of the most crucial issues for the Court, ranging from the Prosecutor's independence and free exercise of discretionary power to the credibility of his or her actions, and the dialogue between the Prosecutor and the judges regarding the objectives of the international criminal justice system as viewed by the ICC.

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much as they seek accountability for core leaders"; Cécile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1357; Jo-Anne Wemmers, "Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims", in *International Review of Victimology*, 2009, vol. 16, no. 2, p. 211.

<sup>18</sup> See, for example, Anni Poes, *Prosecutorial Discretion at the International Criminal Court*, Hart Publishing, Oxford, 2020; Triestino Marinello, "Judicial Control Over Prosecutorial Discretion at the International Criminal Court", in *International Criminal Law Review*, 2019, vol. 19, no. 6, p. 979; William A. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 731; Avril McDonald and Roelof Haveman, "Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC", 15 April 2003; Alexander Greenawalt, "Justice Without Politics? Prosecutorial Discretion and the International Criminal Court", in *New York University Journal of International Law and Politics*, 2007, vol. 39, p. 583; Luc Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 162.

<sup>19</sup> Margaret deGuzman, "Gravity and the Legitimacy of the International Criminal Court", in *Fordham International Law Journal*, 2008, vol. 32, no. 5, p. 1404. See also Marston Danner Allison, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *The American Journal of International Law*, 2003, vol. 97, no. 3, p. 510.

The first section of this chapter focuses on the place occupied by the concept of persons bearing the greatest responsibility in the Prosecutor’s work. The intent is to show how resorting to the concept of the most responsible is used as a tool to build the credibility of the OTP. To this end, for the purposes of analysis, the concept is situated within the timeframe of successive prosecution policies in order to study the spectrum of its evolution, from the initial mentions to its growing complexity with the broadening of the profiles of the perpetrators considered as bearing the greatest responsibility. Special attention is paid to studying the objectives put forward by the OTP in order to justify the prosecution of such perpetrators. Finally, this section focuses on the obstacles that are inherent to the push for prosecuting the individuals bearing the greatest responsibility by international judicial bodies. The second part of the chapter reviews the Court’s case law and the debates surrounding these actors’ hierarchical positions with the aim of demonstrating how prosecuting the individuals bearing the greatest responsibility has become, for the various actors of the Court, an issue of gaining the appropriate understanding of what international criminal justice should be or should achieve. This involves, on the one hand, an analysis of how the criteria of gravity and interests of justice is constructed in the jurisprudence, and on the other hand, an exploration of the relationship between the OTP and Pre-Trial Chambers in the process of selecting situations and cases.

## **7.2. ‘The Most Responsible’: Building the Credibility of the Office of the Prosecutor**

This section analyses the emergence and increasing complexity of the concept of those who are most responsible in prosecution policies (7.2.1), in regard to the objectives put forward to justify these policies and strategies (7.2.2), and with respect to the difficulties that are specific to prosecutions of high-ranking individuals (7.2.3).

### **7.2.1. Building the Concept Over Time in Prosecution Policies: An Economic Multi-Task Tool**

#### **7.2.1.1. ‘The Most Responsible’ As a Tool of Complementarity**

In recent history, the prosecution of the most responsible has been mostly based on the complementarity ideal between international and domestic tribunals. Thus, the Completion Strategies for the ICTY and ICTR work outlined in United Nations Security Council (‘Security Council’) Resolu-

tions 1503 (2003) and 1534 (2004)<sup>20</sup> created a separation between national and international prosecution, requiring international judicial bodies to prosecute the most senior leaders and national jurisdictions to take on cases involving accused individuals of lower rank.<sup>21</sup> Although it has been recognized that there were economic and logistical aspects to this division of labour, warranted by the closure of the two institutions,<sup>22</sup> the concept of individuals bearing the highest level of responsibility was introduced earlier in the history of the ICTY and ICTR, by their Prosecutors and prosecution strategies.<sup>23</sup>

Concerning the ICC, since 2003, the limited resources of the institution is put into relief by the OTP to justify its prosecutorial strategy: “the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, *such as the leaders of the State or organisation allegedly responsible for those crimes*”.<sup>24</sup> In the same document, the OTP explains complementarity between the ICC and domestic courts as a tool to close the impunity gap that will be created by this particular prosecutorial strategy.<sup>25</sup> The focus on the most responsible is also seen by the OTP as an incentive for complementarity by encouraging domestic courts to exercise their jurisdiction:

If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then

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<sup>20</sup> Security Council Resolution 1503 (2003), UN Doc. S/RES/1503 (2003), 28 August 2003 (‘Resolution 1503’) (<http://www.legal-tools.org/doc/05a7de/>); Security Council Resolution 1534 (2004), UN Doc. S/RES/1534 (2004), 26 March 2004 (<http://www.legal-tools.org/doc/4e06ec/>).

<sup>21</sup> Resolution 1503, *ibid.*, para. 7:

endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.

<sup>22</sup> Robert Cryer, “Prosecuting the Leaders: Promises, Politics and Practicalities”, in *Göttingen Journal of International Law*, 2009, vol. 1, p. 49.

<sup>23</sup> Del Ponte, 2004, p. 516, see above note 16.

<sup>24</sup> ICC Office of the Prosecutor (‘OTP’), “Paper on Some Policy Issues before the Office of the Prosecutor”, 5 September 2003, p. 7 (<http://www.legal-tools.org/doc/f53870/>) (the quotation has been reproduced as it appears in the original, emphasis included.).

<sup>25</sup> *Ibid.*

be such as to inspire confidence in the national jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases.<sup>26</sup>

### **7.2.1.2. ‘The Most Responsible’, An Expandable Definition to Guarantee the Efficiency of the Office of the Prosecutor’s Work**

The reference to those who are most responsible also appears in the Report on the Activities Performed During the First Three Years (June 2003–June 2006): “Based on the Statute, the Office adopted a policy of focusing its efforts on the *most serious* crimes and on those who bear the *greatest responsibility* for these crimes.”<sup>27</sup> The process of identifying the perpetrators who are most responsible is presented as being based on the evidence to be collected in the course of investigations.<sup>28</sup> This strategic choice is intended to meet one of the three challenges that emerged in the first three years of the Court’s operation, that is conducting investigations in areas where violence is still ongoing (the two other challenges are ‘how to begin its cases’ and ‘how to execute arrests warrant’).<sup>29</sup> Prosecuting the individuals bearing the greatest responsibility therefore rests on the idea of reducing the investigation’s length and scope.<sup>30</sup> Another measure designed to meet this challenge is the quick presentation of focused, select cases “to provide a sample that is reflective of the gravest incidents and the main types of victimization.”<sup>31</sup> It is interesting to note that the concept of individuals bearing the greatest responsibility is not mentioned in relation to this first challenge identified in the first three years of the Court’s operation, that is the process of selecting situations for the initiation of an investigation. The Prosecutor’s reasoning included considerations on gravity, but they were limited to crime interpretation criteria (scale, nature, manner of commission, and impact of the crimes).<sup>32</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> OTP, “Report on the Activities Performed During the First Three Years (June 2003–June 2006)”, June 2006, pp. 7–8 (<http://www.legal-tools.org/doc/c7a850/>).

<sup>28</sup> *Ibid.*, p. 8.

<sup>29</sup> *Ibid.*, pp. 7–8.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 6.

The Report on Prosecutorial Strategy,<sup>33</sup> also released in 2006, categorizes the prosecution of those who bear the greatest responsibility both as a principle of prosecutorial policy and as a strategic objective. In the former configuration, the individuals bearing the greatest responsibility are a component of the second principle of the prosecutorial strategy – the first being complementarity – that is the need for “focused investigations and prosecutions”: “Based on the Statute, the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes.”<sup>34</sup> This principle is aimed at rationalizing the work of the Office by adopting a ‘sequenced’ approach to selection, whereby cases are selected according to their gravity.<sup>35</sup> In the second configuration, prosecution of the individuals bearing the greatest responsibility refers to the Office’s second strategic objective for the following three years.<sup>36</sup> It seems to stem directly from the perspective of rationalizing the OTP’s work, the document bringing up the Office’s budget constraints and its desire to select cases that are representative of the main types of persecution that occurred during the conflict.<sup>37</sup>

In its document entitled “Prosecutorial Strategy 2009–2012”<sup>38</sup> released during Moreno-Ocampo’s term, the OTP provides greater clarity as to what is meant by individuals bearing the greatest responsibility. Within the perspective of focused investigations and prosecution, the Office specifies that it will prioritize prosecution of “those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes”.<sup>39</sup> This formalized the conflation by the Office of perpetrators at the higher echelons of power and those with greatest responsibility, which was already noticeable within the practice of the Office under Moreno-Ocampo<sup>40</sup> and in his first policy document entitled “Pa-

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<sup>33</sup> OTP, “Report on Prosecutorial Strategy”, 14 September 2006 (<http://www.legal-tools.org/doc/6e3bf4/>).

<sup>34</sup> *Ibid.*, p. 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 3: “The second objective is to conduct four to six new investigations of those who bear the greatest responsibility in the Office’s current or new situations”.

<sup>37</sup> *Ibid.*, p. 7.

<sup>38</sup> OTP, “Prosecutorial Strategy 2009–2012”, 1 February 2010 (<http://www.legal-tools.org/doc/6ed914/>).

<sup>39</sup> *Ibid.*, p. 6.

<sup>40</sup> Luis Moreno-Ocampo’s mandate was marked by prosecutions targeting senior leaders, including five top commanders of the Lord’s Resistance Army in Uganda, two leaders of the

per on Some Policy Issues before the Office of the Prosecutor”<sup>41</sup> in 2003. It also extended the category of intellectual perpetrators to encompass those who financed crimes, although none were prosecuted during his term.

### 7.2.1.3. ‘The Most Responsible’ as a Cumbersome Tool for Prosecutorial Strategies

Fatou Bensouda, elected in 2012, gave a new direction to the concept of prosecuting those individuals who are most responsible and, with a noticeable concern for pedagogy, multiplied publications relating to her prosecutorial policy, commendably improving transparency, an essential ingredient of legitimacy.<sup>42</sup>

Bensouda’s first prosecution policy document concerned the 2012–2015 period.<sup>43</sup> With a continued focus on increasing cost-effectiveness at the Office, this prosecution policy paper sets a clear goal for improving the Office’s performance, in particular as regards the rate of charges confirmed. Focused investigations gave way to the principle of non-restrictive extensive investigation in order to meet higher evidentiary standards<sup>44</sup> and a new gradual prosecution strategy was implemented:

A strategy of gradually building upwards might then be needed in which the Office first investigates and prosecutes a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible.<sup>45</sup>

The Office also expressed interest in beginning to prosecute “lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.”<sup>46</sup> This shift in focus appeared to be justified in light of the setbacks that the Office had faced in the past: “Such a strategy will in the end be more cost-effective than having no or failing prosecu-

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Union of Congolese Patriots, the Sudanese Head of State, a minister and armed group leaders in the Darfur conflict, and top military and political leaders in Kenya.

<sup>41</sup> OTP, “Paper on Some Policy Issues before the Office of the Prosecutor”, see above note 24.

<sup>42</sup> Asad Kiyani, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, pp. 956–957.

<sup>43</sup> OTP, “Strategic Plan June 2012–2015”, 11 October 2013 (<http://www.legal-tools.org/doc/954beb/>).

<sup>44</sup> *Ibid.*, p. 6.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, p. 6.

tions against the highest placed perpetrators.”<sup>47</sup> This strategy was confirmed in the 2016–2018 Strategic Plan.<sup>48</sup>

During her first year as Prosecutor, Bensouda also published a Policy Paper on Preliminary Examinations,<sup>49</sup> in which the individuals bearing the greatest responsibility are presented as a parameter to be considered in the evaluation of gravity.<sup>50</sup> By taking into consideration quantitative and qualitative parameters in the evaluation of the gravity criterion, the Office points out that the manner of commission of the crimes must be evaluated, in particular “the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity”,<sup>51</sup> thereby referring to the position of the perpetrator within the hierarchy of his or her organisation. In 2016, the Office published a Policy Paper on Case Selection and Prioritisation, which reiterates this interpretation of the manner of commission of the crimes to enable an evaluation of their sufficient gravity.<sup>52</sup> This reference to the most responsible is different from the prosecutorial orientation introduced earlier, as it refers to the gravity threshold. However, it shall be noticed that it still linked to the main goal of Bensouda, namely enhancing the OTP’s performance in court.

The Policy Paper on Case Selection and Prioritisation refers to the pyramid strategy<sup>53</sup> and provides characterization elements for what is meant by “those who bear the highest level of responsibility”: “The concept of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence”.<sup>54</sup> Bensouda clearly had a desire to explain the concept. Although she maintained its core significance, presenting it as a goal to be attained, she balanced it against the

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<sup>47</sup> *Ibid.*, p. 14.

<sup>48</sup> OTP, “Strategic Plan 2016–2018”, 16 November 2015 (<http://www.legal-tools.org/doc/2dbc2d/>).

<sup>49</sup> OTP, “Policy Paper on Preliminary Examinations”, 1 November 2013 (<http://www.legal-tools.org/doc/acb906/>).

<sup>50</sup> *Ibid.*, p. 11.

<sup>51</sup> *Ibid.*, pp. 15–16.

<sup>52</sup> OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, p. 14 (<http://www.legal-tools.org/doc/182205/>).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

credibility of the Office in an attempt to avoid the pitfalls it experienced in its early years (withdrawal of charges, non-confirmation of charges, and non-co-operation in the arrest of individuals subject to an arrest warrant).

As it has been explained in this previous part, the concept of ‘the most responsible’ has been extensively used in prosecutorial policies. The next part illustrates how it is related to the objectives of prosecutions.

### **7.2.2. Objectives of Prosecutions: Greater Responsibility, Greater Expectations?**

The expectations of prosecuting those who are most responsible can be analysed on two levels: with respect to objectives that are specific to the Office, on the one hand, and in relation to the more general objectives of the international criminal justice system, on the other.

As regards the objectives that are specific to the OTP, targeting this type of perpetrator was perceived by the Court’s first Prosecutor as a prosecution strategy whose objective is to rationalize the activities of the Office, in particular by reducing the length of investigations. A shift in this respect occurred with the second Prosecutor, who believed that targeting those who are most responsible required careful calculation in order to ensure the confirmation of charges. This change resulted from a number of cases that compromised the Office’s ability to present sufficient evidence for prosecuting those who were most responsible. The following two examples are an illustration thereof. In the *Kenyatta* case, which was initiated during Moreno-Ocampo’s term, Bensouda was forced to withdraw the charges on 5 December 2014 due to insufficient evidence against the Kenyan politician, who later became President.<sup>55</sup> In the *Abu Garda* case (Chairman and General Coordinator of Military Operations of the United Resistance Front, Sudan), charges were not confirmed by the Pre-Trial Chamber on 8 February 2010 due to insufficient evidence.<sup>56</sup>

The setbacks incurred led the Office to redirect its focus toward the confirmation of charges as a main working objective, as stated in the 2012–2016 and 2016–2018 prosecution policy documents. In the two successive

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<sup>55</sup> ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983 (<http://www.legal-tools.org/doc/b57a97/>).

<sup>56</sup> ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (<http://www.legal-tools.org/doc/cb3614/>).

Prosecutor positionings, the shift in the place occupied by the prosecution of those who are most responsible is apparent. Whereas under Moreno-Ocampo, prosecuting those who are most responsible was presented as the fundamental dynamic of the Office because this is what is expected of the ICC, under Bensouda it is seen as an objective that must not undermine the credibility of the Court.

Regarding the relationship between prosecuting senior leaders and the goals of the international criminal justice system, the Office draws a correlation in terms of prevention and deterrence of crimes. For example, the 2009–2012 prosecution policy paper states that “[c]rimes under the Statute are normally committed by large groups of individuals or organisations and require extensive planning; mere announcement of ICC activities can have a preventive impact on this process.”<sup>57</sup> The Policy Paper on Case Selection and Prioritisation establishes a link between senior leaders, mode of liability, combating impunity, and prevention, explaining that:

For this purpose, the Office will also consider the deterrent and expressive effects that each mode of liability may entail. For example, the Office considers that the responsibility of commanders and other superiors under article 28 of the Statute is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention.<sup>58</sup>

The relationship between prosecuting superiors and deterrence has also been addressed by judges of the Pre-Trial Chambers, as examined in the second part of this chapter.

This cause-and-effect relationship has been the subject of debate. Some authors have questioned the pertinence of transposing the objectives of criminal law in the domestic sphere to the international sphere. Indeed, the highly selective prosecution and the range of sanctions incurred seem to thwart the expected deterrent effect.<sup>59</sup> The positions pertaining to the im-

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<sup>57</sup> OTP, “Prosecutorial Strategy 2009–2012”, p. 7, see above note 38.

<sup>58</sup> OTP, “Policy Paper on Case Selection and Prioritisation”, p. 15, see above note 52.

<sup>59</sup> See for example, Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, p. 442–443; James F. Alexander, “The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact”, in *Villanova Law Review*, 2009, vol. 54, no. 1, p. 1; Mark A. Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity”, in *Northwestern University Law Review*, 2005, vol. 99, no. 2, p. 539.

mediate deterrent effect of prosecuting leaders before international courts oscillate between the benefits of preventing the person from continuing with the commission of the crime or a related crime within the ICC’s jurisdiction<sup>60</sup> and isolating the actors concerned on the international scene, which would potentially compel them to negotiate the end of the conflict, and the negative effects symbolized by an intensification of crimes committed by these actors because of that same ostracization.<sup>61</sup> The deterrence resulting from the prosecution of those who are most responsible is then to be understood over the long term as a catalyst for the individual and institutional internationalization of the fight against impunity. Prosecutions of this kind would thus allow for this idea to permeate the domestic sphere, push national courts to prosecute perpetrators of international crimes<sup>62</sup> and, by dint of the media coverage that they generate, lead to an increased consciousness among individuals of the need to respect human rights within states in transition.<sup>63</sup>

### **7.2.3. Overcoming the Obstacles to Prosecuting Those Who Bear the Greatest Responsibility: A Shift in Symbolic Value From the Perpetrators to the Crimes?**

#### **7.2.3.1. Facing the ‘Evidence-Problem’**

Identifying the individuals who bear the greatest responsibility quickly appeared as a significant difficulty in the OTP’s work. In its first activity report for the 2003 to 2006 time period,<sup>64</sup> with regard to Darfur, the Office stated that:

Identifying those persons with greatest responsibility for the most serious crimes in Darfur is a key challenge for the investigation. The complexity of the conflict in Darfur exacerbates this challenge, given that it involves multiple parties, varying over time throughout the different states and localities.<sup>65</sup>

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<sup>60</sup> Rome Statute, Article 58(1)(b)(iii), see above note 5.

<sup>61</sup> Cryer, 2009, see above 22.

<sup>62</sup> Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, in *American Journal of International Law*, 2001, vol. 95, no. 1, p. 13.

<sup>63</sup> Hun Joon Kim and Kathryn Sikkink, “How Do Human Rights Prosecutions Improve Human Rights After Transition?”, in *Interdisciplinary Journal of Human Rights Law*, 2012, vol. 7, no. 1, p. 69.

<sup>64</sup> OTP, “Report on the Activities Performed During the First Three Years (June 2003–June 2006)”, see above note 27.

<sup>65</sup> *Ibid.*, p. 19.

In her 2012–2015 policy strategy, Bensouda reiterated this observation, saying that:

the Office does investigations and prosecutions into often complex structures with the most responsible often keeping a distance between themselves and the crimes and using different mechanisms to hide their role. The structures through which these crimes are committed cover a broader range than the traditional, clear hierarchical structures. They include ideology-driven cellular structures like those encountered in the world of terrorism, as well as temporary and much more fluid structures based on the mobilization of communities.<sup>66</sup>

This finding, and more specifically the Office’s difficulty to constitute a solid body of evidence, is not new. It is supported by comments made by ICTY staff who worked on the indictment of Slobodan Milosević. They stressed the gulf between their convictions and the need to establish a solid body of evidence:

Milosević was usually quite guarded in what he said to outside interlocutors, being careful not to convey anything that would directly implicate him in crimes or link him to perpetrators [...] without evidence of culpability that can stand up to scrutiny in a courtroom, this belief alone [that he was one of the principal architects of the wars] was insufficient for initiating a prosecution.<sup>67</sup>

From the difficulty of gathering evidence to the emergence of a so-called ‘evidence-problem’ in the prosecutorial strategy, there has been a fine line the OTP has crossed several times during its 15 years of investigations. The so-called ‘ICC evidence-problem’<sup>68</sup> has reached its zenith with the acquittals of Laurent Gbagbo and Blé Goudé. Indeed, since the pre-trial stage, the first confirmation of charges hearing offered a real lesson to the OTP on “10 mistakes to avoid during an investigation”.<sup>69</sup>

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<sup>66</sup> OTP, “Strategic Plan June 2012–2015”, p. 13, see above note 43.

<sup>67</sup> Clint Williamson, “Real Justice, in Time: The Initial Indictment of Milosevic”, in William Waters (ed.), *The Milosevic Trial: An Autopsy*, Oxford University Press, 2013, pp. 83–84.

<sup>68</sup> See for example, Christian M. De Vos, “Investing from Afar: The ICC’s Evidence problem”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 1009; Patryk I. Labuda, “The ICC’s ‘Evidence Problem’ – The Future of International Criminal Investigations After the Gbagbo Acquittal”, in *Völkerrechtsblog*, 18 January 2019 (available on its web site).

<sup>69</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 16–36 (<http://www.legal-tools.org/doc/2682d8/>).

Judges already at this stage underlined the importance of the types and quality of evidence and of their chains of custody,<sup>70</sup> the different evidentiary thresholds that must be met during the procedure,<sup>71</sup> and the conduct of an investigation that should be ‘largely completed’ at the confirmation of charges hearing.<sup>72</sup> They also highlighted the lack of linkage evidence presented by the OTP that would demonstrate “inferences from actions or conduct of Mr. Gbagbo, his inner circle and the ‘pro-Gbagbo forces’”.<sup>73</sup> Charges were confirmed by Pre-Trial Chamber I<sup>74</sup> on 12 June 2014. However, Judge Christine Van den Wyngaert, in her dissenting opinion,<sup>75</sup> stated that remains “the previously identified problem regarding reliance upon anonymous hearsay”<sup>76</sup> and that “the evidence for the charges under Article 25(3)(a),(b) and (d) falls below the threshold of Article 61(7) of the Statute”.<sup>77</sup> These considerations put into relief the consequences of the prosecutorial orientations made by the first Prosecutor: “focused investigations and prosecutions”<sup>78</sup> targeting “those situated at the highest echelons of responsibility”<sup>79</sup> in order “to carry out short investigation”.<sup>80</sup> However, according to the same policy paper, this strategy should have been evidence-driven.<sup>81</sup> In this case, it seems that this fundamental principle of a criminal investigation has been drowned under the symbolic weight of the

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<sup>70</sup> *Ibid.*, paras. 24 ff. In particular, see para. 35:

In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute.

<sup>71</sup> *Ibid.*, paras. 16 ff.

<sup>72</sup> *Ibid.*, para. 25.

<sup>73</sup> *Ibid.*, para. 36.

<sup>74</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red (<http://www.legal-tools.org/doc/5b41bc/>).

<sup>75</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Dissenting Opinion of Judge Christine Van den Wyngaert, 12 June 2014, ICC-02/11-01/11-656-Anx (<http://www.legal-tools.org/doc/f715a5/>).

<sup>76</sup> *Ibid.*, para. 2.

<sup>77</sup> *Ibid.*, para. 4.

<sup>78</sup> OTP, “Strategic Plan 2009–2012”, para. 19, see above note 38.

<sup>79</sup> *Ibid.*, para. 20.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, para. 19.

most responsible strategy. This struggle during the confirmation of charges hearing stage was also illustrated during the case of *Jean-Pierre Bemba Gombo*. Indeed, Pre-Trial Chamber III, in its Decision Adjourning the Hearing pursuant to article 61(7)(c)(ii) of the Rome Statute,<sup>82</sup> “request[ed] the Prosecutor to consider amending the charges because the evidence submitted appears to establish a different crime (mode of liability), namely the mode of liability under article 28 of the Statute, in the context and within the meaning of Article 61(7)(c) (ii) of the Statute”,<sup>83</sup> and Pre-Trial Chamber II declined to confirm several charges on 15 June 2009.<sup>84</sup>

### 7.2.3.2. Overcoming the Structural Limits of the Office of the Prosecutor

The shortage of means is another argument formulated with increasing clarity in prosecutorial policy documents over time.<sup>85</sup> The monetary and human resources in the hands of the Office appear to be problematic in the context of the difficult situations that it is navigating. The sometimes significant time lag between the commission of crimes and investigation on the ground (when it is possible to access the territory) makes looking for evidence difficult, and complicates access to and protection of victims and witnesses.<sup>86</sup> The lack of resources also reflects the problem of co-operation from States for the purpose of facilitating access to investigation sites or making arrests. These considerations are relevant to all situations, but difficulties are even greater where the prosecution concerns a serving Head of State. The prosecution of Al-Bashir is a case in point. On the one hand, the Prosecutor repeatedly addressed<sup>87</sup> the issue of the lack of co-operation on

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<sup>82</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388 (<http://www.legal-tools.org/doc/81d7a9/>).

<sup>83</sup> *Ibid.*, para. 49.

<sup>84</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424 (<http://www.legal-tools.org/doc/07965c/>).

<sup>85</sup> See for example, OTP, Strategic Plan June 2012–2015, see above note 43 and OTP, Strategic Plan 2016–2018, see above note 48.

<sup>86</sup> Mark B. Harmon and Fergal Gaynor, “Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 403.

<sup>87</sup> See the Reports of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSC Resolution 1593(2005). (available on its web site).

the part of States in general with the Security Council (which referred the situation in Sudan to the ICC).<sup>88</sup> On the other hand, a judicial saga unfolded between States Parties and the ICC in relation to the treatment of the immunity granted to serving Heads of State.<sup>89</sup>

These concrete difficulties relating to the prosecution of the individuals who bear the greatest responsibility have resulted in a shift in the symbolic value of international criminal justice in the context of prosecution policies. The strong symbolism of the prosecutions of those who are most responsible in the early years of the ICC seems to have been gradually superseded by the symbolism of the crimes being prosecuted as opportunities for prosecution arise and are implemented. A case in point is the treatment of the situation in Mali. The quality of the accused in terms of bearing the greatest responsibility was criticized by international criminal justice commentators<sup>90</sup> and emphasis was placed on the crimes allegedly committed instead. The *Al Mahdi*<sup>91</sup> case, for example, was hailed as a first-time prosecution for the destruction of cultural and religious heritage as a war crime, and the *Al Hassan* case<sup>92</sup> for the prosecution of sexual and gender-based violence in the Mali conflict.

This shift in focus from the perpetrators toward the crimes also manifests itself in the increased number of policy documents put out by the Office on specific crimes (for example, sexual and gender-based violence)<sup>93</sup>

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<sup>88</sup> Security Council Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005 (<http://www.legal-tools.org/doc/4b208f/>).

<sup>89</sup> See ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr (<http://www.legal-tools.org/doc/0c5307/>); Claire Magnoux and Fannie Lafontaine, “La Cour pénale internationale, la coopération et les immunités: l’histoire sans fin?”, in *The Yearbook of Diplomatic and Consular Law*, 2017, vol. 2, p. 19.

<sup>90</sup> Mark Kersten, “Big Fish or Little Fish – Who Should the International Criminal Court Target?”, in *Justice in Conflict*, 1 September 2016 (available on its web site); Eva Vogelvang and Sylvain Clerc, “The Al Mahdi Case: Stretching the Principles of the ICC to a Breaking Point?”, in *Justice Hub*, 29 August 2016 (available on its web site).

<sup>91</sup> ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC01-02/01/15-171 (<http://www.legal-tools.org/doc/042397/>).

<sup>92</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Warrant of Arrest, 27 March 2018, ICC-01/12-01/18-2 (<http://www.legal-tools.org/doc/41c013/>).

<sup>93</sup> OTP, “Policy Paper on Sexual and Gender-Based Crimes”, 5 June 2014 (<http://www.legal-tools.org/doc/7ede6c/>).

and crimes against children),<sup>94</sup> in the need to pay attention to “under-prosecuted crimes” stated in the Policy Paper on Case Selection and Prioritisation,<sup>95</sup> and in the Prosecutor’s speech at the *Al Mahdi* confirmation of charges hearing,<sup>96</sup> in which she restated the gravity of this type of crime and the ongoing conflicts throughout the world where such crimes are taking place. With this new prosecutorial policy orientation and by resting the pertinence of its action on the symbolism of the crimes prosecuted, the OTP detaches from the prosecution of the individuals bearing the greatest responsibility in a strict sense in order to escape the obstacles inherent to this type of prosecution. The OTP adopts an expressivist strategy based on its capacity to prosecute the perpetrators of ‘emblematic crimes’, both as a sample of the crimes committed in the situations that are brought to its attention and as crimes that are under-prosecuted in the history of international criminal justice. This strategy allows the Office to demonstrate the pertinence of its actions and to stress the need to prosecute these types of crimes at the national level.

Having shed light on the use of the concept of those bearing the greatest responsibility by successive ICC Prosecutors, an analysis is warranted of the legal translation thereof in the context of interactions between the OTP and the judges of the Pre-Trial Chambers during the validation of the situation and case selection processes.

### **7.3. Individuals Bearing the Greatest Responsibility and the Criteria of Gravity and Interests of Justice: An Unsteady Jurisprudence**

This second part addresses the relationship of the concept of those bearing the greatest responsibility to the law of the Rome Statute. It analyses the legal implementation of the criterion of gravity (7.3.1) and the tension that emerged between the OTP and Pre-Trial Chambers concerning its interpretation and the interpretation of the interests of justice (7.3.2).

#### **7.3.1. Perpetrators and Gravity: Chaotic Jurisprudence**

Absent an indication in the Rome Statute, the jurisprudence has set the criteria for the evaluation of gravity. It explored the place of those who bear

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<sup>94</sup> OTP, “Policy on Children”, 15 November 2016 (<http://www.legal-tools.org/doc/c2652b/>).

<sup>95</sup> OTP, “Policy Paper on Case Selection and Prioritisation”, see above note 52.

<sup>96</sup> ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Pre-Trial Chamber I, Confirmation of Charges Hearing, 1 March 2016, ICC-01/12-01/15-T-2-Red2 (<http://www.legal-tools.org/doc/1a7bdc/>).

the greatest responsibility in the context of identifying an essential criterion for admissibility in the context of the initiation of an investigation or of a prosecution.

The ICC judges initially addressed the criteria for determining gravity at the time of deciding on whether or not to prosecute in the *Lubanga* case in February 2006.<sup>97</sup> Pre-Trial Chamber I suggested a twofold evaluation test for gravity concerning, on the one hand, the conduct of the accused, and the status of the accused on the other hand. The assessment of gravity in relation to the conduct of the accused included an evaluation of his or her conduct (which must be either systematic or large-scale) and due consideration of the ‘social alarm’ that it caused within the community.<sup>98</sup> Pre-Trial Chamber I indicated that being at the top of the hierarchy is one of the necessary parameters of the criterion of sufficient gravity under Articles 17 and 53:

the Chamber considers that the additional gravity threshold provided for in article 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.<sup>99</sup>

In order to determine whether the accused is a senior leader bearing the greatest responsibility for the crimes committed, three elements were considered by the judges: his or her position as a senior leader,<sup>100</sup> his or her role within the entity at the time of the commission of the crimes, and the role of the entity in the global commission of the crimes for which the Court has jurisdiction.<sup>101</sup>

Pre-Trial Chamber I justified its reasoning on the basis of the deterrence objective that the ICC has chosen to fulfill: these determination criteria enable the Court to prosecute individuals “who can most effectively

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<sup>97</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-US-Corr (<http://www.legal-tools.org/doc/af6679/pdf>).

<sup>98</sup> *Ibid.*, para. 46.

<sup>99</sup> *Ibid.*, para. 50.

<sup>100</sup> *Ibid.*, para. 51.

<sup>101</sup> *Ibid.*, para. 52.

prevent or stop the commission of those crimes”.<sup>102</sup> Prosecution of senior leaders is therefore used by the judges as a ‘weapon of massive deterrence’, a message to leaders occupying top positions:

In the Chamber’s opinion, only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction can they be sure they will not be prosecuted by the Court.<sup>103</sup>

The judges’ position is tantamount to the sanctioning of a core principle of the OTP’s prosecutorial policy in its early years under Moreno-Ocampo. However, far from perceiving it as an anointment of his prosecution policy by the judges, the first Prosecutor appealed the decision because of the important impact that it had on his discretionary power.<sup>104</sup> The specific criteria that the accused must meet in order to fulfill the threshold of gravity results in significantly curtailing the Prosecutor’s flexibility in matters of prosecution.

Identifying those who bear the greatest responsibility appears as the OTP’s bastion of discretionary power that it intends to protect against developing into a strict legal criterion, as revealed by the stance it took in the July 2006 Appeals Chamber ruling:<sup>105</sup>

Prosecutor argued that the Pre-Trial Chamber applied an excessively narrow interpretation of "senior leader", which exempted from prosecution a top commander. Furthermore, the Prosecutor argued that the Pre-Trial Chamber improperly placed emphasis on the authority of suspects to negotiate and sign peace agreements, and that the Pre-Trial Chamber improperly created a criterion that suspects have to be core actors in the decision-making process of policies and practices

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<sup>102</sup> *Ibid.*, para. 53.

<sup>103</sup> *Ibid.*, para. 54.

<sup>104</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Prosecutor’s Appeal against Pre-Trial Chamber I’s 10 February 2006 “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 14 February 2006, ICC-01/04-125 (<http://www.legal-tools.org/doc/821786/>).

<sup>105</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgement on the Prosecutor’s Appeal against the Decision of the Pre-trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest”, 13 July 2006, ICC-01/04-169 (<http://www.legal-tools.org/doc/8c20eb/>).

or have autonomy to change or to prevent the implementation of policies and practices.<sup>106</sup>

In addition to calling into question the criterion regarding the conduct of the accused,<sup>107</sup> the Appeals Chamber unravelled the relationship between the prosecution of those individuals who bear the greatest responsibility and the objective of deterrence set out by the Pre-Trial Chamber. It brought to light the potentially counterproductive effect of applying a restrictive criterion related to the profile of the perpetrators:

the deterrent effect is highest if all other categories of perpetrators cannot be brought before the Court is difficult to understand. It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court.<sup>108</sup>

The Appeals Chamber developed its reasoning around the Court’s preventive mission, indicating that the latter cannot be implicitly tied to the prosecution of perpetrators who are in a position to prevent crimes inasmuch as prevention is not limited to this one parameter, but rather depends on a greater number of factors.<sup>109</sup> Although the Appeals Chamber did not provide a criterion for the evaluation of gravity, it brought attention to the fact that the Rome Statute does not limit the Court’s jurisdiction to the category of senior leaders.<sup>110</sup>

In the *Abu Garda* case, on 20 February 2010, Pre-Trial Chamber I laid out the parameters that allow to determine the sufficient gravity threshold at the time of initiating prosecution, specifying that these parameters are qualitative and quantitative. These criteria relate to crimes and refer to the impact, nature, and manner of commission (the listing is non-exhaustive),<sup>111</sup> and the Judges make no reference to the position of the accused in the hierarchical structure. This jurisprudential stance and the si-

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<sup>106</sup> *Ibid.*, para. 67.

<sup>107</sup> *Ibid.*, paras. 69–72.

<sup>108</sup> *Ibid.*, para. 73.

<sup>109</sup> *Ibid.*, para. 74.

<sup>110</sup> *Ibid.*, paras. 78–79.

<sup>111</sup> ICC, *Prosecutor v. Dahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (<http://www.legal-tools.org/doc/cb3614/>).

lence kept regarding the position of the accused in the hierarchical structure will be repeated in the *Ali* case in 2012 by Pre-Trial Chamber II in 2012.<sup>112</sup>

To the extent that gravity must be evaluated at the time of initiating an investigation,<sup>113</sup> the Pre-Trial Chamber spelt out the criteria to be considered. In 2010, in regard to the situation in Kenya,<sup>114</sup> Pre-Trial Chamber II stated that for the purpose of evaluating the gravity of potential cases that may result from the investigation, analysis was required of the groups of individuals who may be targeted, and the crimes allegedly committed during the incidents that are subject to investigation.<sup>115</sup> Criteria relating to the crimes, both quantitative and qualitative, are the same as those to be given consideration at the time of initiating prosecution.<sup>116</sup>

As regards the perpetrators, the Pre-Trial Chamber indicated that the analysis “involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed”.<sup>117</sup> The judges proceeded to a summary evaluation in order to determine whether the potential perpetrators bear the highest level of responsibility for the crimes, referring to their position within the hierarchical structure and their role in the commission of the crimes:

the supporting material refers to their high-ranking positions, and their alleged role in the violence, namely inciting, planning, financing, colluding with criminal gangs, and otherwise contributing to the organization of the violence. This renders the first constituent element of gravity satisfied.<sup>118</sup>

Although potential cases referred to in the Prosecutor’s legal arguments supporting the initiation of an investigation are not binding when it

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<sup>112</sup> ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (<http://www.legal-tools.org/doc/4972c0/>).

<sup>113</sup> Rome Statute, Article 53(2)(b), see above note 5.

<sup>114</sup> ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr (<http://www.legal-tools.org/doc/ef764f/>).

<sup>115</sup> *Ibid.*, para. 50.

<sup>116</sup> *Ibid.*, paras. 61–62.

<sup>117</sup> *Ibid.*, para. 60.

<sup>118</sup> *Ibid.*, para. 198.

comes to prosecution, considerations regarding rank surprisingly weigh heavier in relation to potential prosecutions than with respect to a prosecution that is underway. Furthermore, the somewhat chaotic identification of criteria for the evaluation of sufficient gravity at the two stages of the selection process, relating to the perpetrators of the crimes, still fails to shed light on the concept of individuals who bear the greatest responsibility, in particular the importance of rank in the appreciation of sufficient gravity. In fact, the interpretation of the determination criteria continues to be a major point of contention between the OTP and Pre-Trial Chambers, as illustrated by the situation of the ships flying the flags of Comoros, Greece, and Cambodia, referred to as the *Mavi Marmara* case.<sup>119</sup>

### **7.3.2. ‘The Most Responsible’, Gravity and Interests of Justice: Between Dialogue of the Deaf and Lack of Dialogue**

#### **7.3.2.1. Gravity and Senior Leaders: The Gordian Knot?**

The interpretation relating to individuals bearing the greatest responsibility as a component of the gravity criterion continues to be a topical issue in the Court’s work. One of the emblematic cases is the OTP’s decision to not initiate an investigation in the situation of ships flying the flag of the Comoros, Greece, and Cambodia.<sup>120</sup> This situation referred by the Union of the Comoros on 14 May 2013, concerns the interception by Israeli Defence Forces (‘IDF’) of a humanitarian flotilla bound for Gaza on 31 May 2010, which resulted in the death of ten passengers of the *Mavi Marmara*, fifty-five persons injured and “possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment”.<sup>121</sup> The OTP initiated a preliminary examination the day of the referral of the situation. Upon completing the examination, the Office made the decision to not initiate an in-

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<sup>119</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the “Application for Judicial Review by the Government of Comoros”, 16 September 2020, ICC-01/13-111 (<http://www.legal-tools.org/doc/mqu8bo/>).

<sup>120</sup> OTP, “Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report”, 6 November 2014 (‘Article 53(1) Report’) (<http://www.legal-tools.org/doc/43e636/>).

<sup>121</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 26 (‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’) (<http://www.legal-tools.org/doc/2f876c/>).

vestigation in an assessment of the facts that led to the conclusion that potential cases do not meet the threshold of sufficient gravity.<sup>122</sup>

Endorsing the jurisprudence of the Pre-Trial Chamber on the situation in Kenya<sup>123</sup> as regards the evaluation criteria to take into account in determining sufficient gravity, the OTP examined in detail the criteria relating to the crimes.<sup>124</sup> The decision is therefore based on an evaluation of the scale of crimes (“the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office”),<sup>125</sup> their nature (“the information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment”),<sup>126</sup> the manner of commission (“the information available does not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty”),<sup>127</sup> and the impact (“the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels in the flotilla”).<sup>128</sup> Regardless of the fact that the OTP’s appreciation of the criteria relating to the gravity of crimes was questioned on the level of coherent reasoning,<sup>129</sup> it is surprising that the Office recalled the criteria that are specific to the perpetrators<sup>130</sup> but stopped short of examining them.

Pursuant to Article 53(3)(a), the Union of the Comoros requested that the Pre-Trial Chamber review the Office’s 29 January 2015 decision to not

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<sup>122</sup> OTP, Article 53(1) Report, para. 24, see above note 120.

<sup>123</sup> *Ibid.*, para. 135.

<sup>124</sup> *Ibid.*, paras. 138–144.

<sup>125</sup> *Ibid.*, para. 138.

<sup>126</sup> *Ibid.*, para. 139.

<sup>127</sup> *Ibid.*, para. 140.

<sup>128</sup> *Ibid.*, para. 141.

<sup>129</sup> Marco Longobardo, “Everything Is Relative Even Gravity. Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 1011; Russel Buchan, “The Mavi Marmara Incident and the International Criminal Court”, in *Criminal Law Forum*, 2014, vol. 25, no. 3–4, p. 465; Kevin Jon Heller, “A Potentially Serious Problem with the Final Decision Concerning Comoros”, in *Opinio Juris*, 1 December 2017 (available on its web site); Marco Longobardo, “Factors Relevant for the Assessment of Sufficient Gravity in the ICC. Proceedings and the Elements of International Crimes”, in *Questions of International Law*, 30 November 2016 (available on its web site).

<sup>130</sup> OTP, Article 53(1) Report, para. 135, see above note 120.

initiate an investigation,<sup>131</sup> invoking in particular the flawed interpretation of the gravity criterion. The decision rendered by the Pre-Trial Chamber I on 16 July 2015<sup>132</sup> offers greater insight into the stance taken by the Office and the Judges on the evaluation of the criteria relating specifically to the perpetrators in the context of determining sufficient gravity, and into the broader problem of the Prosecutor’s exercise of discretionary power in the selection process. While noting that the OTP had overlooked analysing the perpetrators concerned by potential cases,<sup>133</sup> the Chamber recognized indeed that the Prosecutor has discretionary power to initiate an investigation, but that it can only be exercised under Article 53(1)(c), that is the interests of justice, whereas the evaluations that are subject to paragraphs a and b “require the application of exacting legal requirements”.<sup>134</sup>

As regards perpetrators, in its response to the request of the Union of the Comoros,<sup>135</sup> the Office indicated that its decision to not initiate an investigation is justified in view of the fact that “the Prosecution’s analysis *did not support the view* that there was a reasonable basis to believe that ‘senior IDF commanders and Israeli leaders’ were responsible as perpetrators or planners of the apparent war crimes”.<sup>136</sup> In response to this argument based on the position of the individuals who are most responsible within the hierarchical structure, the Pre-Trial Chamber provided an important clarification concerning the gravity determination criterion as it relates to the perpetrators. It made a major distinction between the Prosecutor’s capacity to investigate the individuals bearing the greatest responsibility for crimes committed, and these individuals’ rank:

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<sup>131</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015, ICC-01/13-3-Red (<http://www.legal-tools.org/doc/b60981/>).

<sup>132</sup> Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015, see above note 121.

<sup>133</sup> *Ibid.*, para. 22.

<sup>134</sup> *Ibid.*, para. 14.

<sup>135</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Prosecution’s Response to the Government of the Union of the Comoros’ Application for Leave to Reply in Support of its Application under article 53(3) of the Rome Statute, ICC-01/13-15, 17 April 2015, ICC-01/13-17 (<http://www.legal-tools.org/doc/bc006b/>).

<sup>136</sup> *Ibid.*, para. 24 (the quotation has been reproduced as it appears in the original, emphasis included.)

the conclusion in the Decision Not to Investigate that there was not a reasonable basis to believe that ‘senior IDF commanders and Israeli leaders’ were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, which relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes.<sup>137</sup>

The Pre-Trial Chamber stated that:

there appears to be no reason, in the present circumstances and in light of the parameters of the referral and scope of the Court’s jurisdiction, to consider that an investigation into the situation referred by the Comoros could not lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes committed during the seizure of the *Mavi Marmara* by the IDF.<sup>138</sup>

The judges thereby assumed a more flexible position than the Prosecutor’s as regards the assessment of the individuals bearing the greatest responsibility at the time of initiating investigations, by deciding that the hierarchical position of the perpetrators lacks pertinence. It is rather the Prosecutor’s potential capacity to investigate the individuals bearing the greatest responsibility for the crimes committed that is relevant, thus undoing the ‘senior leaders = individuals bearing the greatest responsibility’ equation. As regards the gravity assessment and by comparison to the parameters used in regard to the situation in Kenya, the Pre-Trial Chamber in the *Mavi Marmara* flotilla situation gave precedence to the role of the perpetrator above the perpetrator’s rank within the hierarchical structure.

Judge Péter Kovács produced a partly dissenting opinion,<sup>139</sup> which included considerations about the perpetrator-related assessment of the gravity of potential cases. He first confirmed the majority position and recalled that the Prosecutor had confused rank and degree of responsibility of

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<sup>137</sup> Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015, para. 23, see above note 121.

<sup>138</sup> *Ibid.*, para. 24.

<sup>139</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Partly Dissenting Opinion of Judge Péter Kovács, 16 July 2015, ICC-01/13-34-Anx (‘Partly Dissenting Opinion of Judge Péter Kovács’) (<http://www.legal-tools.org/doc/c854cf/>).

the individual: “Although ‘those who bear the greatest responsibility’ are quite often at the top of the hierarchy, in some instances mid-level perpetrators could also bear the greatest responsibility.”<sup>140</sup> Subsequently, however, he opined that an evaluation of the perpetrators of the crimes is superfluous because the crimes in question fail to meet the sufficient gravity threshold.<sup>141</sup> In his view, the Prosecutor’s evaluation is based on logic, and hence clear of material error as regards her not examining the perpetrators in her decision to not prosecute.<sup>142</sup>

If we consider this view, the key element of gravity determination becomes the demonstration of sufficient gravity of the crimes based on qualitative and quantitative criteria, inasmuch as concerning the perpetrators, the bare possibility of investigating individuals bearing the greatest responsibility for crimes due to their role and not necessarily their rank suffices to justify the initiation of an investigation.

This exchange between the Pre-Trial Chamber and the OTP, referred to by one commentator as a “strange dialogue”,<sup>143</sup> raises the question of the control mechanism set out by Article 53 of the Rome Statute in the context of the selection process. Although present in the text, it seems to result in reality in a dialogue of the deaf between the judges and the Prosecutor. In fact, the Pre-Trial Chamber’s decision was without consequence, and on 30 November 2017, the Prosecutor reasserted her decision to not initiate an investigation.<sup>144</sup> The Pre-Trial Chamber’s renewed request for the OTP to review her decision.<sup>145</sup> The complexity of this dialogue is owed to the fuzzy delineation between prosecution policies that are the prerogative of the Prosecutor and the interpretation of legal criteria under the Rome Statute, done by the Judges as part of the selection process.

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<sup>140</sup> *Ibid.*, para. 28.

<sup>141</sup> *Ibid.*, para. 29.

<sup>142</sup> *Ibid.*, para. 29.

<sup>143</sup> Dov Jacobs, “ICC OTP Closes Preliminary Examination in the Mavi Marmara Incidents: Some Thoughts”, in *Spreading the Jam*, 30 November 2017 (available on its web site).

<sup>144</sup> “Statement of the ICC Prosecutor, Fatou Bensouda, on the Situation on Registered Vessels of the Union of Comoros et al.”, 30 November 2017 (<http://www.legal-tools.org/doc/10518f/>).

<sup>145</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, 15 November 2018, ICC-01/13-68 (<http://www.legal-tools.org/doc/a268c5/>).

In his partly dissenting opinion, Judge Péter Kovács advocated a more nuanced use by the Pre-Trial Chamber of its supervisory control and called for a balance “between the Prosecutor’s discretion and independence and the Pre-Trial Chamber’s supervisory role in the sense of being limited to only requesting from the Prosecutor to reconsider her decision if necessary.”<sup>146</sup> Judge Kovács even stated that in the case at hand, the Judges’ examination of the Prosecutor’s decision “clearly interferes with the Prosecutor’s margin of discretion”.<sup>147</sup>

The OTP appealed the decision, and the judgment of the Appeals Chamber rejected it, by majority, by finding that: “Neither article 53(3)(a) of the Statute nor rule 108(3) of the Rules preclude a pre-trial chamber from reviewing whether a decision of the Prosecutor that she considers to be ‘final’ actually amounts to a proper ‘final decision’”.<sup>148</sup> However, it stated that “the ‘ultimate decision’ as to whether to initiate an investigation is that of the Prosecutor”.<sup>149</sup>

In addition, the judgment did not clarify the scope of review that the Pre-Trial Chamber can have on an OTP’s decision. Indeed, the Appeals Chamber distinguished between law and facts. Regarding the law, the Chamber explained that there is no margin of appreciation for the OTP:

The Appeals Chamber considers that where questions of law arise, the only authoritative interpretation of the relevant law is that espoused by the Chambers of this Court and not the Prosecutor. It is therefore not open to the Prosecutor, despite the margin of appreciation that she enjoys in deciding whether to initiate an investigation or not, to disagree with, or fail to adopt, a legal interpretation of the pre-trial chamber that is contained in a request for reconsideration.<sup>150</sup>

However, concerning the facts, the Appeals Chamber stated that:

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<sup>146</sup> Partly Dissenting Opinion of Judge Péter Kovács, 16 July 2015, para. 8, see above note 139.

<sup>147</sup> *Ibid.*

<sup>148</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Appeals Chamber, Judgment on the Appeal of the Prosecutor Against the Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of Comoros”’, 2 September 2019, ICC-01/13-98, para. 1 (‘Judgment on the Appeal of the Prosecutor Against the Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of Comoros”’’) (<http://www.legal-tools.org/doc/802549/>).

<sup>149</sup> *Ibid.*, para. 58.

<sup>150</sup> *Ibid.*, para. 78.

the Prosecutor cannot ignore a request by the pre-trial chamber to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation. However, it is not for the pre-trial chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach.<sup>151</sup>

This distinction between law and facts is described by Judge Eboe-Osuji, in his dissenting opinion, as “unsustainable”, because “the law does not operate in a factual vacuum”.<sup>152</sup> Indeed, this distinction made by the Appeals Chamber seems unbearable when applied to gravity:

the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor’s decision. Accordingly, the Appeals Chamber, by majority, finds that it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors. The pre-trial chamber may, however, oblige the Prosecutor to take into account certain factors and/or information relating thereto when reconsidering her decision not to initiate an investigation.<sup>153</sup>

The Pre-Trial Chamber I, following the request for judicial review by the Comoros, on 16 September 2020 (following the decision of the OTP not to open an investigation on 2 December 2019),<sup>154</sup> expressed this confusion. Despite finding several errors of law (including the assessment of the factors relevant to gravity), the Chamber did not request the Prosecutor to reconsider her decision not to investigate because of the fuzziness of the Appeals Chamber’s decision: “it is unclear to the Chamber, based on the

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<sup>151</sup> *Ibid.*, para. 80.

<sup>152</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Partly Dissenting Opinion of Judge Eboe-Osuji, 2 September 2019, ICC-01/13-98-Anx, para. 36 (<http://www.legal-tools.org/doc/5f0b9c/>).

<sup>153</sup> Judgment on the Appeal of the Prosecutor Against the Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of Comoros”’, 2 September 2019, para. 81, see above note 148.

<sup>154</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Final decision of the Prosecutor concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019, 2 December 2019, ICC-01/13-99-Anx1 (<http://www.legal-tools.org/doc/jrysaj/>).

guidance received from the Appeals Chamber, whether and to what extent it may request the Prosecutor to correct errors related to questions of law and the application of the law to the facts.”<sup>155</sup>

The issue of situation and case selection by the Court might become a key problem in the future, to the extent that it involves applying the law and interpreting the Prosecutor’s discretionary power. It puts the spotlight on dissonances between the Court’s actors on a key element of the Court’s policy, namely the ins and outs of initiating prosecution of specific perpetrators.

### 7.3.2.2. Interests of Justice: The Quest for Meaning

The interpretation of the interests of justice<sup>156</sup> also perfectly exemplifies this problematic. The interests of justice raise the issue of the relevance of an intervention of the Court in a situation of conflict and the OTP’s stand on, *inter alia*, the peace v. justice debate.<sup>157</sup> Indeed, what about investigations and prosecution of the most responsible, when these actors are, for example, involved in peace negotiations?

Three preliminary remarks can be made. First of all, the interests of justice is a criterion that is analysed only if other criteria are met and can be described as a “negative-appreciation criterion”.<sup>158</sup> Moreover, Prosecutors never have justified a decision not to proceed on this base. And last but not least, if the decision of the Prosecutor is solely based on this criterion, it allows the Pre-Trial Chamber to review it on its own initiative (Article 53(3)(b)).

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<sup>155</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the ‘Application for Judicial Review by the Government of the Comoros’, 16 September 2020, ICC-01/13-111, para. 107 (<http://www.legal-tools.org/doc/mqu8bo/>).

<sup>156</sup> Rome Statute, Articles 53(1)(c) and 53(2)(c), see above note 5.

<sup>157</sup> For a less recent but deeper analysis of the links between the strategy of prosecuting the most responsible and the peace and justice debate, see Alain-Guy Tachou Sipowo and Fannie Lafontaine, “Le débat Paix/Justice après 10 ans de Cour pénale internationale: une ré-évaluation à la lumière de la stratégie de poursuite limitée aux plus hauts responsables”, in *Vingt Ans de Justice Internationale Pénale, Les Dossiers de la Revue de droit pénal et de Criminologie*, 2014, pp. 219–235.

<sup>158</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, paras. 21, 49 (‘Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan’) (<http://www.legal-tools.org/doc/x7kl12/>).

Although the Rome Statute does not offer any clue of the interests of justice’s meaning, the OTP’s understanding of the criterion is the subject of a paper published in September 2007.<sup>159</sup> In this document, it stands for a restrictive interpretation of the criterion, based on three premises: only exceptional circumstances could lead to a refusal to open an investigation or to prosecute (i), there is a presumption in favour of opening an investigation and a prosecution (ii) and the interpretation of the criterion must be established according to the Statute and in particular its objectives of deterrence and prevention (iii).<sup>160</sup>

Concerning the relationship between the prosecution of specific accused and the interests of justice, the OTP states that: “It is possible however, that even an individual deemed by the OTP to be among the ‘most responsible’ would not be prosecuted in ‘the interests of justice’.”<sup>161</sup> As a result, the OTP affirms that the prosecutorial strategy does not constitute an obstacle to the assessment of the interests of justice. Indeed, the condition of the accused or the serious human rights violations he has been subject to are among the parameters that are taken into account, as it has been done previously by domestic and international courts.<sup>162</sup>

The interaction between the focus on a specific category of accused and the assessment of the interests of justice raises the problematic of compatibility between the different mechanisms of transitional justice. The Prosecutor affirms “the need to integrate different approaches”, that “can be complementary”<sup>163</sup> and expresses “the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap”.<sup>164</sup> However, given its main goal (that is the fight against impunity), it seems inconceivable that the most responsible stay out of the hands of the Court, because of amnesties for example.<sup>165</sup> As a result, a criminal prosecution seems non-negotiable. This position seems consoli-

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<sup>159</sup> OTP, “Policy Paper on the Interests of Justice”, September 2007 (‘Policy Paper on the Interests of Justice’) (<http://www.legal-tools.org/doc/bb02e5/>).

<sup>160</sup> *Ibid.*, pp. 3–4.

<sup>161</sup> *Ibid.*, p. 7.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*, p. 7.

<sup>164</sup> *Ibid.*, p. 8.

<sup>165</sup> See, for example, Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court”, in *European Journal of International Law*, 2003, vol. 14, no. 3, p. 481.

dated when the OTP clearly draws a division of tasks between the ICC and the Security Council concerning the peace and justice debate, based on the reading of Article 16 of the Statute.<sup>166</sup>

The OTP's restrictive interpretation of the interests of justice is also confirmed by the absence of decisions not to proceed based on this criterion. However, it is interesting to analyse the strategic dimension of this choice. Indeed, let us recall that according to the Pre-Trial Chamber I's judges in the *Mavi Marmara* situation, the interpretation of the interests of justice is the only criterion where Prosecutor's discretionary power can express itself:

The Chamber recognises that the Prosecution has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself only in paragraph (c), *i.e.* in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice.<sup>167</sup>

This stance appears to be the counterpart of the specific control mechanism judges have concerning a decision not to proceed solely based on the interests of justice: the Pre-Trial Chamber can review this decision by its own initiative and the decision will only be effective if the Chamber confirms it (Article 53(3)(b)). As a result, it appears of a particular strategic interest for the Prosecutor not to use the interests of justice not to proceed in order to maintain its discretionary power.

However, the jurisprudence related to this criterion does little to clarify the meaning of the interests of justice. Indeed, in the situation of the Islamic Republic of Afghanistan, the Pre-Trial Chamber II rejected the OTP's request to open an investigation, because it reached the conclusion that it would not be in the interests of justice. The interpretation of the interests of justice by the Chamber is based on the objectives of the Statute, namely "the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities",<sup>168</sup> and relies on a feasibility perspective:

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<sup>166</sup> Policy Paper on the Interests of Justice, p. 8, see above note 159.

<sup>167</sup> Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, para. 14, see above note 121.

<sup>168</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 89 (<http://www.legal-tools.org/doc/2fb1f4/>).

All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.<sup>169</sup>

The Pre-Trial Chamber identified three factors (the first two being the time elapsed between the crimes and the request to open an investigation, and the co-operation) relevant to appreciate the interests of justice, and one of them relies on the perpetrators: “the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution’s investigative efforts and activities at this stage.”<sup>170</sup> This condition seems to exclude *per se* certain categories of perpetrators from an investigation, especially the ones on the top of the hierarchy in an ongoing situation of violence. The Appeals Chamber reversed the Pre-Trial Chamber, including that the OTP does not have to determine that an investigation would be in the interests of justice (interests of justice is a negative criterion), and authorized the OTP to investigate.<sup>171</sup> Unfortunately, it failed to address the meaning of interests of justice.

#### 7.4. Conclusion

This chapter has highlighted the dualistic nature of the concept of individuals who bear the greatest responsibility: on the one hand, as a policy and strategy, and on the other, as part of statutory requirements in the Statute, thus a legal stake for the ICC. Managing and equating the notions of individuals who bear the greatest responsibility and senior leaders is an ongoing challenge for the Court. Owing to the historic importance of the concept in the development of international criminal justice, it can be likened to an indicator of the ICC’s pertinence, credibility, and legitimacy. Furthermore, the claim of prosecuting those bearing the greatest responsibility and the actual prosecution are an issue of both policy argumentation and implementation of the law, bringing to the forefront power struggles between internal stakeholders as regards the institution’s mission.

We have seen the decline of the concept of those bearing the highest level of responsibility manifested in two ways. On the one hand, it is re-

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<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*, para. 91.

<sup>171</sup> Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, para. 49, see above note 158.

flected in the prosecutorial strategy: there has been a shift away from the immediate prosecution of senior leaders toward gradual prosecution, in a pyramid-like fashion, starting from the base with the middle and lower rank leaders, in order to collect a solid body of evidence to be used against senior leaders. On the other hand, prosecutorial policies similarly lay down their focus on a new perpetrator profile, that of the lower-ranking leader having committed very serious crimes and acquired broad notoriety. In light of the challenges related to prosecuting senior leaders, the OTP extended its core concept to the more inclusive category of those who bear the greatest responsibility for the crimes committed. In addition, we have observed a prosecutorial policy shift in focus away from the perpetrators toward the crimes committed, the latter featuring heavily in a growing body of focused prosecution policy documentation and the Prosecutor's discourse.

The decline of the concept of senior leaders to the benefit of the notion of individuals bearing the greatest responsibility is also notable in the jurisprudence. Initially, the perpetrators' profile was considered to be indispensable to the Court's deterrence and prevention goals, but later the perpetrator's rank became less central to the evaluation of gravity, second to the role played by the perpetrator in the commission of the crime. However, despite new orientations expressed in policy and strategic documents, the OTP's approach to the concept of those bearing the greatest responsibility, as revealed in the jurisprudence, is still unclear: to the degree that it is the bastion of its discretionary power, the Prosecutor vacillates between taking into consideration and overlooking rank. The OTP does not want to be locked in a strict reading of the concept, but it uses this same strict interpretation to support its argumentation when it does not want to open an investigation. This is where the crux of the problem lies as regards the complex considerations about the opportunity of prosecution in the institutional interests of the OTP.<sup>172</sup>

Interestingly, the decline of the concept can be observed elsewhere, such as in the prosecutorial strategy of the most recent internationalized jurisdiction, the Special Criminal Court for the Central African Republic. The prosecutorial orientation uses the concept of "persons who played a key role in the commission of crimes", instead of 'persons the most respon-

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<sup>172</sup> Mark Kersten, "Taking the Opportunity: Prosecutorial Opportunism, Case Selection, and the International Criminal Court", 2018 (unpublished).

sible’ or ‘senior leaders’.<sup>173</sup> Regardless of the reasons for such drafting, including complementarity with the ICC, this understanding of the level of responsibility in crimes seems to reflect a tendency that moves away from considering rank in the military or political hierarchies as the main criterion guiding prosecutorial policies.

A more flexible understanding of who bears the greatest responsibility is certainly coherent with a better understanding of realities on the ground as to the role of hierarchies in different group dynamics. A rigid interpretation is at odds with more decentralized, egalitarian or informal structures often adopted by actors such as non-state groups, companies, and others. As Stahn remarked:

As noted by Mark Osiel, there is a danger that international criminal courts and tribunals rely partly on fiction in order (sic) bring the reality in line with legal concepts. In such contexts, the level of culpability may be less dependent on hierarchy. Blameworthiness is attached rather to the role that the individual shared.<sup>174</sup>

The shift in symbolic significance from prosecution determined by actors to prosecution determined by criminal actions in prosecutorial policy is supportive of the OTP and the ICC’s management of interests during the selection process because it unbinds this process from the confines of befitting a specific type of perpetrator. The emphasis on perpetrators is often subtly replaced by an emphasis on crimes, allowing the OTP to manage different interests in terms of feasibility and capacity to prosecute and its objective in terms of the fight against impunity.

The issue of prosecuting those who bear the greatest responsibility is a key factor for the credibility and legitimacy of the ICC. It is so, obviously, because the costs of failure of prosecutions of high-level perpetrators are very high, for the Court and in local political dynamics. But it is also so because it directly relates to concerns about selectivity. In this perspective,

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<sup>173</sup> Own translation by the authors. See: Cour pénale spéciale de la République centrafricaine, “Stratégie d’enquête, de poursuite et d’instruction”, p. 15:

La CPS, vu le principe de complémentarité concurrente et le fait que la CPS est une juridiction internationalisée au sein de l’organisation judiciaire nationale, ne se concentrera pas exclusivement sur les plus hauts dirigeants et les personnes les plus responsables. Le Parquet spécial et la Chambre d’Instruction appliqueront le critère plus général de personnes ayant joué un rôle-clé dans la commission de crimes.

<sup>174</sup> Stahn, 2018, p. 129, see above note 17.

the purely legal view of prosecution as a mere reflection of the available evidence is transcended to contemplating the strategic significance of situation and case selection. The resulting choices inevitably bring the international criminal justice observer to question the opportunity of prosecution of certain perpetrators or lack of prosecution of other potential perpetrators. Whereas some selectivity is inevitable in international criminal justice, prosecutorial strategies and legal determinations in the case selection processes concerning who bear the greatest responsibility in a given situation present perhaps the greatest risk of giving rise to perceptions of unjust and biased selectivity.<sup>175</sup> The least we can expect from the Court is transparency and coherence in this decision-making process.<sup>176</sup> Because the ‘most responsible’ concept is not only one of the core features of its history, but could also be one of the possible causes of its future success or failure.

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<sup>175</sup> See Kiyani, 2016, see above note 42, who offers an insightful typology of selectivity and usefully analyses selectivity not as a continuation of inter-state hierarchies, but at the intra-situational level. He explains why one form of selectivity, which he calls group-based selectivity and which focuses on “differential prosecutions of similarly-situated offenders within states and situations” is particularly problematic.

<sup>176</sup> *Ibid.*, p. 956; Marieke de Hoon, “The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s Legitimacy”, in *International Criminal Law Review*, 2017, vol. 17, no. 4, p. 608.

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# The Use of Non-Governmental Investigatory Bodies at the Office of the Prosecutor of the International Criminal Court: An Offer We Can(not) Refuse?

André C.U. Nwadi kwa-Jonathan and Nicholas E. Ortiz\*

We are all crew members with the same mission and destination in mind, albeit with different functions [...]. We must consider our respective but reinforcing roles with commitment, resolve, and resourcefulness, and with only one goal in mind: [...] ensuring that justice is effectively done and is seen to be done.<sup>1</sup>

## 8.1. Introduction: A Long Way from Rome

On 18 July 1998, the late United Nations Secretary-General, Kofi Annan, opened his celebratory statement in the immediate aftermath of the adoption of the Rome Statute ('Rome Statute' or 'Statute') of the International

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<sup>1</sup> Fatou Bensouda, "Commemoration of the 20th Anniversary of the Adoption of the Rome Statute of the International Criminal Court", 17 July 2018, pp. 2–3.

Criminal Court ('ICC' or 'Court') with a choice quip from an Ancient Roman statesman.<sup>2</sup> In the same city, some two millennia before, Marcus Tullius Cicero had famously declared that, "in the midst of arms, law stands mute".<sup>3</sup> It was Annan's hope that, in this truly ground-breaking commitment towards the future of international criminal justice, "that bleak statement would be less true in the future than it had been in the past".<sup>4</sup> The ICC would have jurisdiction over four 'core' crimes: genocide, crimes against humanity, war crimes and aggression.<sup>5</sup> The Rome Statute envisaged that, together, through enhanced co-operation between the Court and its States Parties and their complementary efforts therein, the international community would put an end to impunity for these, the most serious crimes of international concern.<sup>6</sup> However, as we mark the twentieth anniversary of that utopian moment, the growing portfolio of cases before the Court in which charges have been declined,<sup>7</sup> withdrawn<sup>8</sup> or vacated<sup>9</sup> has led us to a

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<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>); United Nations, "Statement by the United Nations Secretary-General Kofi Annan at the Ceremony held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court", 18 July 1998, p. 1 (<http://www.legal-tools.org/doc/8b0ab6/>).

<sup>3</sup> United Nations, 18 July 1998, *ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Rome Statute, Article 5, see above note 2.

<sup>6</sup> Rome Statute, Preamble, Article 17, see above note 2.

<sup>7</sup> ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, ('Abu Garda Confirmation Decision') (<http://www.legal-tools.org/doc/cb3614/>); ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, ('Mbarushimana Confirmation Decision') (<http://www.legal-tools.org/doc/63028f/>).

<sup>8</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on the Withdrawal of Charges against Mr Kenyatta, 13 March 2015, ICC-01/09-02/11-1005 (in which judges also declined to confirm charges against Ali) ('Kenyatta Withdrawal Decision') (<http://www.legal-tools.org/doc/2c921e/>); ICC, *Prosecutor v. Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, 11 March 2013, ICC-01/09-02/11-687, ('Muthaura Withdrawal Notice') (<http://www.legal-tools.org/doc/9d2c58/>).

<sup>9</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, (in which judges also declined to confirm charges against Kosgey), ('Ruto and Sang Acquittal Decision') (<http://www.legal-tools.org/doc/6baecd/>); ICC, *Prosecutor v. Gbagbo and Blé Goudé*, 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

point where suggestions that this project has fallen short of those lofty expectations barely astound.<sup>10</sup>

As the ICC's investigative and prosecutorial authority, the Office of the Prosecutor ('OTP' or 'Office') bears primary responsibility for the outcomes of the cases that it investigates and ultimately decides to bring. Certainly, the OTP is not beyond reproach and must take ownership for infirmities in its prosecutorial strategies. However, in each strategic document, the Office has stressed how full State co-operation is critical to its ability to effectively and efficiently perform its mandate.<sup>11</sup> Still, a review of the Office's past investigative practice reveals that this critical component is yet to be fully realized; despite assertions that co-operation is the "critical success factor" to its ability to perform and increase the impact of the Court's operations.<sup>12</sup> This is most patently clear in the cases arising from the ICC's investigation into Kenya. As such, without absolving the OTP of responsibility, this chapter begins with the premise that negative evidential outcomes can be, and in cases have been, caused as a direct or indirect result of a State co-operation deficit.

Nonetheless, as the Office revises its approach to the co-operation question, non-State actors are becoming increasingly conscious of the threat that a limited ability to investigate poses to the viability and legitimacy of international criminal justice. Now, instead of waiting for the requisite political conditions to bridge this gap, a non-governmental organiza-

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on the Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, ('Gbagbo and Blé Goudé Acquittal Decision') (<http://www.legal-tools.org/doc/440017/>).

<sup>10</sup> Theodor Meron and Maggie Gardner, "Introduction to the Symposium on the Rome Statute at Twenty", in *American Journal of International Law Unbound*, 2018, vol. 112, p. 155 ("still falls short of the expectation of the participants at the groundbreaking conference in Rome, with their visions of creating the best international criminal court possible: one that is efficient, economic, and fair and one that applies a full panoply of human and due process rights").

<sup>11</sup> ICC-OTP, "Report on Prosecutorial Strategy", 14 September 2006, p. 3 ('2006 Prosecutorial Strategy') (<http://www.legal-tools.org/doc/6e3bf4/>); ICC-OTP, "Report on Prosecutorial Strategy 2009–2012", 1 February 2010, p. 2 ('2009 Prosecutorial Strategy') (<http://www.legal-tools.org/doc/6ed914/>); ICC-OTP, "Strategic Plan 2012–2015", 11 October 2013, p. 5 ('2012 Prosecutorial Strategy') (<http://www.legal-tools.org/doc/954beb/>); ICC-OTP, "Strategic Plan 2016–2018", 6 July 2015, p. 5 ('2016 Prosecutorial Strategy') (<http://www.legal-tools.org/doc/7ae957/>); see generally, ICC-OTP, "Strategic Plan 2019–2021", 17 July 2019 ('2019 Prosecutorial Strategy') (<http://www.legal-tools.org/doc/7ncqt3/>).

<sup>12</sup> 2012 Prosecutorial Strategy, *ibid.*

tion ('NGO') has taken the unprecedented step of assuming the role of investigating international crimes itself. The Commission for International Justice and Accountability ('CIJA') is the pioneering body leading this functional adjustment to today's realities.

NGOs are not a new arrival on the international crime scene. Quite the opposite: they are usually amongst the first responders and regularly assist the OTP in discharging its investigative duties by, for example, submitting information on violations that may be in their possession; acting as intermediaries between the Office and the affected population; and providing general research and advocacy support within the relevant communities.<sup>13</sup> However, whilst the tensions between their mandates and that of the Court typically mean that NGOs limit their involvement to roles such as the above, CIJA is the first non-governmental body created to independently perform primary investigative functions previously vested in only the Office itself. In doing so, this chapter posits that CIJA has emerged as the first non-governmental investigatory body ('NGIB') in history.

CIJA has been the subject of growing journalistic<sup>14</sup> and scholarly<sup>15</sup> attention due to the novel nature of the group and its ongoing operations in Syria and Iraq. Since 2013, the 140-employee strong organization has secured approximately one million pages of documents from Syria alone.<sup>16</sup>

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<sup>13</sup> Human Rights First, "The Role of Human Rights NGOs in relation to ICC Investigations", September 2004. NGOs also assist the Court in "developing its institutional policies" and "promoting states' cooperation with the Court". See Nicole de Silva, "Intermediary Complexity in Regulatory Governance", in *The Annals of the American Academy of Political and Social Science*, 2017, vol. 670, no. 1, p. 170.

<sup>14</sup> See, for example, Ben Taub, "The Assad Files", in *The New Yorker*, 18 April 2016; Julian Borger, "Syria's Truth Smugglers", in *The Guardian*, 12 May 2015; Nick Robins-Early, "Inside One Group's Mission To Bring Assad's Regime To Justice", in *The Huffington Post*, 26 April 2016.

<sup>15</sup> See, for example, Melinda Rankin, "Investigating Crimes Against Humanity in Syria and Iraq: The Commission for International Justice and Accountability", in *Global Responsibility to Protect*, 2017, vol. 9, no. 4, pp. 395–421 ('Rankin, 2017'); Melinda Rankin, "The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability", in *Journal of Genocide Research*, 2018, vol. 20, no. 3, pp. 403–404 ('Rankin, 2018'); Ingrid Elliott, "A Meaningful Step Towards Accountability? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 245–247.

<sup>16</sup> In January 2019, the Authors of this chapter conducted a series of comprehensive interviews with various CIJA staff members over the course of a two-day visit to their headquarters. The interviews comprised sessions with William H. Wiley (Executive Director), Nerma

At the time of writing, those combined operations have led to the creation of eighteen case files, each containing allegations against dozens of highly culpable individuals within Da'esh and the Syrian Regime, as well as four additional major investigative reports. In addition, CIJA has created databases that act as information resources for States, holding the names of over one million Syrian Regime military, security and political officials, in addition to thousands of Da'esh members – and all with an annual budget of approximately seven million euros.<sup>17</sup>

CIJA's expansions into Nigeria<sup>18</sup> and Libya<sup>19</sup> will represent the first instance in which an NGIB engages in a situation already in the purview of the chief Prosecutor of the ICC ('Prosecutor').<sup>20</sup> However, given that CIJA Deputy Director Nerma Jelačić has remarked that the proliferation of the NGIB model is "at the core of the vision", it is almost certainly not the last.<sup>21</sup> CIJA Executive Director, William H. Wiley, was the first investigator at the ICC and was engaged in the OTP's investigations in the east of the Democratic Republic of the Congo. He maintains that the NGIB model is "fostering the evolution of international criminal and humanitarian investigations, with the idea of making them faster, cheaper and, from an evidentiary point of view, better".<sup>22</sup> Given that, in the same operating period as

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Jelačić (Director for Management and External Relations), Chris Engels (Director of Investigations and Operations) and the Heads of the Da'esh Crimes Team and Syrian Regime Crimes Team, respectively. The transcripts of these interviews are retained on file with the Authors: CIJA, "Interview with William Wiley", 17 January 2019; see CIJA, "Home" (available on its web site).

<sup>17</sup> *Ibid.*

<sup>18</sup> For the status of the ongoing preliminary examination into Nigeria, see ICC-OTP, "Report on Preliminary Examination Activities 2018", 5 December 2018, p. 55 ('Report on Preliminary Examination Activities 2018') (<http://www.legal-tools.org/doc/39c2c1/>).

<sup>19</sup> Whilst Libya is not a State Party to the Rome Statute, jurisdiction of the situation was conferred upon the OTP by the United Nations Security Council ('UNSC') referral. See Rome Statute, Articles 12, 13, see above note 2; for the UNSC Resolution in question, see Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011, para. 4 (<http://www.legal-tools.org/doc/00a45e/>).

<sup>20</sup> As neither Syria, nor Iraq are States Parties to the Rome Statute, CIJA's previous operations do not fall within the jurisdiction of the ICC, rendering the OTP unable to investigate any alleged international crimes, absent a UNSC referral: Wiley, 2019, see above note 16.

<sup>21</sup> Jelačić, 2019, see above note 16.

<sup>22</sup> Canadian House of Commons, "Evidence of William Wiley – 33rd Meeting of the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development", 22 November 2016.

CIJA, the OTP has had an average annual budget of EUR 36,171,650 for a total of 44 indictees, such claims become all the harder to question.<sup>23</sup>

In keeping with the purpose of this edited volume, this chapter intends to critically examine the past and the present of the ICC in order to use the lessons learned to safeguard against the existential danger that a lack of State co-operation poses to its future. As CIJA continues to achieve positive results in otherwise deadlocked situations, the role of NGIBs in this conversation – particularly as regards overcoming the evidential lacuna caused by a State co-operation deficit – is increasingly unavoidable. However, are NGIBs an adequate response to a lack of State co-operation at the ICC?

This chapter is an exploration of the under-examined relationship between NGIBs and the OTP of the ICC. The second part of this chapter consists of an empirical analysis of the effect of a lack of State co-operation on the OTP's investigative capacity, using 'negative evidential outcomes' as investigative quality indicators. Drawing on interviews conducted with senior CIJA staff members, the third part of this chapter will use CIJA as the archetypal NGIB, thus establishing the characteristics and methodology underpinning 'the NGIB model'. Using this as a framework for analysis, the value of the NGIB model as a response to a lack of State co-operation and other causes of negative evidential outcomes will then be assessed. This chapter will conclude by discussing the extent to which the OTP-NGIB relationship could ever be formally organized under the legal auspices of the Rome Statute and what a future partnership might look like.

## **8.2. Searching for the Critical Component: State Co-operation and the Conduct of Investigations at the Office of the Prosecutor**

### **8.2.1. The Evidence Speaks for Itself: Negative Evidential Outcomes at the Office of the Prosecutor as Investigative Quality Indicators**

A criminal investigation has the identification and collection of *prima facie* evidence as its principal aim. This is all the more pertinent at the international criminal level, where the sheer scale of the criminality and additional contextual complexities necessitate the collation of an extensive amount of

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<sup>23</sup> See ICC, "List of Defendants" (available on its web site). The figure was calculated by taking an average from the annual budget of the OTP between 2012 and 2017. See ICC, "Proposed Budget for 2019 of the International Criminal Court", 1 August 2018, p. 39.

material, in addition to a patient and disciplined approach to subsequent factual and legal analysis.<sup>24</sup> Where a case brief is brought as a result of this rigorous process, it is justifiably expected to contain credible, reliable evidence capable of proving the offences on the indictment to the criminal standard of beyond reasonable doubt. As far as the investigative quality is concerned, if the tribunal comes to a just and sound outcome after a full review of the evidence from both sides, it is ultimately of limited consequence whether they find in your favour or not – an acquittal is but a symptom of a just and functioning legal system. It is another matter entirely, however, where on the basis of the Prosecution evidence alone, the tribunal decides that: (i) there are insufficient grounds to believe that the crime alleged was committed; or (ii) there is no evidence in the Prosecution case on which a reasonable tribunal could safely convict.

As concerns the first evidential outcome, Article 61 of the Statute requires that each suspect who has been surrendered into the custody of the Court be brought before the Pre-Trial Chamber for a hearing to confirm the charges levied against them.<sup>25</sup> Rather than to decide on criminal responsibility, this procedure is designed to “assess the sufficiency of the results of the investigation” by separating “those cases and charges which should go to trial from those which should not”.<sup>26</sup> For the charge to be confirmed, and thus progress to trial, the Pre-Trial Chamber must be satisfied, on the basis of the evidence, that there are “*substantial* grounds to believe” that such a crime has been committed.<sup>27</sup> In *Lubanga*, it was held that this standard requires that the Prosecutor “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations” against the accused.<sup>28</sup> Essentially, the Chamber must be “thoroughly satisfied that the

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<sup>24</sup> Hiroto Fujiwara and Stephan Parmentier, “Investigations”, in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, 2012, pp. 573–575.

<sup>25</sup> Rome Statute, Article 61(1), see above note 2.

<sup>26</sup> Enrique Carnero Rojo, “Article 61: Confirmation of the Charges Before Trial”, in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, FICHL Publication Series No. 29, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 440–464, note 488 (<http://www.toaep.org/ps-pdf/29-klamberg>).

<sup>27</sup> Rome Statute, Article 61(7), see above note 2 (emphasis added). This standard is higher than the ‘reasonable grounds to believe’ required for an arrest warrant but lower than the criminal standard of ‘beyond reasonable doubt’. See *ibid.*, Articles 58(1)(a) and 66(3).

<sup>28</sup> ICC, *Prosecutor v. Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 39 (<http://www.legal-tools.org/doc/b7ac4f/>).

Prosecution's allegations are sufficiently strong to commit [the accused] for trial".<sup>29</sup> However, the Pre-Trial Chamber confirmed in *Gbagbo* that they would decline to confirm charges where the evidence is "so lacking in relevant and probative value that it leaves the Chamber with no choice".<sup>30</sup> Given that the aim of an investigation should be to build cases to the trial standard of beyond reasonable doubt, the "inability to sustain" the charges selected even at this low standard of proof, as indicated by a decision to decline the charges, is symptomatic of "infirmities in the investigation".<sup>31</sup>

With regards to the second indicator, charges against the accused may still be vacated at trial where there is 'no case to answer'<sup>32</sup> – that is, where the Prosecution has failed to provide enough evidence to prove the elements of the offense alleged.<sup>33</sup> On the application of the Defence, and indeed before hearing any details of their case, the Chamber must decide "whether there is evidence on which a reasonable Trial Chamber could convict".<sup>34</sup> The tangible effect of such a finding is that the accused is acquitted of the relevant charge, without having to call any evidence in their defense. It is of note that the stated "primary rationale" behind a finding of no case to answer is: "the principle that an accused should not be called

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<sup>29</sup> *Ibid.*

<sup>30</sup> ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision Adjourning the Hearing on the Confirmation of Charging Pursuant to Article 67(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 25 ('Gbagbo Adjournment Decision') (<http://www.legal-tools.org/doc/2682d8/>).

<sup>31</sup> Dermot Groome, "No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations", in *Penn State Journal of Law & International Affairs*, 2014, vol. 3, pp. 2–3.

<sup>32</sup> For ease of reference, 'no case to answer' will be the appropriate handle for the rest of this chapter. Although, note that motions of 'no case to answer' and 'judgment of acquittal' are used interchangeably in the current practice of the ICC. See, for example: ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decisions No. 5 on the Conduct of Trial Proceedings (Principles and Procedures on 'No Case to Answer' Motions), 3 June 2014, ICC-01/09-01/11-1334 ('Ruto and Sang Decision No. 5') (emphasis added) (<http://www.legal-tools.org/doc/128ce5/>); and ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Defence Applications for *Judgments of Acquittal*, 5 April 2016 ICC-01/09-01/11-2027-Red-Corr ('Ruto and Sang Acquittal Decision') (emphasis added) (<http://www.legal-tools.org/doc/6baecd/>).

<sup>33</sup> The Rome Statute is silent as to the existence of a no case to answer doctrine. However, in *Ruto and Sang*, the Trial Chamber noted its obligation to ensure a fair and expeditious trial, and its power to direct the proceedings and rule on matters concerning their conduct, subsequently deriving a legal basis to make findings of no case to answer. *Ruto and Sang Decision No. 5*, para. 13, see *ibid.*

<sup>34</sup> *Ibid.*, para. 32 (emphasis in original).

upon to answer a charge when the *evidence presented by the Prosecution is substantively insufficient to engage the need for the Defence to mount a defence case.*"<sup>35</sup>

Decisions to decline the charges or otherwise find that there is no case to answer are indicative of a wider defect in the conduct of the investigation and the quality of the evidence obtained.<sup>36</sup> For reasons which are no doubt clear, the same is equally true for cases in which insurmountable evidential issues in the case require the Prosecutor to withdraw altogether. Therefore, decisions to decline confirmation of charges, vacation of charges due to a finding of no case to answer, and withdrawal of charges are to be considered 'negative evidential outcomes'.<sup>37</sup> Apart from bringing clarity to the subject at hand, distinguishing said outcomes from traditional acquittals provides an objective indicator for poor quality investigations before the ICC and, importantly, provides a framework for determining their root causes.

### **8.2.2. A Problem Shared: Negative Evidential Outcomes as a Consequence of Prosecutorial Strategy or State Co-operation?**

As the Court lacks any enforcement mechanisms of its own, it is heavily reliant on co-operation in order to conduct its investigations and carry out other core functions. As such, once jurisdiction is established, Article 86 obliges States Parties "to cooperate fully with the Court in its investigation and prosecution of crimes".<sup>38</sup> However, if States Parties balk at requests for co-operation, the Court, and by extension the Office of the Prosecutor, becomes a "powerless giant", unable to execute its mandate, despite having

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<sup>35</sup> *Ibid.*, para. 12 (emphasis added).

<sup>36</sup> Patryk Labuda, "The ICC's 'Evidence Problem': The Future of International Criminal Investigations After the Gbagbo Acquittal", in *Völkerrechtsblog*, 18 January 2019 (available on its web site).

<sup>37</sup> The shorthand 'negative evidential outcome' will be used throughout this chapter to refer to the aforesaid.

<sup>38</sup> This provision consequently does not apply where jurisdiction is founded on a UNSC Referral. However, it is common practice for the Chapter VII Resolution to contain a binding obligation on UN Member States reflecting the same general obligation. See, for example, Resolution 1593 (2005) (Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan), S/RES/1593 (2005), 31 March 2005, para. 2 (<http://www.legal-tools.org/doc/4b208f/>).

the authority to do so.<sup>39</sup> Although it may be convenient to sacrifice negative evidential outcomes at the altar of State co-operation, the reality is often more nuanced than that. As stated in the introduction to this chapter, the Prosecutor bears ultimate responsibility for the cases that are before the Court. As such, it must be determined which negative evidential outcomes are a consequence of a State co-operation deficit and which are owing to insufficient investigative planning as part of successive prosecutorial strategies at the OTP.<sup>40</sup> In order to do so, it is important to first identify which cases before the ICC have led to negative evidential outcomes, before seeking to understand *why*.

At the time of writing, the OTP has opened investigations into 13 situations:<sup>41</sup> the Democratic Republic of the Congo ('DRC') (2004); Uganda (2004); Darfur, Sudan (2005); Central African Republic I (2007); the Republic of Kenya ('Kenya') (2010); Libya (2011); Côte d'Ivoire (2011); Mali (2013); Central African Republic II (2014); Georgia (2016); Burundi (2017); Bangladesh/Myanmar (2019); and Afghanistan (2020). To date, the OTP has built 28 cases against 44 individuals.<sup>42</sup> Of the 44 individuals, 37 have been charged with core crimes.<sup>43</sup> As detailed in Figure 1 below, from this rank of 37, four have had their cases closed upon receipt of evidence of their death and one has had their case declared inadmissible due to ongoing domestic proceedings.<sup>44</sup> Of the remaining 32, 11 are at large.<sup>45</sup> From the 21 who have been taken into the custody of the Court, one is awaiting confir-

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<sup>39</sup> Elena Baylis, "Outsourcing Investigations", in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 121, p. 122.

<sup>40</sup> With each successive Prosecutor, the OTP has deployed a new prosecutorial strategy setting out their approach to investigating and case building more generally. Moreno-Ocampo adopted a "short, focused investigation strategy" as his default operational protocol. See OTP, 2006 Prosecutorial Strategy, pp. 5–6, see above note 11; OTP, 2009 Prosecutorial Strategy, p. 2, see above note 11. Bensouda, in contrast, elected an "in-depth, open-ended investigation strategy". See OTP, 2012 Prosecutorial Strategy, p. 6, see above note 11. See OTP, 2019 Prosecutorial Strategy, pp. 13–15, see above note 11.

<sup>41</sup> ICC, "Situations under Investigation" (available on its web site).

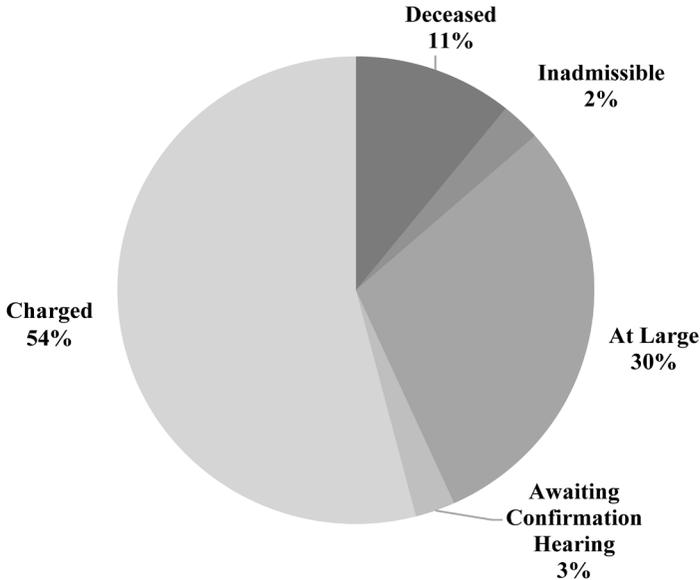
<sup>42</sup> ICC, "Defendants" (available on its web site).

<sup>43</sup> *Ibid.* Five defendants have been charged with offenses against the administration of justice. See Rome Statute, Article 70, see above note 2.

<sup>44</sup> ICC, "Defendants", see above note 42. Five defendants have had their cases terminated upon news of their death: Gaddafi, Jerbo Jamus, Lukwiya, Odhiambo. One defendant has had his case declared inadmissible due to ongoing domestic proceedings: Al Sensussi.

<sup>45</sup> *Ibid.*

mation of charges and has thus not entered the contentious phase of proceedings.<sup>46</sup>



**Figure 1: Status of core crime indictees.**

From the 20 who have entered into the contentious phase, as demarcated by the confirmation hearing, four have had charges declined pre-trial: *Mbarushimana* (DRC); *Abu Garda* (Sudan); *Ali* (Kenya); and *Kosgey* (Kenya).<sup>47</sup> Of the 16 who have progressed to the trial phase, four have had their charges vacated on the basis of there being no case to answer: *Ruto* (Kenya); *Sang* (Kenya); *Gbagbo* (Côte d’Ivoire); and *Blé Goudé* (Côte d’Ivoire). Further, of the same 16, two have had their charges withdrawn owing to evidential issues: *Kenyatta* (Kenya); and *Muthaura* (Kenya).<sup>48</sup> As regards the remaining 10 defendants indicted for core crimes, three have been convicted (*Lubanga*, *Katanga* and *Al Mahdi*),<sup>49</sup> two acquitted after a

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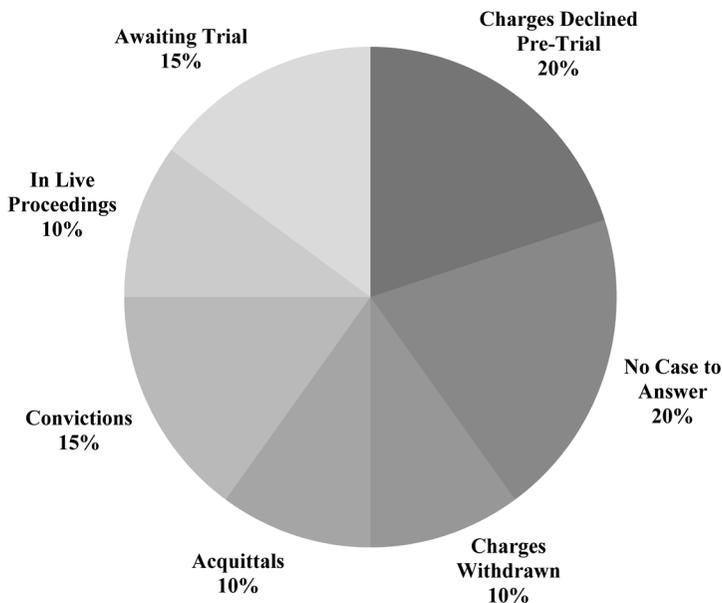
<sup>46</sup> *Ibid.* Note, in this context, the ‘contentious phase’ is taken to mean the part of the proceedings where both the Prosecution and Defence are able to make arguments on the evidence.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> ICC, *Prosecutor v. Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 1358 (‘*Lubanga*, 14 March 2012’) (<http://www.legal-tools.org/doc/677866/>); ICC, *Prosecutor v. Katanga*, Trial Chamber II,

full trial (*Ngudjolo, Bemba*),<sup>50</sup> two are involved in ongoing live proceedings (*Ongwen* and *Ntaganda*),<sup>51</sup> and the three that remain are in custody awaiting trial (*Al Hassan, Yekatom* and *Ngaïssona*).<sup>52</sup>



**Figure 2: Status of active core crimes proceedings.**

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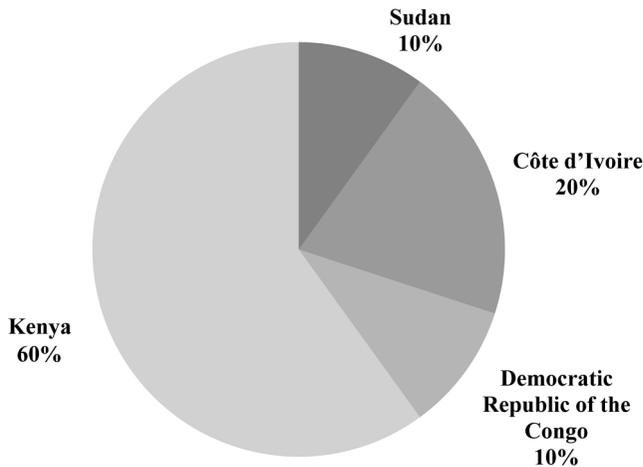
Judgment pursuant to Article 74 of the Statute, 7 March 2014, CC-01/04-01/07-3436-tENG. pp. 658–660 (<http://www.legal-tools.org/doc/f74b4f/>); ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 p. 49 (<http://www.legal-tools.org/doc/042397/>).

<sup>50</sup> ICC, *Prosecutor v. Ngudjolo*, 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, ICC-01/04-02/12-271, para. 296 (<http://www.legal-tools.org/doc/1dce8f/>); ICC, *Prosecutor v. Bemba Gombo*, Appeals Chamber, Judgment on the Appeal of Mr Jean-Pierre Bemba against Trial chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, ICC-01/05-01/08-3636-Red, para. 196 (<http://www.legal-tools.org/doc/40d35b/>).

<sup>51</sup> ICC, “Ongwen Case: The Prosecutor v. Dominic Ongwen” (available on its web site); ICC, “Ntaganda Case: The Prosecutor v. Bosco Ntaganda” (available on its web site).

<sup>52</sup> ICC, “Al Hassan Case: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed ag Mahmoud” (available on its web site); ICC, “Yekatom and Ngaïssona Case: The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona” (available on its web site).

As such, as demonstrated by Figure 2, of the 20 defendants who have entered the contentious phase facing charges of core crimes, 50% have concluded in negative evidential outcomes. Of that, four out of 20 occurred pre-trial, with a further six occurring during the trial phase. The statistics, as indicated in Figure 3 below, show the following situational breakdown: one from the DRC (*Mbarushimana*);<sup>53</sup> two from Côte d'Ivoire (*Gbagbo* and *Blé Goudé*);<sup>54</sup> one from Sudan (*Abu Garda*);<sup>55</sup> and six from Kenya (*Ali*, *Kosgey*, *Ruto*, *Sang*, *Kenyatta* and *Muthaura*).<sup>56</sup>



**Figure 3: Situational breakdown of negative evidential outcomes.**

As regards the DRC, the Congolese Government implemented a number of legal instruments to make co-operation with the ICC fully operational, facilitating positive evidential outcomes in the form of the convictions of *Lubanga* and *Katanga*.<sup>57</sup> Further, in the negative evidential out-

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<sup>53</sup> ICC, *Mbarushimana* Confirmation Decision, see above note 7.

<sup>54</sup> ICC, *Gbagbo* and *Blé Goudé* Acquittal Decision, see above note 9.

<sup>55</sup> ICC, *Abu Garda* Confirmation Decision, see above note 7.

<sup>56</sup> ICC, *Ruto* and *Sang* Acquittal Decision (in which judges also declined to confirm charges against *Kosgey*), see above note 9; ICC, *Kenyatta* Withdrawal Decision (in which judges also declined to confirm charges against *Ali*), see above note 8; ICC, *Muthaura* Withdrawal Notice, see above note 8.

<sup>57</sup> These included, for example: judicial co-operation agreement of 6 October 2004, between the OTP and the DRC; The agreement of 12 October 2004, on the privileges and immunities aimed at protecting staff; The *ad hoc* agreements of 24 November 2015, which implemented the sentences of two persons convicted by the ICC. See International Center for Transitional

come in *Mbarushimana*, the Pre-Trial Chamber was less than satisfied with the OTP's extensive reliance on indirect evidence to fill the gaps in its work. This included an allegation of responsibility for war crimes based on a "single UN or Human Rights Watch Report" without "any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations".<sup>58</sup> In a decision upheld by the Appeals Chambers, the Pre-Trial Chamber held that the:

Prosecution must know the scope of its case, as well as the material facts underlying the charge that it seeks to prove and must be in possession of evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing.<sup>59</sup>

As is clear from the foregoing, it was the view of both the Pre-Trial and Appeals Chambers that the negative evidential outcome was a by-product of the Prosecutor's investigative planning and execution, rather than owing to any deficiencies in State co-operation. As such, a link between a lack of State co-operation and the negative evidential outcome described cannot be asserted with any confidence.

Similarly, the material available from the finding of no case to answer in the Ivorian cases of *Gbagbo* and *Blé Goudé* suggests that the negative evidential outcome stemmed from the fact that:

[T]he Prosecutor failed to demonstrate several core constitutive elements of crimes against humanity as charged: in particular the existence of the alleged common plan to keep Mr Gbagbo in power [...] that Mr Gbagbo or Mr Blé Goudé, knowingly or intentionally contributed to the commission of the alleged crimes or that their speeches constituted ordering, soliciting or inducing such crimes.<sup>60</sup>

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Justice, "A Close-up Look at the Fight Against Impunity in the DRC", 8 April 2016 (available on its web site).

<sup>58</sup> ICC, *Mbarushimana* Confirmation Decision, para. 117, see above note 7.

<sup>59</sup> ICC, *Prosecutor v. Mbarushimana*, 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, ICC-01/04-01/10-514, para. 44 (<http://www.legal-tools.org/doc/6ead30/>).

<sup>60</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Questions and answers on Trial Chamber I's oral decision, 15 January 2019, ICC-Q&A-CDI-04-01/19\_Eng (<http://www.legal-tools.org/doc/859393/>); ICC, *Gbagbo and Blé Goudé* Acquittal Decision, see above note 9.

That notwithstanding, this was not the first time that the Court had expressed concerns about the quality of the evidence relied upon by the OTP in that case. Indeed, at the confirmation stage, the Chamber noted “with serious concern” that:

[T]he Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor.<sup>61</sup>

More generally, the arrest warrant for Laurent Gbagbo having been requested only 22 days after the investigation into Côte d’Ivoire had commenced,<sup>62</sup> and the fact that investigators on the ground in *Gbagbo* were reportedly a team of eight, deployed “in rotating teams of two”, lends itself to a conclusion that the investigation was hurried and limited in scope.<sup>63</sup>

The current ICC investigation into Sudan also presents difficulties in this regard. Certainly, deficiencies in the level of practical State cooperation have prevented the OTP from executing arrest warrants in four out of six cases, including most notably the repeated bouts of non-cooperation as regards the arrest of Omar Al-Bashir.<sup>64</sup> The issues, however, lie elsewhere in *Abu Garda*. In the separate opinion of Judge Cuno Tarfusser, citing the Prosecutor’s failure to establish “a proper link between the historical events” and the suspect, he damningly held that “the lacunae and shortcoming exposed by the mere factual assessment of the evidence [was]

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<sup>61</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 35 (<http://www.legal-tools.org/doc/2682d8/>).

<sup>62</sup> Groome, 2014, p. 9, see above note 31.

<sup>63</sup> John James, “Ivory Coast: Who’s Next after Laurent Gbagbo?”, in *International Justice Tribune*, No. 146, 29 February 2012. By contrast, at any given time, there were up to 200 ICTY investigators active in the Former Yugoslavia and Kosovo, consisting of 10 separate investigative teams of up to 20 individuals each. See Morten Bergsmo and Michael Keegan, “Case Preparation for the International Criminal Tribunal for the Former Yugoslavia”, in Norwegian Centre for Human Rights, *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Oslo, 2008, p. 6 (<http://www.legal-tools.org/doc/bfba0/>); ICTY, “Sixth Annual Report of the International Criminal Tribunal Responsible for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, 31 July 1999, para. 126.

<sup>64</sup> A. Cuzzolino, “Cooperating on Non-Cooperation: A Brief Legal History and Analysis of Sudan’s Non-Compliance with the ICC — and the Role of the Security Council”, in *International Justice Project*, 26 June 2015 (available on its web site).

so basic and fundamental” that the Chamber need not have even analysed the “legal issues pertaining to the merits of the case”.<sup>65</sup> As such, whilst State co-operation has been a key issue more generally in Sudan, it cannot be said to be the operative cause of the problems in *Abu Garda*.

It is thus clear that State co-operation, whilst critical, is not necessarily to blame for each negative evidential outcome. However, of the evidential outcomes which are arguably attributable to the OTP, the remaining six arise from Kenya – the highest number of any single situation and the majority of negative evidential outcomes at the Court. As such, Kenya will be presented as a case study for the analysis of the impact of State co-operation on negative evidential outcomes.

### **8.2.3. The ICC’s Achilles’ Heel: The Republic of Kenya as a Case Study of the Contributory Effect of State Co-operation on Negative Evidential Outcomes**

Against the backdrop of the 2007 Kenyan General Election, the Orange Democratic Movement suffered a shock loss to incumbent Mwai Kibaki, causing extreme inter-communal violence to erupt and soon engulf the entire country.<sup>66</sup> Following an OTP investigation, charges were brought against six individuals: Mohammed Hussein Ali (then Commissioner of the Kenyan Police); Uhuru Muigai Kenyatta (then Deputy Prime Minister, now sitting President of Kenya); Henry Kiprono Kosgey (then Chairman of the Orange Democratic Movement); Francis Kirimi Muthaura (then Cabinet Secretary to Mwai Kibaki); William Samoei Ruto (then Orange Democratic Movement Member of the National Assembly, now Deputy Prime Minister); and Joshua Arap Sang (then Radio Presenter).

At the heart of the case against *Kenyatta* was an allegation that he had financed the post-election violence by funnelling money through a number of intermediaries who would enable the direct perpetrators to “carry out acts of rape and murder [...] resulting in the forced displacement of thousands”.<sup>67</sup> On the basis of the “substantial body of evidence” linking Kenyatta to the financing of this violence, identifying his corporate inter-

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<sup>65</sup> ICC, *Abu Garda* Confirmation Decision, Separate Opinion by Judge Cuno Tarfusser, paras. 3, 6, see above note 7.

<sup>66</sup> BBC, “Odinga in Front in Kenya Election”, 29 December 2007.

<sup>67</sup> Kenyans for Peace with Truth & Justice (‘KPTJ’), “All Bark No Bite? State Cooperation and the International Criminal Court”, 2014, p. 4.

ests was a “central part” of the investigation.<sup>68</sup> As such, in July 2014, the Chamber approved the Prosecution’s revised request for various forms of evidentiary co-operation, including: company records, land registry records, tax records, vehicle records; bank records, telephone records, and intelligence records.<sup>69</sup> However, following a filing from the Kenyan government which purported to be “the fullest possible responses”, the OTP observed that: no company records were provided; no land registry records were provided; the “relevant tax records” provided were neither relevant, nor tax records, and were actually working documents generated by the Kenyan Revenue Authority; rather than the three years of bank statements requested, Kenya provided three months; no telephone records were provided; and no intelligence records were made available, on the basis that no such information was held.<sup>70</sup>

Looking at another example from the confirmation hearings for *Muthaura* and *Ali*, the Prosecution requested that a Kenyan judge, Justice Kalpana Rawal, take statements from 10 senior police officers. In response, the Kenyan Government filed a suit before the High Court of Kenya, challenging this process.<sup>71</sup> As a result, a court order was issued prohibiting Justice Rawal from “taking or recording any evidence from any Kenyan or issuing any summons to any [ICC] process pending the hearing and determination of the application”.<sup>72</sup> In the subsequent confirmation hearing, *Muthaura* and *Ali* relied on no less than 39 senior police officers in their defence, prompting the Prosecutor to note that Kenya’s:

[F]ailure actively and effectively to facilitate the OTP’s request to interview these police officials [as having] contributed to the uneven investigative playing field in this case, in

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<sup>68</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on the Prosecution’s Revised Cooperation Request, 29 July 2014, ICC-01/09-02/11-937, para. 14 (‘Kenyatta Cooperation Request Decision’) (<http://www.legal-tools.org/doc/9e7a87/>).

<sup>69</sup> *Ibid.*, para. 9.

<sup>70</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Prosecution Observations on the Government of Kenya’s 2 September 2014 Update, 5 September 2014, ICC-01/09-02/11-943 para. 15 (<http://www.legal-tools.org/doc/8d982a/>).

<sup>71</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Victims’ response to Prosecution’s application for an adjournment of the provisional trial date, 13 January 2014, ICC-01/09-02/11, fn. 11 (<http://www.legal-tools.org/doc/18fd71/>).

<sup>72</sup> *Ibid.*

which the Accused has enjoyed unfettered access to evidence that has been denied to the Prosecution.<sup>73</sup>

Finally, in the *Ruto and Sang* trial, the Prosecution had seven witnesses who had given statements to the OTP describing pre-election meetings at Ruto's home, in which violence was allegedly planned, in addition to money and weapons distributed.<sup>74</sup> Upon identifying said witnesses to the Defence, the individuals suddenly withdrew support from the Prosecution case. The OTP requested that the Court "take urgent steps to obtain the assistance of the Kenyan authorities to summon these individuals and, if required, secure their appearance at an appropriate location in Kenya for purposes of testifying before the Court".<sup>75</sup> At a status conference shortly after, the Kenyan Government announced that, "for purposes of testifying before the Court [pursuant to the International Crimes Act], a witness cannot be compelled to appear and testify before the Court, regardless of where the Court is sitting".<sup>76</sup> When, after a bitterly fought appeal, the Prosecution was finally able to get the witnesses to testify, several were eventually declared hostile by the Chamber, with one going as far as denying ever having given prior testimony.<sup>77</sup>

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<sup>73</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V, Prosecution response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence", 10 May 2013, ICC-01/09-01/11-730-Red, para. 24 (<http://www.legal-tools.org/doc/d9fdbf/>).

<sup>74</sup> KPTJ, 2014, p. 18, see above note 67; ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274 (<http://www.legal-tools.org/doc/78e130/>).

<sup>75</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses, 29 November 2013, ICC-01/09-01/11-1120-Red2, para. 3 (<http://www.legal-tools.org/doc/2fe851/>).

<sup>76</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses', 10 February 2014, ICC-01/09-01/11-1184, para. 5 (<http://www.legal-tools.org/doc/eee974/>).

<sup>77</sup> Wahome Thuku, "Hostile Witness Denies Giving ICC Any Recordings Incriminating Joshua Sang", in *The Standard*, 23 January 2015.

#### **8.2.4. Conclusions: Impact on the Investigative Process and the Need to Address the State Co-operation Deficit**

Kenya's approach to interaction with the ICC was best characterized by the Prosecutor, who criticized it as being one of "pure obstructionism".<sup>78</sup> Arguably, it was something of a tall order to expect those accused to collaborate in their own prosecution. However, in the era of liberal politics and human rights, an outright policy of non-co-operation is likely to have led to moral outrage and perhaps even political backlash. Whilst the Kenyan Government did not adopt such a stance, its use of the procedural, jurisdictional and practical co-operation framework to frustrate the administration of justice was potentially far more damaging. The *Kenyatta* trial highlighted how, if done effectively, a high-level State policy to undermine the Court can have a paralyzing effect on proceedings – a phenomenon that the Rome Statute system has proven startlingly ill-equipped to deal with. The Kenya investigations exposed the Court's Achilles' heel. If a failure to address it in earnest leads to this policy's proliferation, the goal of ending impunity will be that much more difficult to realize. Therefore, if justice is to not only be done but also be *seen* to be done, this situation is in dire need of creative solutions.

Having tested and validated the premise that a lack of State co-operation negatively impacts the Office's investigative capacity and subsequently its ability to produce positive evidential outcomes, the following section focuses on a potential response to said State co-operation deficit. Namely, the emergence of the NGIB as a resource to overcome investigative hurdles to successful prosecutions at the ICC.

### **8.3. The Commission for International Justice and Accountability: The Archetypal Non-Governmental Investigatory Body**

#### **8.3.1. Non-Governmental Investigatory Bodies: Classification and Characteristics**

The authors define a non-governmental investigatory body as an entity of a non-governmental nature organized to conduct primary investigative functions for the purpose of domestic and international prosecutions of alleged perpetrators of international crimes. 'Primary investigative functions' denote the collection of information and potential evidence directly from

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<sup>78</sup> ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Status Conference, 5 February 2014, ICC-01/09-02/11-T-27-ENG, p. 10, lines 11–12 (<http://www.legal-tools.org/doc/7e6374/>).

the crime scene or situation country, followed by factual and legal analysis, for the purpose of preparing various types of investigative products, including case briefs on alleged perpetrators. In turn, the ‘non-governmental’ status of said bodies serves to distinguish them from entities that derive the authority to carry out primary investigative functions from sovereign power. This would exclude, for example, national law enforcement and prosecutorial bodies, in addition to organizations established by international treaty instruments and the subsidiary bodies created within the ambit of their relevant statutory framework.

Any entity, be it governmental or non-governmental, may provide investigative support to the ICC.<sup>79</sup> However, in contrast to the spectrum of actors who have participated in the investigative process since the Court’s inception, the NGIB distinguishes itself on the basis of its structural organization and *modus operandi*. Rather than simply supporting a criminal investigative body, it is purposefully designed to operate like one. In principle, these bodies would independently select situation countries, before conducting full *in situ* investigations, undertaking factual and legal analysis to international standards and ultimately producing case-ready briefs for domestic and international criminal trials. To date, only one such NGIB exists: CIJA.

CIJA is the archetype of the NGIB model. It pioneered this new breed of NGO by focusing on “closing gaps between the capacity of public institutions (domestic and international) and their ability to build cases that will lead to successful prosecutions”.<sup>80</sup> Wiley describes it as akin to a “pro-OTP Operations and Investigations Division”.<sup>81</sup>

In an effort to outline the NGIB model in the most comprehensive manner possible, the next part of this section will set out a step-by-step

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<sup>79</sup> Under the auspices of the United Nations, novel investigatory bodies such as the International, Impartial and Independent Mechanism for Syria (‘IIIM’), the Independent, Investigative Mechanism for Myanmar (‘IIMM’), and the Investigative Team for Accountability of Da’esh (‘UNITAD’) have been established with mandates to investigate within the parameters of their respective jurisdictions, with a view to assisting eventual prosecutions. On the other hand, entities such as the Human Rights Center at UC Berkeley and Bellingcat, an investigative journalistic collective, have used open source and social media material in an effort to support the OTP. See, for example, Rafael Braga da Silva, “Sherlock at the ICC? Regulating Third-Party Investigations of International Crimes in the Rome Statute Legal Framework”, in *Journal of International Criminal Justice*, 2020, vol. 18, no. 1, pp. 58–86.

<sup>80</sup> Wiley, 2019, see above note 16.

<sup>81</sup> *Ibid.*

breakdown of the methodology adhered to during the development of their investigative products, ranging from the initial decision to investigate, to the factual and legal analysis needed to produce ‘prosecutable’ case briefs.

### **8.3.2. The Non-Governmental Investigative Body Model: The Commission for International Justice and Accountability as a Case Study**

#### **8.3.2.1. Situational Assessment**

As the body that develops the strategic vision for the organization, the initial impetus to open a theatre of operation in a situation country comes from the CIJA Board of Directors – a body consisting of the Executive Director, the Director of Operations and Investigations, and the Director of Management and External Relations.<sup>82</sup> In doing so, the CIJA Board of Directors must conduct a situational assessment, setting out the basis for doing so, as guided by three key considerations.

First, it must be determined whether crimes are being committed or have recently been committed which fall within their subject matter expertise – principally, international criminal law and, secondarily, terrorism-related criminality.<sup>83</sup> This stage involves a review of the conflict, the actors engaged, the type of criminality and, most importantly, the types of evidence that are potentially useful in identifying individual criminal responsibility.<sup>84</sup> As remarked by Chris Engels, CIJA Director of Operations and Investigations, “this process in particular is about identifying the totality of evidence that we could potentially obtain” in order to get as good an understanding of the “digital, physical, social media, number of deserters or defectors or insiders that might be available or whatever it might be”.<sup>85</sup> As such, this includes identifying potential national investigators and operational partners – a key element to CIJA’s success.<sup>86</sup> Operational partners

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<sup>82</sup> Engels, 2019, see above note 16; Jelačić, 2019, see above note 16. The CIJA Board of Directors consists of William H. Wiley and his deputies: Chris Engels (Director of Operations and Investigations), an American lawyer with more than 15 years of international experience, and Nerma Jelačić (Director of Management and External Relations), former Head of Communications at the ICTY.

<sup>83</sup> Jelačić, 2019, see above note 16.

<sup>84</sup> Engels, 2019, see above note 16.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

are situation-specific and can range from local NGOs to United Nations bodies.

Secondly, there must either be no public authority addressing the situation, or an existing gap that needs to be filled.<sup>87</sup> This stage provides a general understanding of the scope of CIJA's prospective role in the investigative process – that is, whether the situation dictates a capacity-building approach, where CIJA is supporting a public authority in their investigations by filling an operational gap, or whether it necessitates a full investigative operation. Nerma Jelačić, CIJA Director of Management and External Relations, highlighted that the operative risk is balanced against the outcome – specifically, whether there are existing international processes, or a prospect of same, that CIJA-obtained information can be fed into.<sup>88</sup>

Third and finally, there must be funding to engage in the situation.<sup>89</sup> CIJA's operational model requires donor funding on a project-led basis.<sup>90</sup> As such, donors must individually decide whether they will fund each project or not. However, Jelačić stressed that donors have “no input whatsoever” in the strategic and operational decision-making processes.<sup>91</sup> After a situational assessment is completed, an investigative plan is put together. This involves determining exactly how the material that has been identified would be obtained and how to engage with the selected partners on the ground.<sup>92</sup>

Where the three key questions are answered in the affirmative, the situational assessment and investigative plan are presented to the CIJA Board of Commissioners. The Commissioners are “former senior-level practitioners”, with noted expertise in international criminal law, international relations, management and fundraising.<sup>93</sup> As expressed by Jelačić, the Commissioners act as the “legitimate oversight board” for the organization.<sup>94</sup> They provide “strategic guidance” to the Directors in order to assist

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<sup>87</sup> *Ibid.*

<sup>88</sup> Jelačić, 2019, see above note 16.

<sup>89</sup> Engels, 2019, see above note 16.

<sup>90</sup> *Ibid.*

<sup>91</sup> Jelačić, 2019, see above note 16.

<sup>92</sup> Engels, 2019, see above note 16.

<sup>93</sup> *Ibid.*

<sup>94</sup> The CIJA Board of Commissioners is currently composed as follows: Stephen Rapp, former United States Ambassador-at-Large for War Crimes and Chief Prosecutor of both the Special Court for Sierra Leone and the ICTR; Alex Whiting, Head of Investigations at the Specialist

them in achieving the mission and objectives of the organization.<sup>95</sup> Drawing on their experience, the Commissioners opine whether the conditions for engagement are met, in consultation with the Directors.<sup>96</sup> The entirety of the process works by consensus.

### 8.3.2.2. Size and Composition of Investigative Teams

As Jelačić remarked, CIJA “operates in the Golden Hour”.<sup>97</sup> Consequently, the CIJA hiring process is fast and highly flexible, with personnel who are not needed or performing let go, “with equal dispatch”.<sup>98</sup> Factors affecting the size and composition of teams include: the number of perpetrators; the diversity of the victim population; and who the target groups and potential groups of witnesses are.<sup>99</sup> This is an important consideration as these situations typically need language skills, cultural sensitivity and an understanding of the needs of the varying victims.

The bulk of CIJA personnel engaged in any theatre of operation are locally retained and “deployed in the operational area on a full-time basis”, thus ensuring that “*prima facie* evidence is constantly being gathered”.<sup>100</sup> Wiley notes that the key here is CIJA’s physical risk tolerance.<sup>101</sup> Compared to a public authority, organizations like CIJA are able to absorb a comparatively high level of risk, recruit faster and adjust teams dynamically, whilst “ensuring that all personnel are engaged, more or less constantly, in evidence gathering and analytical functions”.<sup>102</sup>

In order to allow the organization to properly discharge these functions, the investigative teams are composed of a wide spectrum of individ-

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Prosecutor’s Office at the Kosovo Specialist Chambers, Professor of Practice at Harvard Law School and former Investigations and Prosecutions Coordinator at the ICC; Larry Johnson, former Chef de Cabinet at the Office of the President of the ICTY; Nawaf Obaid, former Special Counselor to the Saudi Ambassador to the United Kingdom: CIJA “Who We Are” (available on its web site).

<sup>95</sup> CIJA, “Terms of Reference for the Board of Commissioners of the Commission for International Justice and Accountability”, p. 1 (‘Terms of Reference’).

<sup>96</sup> Wiley, 2019, see above note 16; CIJA, Terms of Reference, p. 3, see above note 95.

<sup>97</sup> Jelačić, 2019, see above note 16.

<sup>98</sup> CIJA, “Correspondence with William Wiley”, 21 January 2019 (‘Wiley Correspondence 2019’).

<sup>99</sup> Engels, 2019, see above note 16.

<sup>100</sup> Wiley Correspondence 2019, see above note 98.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

uals drawn from the local civilian population, in addition to those with backgrounds in civil society, law, military, and even local and regional government.<sup>103</sup> After a stringent vetting process, selected candidates are subject to a long term programme of instruction and development, structured around the evidentiary requirements of international criminal prosecutions.<sup>104</sup> Drawing on the situational assessment developed at the outset, the programme also provides operation-specific training on risk and the typology of available material.<sup>105</sup>

### 8.3.2.3. Collection of Information and Factual Analysis

In the collection of relevant information, CIJA and its investigators operate in situations where mass criminality has occurred, and inevitably left a “great deal of sources” in its wake.<sup>106</sup> The direct evidence of the criminality actually occurring on the ground – or ‘crime base’ – is usually easier to document as a consequence, with rich information emerging from a multitude of sources, including reports, witness testimony, video recordings, satellite imagery and social media.<sup>107</sup> As such, rather than focusing its resources on readily available information, CIJA will typically defer this task to public institutions, instead focusing on the greatest challenge in international criminal investigations – linkage evidence.<sup>108</sup>

Linkage evidence is material pertaining to command networks, State apparatus, hierarchies and their functioning, which, after being subjected to complex factual and legal analysis, traces actions on the ground to those behind the scenes who are “physically removed from the criminality but who hold responsibility for it”.<sup>109</sup> Engels explained further that the challenge is that “people in positions of power who agree to engage in the criminality and have others do it on their behalf are aware of the fact that they may be prosecuted”.<sup>110</sup> He maintained that because of this, “in most

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<sup>103</sup> Wiley, 2019, see above note 16.

<sup>104</sup> *Ibid.*

<sup>105</sup> Engels, 2019, see above note 16.

<sup>106</sup> *Ibid.*

<sup>107</sup> Wiley, 2019, see above note 16.

<sup>108</sup> *Ibid.*; Engels, 2019, see above note 16.

<sup>109</sup> Engels, 2019, see above note 16; Fujiwara and Parmentier, 2012, p. 577, see above note 24; the shorthand ‘linkage evidence’ will be used throughout this chapter to refer to the aforesaid.

<sup>110</sup> Engels, 2019, see above note 16.

cases you will not find the material that demonstrates the command of the individual and their engagement with criminality directly”.<sup>111</sup> With that in mind, how does one go about finding this critical evidence among massive amounts of potential indirect materials collected from the field?

Engels asserts that it is a question of discipline and knowing what you are looking for, indicating that:

It is often the case that you have to go through a massive amount of information to get that evidence. It requires a certain amount of discipline and an ability to filter [...] what is relevant for linkage. It is always different but there are a lot of different possibilities [...] you have to work to piece together a significant amount of information, where there are pieces of information that alone might not demonstrate very much, but when taken together provide a solid picture of the individual’s command, ability to control their troops and punish them if required - as well as their knowledge of the criminality.<sup>112</sup>

As was indicated above, finding linkage evidence requires a flexible approach which is in a constant state of change, always dependent on the material being analysed. Nonetheless, there are some constants among the vast differences. “Bureaucratic structures where individuals within the chains of command are operating in great fear of doing something without proper instruction from above” leave traces behind – if only to escape punishment.<sup>113</sup> Be it physical or digital copies of documents or messages – “individuals at mid and low levels will always have some proof of an order”.<sup>114</sup> Engels noted that “as long as you have that kind of structure, you are likely to have records of people having done what they are supposed to”.<sup>115</sup>

In practice, collecting this evidence amid armed conflicts and crisis situations requires trained investigators on the ground, risk tolerance, adherence to appropriate investigatory protocols and a clear understanding of where this part of the process is situated in terms of the larger investigative framework.

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

As put by Engels, investigators on the ground are trained to collect everything and make no selection of material – their job is to collect and preserve.<sup>116</sup> In doing so, they are tasked with looking for a wide range of materials and sources, including, but not limited to, victims, witnesses, defectors, digital or physical documents generated by the offending organizations, as well as materials which may be found on Facebook, captured devices and smartphones. Facebook is considered a critical part of the investigation process, particularly as concerns more loosely structured entities like Da’esh. As expressed by the Head of the Da’esh Crimes Team, while “the Syrian Regime is an old-fashioned document driven case, [Da’esh] does not demonstrate that type of linkage. Their criminality is mainly seen through the fact that they were broadcasting [it] via social media”.<sup>117</sup> Open source investigation is thus a crucial element to capturing linkage evidence in these sorts of cases, with some important work also being directed towards finding leads or materials *via* the Dark Web.

The next step in this process is the corroboration of the material collected and preserved, in order to build multi-sourced evidence which can be ultimately used for successful prosecutions. In this process of corroboration, no individual material is relied upon by itself; it must be fully corroborated with other materials collected. To take an example, a document, whether physical or digital, can only be considered to pass this initial test if it is corroborated by, for example, a defector of said organization or materials from victims of the accused crime. In this, CIJA pays close attention to standards across the criminal justice landscape, not just conflict crimes. Whilst secondary sources such as information received from NGOs and international or intergovernmental bodies may be used to corroborate other materials, they are never relied on by themselves.

The last aspect of the factual analysis is the preparation of the raw factual basis for legal analysts. This stage entails a process of filtration of the materials that will be presented to the legal analysts in order to ensure that it is sufficiently substantiated and absent any defects. The legal analysis will then convert this material into evidence.

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<sup>116</sup> *Ibid.*

<sup>117</sup> Head of Da’esh Crimes Team, 2019, see above note 16.

#### 8.3.2.4. Legal Analysis

Once the factual analysis is complete, the factual basis is submitted to the relevant legal team for legal analysis. Once there, there are various procedural stages which must be passed. First, the factual basis is refined after multiple rounds of feedback between the legal analysts and the investigative teams. Second, the legal teams then begin building the cases on the factual basis. Finally, the built cases are subject to three tiers of review, namely: (i) peer review within the relevant team; (ii) an internal review by the CIJA Board of Directors; and (iii) an external review by the CIJA Board of Commissioners and the CIJA Advisory Panel, which is composed of seasoned international criminal law practitioners drawn from OTPs, chambers and defence teams.

In order to refine the investigative product, local investigative teams receive continuous feedback from the analytical teams on, *inter alia*, what material was of significant evidential value, which techniques or submissions could be improved, what further areas of questioning should be explored with witnesses and which further lines of enquiry should be pursued. The investigative teams, in turn, feed information to the analysts on their location and activities to facilitate better quality requests. According to Engels, “it is back and forth all the time”.<sup>118</sup>

The next step, after feedback, is building the case. Here, the legal analysts use tools to store evidence digitally and simultaneously analyse it and find connections. They then create a matrix for their evidence and feed it through specific filters, such as the policy and authority structure(s) of the perpetrating organization(s). Once the material passes the filters, the legal analysis begins. The underlying facts are then subject to specific contextual legal tests, such as whether an armed conflict existed and whether the perpetrating organization was a military group. CIJA’s legal analysts then go about selecting the offences to use as the basis for their cases. The Head of the Da’esh Crimes Team described their approach to offences as ‘conservative’, focusing primarily on direct perpetration as opposed to joint criminal enterprise as a mode of liability.<sup>119</sup> The Head of the Syrian Regime Crimes Team echoed the conservative nature of the legal team, commenting that:

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<sup>118</sup> Engels, 2019, see above note 16.

<sup>119</sup> Head of the Da’esh Crimes Team, 2019, see above note 16.

You find quite soon that the elements of the crime base are abundantly established. From then, we move on to modes of liability using modes that are very well established in the ICC framework [...] When it comes to individual criminal responsibility, we ask “what are the specific acts or omissions that amount to individual criminal responsibility?” We are basically pretty conservative.<sup>120</sup>

CIJA does not actively search for exculpatory material in the way that a public body conducting the same activity is obliged to. That notwithstanding, the Head of the Syrian Regime Crimes Team indicated that potentially exculpatory evidence obtained during the collection stage “is maintained and kept like any other piece of evidence” and accounted for in the formation of the case briefs by CIJA’s legal analysts.<sup>121</sup> When exculpatory material is found, it is flagged within the case file for the attention of the receiving party. However, ultimately it is for the recipient of the brief to determine what value is to be attached to the evidence in question.

The last aspect of the legal analysis is the case review. After the case file is peer reviewed by the legal team, the brief is then submitted for further review by the CIJA Directors, before being externally reviewed by the CIJA Commissioners and the CIJA Advisory Panel. The Commissioners and Advisors provide extensive feedback on the factual and legal analyses and make their judgments as to the value of the case file, at times criticising the briefs for overstating a case or advising on a strong case which has been understated.<sup>122</sup>

### **8.3.3. Negative Evidential Outcomes and the Non-Governmental Investigatory Body Model: Filling the Accountability Gap?**

CIJA has delivered a considerable number of ‘investigative products’ to a diverse range of actors, including: domestic criminal, civil and immigration proceedings; non-judicial international criminal justice mechanisms such as the International, Impartial and Independent Mechanism for Syria (‘IIM’) and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (‘UNITAD’); and international and intergovernmental organizations such as the Organisation for the Prohibition

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

<sup>121</sup> *Ibid.*

<sup>122</sup> Wiley, 2019, see above note 16.

of Chemical Weapons, Interpol and Europol.<sup>123</sup> To date, CIJA has assisted 32 entities from 13 countries (principally national law enforcement and prosecutorial agencies), received 533 formal requests for assistance and provided information on 1,759 suspects.<sup>124</sup> It has furthermore generated close to 200 reports for its public sector operational partners, in addition to providing the IIMM and UNITAD with copies of the totality of CIJA-collected, *prima facie* evidence, in keeping with the respective mandates of these UN organizations.<sup>125</sup>

These investigative products have, in turn, begun to create results before relevant accountability fora. Evidence gathered by CIJA formed a “critical component” of the civil case filed against the Syrian Arab Republic in a U.S. District Court concerning the latter’s responsibility for the assassination of American journalist Marie Colvin in 2012.<sup>126</sup> CIJA also provided investigative, evidentiary and analytical support in the *Anwar R.* trial, beginning in March 2020 before the German Higher Regional Court of Koblenz. Anwar R. was a colonel of the Syrian General Intelligence Directorate and, to date, the highest-ranking Syrian regime official to be prosecuted under the principle of universal jurisdiction. He is accused of, *inter alia*, having overseen the torture and abuse of over 4,000 detainees held under his command between 2011–2012.<sup>127</sup>

In the neighbouring Netherlands, Oussama Achraf Akhlafa, a returning Da’esh foreign fighter, was sentenced to seven and a half years imprisonment in July 2019 for membership of a terrorist organization and for the war crime of committing outrages upon human dignity and degrading treatment.<sup>128</sup> Aside from being the first war crimes European conviction for a returning Da’esh fighter, the judgment drew on a series of evidentiary

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<sup>123</sup> *Ibid.*; Jelačić, 2019, see above note 16.

<sup>124</sup> CIJA, “Who We Are”, (available on its web site); CIJA, “Correspondence with William Wiley”, October 2020 (‘Wiley Correspondence 2020’).

<sup>125</sup> CIJA, “All Entities Request for Assistance Figures 2018–2019”, 15 January 2019, p. 1; Wiley Correspondence 2020, see above note 124.

<sup>126</sup> United States District Court for the District of Columbia, *Cathleen Colvin et al. v. Syrian Arab Republic*, Amended Memorandum Opinion, 30 January 2019, Civil Action N. 16-1423 (ABJ) (‘*Cathleen Colvin et al.*’); Anna Barnard, “Syria Ordered to pay \$302.5 Million to Family of Marie Colvin”, in *The New York Times*, 31 January 2019; CIJA, “Key Successes” (available on its web site).

<sup>127</sup> *Ibid.*; Open Society Justice Initiative, “Federal Prosecutor’s Office v. Anwar R.”, (available on its web site).

<sup>128</sup> Reuters, “Dutch Court convicts Islamic State Militant of War Crimes”, 23 July 2019.

materials provided by CIJA, including the submission of a detailed analytical report to the prosecutors involved in the case.<sup>129</sup>

Another example arose in March 2019 when the German Higher Regional Court of Munich convicted and sentenced Zoher, a former leader of an extremist armed group in Aleppo, for the provision of material support to a terrorist organization.<sup>130</sup> During this trial, CIJA personnel provided expert testimony, including Wiley himself, who testified to the organization's objectives, structures and working methods. Importantly, the key witness in the case was a CIJA field investigator based in Syria, who answered questions concerning the conduct which formed the basis of the charges levied against the accused.<sup>131</sup>

That notwithstanding, a CIJA case brief is yet to come before the ICC. As such, there are no examples that can be used to directly measure their impact on evidential outcomes at the international level. It is possible, however, to do so indirectly by evaluating the NGIB model against the established *causes* of previous negative evidential outcomes at the ICC. In doing so, the NGIB model can be assessed as a response to a lack of State co-operation, as well as other root causes of the aforesaid.

### **8.3.3.1. *Abu Garda, Gbagbo and Blé Goudé: Negative Evidential Outcomes Owing to an Absence of Linkage Evidence***

As already discussed above, in the *Gbagbo* and *Blé Goudé* acquittals, the key to the Court's finding of no case to answer was that the Prosecution had not proven that the speeches of the accused "constituted ordering, soliciting or inducing" the crimes against humanity that occurred on the ground.<sup>132</sup> Recall also that in the *Abu Garda* decision, the quality of the evidence linking the accused to the historical events lacked to such an extent that Judge Tarfusser mused as to why the majority even considered the legal merits of the argument.<sup>133</sup> Both instances are, of course, a question of linkage evidence. As has been discussed extensively in this chapter, this is

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<sup>129</sup> CIJA, "Annual Report 2019–2020", 11 September 2020, p. 11.

<sup>130</sup> Oberlandesgericht München, "Strafverfahren gegen Zoher J. wegen Verdachts der Mitgliedschaft in einer terroristischen Vereinigung im Ausland ("Jabhat al-Nusra" sowie "Islamischer Staat")", 21 March 2019.

<sup>131</sup> CIJA, "Key Successes", see above note 126.

<sup>132</sup> Wiley, 2019, see above note 16.

<sup>133</sup> ICC, *Abu Garda* Confirmation Decision, Separate Opinion by Judge Cuno Tarfusser, paras. 3, 6, see above note 7.

CIJA's established area of expertise, with many national authorities and intergovernmental bodies seeking its assistance as a result. In fact, Wiley has stressed that CIJA employs so many analysts because the organization is "almost entirely geared towards linkage work".<sup>134</sup> Further, this is an area of specialism well suited to NGIBs as the inherent dynamism of this model allows for the composition to be rapidly optimized to accelerate the collection and subsequent analysis of material.

A practical example of how the NGIB model can be used to overcome the aforesaid negative evidential outcome can be observed in the domestic setting, namely CIJA's engagement in the *Anwar R.* trial and in *Colvin et al. v. Syrian Arab Republic*. In the former, CIJA provided evidence to German prosecutors establishing Anwar R's command and control of the interrogation section of Branch 251, a nefarious element of the Syrian Intelligence apparatus where political prisoners were allegedly tortured and killed *en masse*.<sup>135</sup> As concerns *Colvin et al.*, CIJA provided necessary linkage evidence and expert testimony on the command, control and communication systems of the Syrian military and intelligence services to help establish that the Syrian Arab Republic actively directed the extrajudicial killing of an American journalist by attacking the Baba Amr Media Center.<sup>136</sup> In the course of his written expert testimony, the leading CIJA analyst detailed the mechanisms through which senior Syrian regime figures monitored and directed the killings of clearly identified groups, including protesters and journalists, thereby linking them to the conduct in question.<sup>137</sup>

### **8.3.3.2. *Mbarushimana*: Negative Evidential Outcomes Owing to Over-Reliance on Indirect Evidence**

In *Mbarushimana*, the key issue was the Prosecution's reliance on indirect evidence, in the form of NGO reports, to establish the contextual elements of their crimes.<sup>138</sup> However, one of the definitive aspects of the approach taken by CIJA is that it relies almost exclusively on primary sources for its investigative products.

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<sup>134</sup> Wiley, 2019, see above note 16.

<sup>135</sup> Anchal Vohra, "If a Torturer Switches Sides, Does He Deserve Mercy?", in *Foreign Policy*, 20 April 2020 (available on its web site).

<sup>136</sup> *Cathleen Colvin et al.*, p. 35, see above note 126.

<sup>137</sup> *Cathleen Colvin et al.*, Expert Report of Ewan Brown, see above note 126.

<sup>138</sup> ICC, *Mbarushimana* Confirmation Decision, para. 117, see above note 7.

As has been discussed, the standard procedure in an NGIB like CIJA is to independently corroborate any and all secondary material – to the extent that there is any need to take such materials into consideration. In contrast to the OTP, NGIBs make far greater use of local recruitment. This, coupled with their comparatively greater appetite for risk, enables NGIB investigators to interact more readily with sources of direct evidence of alleged international crimes in a way that an ICC investigator might not be able to. In the Syrian context, this locally sourced approach has allowed for the collection of, *inter alia*, one million original pages of regime documentation which underpin all of CIJA’s regime case briefs. A similar approach is taken to the building of Da’esh cases atop primary evidence collected, for the most part, in Syria and Iraq. Taking CIJA as the archetype, Wiley also noted that the bulk of the personnel are retained locally, where “they are paid at the commensurate rates”.<sup>139</sup> As such, the proximity to the situation country also lowers operational costs, freeing up more resources to explore additional investigative channels.

### **8.3.3.3. The Kenya Cases: Negative Evidential Outcomes Owing to Defective State Co-operation**

Much like the OTP, NGIB activities in a situation country can be greatly assisted by the co-operation of the receiving State; for instance, as is the case with CIJA in Iraq. However, NGIBs are created with their independence from State infrastructure borne heavily in mind.<sup>140</sup> As a consequence, they are arranged to absorb a high degree of risk and readily identify domestic and international partners outside of the infrastructure of the relevant State, so as to ensure that they are able to continue to function where co-operation falters or is otherwise non-existent.

In Syria, for example, Wiley noted the extremely hostile environment and the unique evidentiary challenges presented, such as the constant physical danger and complete absence of a public enforcement entity.<sup>141</sup> However, despite this, the organization has managed to obtain approximately one million pages of documents and has completed eighteen case files, each against dozens of individuals, including Assad himself.<sup>142</sup> From an evidentiary point of view, this manner of organization is able to restructure

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<sup>139</sup> Wiley, 2019, see above note 16.

<sup>140</sup> Jelačić, 2019, see above note 16.

<sup>141</sup> Wiley, 2019, see above note 16.

<sup>142</sup> Wiley Correspondence 2019, see above note 98; CIJA, “Home” (available on its web site).

its entire investigative approach in response to the unique needs of the situation at hand, allowing it to change and evolve more quickly than any public authority acting in the same capacity. What started as an investigation into Syria has led to the development of: databases containing over one million names of regime officials; remote programs for sharing evidence with multiple public partners; suspect tracking systems and more. In short, NGIBs are not just a solution to the accountability gap caused by a lack of State co-operation – their proliferation has the potential to cause a shift in the way that international criminal justice is realized at all levels.

In adopting the standards, protocols and *modus operandi* of criminal investigative entities such as the OTP, these non-governmental bodies may prove to be a considerable asset in overcoming political and diplomatic barriers to justice for atrocity crimes. CIJA has begun to demonstrate that, through their ability to obtain results in otherwise inaccessible crime scenes, NGIBs may continue to enhance domestic and international trials. However, as the model becomes more successful, it could also change the policy of national and international prosecutorial bodies as concerns reliance on evidence presented by such non-governmental entities. The NGIB model could therefore be the initial step towards the creation of a more robust web of actors co-operating in pursuing accountability, while adopting the highest investigative standards necessary for trials in *all* jurisdictions.

That is not to say that the scenario presented comes with no associated risks and challenges – or even controversies.<sup>143</sup> While CIJA has so far proven to be successful in its professional endeavours, it is difficult to envisage the raw materials for this formula simply lying around. Others may form NGIBs but without properly accounting for the necessary risk tolerance, rigorous grounding in international criminal and humanitarian investigations, and critically, the relevant funding. There are, however, means to mitigate the above-mentioned challenges. These include, for example, having NGIBs operate within the remits of public institutional requirements when collaborating with said bodies, or through co-operation and capacity building among NGIBs and the standardization of best practices through initiatives such as the Nuremberg Guidelines for Non-Public Investigative

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<sup>143</sup> European Anti-Fraud Office ('OLAF'), "OLAF unravels fraud among partners in Rule of Law project in Syria", 24 March 2020, Press Release No. 08/2020; Arjen van der Ziel, "De oorlogsonderzoekers in Syrië liggen nu zelf onder de loep", in *Trouw*, 22 May 2020.

Bodies in the field of International Criminal Law and Humanitarian Law ('Nuremberg Guidelines').<sup>144</sup>

Nevertheless, the ultimate test for the NGIB model is its ability to facilitate successful prosecutions of persons accused of core international crimes at the domestic and international levels. The growing use of NGIBs in domestic proceedings is cause for optimism. What remains absent to this point are international prosecutions built upon substantial NGIB support. If the purported benefits of the NGIB model are ever to be truly realized, it must prove itself within this critical forum. It is thus essential to determine precisely *how* NGIBs could co-operate with arguably one of their most important endpoints – the OTP of the ICC.

#### **8.4. Terra Incognita: Exploring the Modalities of a Framework for Co-operation between Non-Governmental Investigatory Bodies and the Office of the Prosecutor**

##### **8.4.1. Gateways for Co-operation in the Rome Statute System: Squaring the Circle?**

In contrast to the extensive legal framework provided for State co-operation, NGOs have a relatively modest presence in the Rome Statute, despite the OTP considering them “critical” co-operation partners.<sup>145</sup> Nevertheless, there are three discernible mechanisms for OTP-NGIB co-operation in the text of the Statute, through which the OTP may formally engage with NGOs in order to discharge its primary functions. However, each of these provisions – or ‘co-operation gateways’ – vary greatly in

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<sup>144</sup> Given the novelty of the undertaking and phenomenon of non-public bodies investigating international crimes, the importance of public scrutiny and the need for guidelines of such bodies has been established. An initiative led by the International Nuremberg Principles Academy and based on a broad consultative process with CIJA and experts in the field of international criminal law has resulted in Nuremberg Guidelines for Non-Public Investigative Bodies in the field of International Criminal Law and Humanitarian Law, forthcoming.

<sup>145</sup> ICC-OTP, 2012 Prosecutorial Strategy, p. 23, see above note 11; Emily Haslam, “Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society”, in *International Journal of Transitional Justice*, 2011, vol. 5, no. 2, p. 232; Coalition for the International Criminal Court (‘CICC’), “Rome Report of the Coalition for an International Criminal Court: The Role of the Coalition at the UN Diplomatic Conference Establishing the International Criminal Court 15 June – 17 June 1998”, 2018, pp. 3–4; De Silva, 2017, p. 171, see above note 13; Deirdre Clancy, “‘They told us we would be part of history’: Reflections on the Civil Society Intermediary Experience in the Great Lakes Region”, in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015, p. 224.

terms of their nature and scope.<sup>146</sup> The first, Article 15(2) of the Rome Statute, provides that the Prosecutor may receive and request information from NGOs about a situation within the Court's jurisdiction for the purpose of analysing its seriousness.<sup>147</sup> The second provision, Article 44(4) of the Statute, provides that the OTP may, in exceptional circumstances, employ the expertise of gratis personnel, which has, in practice, been taken to include the use of NGOs as intermediaries.<sup>148</sup> The third and final gateway, under Article 54(1)(b) of the Statute, is a residual power of a markedly broader scope, empowering the Prosecutor to take "appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court."<sup>149</sup>

Taking into account the *sui generis* nature of NGIBs and the need for creative solutions, what follows is an assessment of the compatibility of the NGIB model with the co-operation gateways described in the foregoing. This section will conclude with the extent to which co-operation between the OTP and NGIBs could ever be organized under the Rome Statute.

#### **8.4.1.1. Co-operation Gateway I: Article 15(2) of the Rome Statute**

The Prosecutor's *proprio motu* power to initiate investigations under Article 15 of the Statute is dependent on information concerning crimes within the jurisdiction of the Court that is either received or sought from, *inter alia*, NGOs.<sup>150</sup> Article 15(2) of the Statute is therefore the first co-operation gateway between the OTP and NGOs. Depending on whether the NGO in question submits information to the Prosecutor or is requested to provide additional information, this provision provides the basis for 'proactive' or 'reactive' co-operation with the OTP.

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<sup>146</sup> The shorthand 'co-operation gateway' will be used throughout this chapter to refer to the aforesaid.

<sup>147</sup> Rome Statute, Article 15(2), see above note 2; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 402; Haslam, 2011, p. 232, see above note 145.

<sup>148</sup> Rome Statute, Article 44(4), see above note 2.

<sup>149</sup> Rome Statute, Article 54(1)(b), see above note 2.

<sup>150</sup> Rome Statute, Article 15(2), see above note 2; Schabas, 2016, p. 402, see above note 147; Mark Klamberg, "Article 15: Prosecutor", in Klamberg (ed.), 2017, pp. 184–185, notes 189–190, see above note 26.

For proactive co-operation, an NGO merely has to submit an Article 15 communication to the Prosecutor.<sup>151</sup> Pursuant to the first sentence of Article 15(2) of the Statute and Rule 104 of the Rules of Procedure and Evidence, the Prosecutor must always “analyse the seriousness of information received”, making this co-operation gateway one of the most utilized to provide information to the OTP.<sup>152</sup> At the time of writing, the Office has received 14,068 Article 15 communications – primarily from individuals and NGOs.<sup>153</sup> Pursuant to the second sentence of Article 15(2) of the Rome Statute, the Prosecutor “may seek additional information” from NGOs and “may receive written or oral testimony at the seat of the Court”.<sup>154</sup> The decision to seek further information is therefore discretionary, and forms the basis of ‘reactive’ co-operation between the OTP and NGOs, where the Prosecutor is able to send requests for information on alleged crimes to NGOs, leaving them with the choice to respond to such requests for assistance.<sup>155</sup>

As a standalone regime, however, the limited scope of Article 15(2) is ill-suited for full NGIB engagement. Article 15 forms part of the preliminary examination framework – a stage at which the Prosecutor does not enjoy full investigative powers.<sup>156</sup> Accordingly, whilst NGOs and other actors may submit any form of information to the Court, when acting under Article 15(2), the Prosecutor is ultimately confined in its response to activities which will enable it to determine whether there is a “reasonable basis” to conclude that core crimes have been or are being committed in the situation country.<sup>157</sup> Whilst there is undoubtedly some room for NGIB involve-

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<sup>151</sup> *Ibid.*; ‘Communications’ being the term adopted by the OTP to describe information which is provided to it on the basis of Article 15.

<sup>152</sup> Rome Statute, Article 15(2), see above note 2; ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 104(1) (<http://www.legaltools.org/doc/8bcf6f>); Schabas, 2016, p. 402, see above note 147; Klamberg, 2017, pp. 184–185, notes 189–190, see above note 150.

<sup>153</sup> *Ibid.*; ICC-OTP, “Report on Preliminary Examination Activities 2019”, 5 December 2019, p. 8 (<http://www.legal-tools.org/doc/lq7j94/>); Report on Preliminary Examination Activities 2018, p. 9, see above note 18.

<sup>154</sup> Rome Statute, Article 15(2), see above note 2.

<sup>155</sup> Rome Statute, Article 15(2) see above note 2; Schabas, 2016, p. 402, see above note 147; Klamberg, 2017, pp. 184–185, notes 189–190, see above note 150.

<sup>156</sup> ICC-OTP, “Policy Paper on Preliminary Examinations”, 1 November 2013, para. 85 (<http://www.legal-tools.org/doc/acb906/>).

<sup>157</sup> ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Repub-

ment pre-investigation, the comparatively low standard of proof and the limited powers available to the Prosecutor mean that there is little utility in their doing so, as it is unlikely to build capacity in a way which mitigates the risk of the negative evidential outcomes already discussed.

#### **8.4.1.2. Co-operation Gateway II: Article 44(4) of the Rome Statute**

Article 44(4) of the Rome Statute provides that the Court may “in exceptional circumstances” employ the expertise of “gratis personnel” or individuals on secondment from States, intergovernmental organizations or NGOs to assist with the work of any of the organs of the Court.<sup>158</sup> Broadly utilizing the same power, there is a growing practice of the OTP using intermediaries in the field<sup>159</sup> – a practice which has become so entrenched that it is now viewed as “critical to the effective work of the Court”.<sup>160</sup>

The Guidelines Governing the Relations between the Court and Intermediaries (‘Intermediary Guidelines’) broadly define an intermediary as:

A person who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other.<sup>161</sup>

The OTP has been most active in its use of intermediaries, using them to, among other activities, access local communities and gather witnesses and evidence of crimes.<sup>162</sup> According to the Intermediary Guidelines, the OTP may further utilize them to “assist in identifying evidentiary leads and/or witnesses”, “[facilitate] contact with (potential) witnesses)” and to

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lic of Côte d’Ivoire, 3 October 2011, ICC-02/11-15, para. 29 (<http://www.legal-tools.org/doc/ea2793/>); Rome Statute, Article 15(2), see above note 2.

<sup>158</sup> Rome Statute, Article 15(2), see above note 2; Yvonne McDermott, “Article 44: Staff”, in Klamberg (ed.), 2017, p. 369, note 389, see above note 26.

<sup>159</sup> Strictly speaking, neither the Rome Statute nor its subsidiary texts provide a direct basis for the use of intermediaries. De Silva argues that their use stems from a constructive reading of Article 44(4) and the ICC’s discretion over its institutional policies and practices. See De Silva, 2017, p. 181, above note 13.

<sup>160</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Prosecution’s submissions in response to Trial Chamber’s oral request of 10 February 2010, 25 February 2010, ICC-01/04-01/06-2310-Red, para. 14 (‘*Lubanga*, 25 February 2010’) (<http://www.legal-tools.org/doc/24feab/>).

<sup>161</sup> ICC, Guidelines Governing the Relations between the Court and Intermediaries for Organs of the Court and Counsel working with Intermediaries, 1 March 2014, p. 5 (‘Intermediary Guidelines’) (<http://www.legal-tools.org/doc/e0f990/>).

<sup>162</sup> De Silva, 2017, p. 181–182, see above note 13; *Lubanga*, 14 March 2012, para. 181, see above note 49; *Lubanga*, 25 February 2010, paras. 12–14, see above note 160.

“communicate with [victims and witnesses] in situations in which direct communication with the Court could endanger the safety of the victim/witness”.<sup>163</sup> In practice, they are also used to: monitor the situation and document international crimes; assist in the preservation of evidence; assist the OTP to locate and contact witnesses and other investigative leads; and to maintain contacts between the OTP and witnesses (for both investigation and protection purposes), particularly where it is adjudged to be too insecure for OTP staff to do so directly.<sup>164</sup>

However, whilst intermediaries are now an established feature in OTP investigations, and with ever increasing functions, the tension between their use and the NGIB model will likely render this co-operation gateway unviable. For example, both the guidelines applicable to intermediaries and gratis personnel are unequivocal in establishing that they are not to be used as a substitute for staff discharging the primary functions of the Court’s mandate.<sup>165</sup> In principle, NGIBs as entities exist to exercise the primary investigative functions that one would usually only expect to find within the OTP - a feature that clearly clashes with the Court’s stance on substitution. Moreover, when working for the Prosecutor, neither category of personnel is permitted to seek or accept instructions from any other organization, instead effectively becoming agents of the OTP for the period of the engagement.<sup>166</sup> In contrast to a partnership governed by a memorandum of understanding, the lack of autonomy that necessarily flows from an Article 44(4) engagement would likely impinge upon the ability of the NGIB to independently execute its mandate. It may further frustrate the efforts of the NGIB to work with other criminal justice partners in the same location, such as international organizations and local governments.

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<sup>163</sup> Intermediary Guidelines, Annex I, Summary of the Activities of Intermediaries (by Function and Organ/Unit), p. 2, see above note 161.

<sup>164</sup> *Ibid.*; *Lubanga*, 25 February 2010, paras. 12–14, see above note 160.

<sup>165</sup> Intermediaries “are not a substitute for staff for the implementation of the mandate of the Court”: See *ibid.*, p. 3. Gratis personnel “may not be sought or accepted as a substitute for staff to be recruited against posts authorized for the Court’s regular and normal functions”. See ICC, Guidelines for the Selection and Engagement of Gratis Personnel at the International Criminal Court, 3 December 2005, ICC-ASP 4/32 Res. 4., Annex II (‘Gratis Personnel Guidelines’), Section 2.

<sup>166</sup> *Ibid.*; ICC, “Model Contract for Intermediaries”, 2014, Article 5.

#### 8.4.1.3. Co-operation Gateway III: Article 54(1)(b) of the Rome Statute

The final co-operation gateway identified is Article 54(1)(b) of the Rome Statute. It stipulates that the Prosecutor shall “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>167</sup> Sub-paragraph (b) provides the Prosecutor with the power to determine the measures they consider ‘appropriate’ and should be read together with the Prosecutor’s obligation to “establish the truth” under Article 54(1)(a) of the Statute.<sup>168</sup> This article provides the Prosecutor with the discretion to decide what is considered to be an appropriate measure. For our purposes, this article is a co-operation gateway in so far as the OTP may decide that co-operation with an NGO is an “appropriate measure” to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. Seeking co-operation or forming a relationship with an NGO under this provision would also not be subject to the same formalities required for seeking co-operation or an agreement with a State or intergovernmental organization under Article 54(3) of the Statute.<sup>169</sup> Furthermore, as clarified by Pre-Trial Chamber II in the *Situation in Kenya*, the Prosecutor would not be subject to judicial oversight for their compliance with Article 54(1). In fact, the Court noted that, lacking any statutory provision to the contrary, “the Chamber is not competent to intervene in the Prosecutor’s activities carried out within the ambit of Article 54(1) of the Statute”.<sup>170</sup>

The Prosecution’s understanding of its obligation to ensure ‘effective investigation and prosecution’ under Article 54(1)(b) is detailed further in Article 51 of the Prosecutor’s Code of Conduct.<sup>171</sup> The Code of Conduct provides that, in accordance with Article 54(1)(b), members of the Office shall ensure that the *standards* of effective investigation and prosecution

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<sup>167</sup> Rome Statute, Article 54(1)(b), see above note 2.

<sup>168</sup> Karel De Meester, “Article 54: Duties and Powers of the Prosecutor with Respect to Investigations”, in Klamberg (ed.), 2017, p. 403, note 434, see above note 26; Schabas, 2016, pp. 848–849, see above note 147.

<sup>169</sup> Rome Statute, Article 54(3)(c), (d), see above note 2; De Meester, 2017, p. 403, notes 440–441, see above note 168.

<sup>170</sup> ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber, “Decision on the “Victims’ Request for Review of Prosecution’s Decision to Cease Active Investigation”, 5 November 2015, ICC-01/09-159, para. 13 (<http://www.legal-tools.org/doc/18b367/>).

<sup>171</sup> ICC-OTP, “Code of Conduct for the Office of the Prosecutor”, 5 September 2013, Article 51 (<http://www.legal-tools.org/doc/3e11eb/>).

are upheld and shall, *inter alia*, act with competence and diligence, fully respect the rights of persons under investigation and refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognized human rights as per Article 69(7) of the Statute.<sup>172</sup>

Beyond these provisions, there is no explicit guidance on the exact scope of what constitutes “appropriate measures” under Article 54(1)(b) of the Statute. Interpreting Article 54(1)(b) in good faith, in accordance with its “ordinary meaning”, leads to the conclusion that the Prosecutor has an undefined degree of discretion when it comes to determining what is deemed to be an “appropriate measure” to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.<sup>173</sup> That discretion would be used on an *ad hoc* basis, subject to the necessities of the moment, rather than in one predetermined manner. It was acknowledged, for example, by the Prosecutor in the OTP’s Policy Paper on Case Selection and Prioritisation, that “case prioritisation flows from the requirement under Article 54(1)(b) that the Office take appropriate measures to ensure the effective investigation and prosecution of crimes”.<sup>174</sup>

Having examined the nature and permissible scope of engagement presented by each gateway, it is considered that Article 54(1)(b) of the Rome Statute is the most suitable for OTP-NGIB co-operation. Article 54(1)(b) provides wide discretion for the Prosecutor to organize the best possible relationship between the Office and NGIBs. In this manner, the NGIB in question could guarantee that its core independence, protocols and style of operation were respected by the OTP. On the part of the OTP, Article 54(1)(b) of the Statute provides considerable latitude for the Prosecutor to develop an *ad hoc* framework to regulate the partnership. Such an agreement would allow either party to clearly delineate their areas of competence and establish protocols and modalities for information sharing, joint investigations and best practice. This would enable the OTP to maximize any benefits that it may derive from NGIB co-operation. Moreover, this gateway provides a direct route for the Prosecutor to extend the ethical obligations under Article 51 of the Prosecutor’s Code of Conduct onto the

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<sup>172</sup> *Ibid.*

<sup>173</sup> Vienna Convention on the Law of Treaties, 23 May 1969, Article 31 (‘VCLT’) (<http://www.legal-tools.org/doc/6bfcd4>).

<sup>174</sup> ICC-OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, para. 49 (<http://www.legal-tools.org/doc/182205/>).

part of the cooperating NGIB. Such a relationship would create a level of accountability that presently does not exist for NGIBs, whilst further strengthening soft law initiatives like the Nuremberg Guidelines that are beginning to emerge to address this *non liquet*. This standardization and regulation would also go a considerable way towards the OTP's strategic goal of encouraging higher quality investigations by third party actors by "making its standards, lessons learned and best practices available for use".<sup>175</sup>

To see a potential, albeit institutionally distinct, example of what a relationship of this category could look like, one need not look further than the existing relationship between the IIIM and CIJA. These organizations have signed two memoranda of understanding based on a wider framework called the 'Lausanne Platform of April 2018'. This framework outlines a set of overarching principles to guide their engagement and to "ensure mutual understanding regarding opportunities for collaboration, in furtherance of both parties' common goal of ensuring justice, accountability and redress for victims of crimes committed in Syria".<sup>176</sup> Beyond access to a large part of CIJA's archives and case briefs on Syria, the agreements in question further regulate the transfer of copies of those materials to the IIIM, in conformity with applicable European privacy laws.<sup>177</sup> Notably, the documents also set out a general consensus between the parties that enables collaborative engagement, with provision made for individual memoranda to address more technical aspects of their relationship, such as operational details and working procedures.<sup>178</sup> A similar agreement is in place between CIJA and UNITAD.

Arguably, the CIJA-IIIM Partnership, as much as the Lausanne Platform in a wider context, is the closest parallel to the relationship proposed and it demonstrates the way in which an OTP-NGIB partnership could both expedite and enhance the execution of prosecutorial functions under the

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<sup>175</sup> OTP, 2019 Prosecutorial Strategy, para. 51, above note 11.

<sup>176</sup> International, Impartial and Independent Mechanism for Syria (IIIM), "Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform", 3 April 2018 ('IIIM, "Protocol of Cooperation").

<sup>177</sup> Michelle Burgis-Kasthala, "Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice", in the *European Journal of International Law*, 2019, vol. 30 no. p. 1184.

<sup>178</sup> IIIM, "Protocol of Cooperation", see above note 176.

Rome Statute. Indeed, the IIIM has advocated for the value added by “public-private” relationships of this nature, indicating in its 2019 Report to the United Nations General Assembly that, through the technologies and methodologies it has been able to derive from this relationship, it has reduced the tasks and labour required for its core activities “from weeks to hours”.<sup>179</sup> This practical example is an illuminating case study, not only of the potential contours of this class of co-operation, but also of the benefits which may be derived. The Article 54(1)(b) regime means that such an avenue remains open to the OTP. However, it remains to be seen whether the Prosecutor has the appetite. That said, given that CIJA is already operating in a number of active ICC situation countries, the time for such a decision may come sooner than later.

### **8.5. Conclusion: An Offer We Cannot Refuse?**

The purpose of this inquiry is to explore the relationship between non-governmental investigatory bodies and the Office of the Prosecutor of the International Criminal Court. Using negative evidential outcomes as a performance indicator, it has reviewed the practice of the OTP to establish the precise impact that a lack of State co-operation is having on the prosecution of crimes under the jurisdiction of the Court. This deep dive has sought to establish that whilst State co-operation had been by far the most impactful factor *vis-à-vis* negative evidential outcomes, it was by no means the only contributor – blame also lay with successive OTP investigative failures.

The chapter posits that the NGIB is a solution to the recurring problem of negative evidential outcomes, with a focus on CIJA. Drawing on interviews conducted with senior CIJA staff and the growing body of universal jurisdiction prosecutions in which the organization has been involved, the NGIB model was assessed for its effectiveness as a response to: (i) a lack of State co-operation; (ii) the under-investigation of linkage evidence; and (iii) the over-reliance on material from secondary sources. However, where the performance of the OTP was lacking, the practice of NGIBs provided examples of how to successfully address these challenges, particularly given their comparatively greater appetite for risk, their focus

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<sup>179</sup> Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/73/741, 13 February 2019, para. 15 (<http://www.legal-tools.org/doc/8fgco9/>).

on linkage evidence and primary sources, and their emphasis on local staffing.

Finally, the discussion went on to explore the prospective gateways for OTP-NGIB co-operation within the auspices of the Rome Statute. It was determined that the residual investigative power of the Prosecutor under Article 54(1)(b) provides the most fertile ground for a mutually beneficial relationship. In doing so, the Prosecutor would have the competence to create an *ad hoc* framework for operation-specific partnerships that respects the independent functioning of both actors, whilst also providing scope for the Office to extend the ethical obligations under Article 51 of the Prosecutor's Code of Conduct onto the part of the cooperating NGIB. Using the nature of the partnership between CIJA and the IIIM as the closest parallel to such a relationship, we concluded that the OTP stands to benefit from higher quality investigations, standardized best practice and access to technologies and methodologies that may lead to greater efficiencies in the execution of prosecutorial functions before the Court.

As the chapter draws to a close, it is opportune to discuss the wider context behind this shift in the so-called public-private dynamic in the field of international criminal justice. Ultimately, the advent of the NGIB must be recognized as a functional adjustment to barriers to the full realization of those objectives envisioned at Rome. While the Court was born of boundless optimism around what the international criminal justice project could be, insufficient heed was paid to the dangers of placing its most important vehicle at the mercy of political will. It is by now clear that a State co-operation deficit has given rise to a structural weakness which, in turn, has damaged the performance of the Office in areas intrinsically linked to its ability to successfully prosecute cases before the Court. However, a potential lifeline has emerged.

The NGIB model is designed with the aim of addressing the issues set out in this chapter through the delivery of comprehensive investigative products, and all for the singular purpose of facilitating prosecutions of alleged high-level perpetrators. What use, if any, is to be made of this resource by the Court is currently a matter for the Prosecutor. However, as the negative evidential outcomes mount and NGIBs show a willingness to operate in ICC situation countries, the Office may soon find that this is an offer that it simply *cannot* refuse.



**SECTION B:  
JURISDICTION AND ADMISSIBILITY:  
NORMATIVE CONSIDERATIONS  
AND PROSECUTORIAL DISCRETION**



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# General Assembly Referral to the International Criminal Court

Fergal Gaynor\*

## 9.1. Introduction

“In the face of blatant inhumanity, the world has responded with disturbing paralysis”, said the United Nations (‘UN’) Secretary-General in late October 2015, following a round of vetoes at the UN Security Council (‘Security Council’) on the situation in Syria, which, *inter alia*, prevented referral of Syria to the ICC. “This flouts the very *raison d’être* of the United Nations”, he added.<sup>1</sup> The future of the International Criminal Court (‘Court’ or ‘ICC’) in the decades ahead depends to some degree on whether the ICC’s Assembly of States Parties (‘ASP’) decides to amend the Rome Statute of the International Criminal Court (‘ICC Statute’)<sup>2</sup> to facilitate referral of situations to the Court by the UN General Assembly. This turns on the legal question of whether the General Assembly has authority under the UN Charter (‘Charter’) to refer crimes committed on the territory of an ICC non-party State to the ICC for investigation and prosecution. If the General Assembly has such authority, a two-thirds majority of the ICC’s States Parties could amend the ICC Statute to facilitate referral by the General Assembly.<sup>3</sup>

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<sup>1</sup> International Committee of the Red Cross (‘ICRC’), “World at a Turning Point: Heads of UN and Red Cross Issue Joint Warning”, 30 October 2015.

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>3</sup> Any State Party may propose an amendment to the ICC Statute. The adoption of an amendment is by consensus, failing which amendment requires a two-thirds majority of States Parties (Article 121 of the ICC Statute, *ibid.*).

The ICC Statute currently envisages referral of crimes on the territory of non-party States only by the Security Council.<sup>4</sup> Vetoes by permanent members of the Security Council have prevented referral of large-scale atrocity crimes to the ICC,<sup>5</sup> against the express wishes of a great majority of members of the General Assembly.

Following repeated instances of Security Council inaction on accountability, and in the absence of meaningful progress on Security Council reform, creative responses have emerged. Acting through the General Assembly and the Organisation for the Prohibition of Chemical Weapons ('OPCW'), dozens of States from all parts of the world have taken historic steps to promote accountability in the face of Security Council inaction; these are discussed below. But there has been little effort to reassess the Security Council's exclusive function, in Article 13 of the ICC Statute, to refer a situation in a non-party State to the ICC. In particular, there has been little discussion of whether General Assembly referral would be *intra vires* and therefore might provide a legitimate basis for the exercise of the Court's jurisdiction. This chapter therefore aims to address the legal question<sup>6</sup> of whether the General Assembly has power to refer under the Charter.

ICC States Parties will be unlikely to approve a new basis for exercise of jurisdiction unless they are persuaded that General Assembly referral does not unlawfully invade on the Security Council's powers under the Charter. Any amendment of the ICC Statute to facilitate General Assembly referral should observe the principle that the Security Council has primary, and the General Assembly has subsidiary, responsibility for peace and security under the Charter. General Assembly referral should be additional to, rather than a replacement of, the Security Council's existing referral func-

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<sup>4</sup> The ICC Statute envisages the exercise of jurisdiction over war crimes, crimes against humanity, and genocide where a State Party refers crimes committed in a State Party or by nationals of a States Party; where the Security Council refers crimes committed in, or by nationals of, any State; or where the Prosecutor decides *proprio motu* to exercises jurisdiction over crimes in a State Party or by nationals of a State Party, Articles 12(2) and 13 of the ICC Statute, see above note 2. Specific provisions address the Court's jurisdiction over the crime of aggression, Articles 15*bis* and 15*ter* of the ICC Statute, see above note 2.

<sup>5</sup> See Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Cambridge University Press, 2020.

<sup>6</sup> But, as the International Court of Justice has pointed out, "most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise", ICJ, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 20 July 1962, p. 8 ('Certain Expenses') (<http://www.legal-tools.org/doc/72e883/>).

tion under ICC Statute Article 13(b).<sup>7</sup> It should leave unaffected the Security Council's exclusive function to defer an ongoing investigation or prosecution under Article 16,<sup>8</sup> and its exclusive competence over the crime of aggression under Articles 15*bis* and 15*ter* of the ICC Statute.<sup>9</sup> To ensure it is adopted by the margin required by Article 18(2) of the UN Charter, a General Assembly referral should be passed by two-thirds of the States voting. To ensure the solidity of a General Assembly referral as a basis for the exercise of jurisdiction, the ICC's States Parties should invite the International Court of Justice ('ICJ'), as the primary interpreter of the Charter, to issue an advisory opinion on the lawfulness of the first referral to the ICC approved by a two-thirds majority of the General Assembly.<sup>10</sup>

An amended Article 13 of the ICC Statute would enable the Court to exercise jurisdiction where "a situation in which one or more acts of genocide, crimes against humanity or war crimes appears to have been committed is referred to the Prosecutor by the General Assembly in a decision passed by a two-thirds majority of its members present and voting". States Parties would also have to approve consequential amendments to other Articles of the ICC Statute.<sup>11</sup>

The structure of this chapter is as follows. It addresses first the inadequacy of the existing Security Council referral function, and responses to Security Council inaction. It focuses on steps by the OPWC and the General Assembly to promote accountability for chemical weapons attacks, and massive crimes in Syria and Myanmar, and on the decisions of two Pre-Trial Chambers of the ICC to uphold the Court's jurisdiction concerning deportation of Rohingya from Myanmar to Bangladesh. The chapter goes

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<sup>7</sup> Article 13(b) of the ICC Statute, see above note 2, permits the Court to exercise jurisdiction over "a situation in which one or more [crimes referred to in Article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".

<sup>8</sup> Article 16 of the ICC Statute, see above note 2:

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

<sup>9</sup> These Articles envisage the participation of the Security Council in determining whether a State has committed an act of aggression, and in determining whether an investigation into it should proceed.

<sup>10</sup> Article 119(2) of the ICC Statute, see above note 2, envisages referral to the ICJ of disputes between States Parties relating to the interpretation or application of the ICC Statute.

<sup>11</sup> Consequential amendments, providing for referral by the General Assembly, would be necessary to Articles 87(7), 115(b), 53(2)(c) and 87(5)(b) of the ICC Statute, see above note 2.

on to assess whether the General Assembly has an implied power under the UN Charter to refer crimes in a non-consenting State to the ICC. The chapter addresses the strong presumption of legality that attaches to all actions approved by a two-thirds majority of by the General Assembly. It discusses the purposive interpretation of the Charter which underlies the legal basis of the Security Council's power to refer situations to the ICC and to establish international criminal tribunals, and assesses whether a similarly purposive interpretation of the General Assembly's powers could embrace referral to the ICC. The chapter addresses the growing acceptance of the duty, on all UN Member States, to end impunity for genocide, war crimes, and crimes against humanity by effective investigation and prosecution. It addresses briefly the obvious practical difficulties when investigating and prosecuting crimes concerning a non-consenting State: securing access to witnesses, documentary evidence, and fugitives. It argues that the presence or absence of Chapter VII powers is not necessarily determinative of the success of an international investigation. It concludes with a brief overview of the safeguards in the UN Charter and the ICC Statute to address the concern that the General Assembly might refer unmeritorious situations to the ICC.

## **9.2. The Necessity for Change: The Inadequacy of the Security Council's Referral Function**

The Security Council referral function is not working as its drafters intended. The Council has referred two situations to the ICC: Darfur and Libya. But its failure to take Chapter VII enforcement action in those two situations to secure the arrest of fugitives and the delivery of evidence has drawn criticism from the ICC Prosecutor,<sup>12</sup> a Pre-Trial Chamber,<sup>13</sup> and

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<sup>12</sup> See, for example, ICC-OTP, "Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council (2005)", 13 December 2016, paras. 19–22:

I can only underscore the necessity of this Council taking swift and concrete action to ensure compliance with all arrest warrants against the fugitives in Darfur situation. This includes action against Sudan for its continued and open defiance of the Court's orders and Resolution 1593. The Pre-trial Chamber has now issued 13 decisions finding non-compliance and/or requesting for appropriate action to be taken against Sudan and States Parties for failing to arrest Mr Al-Bashir and other fugitives. [...] It is not enough for Council Members to continue calling for support for the Court. Such calls have to be matched by concrete action.

<sup>13</sup> "In the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of Charter of the United Nations would become futile and incapable of achieving its ultimate goal of putting an end to impunity", ICC, *Prosecutor v. Omar*

some States Parties.<sup>14</sup> The Council has refused to permit the UN to refund the Court for expenses incurred by the two referrals.<sup>15</sup>

But it is the Council's refusal to refer obvious situations of atrocity crimes to the ICC that is the most striking indicator of inaction. Between October 2011 and April 2018, 12 Security Council resolutions relating to Syria were vetoed. These included draft resolutions intended to refer Syria to the ICC, and to secure accountability for the use of chemical weapons in Syria.<sup>16</sup> It has been argued that some vetoes may have played a role in preventing an uncontrolled escalation of hostilities in Syria.<sup>17</sup> But the General Assembly criticized the Security Council's inability to act in the face of massive crimes by Syrian authorities. In February 2012, the General Assembly "[s]trongly condemn[ed]", by overwhelming majority, "the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities".<sup>18</sup> In August 2012, the General Assembly issued a rare criticism of the Security Council, "deploring the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions."<sup>19</sup>

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*Hassan Ahmad Al-Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09, para. 17 (<http://www.legal-tools.org/doc/a09363/>).

<sup>14</sup> The Netherlands, for example, stated:

It is the responsibility of the Council to follow up on its referrals. [...] [W]e feel very strongly that the Council should discuss any findings of non-cooperation. The Council should determine which of the tools it has at its disposal for the most appropriate response. [...] But if the Council does not take action on non-compliance, we feel that the credibility and reputation of the Security Council is damaged.

The Netherlands, "Statement by H.E. Karel J.G. van Oosterom, Permanent Representative of the Kingdom of the Netherlands to the United Nations in New York", 6 July 2018.

<sup>15</sup> Expenses incurred due to those referrals of have been borne by the ICC States Parties. Article 115(b) of the ICC Statute, see above note 2, envisages that the Court would receive funds from the UN "in particular in relation to the expenses incurred due to referrals by the Security Council."

<sup>16</sup> UN News, "Security Council fails to adopt three resolutions on chemical weapons use in Syria", 10 April 2018.

<sup>17</sup> See Philippa Webb, "Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria", in *Journal of Conflict & Security Law*, 2014, vol. 19, no. 3, pp. 471–488.

<sup>18</sup> The situation in the Syrian Arab Republic, UN Doc. A/RES/66/253, 21 February 2012 (<http://www.legal-tools.org/doc/4z6anh/>).

<sup>19</sup> The situation in the Syrian Arab Republic, UN Doc. A/RES/66/253 B, 7 August 2012 (<http://www.legal-tools.org/doc/7ww16y/>).

The concern that the Security Council will lose credibility and effectiveness due to overuse of the veto has been voiced by three of its permanent members. The US representative to the UN warned 2015 that repeated vetoes would lead to efforts to have atrocities investigated elsewhere.<sup>20</sup> The UK warned of consequences for the standing of the Security Council.<sup>21</sup> France has long argued that the five permanent members should adopt a code of conduct requiring restraint in the use of the veto.<sup>22</sup> The UN Secretary-General emphasized the Security Council's responsibility to hold accountable those responsible for crimes in Syria, and decried its inability to do so.<sup>23</sup>

In the medium term, it appears likely that at least one permanent member will veto referral of a situation to the ICC against the wishes of a significant majority of UN Member States.

### 9.3. Responses to Security Council Inaction

Security Council paralysis on accountability for atrocity crimes has led to creative responses. A hundred and nineteen States have pledged to support

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<sup>20</sup> The US permanent representative to the UN, Samantha Power, said that the US and other countries had increasingly been going elsewhere to have atrocities investigated, and that a "forum-shopping" trend was likely to continue, Julian Borger and Bastien Inzaurre, "Russian vetoes are putting UN security council's legitimacy at risk, says US", in *The Guardian*, 23 September 2015:

It's a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere [...] And if that happened for more than Syria and Ukraine and you started to see across the board paralysis [...] it would certainly jeopardise the security council's status and credibility and its function as a go-to international security arbiter.

<sup>21</sup> The United Kingdom representative to the UN, Matthew Rycroft, said: "Syria is a stain on the conscience of the security council. I think it is the biggest failure in recent years, and it undoubtedly has consequences for the standing of the security council and indeed the United Nations as a whole", *ibid*.

<sup>22</sup> France, "Déclaration de M. François Hollande, Président de la République, sur les défis et priorités de la communauté internationale notamment de l'ONU", 24 September 2013.

<sup>23</sup> United Nations, "Deputy Secretary-General 'Pleads' with Security Council Members to Set Aside Differences, End Syrian People's 'Long Nightmare'", 22 May 2014, DSG/SM/776-SC/11408:

The Security Council has an inescapable responsibility [to bring accountability in Syria] [...] For more than three years, this Council has been unable to agree on measures that could bring an end to this extraordinarily brutal war [...] If members of the Council continue to be unable to agree on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire Organization will continue to suffer.

Security Council action aimed at preventing or ending crimes against humanity, war crimes or genocide.<sup>24</sup> The demise of the OPCW-UN Joint Investigative Mechanism ('JIM') led to an expansion of the OPCW's mandate. The JIM produced seven detailed reports identifying perpetrators of chemical weapons attacks in Syria before its mandate came to an end, due to veto at the Security Council, in October 2017. In June 2018, the OPCW States Parties, by large majority, approved a resolution in which they regretted that the JIM's mandate had not been renewed, and directed the OPCW Secretariat to "put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic".<sup>25</sup> In September 2018 and in November 2019, two ICC Pre-Trial Chambers upheld the Court's jurisdiction to scrutinize crimes in Myanmar that contained an element physically committed in Bangladesh.<sup>26</sup>

The most expansive exercise of the General Assembly's powers, in the face of Security Council paralysis, was its establishment of investigative mechanisms for Syria and Myanmar with unprecedented reach. In December 2016, the General Assembly created an independent, impartial in-

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<sup>24</sup> Nine of the 15 members of the Security Council in June 2018 had signed the Code of Conduct. Signatories pledge:

to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes [and] to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes.

Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621-S/2015/97814, 14 December 2015 (<http://www.legal-tools.org/doc/udgscv/>); Accountability, Coherence and Transparency Group, "Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes", 23 October 2015 (available on the Global Centre for the Responsibility to Protect's web site). As of January 2019, the Code of Conduct has been signed by 117 member states and two observers. Permanent Mission of Liechtenstein to the United Nations, "List of Signatories to the ACT Code of Conduct", 20 June 2019 (available on the Global Centre for the Responsibility to Protect's web site).

<sup>25</sup> Organization for the Prohibition of Chemical Weapons, Decision: Addressing the Threat from Chemical Weapons Use, Resolution C-SS-4/DEC.3, 27 June 2018 (<http://www.legal-tools.org/doc/lmqyd4/>).

<sup>26</sup> ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37 (<http://www.legal-tools.org/doc/73aeb4/>); ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 4 November 2019, ICC-01/19-27 (<http://www.legal-tools.org/doc/kbo3hy/>).

vestigative mechanism for Syria ('Syria Mechanism').<sup>27</sup> The UN Human Rights Council, a subsidiary body of the General Assembly, created a similar mechanism for Myanmar ('Myanmar Mechanism') in September 2018.<sup>28</sup> The mechanisms have no authority to arrest or prosecute. But their founding resolutions contain identical wording requiring them "to collect, consolidate, preserve and analyse evidence", and to "prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over"<sup>29</sup> serious crimes in those States, in accordance with international law. In distinguishing the new Syria Mechanism's functions from the existing Commission of Inquiry for Syria, the UN Secretary-General said:

The Mechanism has an explicit nexus to criminal investigations, prosecutions, proceedings and trials that is not within the mandate of the Commission. Specifically, the Mechanism is required to prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to *mens rea* and to specific modes of criminal liability. In essence, the Mechanism has a *quasi-prosecutorial function* that is beyond the scope of the Commission's mandate.<sup>30</sup>

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<sup>27</sup> In doing so, the General Assembly noted "the repeated encouragement by the Secretary-General and the High Commissioner for Human Rights for the Security Council to refer the situation in the Syrian Arab Republic to the International Criminal Court", International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 21 December 2016, p. 2 ('UNGA Resolution 248') (<http://www.legal-tools.org/doc/fecaf0/>).

<sup>28</sup> Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc. A/HRC/RES/39/2, 3 October 2018 ('UNHRC Resolution 39/2') (<http://www.legal-tools.org/doc/0917d7/>).

<sup>29</sup> UN General Assembly Resolution 248, see above note 27 and Human Rights Council Resolution 39/2, see above note 28.

<sup>30</sup> Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/71/755, 19 January 2017, para. 32 (emphasis added) (<http://www.legal-tools.org/doc/a0cd85/>).

Both mechanisms were established by comfortable majorities. The General Assembly approved the establishment of the Syria Mechanism by 105 votes to 15 (with 52 abstentions),<sup>31</sup> and welcomed the establishment of the Myanmar Mechanism by a vote of 136 to eight (with 22 abstentions).<sup>32</sup> Russia has argued that the Syria Mechanism should have been established either with the consent of Syria or by the Security Council acting under Chapter VII.<sup>33</sup> Its positions on the issue have attracted little support. It appears to be now widely accepted that the General Assembly has the authority to investigate human rights abuses in a non-consenting State, by and against its nationals, and to determine who is responsible.

But none of these initiatives would have been necessary if the General Assembly had referred the situations in question – Syria and Myanmar – to the ICC. I now address whether the General Assembly has an implied power under the Charter to do so.

#### **9.4. The General Assembly’s Power to Refer a Situation to the ICC**

The General Assembly has a well-recognized power to take non-military action in respect of peace and security over non-consenting States, as evidenced by its establishment of numerous commissions of inquiry and fact-finding missions relating to such States, including the mechanisms for Syria and Myanmar. Plainly, it is widely accepted that the General Assembly has power under the Charter to grant jurisdiction to subsidiary bodies to investigate nationals of a non-consenting State for participation in crimes against humanity, war crimes and genocide. Nevertheless, it is also generally assumed that only the Security Council can empower an international tribunal, or the ICC, to *prosecute* nationals of a non-consenting state.<sup>34</sup> This

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<sup>31</sup> Two weeks previously, in a Resolution adopted by a vote of 122 in favour, 13 against, and 36 abstentions, the Assembly expressed grave concern at the continued deterioration of the devastating humanitarian situation in Syria and demanded “rapid, safe, sustained, unhindered and unconditional humanitarian access throughout the country for UN [...] and all humanitarian actors”. This came days after China and Russia vetoed a similar Resolution at the UN Security Council demanding a ceasefire in Aleppo. UN News, “‘Outraged’ UN Member States demand immediate halt to attacks against civilians in Syria”, 9 December 2016.

<sup>32</sup> UN News, “General Assembly Adopts 16 Texts Recommended by Fifth Committee, Concluding Main Part of Seventy-Third Session”, 22 December 2018.

<sup>33</sup> *Note verbale* dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/71/793, 14 February 2017 (<http://www.legal-tools.org/doc/uu9210/>).

<sup>34</sup> Alex Whiting, for example, writes:

understanding – that the General Assembly may delegate the power to investigate, but it is only the Security Council that may delegate the power to prosecute, nationals of a non-consenting State – is not articulated in any decision of the ICJ or ICC. Nor does it necessarily follow from a literal or a purposive interpretation of the Charter. An alternative view, to the effect that the Charter neither contemplates nor precludes referral by the General Assembly has been articulated by commentators<sup>35</sup> and by the Commission of Inquiry for the Democratic People’s Republic of Korea (‘DPRK’).

Proponents of this view argue that if the Security Council fails to refer a situation to the ICC or set up an *ad hoc* tribunal, the General Assembly can establish a tribunal. In this regard, the General Assembly could rely on its residual powers recognized inter alia in the “Uniting for Peace” Resolution and the combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction.<sup>36</sup>

The General Assembly generally does not identify the precise basis for its actions in its resolutions concerning matters of international peace and security. What is clear, from law and practice, is that it has extensive powers to take action. The leading case on the implied powers of the General Assembly on matters of peace and security is *Certain Expenses*.<sup>37</sup> There, the ICJ conducted “an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security”.<sup>38</sup>

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Only the Security Council has the authority under the UN Charter to establish tribunals with compulsory legal authority over individuals or states. The General Assembly cannot itself create a body that can prosecute and so it went as far as it could within its mandate.

Alex Whiting, “An Investigation Mechanism for Syria: The General Assembly Steps into the Breach”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 231–237.

<sup>35</sup> Michael Ramsden and Tomas Hamilton, “Uniting against impunity: the UN General Assembly as a catalyst for action at the ICC”, in *International and Comparative Law Quarterly*, 2017, vol. 66, no. 4, pp. 893–921.

<sup>36</sup> Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/CRP.1, 7 February 2014, para. 1201 (<http://www.legal-tools.org/doc/1177a4/>). The Commission cited as examples of the General Assembly pooling the powers of its members the establishment of the ECCC and the SCSL. Both, however, were created with the consent of the state concerned.

<sup>37</sup> ICJ, *Certain Expenses*, see above note 6.

<sup>38</sup> *Ibid.*, p. 167.

From the ICJ's examination, certain conclusions emerge. First, the Security Council's authority in respect of international peace and security is primary and not exclusive: the General Assembly has significant secondary authority. The authority granted by the UN Member States to the Security Council has the express aim of securing "prompt and effective action". The ICJ held:

The responsibility conferred [on the Security Council by Article 24] is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security.<sup>39</sup>

A logical corollary is that, when the Security Council does not carry out prompt and effective action on matters of peace and security, it is failing to fulfil its duty under the Charter; the General Assembly's residual powers permit it to act. This is reinforced by the fact that every member of the General Assembly is required to act in accordance with the purposes of the UN as a whole. These purposes include "to take effective collective measures for the prevention and removal of threats to the peace" and "to achieve international co-operation in [...] promoting and encouraging respect for human rights and for fundamental freedoms for all for all without distinction as to race, sex, language, or religion".<sup>40</sup> The General Assembly in 2006 reaffirmed its authority on questions of international peace and security, and its ability to take "swift and urgent action".<sup>41</sup>

Much of what the General Assembly does is justified by the doctrine of implied powers: the United Nations "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of

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<sup>39</sup> *Ibid.*, p. 195.

<sup>40</sup> Charter of the United Nations, 24 October 1945, Article 1 ('UN Charter') (<http://www.legal-tools.org/doc/6b3cd5/>).

<sup>41</sup> Revitalization of the General Assembly, UN Doc. A/RES/60/286, 9 October 2006, Annex, para. 1 (<http://www.legal-tools.org/doc/16z69h/>).

its duties”.<sup>42</sup> In *Certain Expenses*, the ICJ confirmed that peacekeeping is a proper exercise of those implied powers.<sup>43</sup>

A key question is whether referral to the ICC is also a proper exercise of the General Assembly’s implied powers. The ICJ relied upon Articles 11 and 14 in *Certain Expenses* as a legitimate basis for extensive action by the General Assembly. The ICJ interpreted Charter Article 11(2) – which on its face is limited to discussion and recommendation<sup>44</sup> – as permitting the General Assembly to take “*action*” on matters of international peace and security, including peacekeeping. The ICJ’s interpretation is worth considering in full, as it is directly relevant to considering whether referral to the ICC constitutes coercive or enforcement ‘action’ which is solely within the province of the Security Council, or is organizational activity ‘action’ in connection with the maintenance of international peace and security which the General Assembly may undertake:

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of

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<sup>42</sup> ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 11 April 1949, p. 184 (<http://www.legal-tools.org/doc/f263d7/>).

<sup>43</sup> Peacekeeping lacks explicit authorization in the Charter. Its legal basis is an example of a progressive, purposive interpretation of the Charter.

The starting point for any discussion of the legal framework of UN peace operations is that the power to undertake or create such operations is not written anywhere in the UN Charter. Instead, the legal basis for peacekeeping is most commonly considered to be located in the implied powers of the organisation. One scholar argues that it can be construed as a provisional measure under Article 40, whereas Christine Gray argues that “the debate seems to be without practical significance”. Nonetheless, it does mean that the specific rules on peace operations are not set down in the Charter; rather, they have evolved through peacekeeping doctrine over the past six decades.

Lindsey Cameron, “The Legal Basis for Peacekeeping/Peace Operations”, in *The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law*, Cambridge University Press, 2017, pp. 51–52 (internal citations omitted).

<sup>44</sup> Article 11(2) of the UN Charter, see above note 40, reads:

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council [...] and [...] may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when “action” is necessary the General Assembly shall refer the question to the Security Council. The word “action” must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The “action” which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. If the word “action” in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term ‘action’ in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity ‘action’ in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision,

but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.<sup>45</sup>

The Charter Article 12 requirement that the General Assembly refrain from making any recommendation “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter” has narrowed considerably in practice; that practice was upheld as lawful by the ICJ in the *Wall* Advisory Opinion.<sup>46</sup> Both entities may lawfully deal in parallel with the same situation.<sup>47</sup> This means that the General Assembly could refer a situation to the ICC while the Security Council is seized of the same matter.

Charter Article 14 is another source for the extensive implied powers which the General Assembly enjoys. It reads:

The General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

The ICJ in *Certain Expenses* clarified that the ‘measures’ that the General Assembly can lawfully take under Article 14 include *actions* falling short of coercive action:

The word ‘measures’ implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which,

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<sup>45</sup> ICJ, *Certain Expenses*, see above note 6, pp. 164–165.

<sup>46</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 9 July 2004, paras. 27–28 (‘Wall Advisory Opinion’) (<http://www.legal-tools.org/doc/e5231b/>).

<sup>47</sup> The ICJ said, *ibid.*:

[T]here has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. [...] It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.<sup>48</sup>

The kind of ‘action’ taken by the General Assembly and its subsidiary organs has widened considerably since *Certain Expenses*. The General Assembly now routinely takes, with overwhelming support from its members, action to investigate mass atrocities in non-consenting states by nationals of those states. These include the establishment of entities with explicit mandates to identify those responsible, and to build criminal cases against them, such as the Syria Mechanism and Myanmar Mechanism.

Critically, the target state is not *obliged* to co-operate with such investigations. They are non-coercive actions. Referral of a non-consenting State by the ICC is similarly non-coercive: the target state would have no legal obligation to comply. The only States required to comply with warrants of arrest and request for access to evidence issued by the ICC in such a situation would be the ICC’s 123 States Parties. Referral by the General Assembly to the ICC would therefore fall within the category of non-coercive action concerning mass atrocities in non-consenting States that the General Assembly now routinely takes.

The “Uniting for Peace” Resolution,<sup>49</sup> in which the General Assembly authorized military force against a non-consenting State, is of limited relevance to the question of whether the General Assembly can refer a situation to the ICC. The Resolution now occupies an uncertain position, arguably in the backwaters of international law, and is viewed by many as an unlawful encroachment on the Security Council’s exclusive competence to authorize the use of military force.<sup>50</sup> But this should not blind us to its value in interpreting the General Assembly’s duties and powers under the

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<sup>48</sup> ICJ, *Certain Expenses*, see above note 6, p. 163.

<sup>49</sup> Uniting for peace, UN Doc. A/RES/377(V)A-C, 3 November 1950 (‘UNGA Resolution 377 A(V)’ (<http://www.legal-tools.org/doc/1a21a9/>)).

<sup>50</sup> See C oman Kenny, “Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security”, in *Journal on the Use of Force and International Law*, 2016, vol. 3, no. 1, pp. 7–16; Andrew J. Carswell, “Unblocking the Security Council: The Uniting for Peace Resolution”, in *Journal of Conflict and Security Law*, 2013, vol. 18, pp. 455–456. Michael Ramsden, ““Uniting for Peace” and Humanitarian Intervention: The Authorising Function of the UN General Assembly”, in *Washington International Law Journal*, 2016, vol. 25, no. 2, p. 267.

Charter on measures *not* including armed force.<sup>51</sup> In particular, the preamble to the “Uniting for Peace” Resolution remains relevant:

[F]ailure of the Security Council to discharge its responsibilities on behalf of all the Member States [...] does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security [...] in particular [...] such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security.<sup>52</sup>

### 9.5. The Presumption of Legality of Action by the General Assembly

A General Assembly resolution passed by a two-thirds majority, referring a situation to the ICC, would benefit from the ICJ’s doctrine of presumption of legality of decisions by UN bodies. If it were asked to provide an advisory opinion on the matter, the ICJ would no doubt consider the evolving practice of the General Assembly regarding the granting of investigative jurisdiction to subordinate bodies over crimes by nationals of non-consenting States on the territories of those States. The ICJ would also consider Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which permits “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. The ICJ in the *Namibia* Advisory Opinion upheld the lawfulness of a Security Council practice that was not in the Charter but that “has been generally accepted by Members of the United Nations and evidences a general practice of that Organization”.<sup>53</sup> In the *Wall* Advisory Opinion, the ICJ upheld the lawfulness of “the accepted practice of the General Assembly, as it has evolved”.<sup>54</sup> In brief, the ICJ could well hold that referral to the ICC by the General Assembly benefits from the presumption of legality. Michael Ramsden writes:

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<sup>51</sup> See also Graham Melling and Anne Dennett, “The Security Council veto and Syria: responding to mass atrocities through the ‘Uniting for Peace’ resolution”, in *Indian Journal of International Law*, 2017, vol. 57, no. 3–4, pp. 285–307.

<sup>52</sup> Preamble to UNGA Resolution 377 A(V), see above note 49.

<sup>53</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 21 June 1971, para. 22 (‘*Namibia* Advisory Opinion’) (<http://www.legal-tools.org/doc/d0effa/>).

<sup>54</sup> *Wall* Advisory Opinion, paras. 27–28, see above note 46.

[I]t is very unlikely that the ICJ would cast doubt on the legality of an Assembly Resolution given the broad approach it has taken to implied powers. Such unlikelihood is further reinforced by the deferential standard of review adopted by the ICJ. A Resolution would have to be “manifestly *ultra vires*” to be invalidated by the ICJ. As Judge Fitzmaurice noted when reviewing the validity of [Uniting for Peace] expenditure, “only if the invalidity of the expenditure was apparent on the face of the matter, or *too manifest* to be open to reasonable doubt, would such a *prima facie* presumption [of validity] not arise”. A Resolution that violated the *jus cogens* is indicative of a fundamental defect.<sup>55</sup>

A General Assembly referral of a situation to the ICC, approved by two-thirds majority of States present and voting, would also enjoy widespread legitimacy. A hundred and ninety-three sovereign States can vote at the General Assembly. While it is not perfectly representative (India’s 1.39 billion people have one General Assembly vote, as do Tuvalu’s 12,000 people), it remains the world’s most representative body. The will of humanity is surely more accurately reflected in a General Assembly resolution approved by over a hundred sovereign States from all continents than in a veto by a single State at the Security Council.

In summary, the arguments in favour of a General Assembly power to refer a situation to the ICC are as follows: the General Assembly has secondary authority under the Charter in respect of peace and security, which becomes particularly relevant when the Security Council fails to act. It may lawfully take non-coercive action to ensure that the UN can take effective collective measures to prevent and remove threats to the peace, and to secure respect for human rights and fundamental freedoms. It may act in parallel with the Security Council. The Charter, which is a growing, living document, nowhere distinguishes between the power to investigate and the power to prosecute. It does not state, nor suggest, that the General Assembly can grant jurisdiction to a subordinate body to investigate but not to prosecute, while the Security Council can both investigate and prosecute. The General Assembly’s power to grant jurisdiction to subordinate entities to investigate crimes by citizens of a nonconsenting state on the territory of that State, and to attribute responsibility to those most responsible, is widely accepted. A General Assembly resolution passed by two-thirds majority is a powerful and legitimate basis for the grant of criminal jurisdiction both

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<sup>55</sup> Ramsden, 2016, see above note 50.

to investigate *and prosecute* any person responsible for participation in mass atrocities. Such a resolution benefits from a presumption of legality. The fairest way to confirm such legality would be for the General Assembly to invite the ICJ to issue an advisory opinion on its first resolution referring a situation to the ICC.

### **9.6. The Purposive Interpretation of the Charter which Underlies the Security Council's Powers in International Criminal Justice**

Since its inception, the Charter has been interpreted by the ICJ and by the organs of the UN itself in a purposive manner. Broadly speaking, the doctrine of purposive interpretation requires that, where a treaty is capable of alternative interpretations, the interpretation that best achieves its intended purpose should be preferred, and any interpretation that frustrates the intended purpose of the treaty should be rejected. The notion is reflected in the “object and purpose” limb of Article 31 of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>56</sup>

While the “the precise nature, role and application of the concept of ‘object and purpose’ in the law of treaties present some uncertainty”,<sup>57</sup> a purposive interpretation of the Charter is what permits the UN’s vast peacekeeping operations to function, and the work of fact-finding missions probing crimes in non-consenting States to continue. A purposive interpretation allowed the Security Council to establish international criminal tribunals, and to refer situations to the ICC, as we now examine.

The Charter is silent on international criminal justice. There is no provision to the effect that the Security Council, and only the Security Council, can compel nationals of a non-consenting State to be subject to criminal jurisdiction. Nor does the Charter suggest that the permanent members of the Security Council have exclusive authority over the decision to vest criminal jurisdiction over serving heads of state and government of a non-consenting state. Nowhere does the Charter provide that the Security Council can investigate and prosecute international crimes, but the General Assembly can only investigate them. All these are now widely ac-

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<sup>56</sup> Vienna Convention on the Law of Treaties, 23 May 1969, Article 31 (<http://www.legal-tools.org/doc/6bfcd4/>).

<sup>57</sup> Richard K. Gardiner, *Treaty Interpretation*, Oxford University Press, New York, 2008, p. 190.

cepted interpretations of the Charter; none would have seemed obvious in 1946.

It is worth recalling what the Charter does say on the matter. Chapter VII sets out the powers of the Security Council to take action in respect of any threat to the peace, breach of the peace, or act of aggression. It permits the Security Council to authorize “measures not involving the use of armed force”,<sup>58</sup> failing which it can authorize the use of armed force, to give effect to its decisions. The measures not involving armed force, set out in Article 41, “may include 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>59</sup> Under Article 48, it is incumbent on Member States to implement these measures. Article 42 foresees the use of armed force if the Article 41 measures prove ineffective: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”.<sup>60</sup>

In May 1993, the Security Council interpreted these Articles to include the power to establish an international tribunal with the power to arrest, prosecute and imprison any citizen, including the Heads of State and government, of a non-consenting State. This novel and unexpected interpretation permitted establishment of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), and, a year later, the International Criminal Tribunal for Rwanda (‘ICTR’). Richard Goldstone, former Prosecutor of the ICTY and ICTR, noted:

It came as a surprise to the international community when in May [1993] the Security Council of the UN decided to establish the [ICTY]. International lawyers had not contemplated that the powers of the Council under Chapter VII of the UN Charter could be used for such a purpose. [...] In a very innovative move, the Security Council decided that those Chapter VII powers confer by implication the capacity to establish a war crimes criminal tribunal.<sup>61</sup>

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<sup>58</sup> Article 41 of the UN Charter, see above note 40.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, Article 42.

<sup>61</sup> Richard J. Goldstone, “The role of the United Nations in the prosecution of international war criminals”, in *Washington University Journal of Law and Policy*, 2001, vol. 5, no. 1, pp. 119–127, 120.

The *Simma* commentary on the Charter described the Security Council's action in establishing the ICTY as "the most far reaching use of Article 41".<sup>62</sup>

The lawfulness of the establishment of the ICTY by Security Council resolution was upheld by trial and appellate judges in *Tadić*.<sup>63</sup> They rejected the argument that the establishment of an international tribunal is not a measure contemplated by Article 41: "It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force'. It is a negative definition".<sup>64</sup>

The Secretary-General had recommended that the ICTY be established by the Security Council, rather than by the General Assembly, in significant part due to the desire for a speedy establishment. His report stressed urgency but did not state that the General Assembly had no power to establish an international tribunal.<sup>65</sup> But the very fact that Chapter VII envisages a degree of compulsion – Article 48 compels Member States to take action to carry out the Security Council's decisions – no doubt proved attractive, as it did to the members of the International Law Commission ('ILC'), who were drafting what became the ICC Statute. The ILC's 1994 draft statute permitted the Security Council, but not the General Assembly, to refer a situation to the ICC. The ILC explained:

Some members were of the view that the power to refer cases to the court [...] should also be conferred on the General Assembly, particularly in cases in which the Security Council

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<sup>62</sup> Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 626.

<sup>63</sup> ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ('*Tadić* Jurisdiction Decision') (<http://www.legal-tools.org/doc/866e17/>).

<sup>64</sup> *Ibid.*, para. 35.

<sup>65</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, paras. 20–22 (<http://www.legal-tools.org/doc/c2640a/>):

The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). [...] In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII.

might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter of the United Nations to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction.<sup>66</sup>

The lawfulness of the establishment of the ICTY and ICTR by the Security Council is today widely accepted. Few question the use of Chapter VII as a valid basis for the assumption of criminal jurisdiction by the two tribunals. Other measures taken by the Security Council under Chapter VII, and not expressly contemplated in Article 41 of the Charter, include establishing a residual mechanism for both tribunals,<sup>67</sup> and the extension of terms of appointment of judges.<sup>68</sup>

In summary, the Security Council's power to establish an international tribunal with authority to arrest and imprison serving Heads of State of non-consenting States is an example of a purposive interpretation of the Charter. Nothing in the Charter, nor in *Tadić*, nor in the Secretary-General's report on the establishment of the ICTY, suggests that *only* the Security Council, and not the General Assembly, has the power to establish an international criminal tribunal. The Appeals Chamber in *Tadić* characterized the establishment of the tribunal – and, necessarily, the grant of criminal jurisdiction to it – as the exercise of the Security Council's principal function of maintenance of peace and security:

The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance

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<sup>66</sup> Report of the International Law Commission on the work of its forty-sixth session, 2 May–22 July 1994, UN Doc. A/49/10, 2 September 1994, p. 86 (<http://www.legal-tools.org/doc/f73459/>).

<sup>67</sup> UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010 (<http://www.legal-tools.org/doc/e79460/>).

<sup>68</sup> UN Security Council Resolution 2329 (2016), UN Doc. S/RES/2329 (2016), 19 December 2016 (<http://www.legal-tools.org/doc/b1bc1c/>).

of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

This paragraph applies *mutatis mutandis* to referral of a situation by the General Assembly to the ICC. By referring a situation, the General Assembly would not be delegating to the ICC some of its own functions or the exercise of some of its own powers, nor would it be usurping for itself any judicial function. Rather, it would be using the instrument of referral to the ICC as an exercise of its own function under the Charter, secondary only to that of the Security Council, of maintenance of peace and security in the situation country.

### **9.7. The Obligation of All States to Deter, Investigate and Prosecute Genocide, War Crimes and Crimes Against Humanity**

To interpret the Charter to include a General Assembly referral power is consistent with the growing acceptance of the duty, on all UN Member States, to end impunity for genocide, war crimes and crimes against humanity by effective investigation and prosecution.<sup>69</sup> All three sets of crimes – genocide, war crimes, and crimes against humanity – fall within the small group of crimes that are considered *jus cogens* and attract universal jurisdiction. General Assembly referral would therefore help States to discharge their duties under international law to investigate and prosecute these crimes, and to provide redress to survivors.

All members of the General Assembly are required to fulfil in good faith the obligations assumed by them under the Charter.<sup>70</sup> The Charter's preamble refers to the determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". States have duties under treaties to investigate, prosecute and punish gross human rights violations, in particular when they amount to war crimes, crimes against humanity and

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<sup>69</sup> See Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, 30 November 2012 (<http://www.legal-tools.org/doc/d0qwyx/>), in which heads of state and government:

commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms.

<sup>70</sup> Article 2.2 of the UN Charter, see above note 40.

genocide.<sup>71</sup> The obligation to search for and prosecute (or extradite) any individual – regardless of nationality – for grave breaches appears in all four Geneva Conventions.<sup>72</sup> States have the right to vest universal jurisdiction in their national courts over war crimes committed in both international and non-international armed conflicts.<sup>73</sup> Every party to the Convention Against Torture has “an obligation to establish the universal jurisdiction of its courts over the crime of torture”.<sup>74</sup> The ILC’s draft articles on crimes against humanity, which may form the basis for a future multilateral con-

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<sup>71</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I, Cambridge University Press, New York, 2009, Rules 150, 158 (‘Customary Rules’) (<http://www.legal-tools.org/doc/78a250/>); United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, UN Doc. A/RES/2550 (XXIV), 12 December 1969 (<http://www.legal-tools.org/doc/8e43b9/>); Question of the punishment of war criminals and of persons who have committed crimes against humanity, UN Doc. A/RES/2712 (XXV), 15 December 1970 (<http://www.legal-tools.org/doc/1fdd22/>); Question of the punishment of war criminals and of persons who have committed crimes against humanity, UN Doc. A/RES/2840 (XXVI), 18 December 1971 (<http://www.legal-tools.org/doc/2745f2/>) and Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UN Doc. A/RES/3074 (XXVIII), 3 December 1973 (<http://www.legal-tools.org/doc/759822/>); Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article 1 (<http://www.legal-tools.org/doc/498c38/>); General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 (<http://www.legal-tools.org/doc/e7d9a3/>); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006, Principles 1–5 (<http://www.legal-tools.org/doc/bcf508/>).

<sup>72</sup> Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, 12 August 1949, Article 49 (<http://www.legal-tools.org/doc/baf8e7/>); Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, 12 August 1949, Article 50 (<http://www.legal-tools.org/doc/0d0216/>); Geneva Convention (III) relative to the treatment of prisoners of war, 12 August 1949, Article 129 (<http://www.legal-tools.org/doc/365095/>); ICRC, Geneva Convention (IV) relative to the protection of civilian persons in time of war, 12 August 1949, Article 146 (<http://www.legal-tools.org/doc/d5e260/>); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, 8 June 1977, Article 85(5) (<http://www.legal-tools.org/doc/d9328a/>).

<sup>73</sup> For a list of domestic provisions vesting universal jurisdiction in domestic courts over war crimes, see ICRC, “Practice Relating to Rule 157. Jurisdiction over War Crimes”.

<sup>74</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, Article 7(1) (<http://www.legal-tools.org/doc/713f11/>). See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, 20 July 2012, para. 74 (<http://www.legal-tools.org/doc/18972d/>).

vention, require States Parties to prosecute crimes against humanity.<sup>75</sup> States must ensure that individuals have accessible and effective remedies to enforce their rights, including through redress for violations.<sup>76</sup> Several States have incorporated the crimes contained in the ICC Statute in their national legislation and vested jurisdiction in their courts to prosecute persons suspected of having committed them on the basis of the principle of universal jurisdiction.<sup>77</sup> The Security Council has emphasized “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law”.<sup>78</sup>

In respect of genocide, specific legal duties arise under the Genocide Convention to prevent genocide and to punish its perpetrators.<sup>79</sup> Any party to it “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide”.<sup>80</sup> The obligation to prevent genocide applies to any State with the “capacity to

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<sup>75</sup> Crimes against humanity, UN Doc. A/CN.4/L.892, 26 May 2017, draft Articles 8 to 10 (<http://www.legal-tools.org/doc/3ce0e9/>).

<sup>76</sup> The right of victims to an effective and enforceable remedy for violations of their human rights appears in Article 8 of the Universal Declaration of Human Rights, 10 December 1948 (<http://www.legal-tools.org/doc/de5d83/>); International Covenant on Civil and Political Rights, 16 December 1966, Article 2 (<http://www.legal-tools.org/doc/2838f3/>); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, Article 6 (<http://www.legal-tools.org/doc/43a925/>); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 14 (<http://www.legal-tools.org/doc/713f11/>); Convention on the Rights of the Child, 20 November 1989, Article 39 (<http://www.legal-tools.org/doc/f48f9e/>); Hague Convention Respecting the Laws and Customs of War on Land, 18 October 1907; Additional Protocol I to the Geneva Conventions, 12 August 1949, Article 91. It is further developed in Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (<http://www.legal-tools.org/doc/bcf508/>).

<sup>77</sup> See ICRC, “Rule 157. Jurisdiction over War Crimes”, citing the legislation of Belgium, Canada, Germany, New Zealand and the United Kingdom.

<sup>78</sup> UN Security Council Resolution 1674 (2006), UN Doc. S/RES/1674 (2006), 28 April 2006, para. 8 (<http://www.legal-tools.org/doc/4bf3cc/>).

<sup>79</sup> Under Article I of the Convention Against the Prevention and Punishment of the Crime of Genocide, 12 January 1951 (<http://www.legal-tools.org/doc/498c38/>) the parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they *undertake to prevent and to punish*” (emphasis added).

<sup>80</sup> *Ibid.*, Article VIII.

influence effectively the action of persons likely to commit, or already committing, genocide”.<sup>81</sup> States are required to do all that they can to prevent the genocide, even if the prospects of success are not good:

[T]he obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ *all means reasonably available to them, so as to prevent genocide so far as possible*. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.<sup>82</sup>

“All means reasonably available” is open to the interpretation that it includes referring a situation of imminent or actual genocide to the ICC as a means of deterring genocide. Furthermore, the obligation to prevent genocide, and the corresponding duty to act,

arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.<sup>83</sup>

This also supports the argument that all States, which can avail of a deterrent mechanism that might deter a genocide – such as referral to the ICC – must use that mechanism.

In brief, there exists a general principle of international law that States are obliged to do what they can do investigate and prosecute genocide, war crimes and crimes against humanity, and to provide means for survivors to have effective and accessible remedies against those most responsible. Supporting a General Assembly resolution to refer a situation of

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<sup>81</sup> ICJ, *Bosnia and Herzegovina v. Yugoslavia*, Judgement of 26 February 2007, 26 February 2007, para. 430 (<http://www.legal-tools.org/doc/5fcd00/>).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, para. 431.

such crimes to the ICC is an effective way for States to discharge, at least in part, these obligations.

### **9.8. The Exercise of Jurisdiction Over Nationals of a Non-Party: Practical Difficulties**

A referral of a situation by the General Assembly would require the Court to exercise jurisdiction over nationals of a very likely uncooperative non-party State.<sup>84</sup> This presents obvious practical difficulties: securing access to witnesses, documentary evidence, and fugitives would not be easy.

But the ICC Statute already envisages the conduct of investigations in circumstances of great difficulty. It concerns exclusively crimes against humanity, war crimes, genocide and aggression: crimes that happen in circumstances of great turmoil. It grants the Court jurisdiction *only* where the State in question is unable or unwilling to prosecute: environments unlikely to be conducive to a smooth investigation. Further, the ICC Statute already envisages jurisdiction over nationals of non-parties, absent Security Council consent, for all ICC Statute crimes except aggression.<sup>85</sup> This arises where the crime is committed, at least in part, on the territory of a State Party.<sup>86</sup> The ICC Statute is one of many treaties that envisage jurisdiction over nationals of non-parties, without the consent of the non-party.<sup>87</sup>

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<sup>84</sup> The General Assembly plainly has the power to recommend to all UN member states who are also ICC States Parties to refer a situation in a State Party to the Court. It has never done so. Until recently, States Parties have been reluctant to take the step of referring situations in other States Parties to the Court, even though this was clearly anticipated at Rome. The first such referral was on 27 September 2018. Argentina, Canada, Colombia, Chile, Paraguay, and Peru together referred under Article 14 of the ICC Statute, see above note 2, the situation in Venezuela to the Court (<http://www.legal-tools.org/doc/92lp01/>).

<sup>85</sup> Article 15*bis*(5) of the ICC Statute, see above note 2, states that the Court “shall not exercise jurisdiction over the crime of aggression when committed by the nationals of, or on the territory of, a State that is not a party to the Statute”.

<sup>86</sup> Article 12(2)(a) of the ICC Statute, see above note 2. The deliberate formulation in Article 12 contrasts with Article 15*bis*(5), which expressly excludes ICC jurisdiction with respect to a national of non-party.

<sup>87</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber III, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, para. 45 (<http://www.legal-tools.org/doc/db23eb/>) (internal citations omitted):

Similar bases for the exercise of criminal jurisdiction are provided for in numerous multilateral conventions, including with regard to slavery, piracy, genocide, apartheid, counterfeiting of currency, war crimes (grave breaches of the Geneva Conventions), drug trafficking, hijacking and sabotage of aircraft, sabotage on the High Seas, attacks on dip-

Non-parties are not obliged to co-operate with the ICC in investigations of their citizens. The absence of non-party consent certainly adds to the difficulties of an investigation, but does not deprive it of lawfulness, credibility, or potential deterrent effect. The logistical challenges of investigating a situation in a non-consenting State must never be underestimated. But novel methods of investigation, including the collection of social media, commercially-available high-resolution satellite photography, and other digital evidence, which does not require physical presence in the situation country, are developing at a fast pace. Witnesses often take refuge in other States: large numbers of victims and anti-Regime defectors fled Syria, for example, and support criminal accountability efforts.

### **9.9. The Existence of Chapter VII Remedies and the Success of a Prosecution**

A General Assembly referral to the ICC might not be backed up by Chapter VII enforcement action by the Security Council. This is not necessarily fatal to the success of an investigation. Neither the ICC's judges, nor the ASP, have Chapter VII-type power. This has not affected the Court's legitimacy among the 123 States Parties. Nor has it been decisive in securing the cooperation of States in relation to the delivery of documentary evidence, or the execution of arrest warrants.

The experience of the *ad hoc* Tribunals and the ICC suggests that willingness to assist in arresting fugitives and delivering evidence to an international court is not dependent on the presence or absence of Chapter VII powers.<sup>88</sup> The reality is more nuanced. For example, a significant proportion of ICTR fugitives were located and arrested relatively swiftly by African and other States and transferred to the ICTR.<sup>89</sup> There is nothing to

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lomats, the taking of hostages, and torture. Those treaty regimes do not exclude nationals of States that are not parties to the relevant treaty. Indeed, such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole. Nor is the conferral or delegation of jurisdiction by a party to a treaty to an international jurisdiction in itself novel, this already having been the basis for the establishment of the Nuremberg Tribunal.

The exercise of jurisdiction under the treaties referred to over nationals of nonparties is not restricted to crimes committed on the territory of a party. Crimes such as piracy, slavery, and sabotage on the high seas are prosecutable even when committed on the high seas.

<sup>88</sup> ECCC, Special Court for Sierra Leone, and the Special Tribunal for Lebanon did not have Chapter VII-type power. They were established with the consent of the states in question (Cambodia, Sierra Leone and Lebanon), which undertook to co-operate.

<sup>89</sup> By 21 December 2001, 56 ICTR fugitives had been arrested. The arrests were by Kenya (13), Cameroon (9), Belgium (6), Ivory Coast (2), Togo (2), Mali (2), Benin (2), France (2), Na-

suggest that these States arrested the authors of Rwanda's genocide under threat of Chapter VII action; they did so because it was the right thing to do. On the other hand, the ICTY faced serious difficulty in persuading NATO states to permit their forces to arrest ICTY fugitives in Bosnia. Serbia and Croatia serially failed to arrest fugitives or deliver documentary evidence. The ICTY repeatedly reported non-co-operation to the Security Council. The ICTY was eventually able to secure co-operation from Serbia and Croatia, including the arrest of all fugitives, largely because of the concept of 'conditionality': the progress of negotiations for accession to the EU was linked to co-operation with the ICTY.<sup>90</sup>

Many States – including non-parties such as Rwanda and the United States – have provided valuable assistance to the ICC in situations not backed up by Chapter VII. On the other hand, in the Chapter VII-mandated situations of Darfur and Libya, numerous States Parties have failed to execute arrest warrants. As noted earlier, the ICC's Prosecutor and judges have frequently criticized the Security Council's unwillingness to use its Chapter VII powers to secure the arrest of fugitives relating to Darfur and Libya.

This is not to suggest that Chapter VII authorization has no value. Clearly it carries political and diplomatic weight. The policy of conditionality, which resulted in increased co-operation from Serbia and Croatia, might have been less effective if the threshold question of the ICTY's legal entitlement to co-operation was not already settled by virtue of the Chapter VII resolution creating the ICTY. But the fact remains that States choose to co-operate or not for many reasons, only one of which is whether an investigation enjoys Chapter VII *imprimatur*.

As noted earlier, a General Assembly referral to the ICC, authorized by a two-thirds vote, would likely lack Chapter VII support from the Security Council, but it would carry considerable moral and diplomatic weight. It would also be the subject of co-operation obligations. All 123 States Parties would be required promptly to execute arrest warrants and facilitate access to relevant witnesses and documentary evidence in relation to any General Assembly-referred situation, in accordance with their obligations

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mibia (1), United Kingdom (1), Burkina Faso (1), Denmark (1), Zambia (3), Tanzania (5), Senegal (1), Switzerland (2), USA (1), South Africa (1) and the Netherlands (1). See ICTR, "Nzabirinda arrested in Belgium", 21 December 2001.

<sup>90</sup> See Florian Bieber (ed.), *EU Conditionality in the Western Balkans*, Routledge, Abingdon, 2012.

under Part 9 of the ICC Statute.<sup>91</sup> Non-compliance would permit the Court to report the State Party to the ASP. Part 9 provides a detailed basis for encouraging and monitoring co-operation with a General Assembly-referred situation.

In practice, the remedy of reporting non-compliance by ICC States Parties is unsatisfactory, whether a complaint is made to the ASP or (for Security Council-referred situations) to the Security Council. The ASP has elaborate procedures,<sup>92</sup> and the Security Council has a range of options under Chapter VII, to secure co-operation by a recalcitrant State Party. But neither the Security Council nor the ASP have taken effective action in respect of the instances of non-co-operation referred to it.<sup>93</sup>

The problem of securing State co-operation for ongoing international investigations is not on its own a valid reason not to facilitate General Assembly referral. As seen with respect to Darfur, Libya, Serbia, and Croatia, Chapter VII is not necessarily a panacea. The non-availability of Chapter VII-type enforcement action is not a legal or practical barrier to the inclusion of a referral function for the General Assembly in the ICC Statute.

To secure co-operation in a General Assembly-referred situation, the General Assembly and the ASP could lawfully call upon States to take

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<sup>91</sup> States Parties and non-States Parties to the ICC Statute would have different duties to co-operate in the event of a General Assembly referral. The former have ratified the ICC Statute and voluntarily assumed the obligations imposed by it; they have a duty to co-operate fully. The latter do not.

<sup>92</sup> ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011, para. 9 (<http://www.legal-tools.org/doc/ec50d0/>). The “informal response procedure” includes an emergency Bureau meeting, triggering the good offices of the President of the ASP, a meeting of the New York Working Group, an open letter from the ASP President to the recalcitrant state, and other measures. The ASP’s “formal procedure” envisages a range of options: (a) the Bureau of the ASP seeks the views of the requested State; (b) States Parties raise the matter in bilateral contacts with the requested State; (c) the ASP President uses his good offices to resolve the matter; (d) a dedicated facilitator consults on a draft resolution containing concrete recommendations on the matter, see *ibid.*, Annex 8.

<sup>93</sup> The ASP has adopted no resolution condemning non-compliance by States, and has scarcely referred to judicial findings of their non-compliance. On 24 November 2016, the ASP:

Recall[ed] the non-cooperation procedures adopted by the Assembly in ICC-ASP/10/Res.5, recognizes with concern the negative impact that the non-execution of Court requests continues to have on the ability of the Court to execute its mandate, takes note of the decisions of the Court on non-cooperation findings in relation to Djibouti, Uganda and Kenya, and of the report of the Bureau on non-cooperation.

ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/15/Res.5, 24 November 2016, p. 39 (<http://www.legal-tools.org/doc/991a13/>).

measures to secure the arrest and delivery of fugitives and access to critical evidence. Many States have imposed measures in recent years on individuals within Syria, Yemen, South Sudan, Myanmar, and the DPRK, including asset freezes, travel bans, arms embargoes, and restrictions on trade and military training and military co-operation.<sup>94</sup> In the event of General Assembly referral to the ICC, blocs of willing States would be able to modify and leverage these tools to secure co-operation with the investigation and prosecution.

### **9.10. Guards Against Unmeritorious Referrals by the General Assembly**

Both the UN Charter and the ICC Statute contain numerous safeguards to address the concern that the General Assembly might refer unmeritorious situations to the ICC, resulting in unfair prosecutions.

The first is that the General Assembly must act by two-thirds majority of “members present and voting” for “important questions”, including matters concerning the maintenance of international peace and security, under Article 18 of the Charter. The two-thirds majority requirement should ensure that only the most egregious situations of human rights abuse, attracting almost universal condemnation, would be referred to the Court.

This is borne out by resolutions passed by majorities exceeding two-thirds of members voting supporting referral of Syria and the DPRK to the ICC.<sup>95</sup> In August 2012, the General Assembly passed Resolution 66/253, *inter alia* encouraging the Security Council to consider accountability measures for those responsible for crimes against humanity in Syria. It came three months after the Security Council referral of Syria to the ICC was vetoed, and was passed by 133 votes to 12 (with 31 abstentions).<sup>96</sup> In

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<sup>94</sup> See, for example, those imposed by the EU on individuals in Myanmar and South Sudan, EU, Council Decision (CFSP) 2018/655 of 26 April 2018 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma, 26 April 2018, 2018/655/CFSP (<http://www.legal-tools.org/doc/ttyzyj/>); EU, Council Decision (CFSP) 2018/1125 of 10 August 2018 amending Decision (CFSP) 2015/740 concerning restrictive measures in view of the situation in South Sudan, 10 August 2018, 2018/1125/CFSP (<http://www.legal-tools.org/doc/a08n72/>); and those by the US on individuals based in Syria, US, Office of Foreign Assets Control, “Syria Sanctions Program”, 2 August 2013.

<sup>95</sup> Members “present and voting” means members casting an affirmative or negative vote. Those who abstain are considered not voting. UN General Assembly, Rules of Procedure and Comments, Rule 86 (<http://www.legal-tools.org/doc/nb3c1y/>).

<sup>96</sup> In May 2014, 13 of the 15 Security Council members, supported by 65 other UN member states, endorsed a French proposal to refer Syria to the ICC. UN Security Council Draft

December 2014, the General Assembly passed Resolution 69/188, co-sponsored by 62 countries, calling for referral of the DPRK to the ICC, by 116 votes to 20 (with 53 abstentions).<sup>97</sup> As noted above, the creation of the Syria and Myanmar mechanisms were carried by resolutions supported by well over two-thirds of members present and voting.

It is unlikely that the General Assembly, acting by two-thirds majority, would refer an unmeritorious situation to the ICC. But if it did, the ICC Statute contains further safeguards. The Security Council can at any time pass a resolution to defer any investigation or prosecution.<sup>98</sup> The State under scrutiny can put an end to it by carrying out genuine investigations and prosecutions.<sup>99</sup> The ICC Prosecutor must be satisfied that the situation meets the gravity threshold.<sup>100</sup> Even if the Prosecutor is so satisfied, he or she can decline to investigate or prosecute if he or she concludes that this is in the interests of justice.<sup>101</sup> An unmeritorious case can be halted by a preliminary ruling on admissibility<sup>102</sup> or other forms of challenge to the jurisdiction of the Court or the admissibility of a case.<sup>103</sup> Appeal proceedings exist with respect to jurisdiction and admissibility.<sup>104</sup> The confirmation process by the Pre-Trial Chamber acts to prevent prosecutions on unfounded charges.<sup>105</sup> All these safeguards apply *before* trial even starts. The concern that facilitating General Assembly referral would open the floodgates to the investigation of minor cases by the ICC has no foundation.

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Resolution 348 (2014), UN Doc. S/2014/348 (2014), 22 May 2014 (<http://www.legal-tools.org/doc/f8f995/>). China and Russia vetoed the draft resolution.

<sup>97</sup> UN General Assembly Resolution 69/188, UN Doc. A/RES/69/188, 18 December 2014(<http://www.legal-tools.org/doc/xkzc3a/>). China and Russia voted against the resolution.

<sup>98</sup> Deferral requires an affirmative Resolution by the UNSC under Chapter VII, and therefore requires the support of non-permanent members of the UNSC as well as support or abstention of all five of the permanent members. This is in the spirit of the Charter, which foresees the UNSC *as a whole* taking primary responsibility for international peace and security on behalf of all UN Member States and taking “in order to ensure prompt and effective action”, Article 24 of the UN Charter, see above note 40.

<sup>99</sup> Article 17(a) of the ICC Statute, see above note 2.

<sup>100</sup> *Ibid.*, Article 17(1)(d).

<sup>101</sup> *Ibid.*, Article 53(1)(c) and (2)(c).

<sup>102</sup> *Ibid.*, Article 18.

<sup>103</sup> *Ibid.*, Article 19.

<sup>104</sup> *Ibid.*, Article 82(1)(a).

<sup>105</sup> *Ibid.*, Article 61.

### **9.11. Conclusion**

ICC States Parties must reconsider the current interpretation of the UN Charter which requires them, in effect, to delegate their responsibilities to investigate and prosecute atrocity crimes in non-States Parties to a Security Council which is too often prevented from action by actual or threatened veto by one or more of its permanent members.

There are no attractive alternatives to referral of meritorious situations to the ICC. Valuable as the work that national war crimes investigation and prosecution units do, none has the capacity to handle a full investigation and prosecution of a major situation, such as the crimes committed in Syria in 2011–2021. Only a well-resourced international court can handle atrocity on such a scale. The General Assembly-approved investigation mechanisms for Syria and Myanmar are carrying out excellent work but lack the power to prosecute.

Further Security Council vetoes in the face of mass atrocity might well lead to the establishment of more General Assembly-approved investigation mechanisms, which will exist alongside the Syria Mechanism and Myanmar Mechanism, and the OPCW's investigative unit. While co-operation between these mechanisms is desirable and inevitable, each new mechanism will nevertheless require considerable annual funding to establish and operate units dealing with evidence-gathering, storage, analysis, co-operation, witness protection, legal advice, personnel, finance and other support functions. Nobody argues that the establishment of further investigative mechanisms, with similar operational challenges, will be a cheaper or faster alternative to referral to the ICC. Nor is the creation of a single permanent investigative mechanism, without a prosecutorial mandate, a satisfactory alternative. The nature and scale of the crimes under discussion demands not merely investigation, but the swift arrest and fair trial of those most responsible.

A General Assembly referral function in the ICC Statute would enable ICC investigations and prosecutions to get off the ground without delay. Bringing all future investigations into major atrocities under the roof of the ICC would enable the ICC to apply across all these situations its expertise in evidence collection, analysis, witness protection, and international co-operation. It would enable a more efficient use of the limited resources available for investigation and prosecution of atrocity crimes.

At the same time, States Parties must be realistic about the value of enabling more ICC investigations but not providing the political and financial back-up necessary to make them effective. Material and logistical support for the ICC remains critically important.

In the final analysis, we cannot in the third decade of the twenty-first century continue to tolerate impunity in the face of barbaric atrocity. A referral resolution supported by two-thirds of the General Assembly in the face of mass atrocities carries not only a presumption of legality, but also enormous moral weight. The ICC's 123 States Parties should not underestimate their power to end impunity for massive crimes that continue to shock the conscience of humanity.



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# The Complementary Global Regimes Working for Peace and Justice and the Pursuit of Universal Jurisdiction

Andrea Marrone\*

## 10.1. Introduction

Substantive and institutional reforms for the maintenance of international peace and security are required and this is not new. A review of the United Nations (‘UN’) Charter in Chapter VII should consolidate the efforts working for peace and justice for the sake of human security. The reform of the United Nations Security Council (‘UNSC’) encompasses five key issues, such as the categories of membership, the question of the veto held by the five permanent members, regional representation, the size of an enlarged UNSC and its working methods, and the Security Council-General Assembly relationship. The veto of the permanent members of the UNSC is the most undemocratic element as well as the main cause of inaction when genocide, war crimes and crimes against humanity occur. The veto effectively prevents UN action against the permanent members and their allies and undermines the regime of international criminal justice falling under the Rome Statute of the International Criminal Court (‘Rome Statute’).<sup>1</sup>

In the last decade, the debate in the UN centred on the responsibility to protect individual fundamental rights by the international community

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<sup>1</sup> Jean-François Thibault, “The UN Security Council isn’t working. Will it ever be completely reformed?”, in *The Conversation*, 21 June 2020; Louise Arbour, “The Relationship Between the ICC and the UN Security Council”, in *Global Governance. A Review of Multilateralism and International Organisations*, 2014, vol. 20, no. 2, pp. 195–201.

when States are failing or unwilling to do so. UNSC Resolution 1674 adopted on 28 April 2006, reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>2</sup> Resolution 1674 committed the UNSC to take action protecting civilians during armed conflicts. The normative developments in the UN legislation about the duty to protect civilians is correlated with the maintenance of peace and security and with the right to intervene in the domestic affairs of sovereign States for humanitarian reasons, while further extending the reach of a criminal jurisdiction to punish the perpetrators in accordance with the provisions of the Rome Statute.<sup>3</sup> This has been the case in Darfur, Sudan,<sup>4</sup> and Libya,<sup>5</sup> although, so far, the UNSC has remained silent with regard to the extreme violence used against civilians in Syria and in other country situations.

Additional discussions concern the political responsibility of the UNSC to support the presence and activity of the International Criminal Court ('ICC') with its mandate configurations in the Democratic Republic of Congo ('DRC'), Uganda, Central African Republic, Ivory Coast, Mali, Afghanistan, and so forth, preventing the escalation of violence during difficult political transitions such as in Guinea, Burundi and in the context of the armed conflict between Boko Haram and the security forces in Nigeria.<sup>6</sup>

This chapter investigates the current challenges pursuing universal jurisdiction for serious crimes of common concern. It questions the progress of international law preserving fundamental individual rights between the respective different but interlinked mandates of the ICC and the UNSC.

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<sup>2</sup> Security Council Resolution 1674 (2006), UN Doc. S/RES/1674 (2006), 28 April 2006 (<http://www.legal-tools.org/doc/4bf3cc/>).

<sup>3</sup> See Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court. Legal Nature, Effects and Limits*, Leiden Studies on the Frontiers of International Law, Brill Nijhoff, Leiden, 2018, p. 55; United Nations Human Rights Office of the High Commissioner, "Peacekeeping and peace enforcement operations", in *International Legal Protection of Human Rights in Armed Conflicts*, 2011, p. 28.

<sup>4</sup> Security Council Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005 (<http://www.legal-tools.org/doc/4b208f/>).

<sup>5</sup> Security Council Resolution, 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011 (<http://www.legal-tools.org/doc/00a45e/>).

<sup>6</sup> See ICC Office of the Prosecutor ('OTP'), *Report on Preliminary Examination Activities (2019)*, 5 December 2019.

In other words, the pursuit of justice by the ICC and the pursuit of international peace and security by the UNSC. This chapter discusses the progress achieved and further progress possibly achievable by the legal and political frameworks protecting civilians with a universal jurisdiction. It highlights the necessity to define the meaning of complementary global regimes fostering peace, justice and security in respect of constitutional measures. It debates the global humanitarian policy of interventions and the preparedness of international governance institutions which deal with mass atrocity crimes and aggression, including their public authority, delimitation of competence and responsibility. It contributes to contemporary visions for the preservation of the international legal and political order, including the capacity building of the international community governing *intra* and *inter*-state conflicts on the ground, much more than as distant observers, or with militarized international responses under the flag of humanitarianism and the responsibility to protect civilians.<sup>7</sup>

The ideal would be to see complementary global regimes supporting each other in the country situations where they are both involved. The partnership that exists between the UN and the ICC represents a good opportunity but this is still at an embryonic stage. The fight against war and crime based on the rule of law, multilateralism, collective responsibility and global solidarity requires further political will and substantive reforms.<sup>8</sup>

## **10.2. The Initiatives to Restrain the Veto Powers of the United Nations Security Council**

Over the last 20 years, a variety of initiatives tried to neutralize the veto powers in the UNSC. According to such initiatives, the permanent members of the UNSC should voluntarily restrain the use of their veto in the face of genocide, crimes against humanity and war crimes. The first of these initiatives or the so-called ‘responsibility not to veto’ developed as part of the doctrine of the ‘responsibility to protect’ (‘R2P’) since 2001.

The most prominent ‘veto restraint’ initiatives refer to the Accountability, Coherence and Transparency (‘ACT’) Group of States’ initiative of

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<sup>7</sup> Parts of this chapter are taken from my previous work. See Andrea Marrone, *The Governance of Complementary Regimes and the Pursuit of Human Security. The Interaction between the United Nations and the International Criminal Court*, Intersentia, Antwerpen, Cambridge, 2016, p. 3.

<sup>8</sup> *Ibid.*, p. 35.

the Code of Conduct (signed by 117 member States and 2 observers)<sup>9</sup> and the ‘French/Mexican Initiative’ (supported by 103 States).<sup>10</sup> In 2015 France launched a Political Declaration on the suspension of veto powers open to all UN Member States to support. The Political Declaration refers only to the five permanent members of the UNSC and calls for voluntary restraint of the use of the veto in cases of mass atrocities. In 2020, the Political Declaration was supported by 103 member States and two UN observers. As stated by Jennifer Trahan:

these initiatives are extremely important in galvanizing momentum that the veto needs to be restrained when atrocity crimes occur, increasing the political cost of using the veto during the commission of such crimes, and stressing the importance of all States acting in the face of such crimes, as the Code of Conduct does. Yet, only two permanent members of the UNSC (France and the UK) have joined such initiatives. Additionally, both voluntary ‘veto restraint’ initiatives are considered ‘soft law’, a code of conduct and a “political doctrine”, so neither of these initiatives purports to create binding legal obligations.<sup>11</sup>

Also, some inter-institutional initiatives did not bring a positive outcome. The introductory remarks during the Arria-formula meeting UNSC-ICC interaction in 2018 referred to the slogan of “no peace without justice and no justice without peace”.<sup>12</sup> Such slogan best captures the relationship

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<sup>9</sup> “Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes”, in Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621–S/2015/978, 14 December 2015 (<http://www.legal-tools.org/doc/udgscv>); the ACT Group in the UN is a cross-regional group of states working together to improve the working methods of the UNSC. See the International Committee of the Responsibility to Protect, “The ACT Code of Conduct”, September 2018.

<sup>10</sup> See France, Ministry of Foreign Affairs, “Why France wishes to regulate use of the veto in the United Nations Security Council?”, 2013 (available on the Ministry’s web site).

<sup>11</sup> See International Centre for Transitional Justice, “Legal Limits to the Veto Power in the Face of Atrocity Crimes”, 4 November 2019 (available on its web site). On 22 October 2018, Jennifer Trahan gave a speech at the UN in the Trusteeship Council as part of the Program of the 29th Informal Meeting of Legal Advisers on a panel entitled “Preventing and Punishing Atrocity Crimes. Reflections 70 Years after the Adoption of the UN Convention on Genocide”.

<sup>12</sup> Letter dated 31 August 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc. S/2018/810, 4 September 2018, p. 5 (<http://www.legal-tools.org/doc/w3k9ww/>).

between the UNSC and the ICC. The UNSC held its first thematic open debate focusing on the ICC in October 2012, during which several calls were made to improve its interaction and co-operation with the ICC.<sup>13</sup> Notably, the UNSC was called upon to effectively follow-up its Article 13(b) referrals to ensure its own credibility and the effectiveness of international criminal justice system, in particular through co-operation with the ICC, including the timely implementation of ICC decisions. More generally, the ‘peace goal’ enshrined in the UN Sustainable Development Goal 16 (“Peace, Justice and Strong Institutions”) recognizes that “there can be no sustainable development without peace, and no peace without sustainable development”. Equally, recent calls for ‘just security’ in global governance seek to ensure that neither justice nor security imperatives are neglected as the world grapples with critical issues including the growing of mass atrocities in fragile States.<sup>14</sup>

A serious issue waiting for a solution resulted from the fact that the UNSC resolutions in Darfur, Sudan and Libya placed the financial burden exclusively on the ICC and excluded from ICC jurisdiction foreign nationals operating under the authorization of the UNSC. While imposing an obligation on parties to the conflict to co-operate fully with the ICC, the resolutions merely urged States other than Sudan and Libya to co-operate with the ICC, noting that they were under no obligation to do so.<sup>15</sup>

The ICC, as an independent judicial institution, has acquired jurisdiction over crimes committed in the territory of non-States Parties to the Rome Statute. Soon after these referrals were issued, however, support by the UNSC to the ICC waned and the criticisms were widespread.<sup>16</sup> In any case, the US decision to authorize sanctions targeting staff at the ICC investigating and prosecuting Afghan war crimes is “a direct attack to the

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<sup>13</sup> Ban Ki-Moon, “Remarks at Security Council open debate on ‘Peace and Justice with a Special Focus on the Role of the International Criminal Court’”, 17 October 2012.

<sup>14</sup> For the extensive debate on these sensitive issues see Platform on Global Security and Justice Governance, “Just Security and Global Governance in Critical Spaces”, Stimson Center, 2015, p. 20 (available on its web site).

<sup>15</sup> See Security Council Report, “In Hindsight: The Security Council and the International Criminal Court”, 31 July 2018 (available on its web site).

<sup>16</sup> See International Law Meeting Summary, with Parliamentarians for Global Action, “The UN Security Council and the International Criminal Court”, in *Chatham House*, 16 March 2012.

institution's judicial independence" and it openly undermines the rule of law.<sup>17</sup>

### 10.3. The Current Issues Pursuing Civilian Protection Duties

Although complementarity has been described as the cornerstone of the ICC, questions persist as to whether the UNSC, "as the body charged with the primary responsibility for the maintenance of international peace and security, can abrogate this principle and confer jurisdictional primacy upon the ICC".<sup>18</sup> So far without the US, China and the Russian Federation on the side of international criminal justice this is practically impossible. Broadly the current dynamics of humanitarian *solidarism* and the trends of *interventionism* and *isolationism* in international policy and law<sup>19</sup> require discussions taking into consideration the challenges of our time and the political realism of some permanent members of the UNSC in regard to mass atrocity crimes.

The R2P doctrine has been developed at the beginning of this century by the International Commission on Intervention and State Sovereignty ('ICISS')<sup>20</sup> in response to the challenge imposed on States on how to respond to grave human rights violations if humanitarian interventions were an unacceptable assault on sovereignty. The ICISS tried to solve the dilemma of sovereignty versus human rights by arguing that sovereignty entails certain responsibilities. In accordance with the rule of law, a sovereign State has the responsibility to protect its citizens from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>21</sup> With the adaptation of the R2P during the 2005 World Summit, the UN Member States accepted that the protection of human rights was an inherent part of sovereignty. Fur-

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<sup>17</sup> See UN News, "UN dismayed over US sanctions on top International Criminal Court officials", 2 September 2020.

<sup>18</sup> See Harry Hobbs, "The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya", in *Eyes on the ICC*, vol. 9, no. 1, 24 April 2014.

<sup>19</sup> Interventionism, a concept that addresses the characteristics, causes, and purposes of a country's interfering with another country's attitudes, policies, and behaviour. See Alex J. Bellamy, "Humanitarian Intervention and the Three Traditions", in *Journal Global Society*, 2003, vol. 17, no. 1; see also Katrina Fetsch, "A World in Flux: The Waning of International Cooperation and the Rise of Isolationism in the New Global Climate", in *MJIL Online*, 10 February 2017, vol. 38 (available on its web site).

<sup>20</sup> See ICISS, "Report of the International Commission on Intervention and State Sovereignty", 2001.

<sup>21</sup> Jared Genser and Irwin Coler (eds.), *The Responsibility to Protect. The Promise of Stopping Mass Atrocities in our Time*, Oxford University Press, 2012.

thermore, the UN Member States accepted not only that every State had this responsibility towards their own population, but when a State fails to protect its citizens from these crimes the State in question temporarily loses its right on sovereignty and the responsibility to protect shifts towards the international community. This responsibility entails the prevention of serious crimes, including their incitement, through appropriate, necessary and shared intervention duties.<sup>22</sup>

The UN's 2005 World Summit Outcome Document explicitly limits the application of the R2P norm to genocide, ethnic cleansing, war crimes and crimes against humanity. These crimes of common concern have been clearly and comprehensively defined in a range of documents including the founding treaty of the ICC (Rome Statute). It needs to be noted that the R2P does not apply to many grave threats to human security, whether from climate change or pandemic, or from many aggressive or even harmful national policies, such as the suspension of civil liberties, mass corruption, or *coups d'état*. Other human rights instruments, legal frameworks and international governance institutions are considered to be better suited to address these pressing human security threats, namely the ICC and the UN institutions.

At the very heart of the R2P norm is the principle that States, with the aid of the international community, must act to *prevent* mass atrocities, including to *respond* and *rebuild* situations where mass atrocities occur. Equally central remains the idea that the concerned stakeholders of the international community should help States to prevent these gross abuses through what the UN characterizes as “diplomatic, humanitarian and other peaceful means”. This could include strengthening State capacity through economic assistance, rule-of-law reform, building of political institutions and security sector reforms (army, police and judiciary), or, when violence has begun or seems imminent, through direct acts of mediation negotiating peace processes. Only when such means have been unsuccessful should the international community, acting through the UNSC, turn into more coercive measures. These could include such non-consensual measures as economic sanctions or the threat of sanctions, arms embargoes, or the threat to refer perpetrators to international criminal prosecution. Should peaceful means be inadequate and the State in question is manifestly failing to pro-

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<sup>22</sup> See Note by the Secretary-General, UN Doc. A/59/565, 2 December 2004 (<http://www.legal-tools.org/doc/2avt2k/>).

tect its population, then, and only then, would the UNSC consider the use of military force. Thus, it comes as a pressing issue to discover relevant links between regimes and sub-regimes dealing with mass atrocity crimes, establishing the truth about them, fighting against impunity, and providing law enforcement capacity.

#### **10.4. The Complementary Global Regimes Fostering Peace and Justice**

The establishment of judicial institutions enforced by political organs after the scourge of two world wars since the Tokyo and Nuremberg tribunals, the advent of *ad hoc* Tribunals (International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR')) and mixed courts, including the broad definition of multilevel jurisdictions, are important reference points by which to measure the progress in the fight against impunity of international crimes at a global level. The ICC, established as the result of an emerging multilateral political process, is one of the major *third* generation of international judicial institutions securing justice for victims when it cannot be delivered at the national level.<sup>23</sup>

It must be noted that multilateral treaties provide the basic architecture of complementary global regimes relying on international co-operation in the fight against war and crime. This is the case for the UN Charter and the Rome Statute. These regimes established international governance institutions, normative capacity and multi-level jurisdictions to influence State behaviour and to strengthen the notion of individual accountability, whilst also promoting the concept of human security in international society.<sup>24</sup> Nevertheless, their effectiveness and public authority dealing with global threats and crimes continues to be problematic for several reasons. Considering the minimal resources allocated to them alone, the expectations that they will respond to the current challenges in conflict and post-conflict situations are very high. First, these global regimes have to rely on the support and co-operation of governments. Second, in order to maximize

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<sup>23</sup> Yuval Shany, *Assessing the Effectiveness of International Courts*, Oxford University Press, 2013, p. 206.

<sup>24</sup> Gerd Oberleitner, "Human Security: A Challenge to International Law?", in *Global Governance: A Review of Multilateralism and International Organizations*, 2005, vol. 1, no. 2, p. 185; Cedric Ryngaert and Math Noortmann, *Human Security and International Law*, Intersentia, 2013, p. 195.

their results, the interaction between them is fundamental for democratic governance but not less problematic.

The political determination to establish an independent and permanent ICC in ‘relationship’ with the UN system, “with jurisdiction over the most serious crimes of common concern to the international community as a whole”, was settled in the Preamble of the Rome Statute. The Preamble of this treaty recognizes the link between peace and justice, stating that “grave crimes threaten the peace, security, and well-being of the world” and affirming that “the States Parties are determined to put an end to the impunity for the perpetrators of these crimes, and thus, contribute to the prevention of such crimes”.<sup>25</sup>

Considering the practice of the last decade, the pursuit of peace and justice in conflict and post-conflict societies presents controversial challenges for the governance of humanitarian escalations so-called of *last resort*. Several problems occur in the co-ordination of efforts of independent political and judicial international mandates, particularly between the configuration strategies of international peacemakers and peacekeepers, and the interests of victims and witnesses of international crimes, mainly concerning their relocation, protection and reparation in the context of human security.<sup>26</sup> Some analysts point out that “even if peace and justice complement each other in the long term, in the short term, tensions have arisen between efforts to secure peace and efforts to ensure accountability for international crimes”.<sup>27</sup>

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<sup>25</sup> See Rome Statute of the International Criminal Court, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>26</sup> See Neha Jain, “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court”, in *European Journal of International Law*, 2005, vol. 16, no. 2, pp. 239–254; Frédéric Mégret, “Victims before the International Criminal Court: A New Model of Criminal Justice?”, in *Department of Justice: Victims of Crime Research Digest*, 2017, no. 5.

<sup>27</sup> See Sara Darehshori, “Pursuing Peace in an Era of International Justice”, in *Politorbis*, 2010, vol. 3, no. 50, p. 83. See Alvaro de Soto, “Peace versus Justice: A False Dichotomy”, in *Paris School of International Affairs: Contemporary Issues in Conflict Resolution*, Spring/Summer 2017; M. Cherif Bassiouni, “Justice And Peace: The Importance of Choosing Accountability over Realpolitik”, in *Case Western Reserve Journal of International Law*, 2003, vol. 34, no. 2, pp. 191–204 (<http://www.legal-tools.org/doc/db0d07/>); M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 9–28 (<http://www.legal-tools.org/doc/9f0a15/>).

In theory, the principle of interdependence between peace, justice and security at a global level should focus on strengthening relationships and partnerships between complementary global regimes, such as the Rome Statute institutions (Assembly of States Parties ('ASP'), ICC and Trust Fund for Victims ('TFV')) and the UN system. This is particularly important considering that the main characteristic of the regime of international criminal justice is based on co-operation networks at the domestic, regional and global levels.<sup>28</sup> In practice, the interdependence between peace, justice and security is compromised by the obstacles caused by balancing powers at international level. This is particularly evident when looking at the interaction between political, executive and judicial mandates and the international governance that derives from such compromise manifested in the complementarity principle of the ICC.<sup>29</sup>

At the structural level, all of the Rome Statute institutions are complementary to the UN system. These global governance institutions deal, respectively, with international threats, peace sustainability and crime control, but their partnership is not sufficiently implemented, while the ICC jurisdiction is limited to the most serious crimes of international concern. The institutional relationship between the ICC and the UN is governed by the relationship agreement between the organizations. Any amendment of such agreement must be approved by the UN General Assembly and by the ASP in accordance with Part 2 of the Rome Statute on jurisdiction, admissibility and applicable law. Several basic principles, such as discretion and confidentiality, preside over the co-operation between the ICC and the UN. In addition, there is a kind of co-operation, which also relies on specific arrangements and agreements regulating their interaction in the field operations.<sup>30</sup>

In theory, the ways in which global actors interact with each other is relevant to evolve in their respective competences. This is also valid for the governance of serious humanitarian crises, which are all related to the destabilization and disintegration of nation-States and the struggle of capacity building in their own domestic reality in order to fight against war and

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<sup>28</sup> See Anne-Marie Slaughter, *A New World Order*, Princeton University Press, 2004, p. 31.

<sup>29</sup> See Laura Clarke, "Complementarity as Politics", in *Journal of International and Comparative Law*, 2012, vol. 2, no. 2, pp. 38–65.

<sup>30</sup> See United Nations, "Best Practices Manual for United Nations – International Criminal Court Cooperation", 26 October 2016; see also ICC, "Understanding The International Criminal Court", 2016, p. 4 (<http://www.legal-tools.org/doc/9ea9fa/>).

crime. Although there are no doubts that a multilateral dimension is necessary to centralize the security of individuals at a global scale, the interaction between complementary global regimes depends on the complex intersection between politics and law in the ‘new’ world order. This interaction depends on the political determination of the international community to *prevent, react* and *rebuild* fighting against the impunity of mass atrocity crimes. The ideal would be the establishment of a system of governance which monitors humanitarian interventions and civilian protection mandates, with a focus on the prevention of, response to, and reconstruction after mass atrocity crimes would occur. Despite the existence of a treaty-based jurisdiction dealing with serious crimes of common concern and a regime of international criminal justice complementary to the UN system, such an ideal is far from being realized.<sup>31</sup> The fragmentation of legal frameworks based on co-operation with their liberal views based on pluralism is still the trend. In the current political reality, the five permanent members of the UNSC have established fragmented international public policy and controversial legislation with regard to the governance of mass atrocity crimes.<sup>32</sup>

The main concern is whether human security measures would be applied during humanitarian escalations of *last resort* between complementary global regimes fostering peace and justice. It will need to be verified in which direction the policies of global ‘humanitarianism’, global ‘solidarity’, collective ‘responsibility’ and mutual ‘accountability’ will further evolve. A political *road map* preserving human security is required and the next section debates the major dilemma among the rule of law frameworks preserving human security in conflict and post-conflict societies.

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<sup>31</sup> David R. Black and Paul D. Williams, *The International Politics of Mass Atrocities. The Case of Darfur*, Routledge, 2010, p. 155.

<sup>32</sup> In Resolution 1422 (2002), UN Doc. S/RES/1422 (2002), 12 July 2002 (<http://www.legal-tools.org/doc/1701d5/>), the Security Council, acting pursuant to Chapter VII of the Charter of the United Nations, 1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise; 2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary; 3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations.

### **10.5. The Concept of Complementarity and the Dilemma of Human Security**

Soon after the establishment of the Rome Statute system and the treaty-based framework of international criminal justice deriving from it, it became clear that the fight against impunity of crimes of common concern, and the limited jurisdiction dealing with such impunity, is not a sufficient prerequisite for human security expectations in conflict zones. The Rome Statute system has been settled outside the UN premises. It is based on a political and management oversight from its States Parties in order to do something about the victims and the affected communities by mass atrocity crimes, responding to the promise of *never again* after the occurrence of the genocide in the Balkans in Rwanda and Cambodia. Right after its establishment and the first generation of judicial activities, the problem of uneven global access to justice for war crimes, crimes against humanity and genocide became evident. The solution remaining the universal ICC ratification, the adoption of national laws to prosecute individuals for grave crimes and to co-operate with the ICC at national, regional and global levels.

The nature of interactions between complementary global regimes merits further development handling mass atrocity crimes and the protective measures of civilians. At any given time, the ICC prosecutor is exploring the possibility of bringing prosecutions against individuals in situations around the world. The ICC cases mostly focus on those most responsible for committing grave crimes such as high government officials, military leaders, or rebel commanders. The Rome Statute created two independent institutions: the ICC and the TFV. The ICC investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community. While it is impossible to fully undo the harm caused by genocide, war crimes, crimes against humanity and the crime of aggression, it is possible to help victims rebuild their lives and regain their dignity and status as fully functioning members of their communities. The TFV:

advocates for victims and mobilizes individuals, institutions and governments with resources for the benefit of victims and their communities. It funds and sets up innovative projects to meet victims' physical, material, or psychological needs. It may also directly undertake activities as and when requested

by the ICC. The TFV co-operates with the ICC to avoid any interference with ongoing legal proceedings.<sup>33</sup>

In spite of their small size and the very few resources allocated outside the constellation of the UN entities, the institutions established under the Rome Statute regime (ICC, TFV and the ASP) have the potential to re-propose new approaches for the preservation of the international legal and political order dealing with mass atrocities. Such influence depends on several factors and the most important of them deserve further discussions. The establishment by the UN Human Rights Council ('UNHRC') of commissions of inquiry in the situations where the ICC is investigating would benefit the collection of information and evidence for its investigations and prosecutions. Another important role for the UN would be the configuration of mandates on the ground, supporting the activities of the ICC, as a prerequisite of an architecture which fosters peace and justice in the context of human security. The main solution remains the restriction of the veto powers in the UNSC in cases of genocide, crimes of war and crimes against humanity.

The responsibility to protect civilians in conflict zones using 'all necessary measures' and the new language used for the right of humanitarian intervention in the R2P framework are criticized as being characterized by flawed decision-making based on interests and alliances within political organs, and not upon an established legal procedure of binding character as a prerequisite of democratic global governance.<sup>34</sup> All this relates to the debate on the evolution on humanitarian intervention and the R2P and whether and how the R2P is just a new language for the right to intervene including the French distinction between *droit d'ingérence* and *devoir d'ingérence*.<sup>35</sup> Contrary to a widespread assumption, the idea of a 'responsibility to protect' does not date from the ICISS report, which made it glob-

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<sup>33</sup> See ICC, "Understanding the International Criminal Court", p. 38.

<sup>34</sup> See Mónica Serrano, "The Responsibility to Protect and its Critics: Explaining the Consensus", in *Global Responsibility to Protect*, 2011, vol. 3, no. 4, pp. 425–437; Gareth Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, Brookings Institution Press, 2008, p. 55.

<sup>35</sup> See Yves Sandoz, "Droit or devoir d'ingérence and the right to assistance: the issues involved", in *International Review of the Red Cross*, 1992, vol. 32, no. 288; See also Philippe Garigue, "Intervention – sanction and 'droit d'ingérence' in international humanitarian law", in *International Journal*, 1993, vol. 48, no. 4, pp. 668–86.

ally renowned in 2001.<sup>36</sup> The same limitation applies to the humanitarian escalations referred to a treaty-based organization dealing with internationally recognized crimes, which struggles to hold non-state actors accountable without reliable law enforcement measures. Furthermore, the support and co-operation inherently required by referrals addressed to international criminal justice by the UNSC, currently precludes any binding character of political organs in their responsibility to support financially the ICC. The same limits apply to the configuration of mandates on the ground, where the configuration of peace enforcement does not take international judicial activities and the outcomes of such activities into appropriate consideration. That said, are we simply dealing with the arrays of ‘symbolic politics’ of law enforcement, or can we refer to a ‘paradigm in the making’ of governance systems dealing with sensitive human security issues?

In several situations the military engagements and coalitions, which characterized international responses during internal armed conflicts, undermined the credibility of multilateral treaties fostering stability and the rule of law, including the international governance institutions from which they derived. The main issue is that the prevention of serious humanitarian breaches and the protection of civilians during difficult political transitions are currently applied in respect of the international security measures of militarization. There are serious doubts that such an approach is a reliable preventive measure capable of challenging the mentality of war and violence during armed conflicts of international or non-international character. Moreover, does global solidarity mean that military coalitions have the potential to challenge the ideology of despotism and/or terrorism? This controversial policy issue is also related to the governance of terrorism and the use of weapons of mass destruction, including other serious global threats which have been omitted from any multilateral legal system. The fight against terrorism or ‘war on terror’ against a dangerous enemy and the quick fix of military operations as seen in the international security policy against Al-Qaida, with Osama Bin Laden wanted dead or alive, did not work. The risks of applying such methods of security have undermined universal values shared by the world community. Torture, imprisonment, disappearances of individuals and other methods used by secret intelligence have violated the basic requirements of human rights law creating further

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<sup>36</sup> See Jean-Baptiste Jeangène Vilmer, “Ten Myths about the Responsibility to Protect: A Realist Critique”, in David Whetham and Bradley J. Strawser (eds.), *Responsibilities to Protect. Perspectives in Theory and Practice*, 2015, p. 81.

extremism and international fracture.<sup>37</sup> The problem is that terrorism, as an international security threat, including its legal definition as an international crime, is only at its initial stage of being considered in multilateral governance systems. Furthermore, if the complexity of reaching political convergence of expectations at a global scale, when dealing with international threats not yet defined as international crimes is well noted, the progress achieved by governance systems dealing with serious violations of international humanitarian law needs to be verified. Once again, the Libyan situation witnessed the military approach with NATO leading military operations and the UNSC referring the situation to the pillar of accountability of the ICC while human security was not appropriately prioritized. And much worse, the referral of Syria to the ICC failed. The veto powers used by China and the Russian Federation blocked the UNSC from adopting the Syrian draft resolution.<sup>38</sup>

### **10.6. The Interaction Strategies between Complementary Global Regimes**

In post-Cold War international relations, the obstacles, challenges and concerns facing the governance of international threats and crimes proliferate.<sup>39</sup> Appropriate interaction strategies between complementary global regimes are absolutely required. The clusters of international governance currently under scrutiny require attention by decision-makers in the fields of peace and justice, co-operation, complementarity and victim rights. The maintenance and restoration of peace and security based on accountability is still weak in regard to aggression, terrorism, nuclear and chemical weapons, and also against the illicit trafficking of drugs, people, firearms and natural resources. Furthermore, the emerging frameworks of governance dealing with mass atrocity crimes rely on *last resort* methods falling under *complementary* responsibilities rather than relying exclusively on international criminal justice and the paradigm of accountability. The international governance of war and crime in multiple country situations is characterized

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<sup>37</sup> See International Commission of Jurists, *Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter – terrorism and Human Rights*, 2009, p. 49.

<sup>38</sup> Peter Nadin, “How the UN Security Council failed Syria”, in *The Interpreter*, 30 August 2017.

<sup>39</sup> See UN, “A More Secure World. Our Shared Responsibility: Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change”, Annexes: Summary of recommendations, Part 2: Collective security and the challenge of prevention, Conflict between and within States, 2004, p. 100 (<http://www.legal-tools.org/doc/b7add1/>).

by serious issues in the areas of law enforcement, civilian protection duties and sustainable order requiring all of them urgent solutions. In addition, the current shifts of international law preserving individual fundamental rights, namely international humanitarian law, international criminal law and human rights law require analysis and debate now and in the years to come.<sup>40</sup>

The establishment of an international judicial institution is a visible accomplishment advocated for decades. The regime established under the Rome Statute is the result of global advocacy for international criminal justice and accountability and requires further consensus for its empowerment strengthening universal jurisdiction.<sup>41</sup> The role of civil society has been proactive mobilizing the international community, namely States, intergovernmental organizations, the UN institutions, the European Union, the African Union and other regional organizations about the fight against impunity. The significant paradigm shift resides in the governance of massive humanitarian escalations of *last resort* in conflict and post-conflict situations, where both the responsibility to protect civilians and the fight against the impunity of international crimes have to be taken into account.

In contrast with the traditional meaning of domestic governance, which refers to decision-making defining expectations, granting public powers, or verifying performance in national governing activities,<sup>42</sup> the term global governance denotes the regulation of international relations between independent and sovereign States in the absence of a *supranational* authority.<sup>43</sup> There is general agreement between the different schools of governance that the extreme challenges that occur in societies in transition from war to peace, combined with the shortcomings of domestic jurisdictions, require solid rather than symbolic international governance institu-

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<sup>40</sup> See Andrea Marrone, 2016, p. 15, see above note 7.

<sup>41</sup> *Ibid.*, p. 41. For the debate and the literature on the role of civil society see Kjersti Lohne, “Advocates of Humanity: Human Rights NGOs in International Criminal Justice”, in *Newsletter Criminology and International Crimes*, 2015, vol. 10, no. 1, p. 11.

<sup>42</sup> Yu Keping, “Governance and Good Governance: A New Framework for Political Analysis”, in *Fudan Journal of the Humanities and Social Sciences*, 2018, vol. 11, no. 1, pp. 1–8.

<sup>43</sup> Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey*, Indiana University Press, 2010, p. 28; Karsten Nowrot, *Global Governance and International Law*, Institut für Wirtschaftsrecht, 2004, p. 16; Eric Ip, “Globalization and the future of the law of the sovereign state”, in *International Journal of Constitutional Law*, 2010, vol. 8, no. 3, July 2010, pp. 636–655; Jimmy Santiago, “Rejection of Supranational Institutions Diminishing Regional Integration Potential”, in *University of Miami: Junior Paper Series*, 2017, vol. 17, no. 4 p. 5.

tions. The mission of such institutions of universal character is to preserve norms and values internationally recognized for the sake of individual rights, while implementing strategies on matters of mutual concern and public good, under the premises of ‘effective’ multilateralism.<sup>44</sup> Recent decades have been characterized by various shortcomings in multilateral options, including the disintegration of international legal and political global frameworks. The systemic crises within international governance institutions have become more complex with the economic and financial breakdowns and the new trend of *isolationism* in international relations that have taken place at domestic, regional and global levels.<sup>45</sup> Nevertheless, while new opportunities arise for the governance systems presiding over international threats and crimes on which States may rely in case of serious domestic shortcomings, we are still far from the realization of any *supranational* system. The current interaction among international governance institutions is only based on the early formation of mutual interests, including agreements and arrangements of co-operation based on secondary law, for example the relationship agreement between the UN and the ICC.

In any case, the fact that there are multilateral settings in which to debate issues and determine a collective course of actions means that the international community is responsible for improving the democratic legitimacy of international governance institutions. Such legitimacy depends on democratization processes balancing public powers between complementary authorities, while also defining their policies and their legal responsibilities. In order to explore the current standpoint of such democratic processes it is important to find some common ground in the controversial long-running debates ((i) on peace and justice priorities; (ii) on the law enforcement and co-operation dilemmas; (iii) on the protection of human rights and implementation of human security measures; (iv) on the preservation of the rule of law at domestic, regional and global levels; and (v) on the political determinations to implement interactions in conflict and post-conflict situations where complementary global actors are currently involved. In other words, the nature of the responsibilities of co-operation

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<sup>44</sup> Sven Biscop and Edith Drieskens, “Effective Multilateralism and Collective Security: Empowering the UN”, in Katie V. Laatikainen and Karen E. Smith (eds.), *The European Union at the United Nations*, Palgrave Macmillan, London, 2006, p. 115.

<sup>45</sup> Kristen Boon, “President Trump and the Future of Multilateralism”, in *Emory International Law Review*, 2017, vol. 31; Jed Odermatt, “Brexit and International Law: Disentangling Legal Orders”, in *Emory International Law Review*, 2017, vol. 31.

that those complementary governance institutions might share in the medium- and long-term require further debate in international political *fora*, particularly on the nature, identification, prevention and prosecution of mass atrocity crimes.

The paradigm of international criminal justice and accountability referred under the UN umbrella of international peace and security, particularly used for its maintenance and restoration, requires solutions upholding the priority of human security in accordance with the constitution of the world community and the notion of universal jurisdiction.<sup>46</sup>

### 10.7. Conclusion

In the immediate and mid term, the implementation of interaction strategies between international governance institutions of complementary character for the sake of civilians in conflict and post-conflict situations is absolutely required. In the longer term, such strategies should serve the development of policy making among the relevant stakeholders strengthening the universal jurisdiction of the ICC, the relationships between the principles of universal jurisdiction and complementarity and the difficulties in their implementation.<sup>47</sup> First of all, the practice applied to *prevent, react* and *re-build* situations of mass atrocity crimes require workable, rather than disconnected global regimes of complementary character. The ICC should receive support before, during, and after the humanitarian escalations of *last resort* and the referral activity coming from the UNSC would take place. Therefore, the implications of, and the controversial intersection between politics and law in our globalized society deserve stronger advocacy in order to progress with the application of international criminal justice. After years of divergence in the debate of peace versus justice, the common ground in which respect the regime of international criminal justice deserves a place in the arrays of international peace and security and in civilian protection paradigms, has not been reached in the pursuit of accountability. It still remains to be seen how complementary frameworks will evolve for the pursuit of human security supporting the ICC judicial out-

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<sup>46</sup> Nico Schrijver, *Internationaal Publiekrecht als Wereldrecht: een inleiding*, Boom Juridische Uitgevers, 2012, p. 27.

<sup>47</sup> Xavier Philippe, “The principles of universal jurisdiction and complementarity: how do the two principles intermesh?”, in *International Review of the Red Cross*, 2006, vol. 88, no. 862, p. 375.

comes. The current practice and working methods between the UNSC and the ICC need to be reviewed.<sup>48</sup>

Obviously, the distance between multilateral regimes fostering peace, justice and security, and the obstacles to preserve fundamental individual rights are caused primarily by the disintegration of nation-states and by the widening gap between nation-States and civilians. This is primarily due to shortfalls in their domestic ability and willingness to take care of civilians in situations of war and crime, and because of three other main factors characterizing the international society, which are: (i) the fragmentation and decentralization of an international architecture and the legal and political frameworks dealing with individuals, (ii) the lack of an idealistic vision and a political *road map* reflecting human security expectations in international humanitarian interventions, and (iii) serious governance gaps that exist in the approach of international threats and crimes detectable at the domestic, regional and global levels.

Unfortunately, the old promise by the international community of *never again* in regard to genocide has not been fully upheld. The quest for complementarity between domestic, regional and international frameworks deserves further efforts based on the civilian protection mandates applied on the ground in situations of war and crime. The problem is that a political *road map* fostering human security in the current systems of international governance requires enduring endeavour. It is required to maximize the results through the complementary character of global regimes for the sake of civilians and in accordance with the challenges of our time.

This chapter advocates for global features preserving, maintaining and restoring the rule of law, while offering capacity building to protect civilians in situations of war and crime. The expectation of human security that centralizes the fundamental rights of individuals in legal and political frameworks is the priority, and complementary global regimes should be designed and governed in accordance with such a priority. In their struggle to govern multiple situations of war and crime, complementary global regimes simply deal with governance without a government in accordance with their provisions, policy formulation and the co-operation among their stakeholders and partners. This is true for both the UN and the Rome Statute system. The enduring struggle for a legal doctrine delineating domestic

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<sup>48</sup> See Andrea Marrone, 2016, p. 241, see above note 7.

and international responsibilities in situations of war and crime has brought some results, but there is still a long way to go.

The current dilemma as to whether to intervene in political transitions that are internal to collapsed nation-States and their failure *vis-à-vis* the security of individuals during civil wars requires preventive, responsive and sustainable measures. In many country situations, engagement in military actions by States and global actors would appear legal but not fully legitimate when promising unrealistic civilian protection duties during humanitarian interventions. The same concern is valid for the governance of conflicts between States, or inter-state conflicts, as in the case of the commission of the crime of aggression. Such governance also represents a controversial ‘paradigm in the making’ of complementary global regimes, if we only consider the triggering mechanisms between the UNSC and the ICC, which deal respectively with the accountability of States and individuals. The ideal would be to provide the configuration of the UNSC mandates under the flag of the R2P with the demands for the ICC to protect, demobilize, relocate and rehabilitate victims and witnesses, including law enforcement actions on the ground following its judicial outcomes. In regard to the humanitarian escalations of *last resort*, current debate in the UNSC should serve to examine the failure to refer country situations to the ICC, such as the violence in Gaza, Syria and other country situations as well as the serious shortcomings in its referrals in Libya and Darfur.<sup>49</sup>

In order to centralize individual rights in situations of war and crime, good governance of global regimes of complementary character concerning civilian protection duties requires further commitment and a deeper political determination to strengthen them. Further responsibilities of the actors involved are required to the same extent in the domestic, regional, and, particularly, in the international dimensions of global co-operation against the devastation of war and crime. Such interaction strategies are significant for the pursuit of their complementary character in dealing with peace and justice, for the expectations of human security measures applied on the ground, and for an integrated governance approach in situations of war and crime. The important requirement for such interaction strategies is to rely on the rule of law, effective multilateralism, collective responsibility, global soli-

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<sup>49</sup> On 26 February 2011, the Security Council voted unanimously to impose sanctions on the Libyan authorities, slapping the country with an arms embargo and freezing the assets of its leaders, while referring the violent repression of civilian demonstrators to the ICC, adopting Resolution 1970.

parity and mutual accountability. Any effort based on such values will reflect on the application, respect and extension of the principle of universal jurisdiction upholding the preservation of fundamental individual rights in international law.

The volatile concept of *trias politica* in global governance systems undermines the regime of international criminal justice. At this moment in time, the policy formulation of interaction strategies between multilateral premises of complementary character dealing with international threats and crimes deserves debate for several reasons. A constitutional strategy at the international level reviewing Chapter VII of the UN Charter providing a stronger role to international criminal justice has the potential to influence national constitutions and *vice versa*. Such a strategy would neutralize the risks of undemocratic positions, which compromise judicial decisions and the important role of justice, which simply deserves a better place in the arrays of international peace and security. In the long term, the visibility of such a strategy would also serve to harmonize universal values within the different legal systems and traditions of the world community. For such a strategy to become a reality, the UNSC should start losing its veto powers when dealing with the respect and dignity of human lives. The UNSC should increase the referrals to the independent jurisdiction of the ICC of any State Party or not to the Rome Statute instead of remaining silent and inactive in the face of mass atrocity crimes.<sup>50</sup>

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<sup>50</sup> See Andrea Marrone, 2016, p. 186, see above note 7.



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## Complementarity and Due Process as a Question of Admissibility: From Fighting Impunity to Seeking Justice?

Anderson Javiel Dirocie De León\*

### 11.1. Introduction

The principle of complementarity has been, and continues to be, one of the most addressed elements of the Rome Statute of the International Criminal Court ('Rome Statute' or 'Statute') by academics and practitioners. Albeit the latter is true, it does not mean that all doubts or ambiguities with regards to the scope, implementation, and objective of this principle have been ultimately clarified. The existence of many issues related to this principle can be justified by its inherently complex and at the same time still debated role in the framework of the International Criminal Court ('ICC' or 'Court') that makes it relevant not only as a mere jurisdictional test but as a transversal element that continuously impacts the practice, policy and even our understanding of the Court's nature.

This chapter does not over-elaborate on the principle of complementarity beyond those notions deemed necessary to contextualize the subject-matter of the discussion at hand and illustrate the rationale behind said principle. On the contrary, it focuses on the issue concerning the role of due process in this complementarity regime as raised by the situation in Libya before the ICC. Therefore, the chapter expands both on the principle of complementarity as a structural principle and as an issue of admissibility.

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In other words, it examines the interplay of the principles of complementarity and due process when assessing the admissibility of a case before the ICC.

In particular, the chapter focuses on the question of whether the Rome Statute can be interpreted in a way that legal proceedings designed to make it easier to convict defendants in clear violation of due process can fall within the ‘unwilling or unable’ admissibility criterion. This whole debate is based on the different understandings of the principle of complementarity and how the Court may actually interact with domestic jurisdictions, but at the same time, it involves the different perceptions of what the role of the Court is or should be.

In the same line of ideas concerning the debate on the dichotomy between international criminal courts and tribunals and international human rights courts, the adequacy of the ‘due process thesis’ of admissibility in the ICC framework is analysed. In addition to examining the relevant positions on the issue from a substantive perspective, the chapter includes some considerations on the particular procedural implications *vis-à-vis* the defendant if due process considerations are accepted when assessing the admissibility of a case.

Moreover, the chapter navigates between the defendant’s rights and the State’s primary right to prosecute in the ICC framework. The chapter concludes with a focus on what should be the Court’s approach to these cases where domestic procedures are characterized by gross violations of due process and the right to a fair trial. Finally, the chapter elaborates on a proposition on how the Court should manage the procedural implications, considering its nature, the Rome Statute, and the relevant case law. The issues presented in this chapter look at the past through some of the Court’s core legal text; it addresses the present through the lens of the Court’s current practice while providing relevant considerations for its future.

## **11.2. Revisiting the Principle of Complementarity**

In order to address the particularities of the principle of complementarity involved in the chapter’s main research issue, it is necessary to revisit this principle, its significance, and the rationale behind it. The first glimpse of the principle of complementarity in the Rome Statute can be found in its Preamble, where it is emphasized that “the International Criminal Court established under this Statute shall be complementary to national criminal

jurisdiction”.<sup>1</sup> It was further developed in an operative provision of the treaty in Article 17, where it was included as an admissibility mechanism with express limitation to the exercise of the Court’s jurisdiction. In that sense, the Rome Statute departed from the legal framework of its predecessors, the Statutes of the *ad hoc* Tribunals, which granted primacy to the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and to the International Criminal Tribunal for Rwanda (‘ICTR’) over domestic jurisdictions.<sup>2</sup>

In 1995, the existing consensus on the preference for a Court intended to be complementary to national criminal justice systems was evidenced by the general endorsement given to the preamble of the draft statute as proposed by the International Law Commission (‘ILC’) to the Sixth Committee of the United Nations General Assembly, and, in particular to its paragraph on complementarity.<sup>3</sup> In its report, the General Assembly’s *Ad Hoc* Committee on the Establishment of an International Criminal Court (‘*Ad Hoc* Committee’) collected the Member States’ views of the principle of complementarity as an essential element in the establishment of an international criminal court.<sup>4</sup> While some delegations called for further elaboration on the implications of this principle with regard to substantive provisions, it was also expressed that “in dealing with the principle of complementarity a balanced approach was necessary [...] not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction”.<sup>5</sup>

The referred balanced approach was addressed by the ICC Appeals Chamber in the *Katanga* case where it stressed that the complementarity

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, Preamble (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>2</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, Article 9 (<http://www.legal-tools.org/doc/b4f63b/>), and Statute of the International Criminal Tribunal for Rwanda, 1994, Article 8 (<http://www.legal-tools.org/doc/8732d6/>).

<sup>3</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 34. See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat, UN Doc. A/CN.4/464/Add.1, 22 February 1995, para. 28 (<http://www.legal-tools.org/doc/d23f37/>).

<sup>4</sup> Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 29 (‘Report of the *Ad Hoc* Committee’) (<http://www.legal-tools.org/doc/b50da8/>).

<sup>5</sup> *Ibid.*, para. 33.

principle “strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand.”<sup>6</sup> The Pre-Trial Chamber II in the *Muthaura* case further elaborated on this principle, stating that:

The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States’ sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so as explicitly stated in the Statute’s preambular paragraph 6. However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at “striking a balance between safeguarding the primacy of domestic proceedings vis-à-vis the [...] Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in. Therefore, in the context of the Statute, the Court’s legal framework, the exercise of national criminal jurisdiction by States is not without limitations.”<sup>7</sup>

The previous excerpt allows for an introduction to a closer examination of the different elements reconciled as the rationale behind the principle of complementarity. Indeed, the first interest that the principle of complementarity aims to protect is the State’s sovereign right to exercise criminal jurisdiction. With regard to the scope of the State’s right to exercise criminal jurisdiction within the proposed complementarity regime, in the preparatory works of 1996, the United Kingdom illustrated the dynamic between the ICC and domestic jurisdiction, emphasizing that:

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<sup>6</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 85 (*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 25 September 2009) (<http://www.legal-tools.org/doc/ba82b5/>).

<sup>7</sup> ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 40 (<http://www.legal-tools.org/doc/bb4591/>).

The intention is that all proper decisions by national authorities in connection with matters of interest to the ICC should be respected by the ICC and that no action should be taken by it in such cases. This principle applies not only to national decisions to prosecute or not to prosecute, and to court decisions of acquittal or conviction, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such another State to cooperate accordingly, particularly where that State is under an international obligation to do so.<sup>8</sup>

Without a doubt, this has been the element of the rationale behind complementarity that motivated States to adopt this principle in the first place. Authors consider the ICC complementarity doctrine as “an attempt to pacify concerns that the Court could exercise unchecked dominance over States parties and be manipulated as a political weapon against opponents”.<sup>9</sup> However, the deference to national jurisdiction within the ICC complementary regime does not only answer to the State’s sovereign right to exercise its criminal jurisdiction, but it is also attached to the growing recognition in international law that, in some circumstances, the exercise of national jurisdiction is a question of duty or obligation rather than simply a right or discretion.<sup>10</sup> The idea of a ‘positive’ dimension of State jurisdiction is supported by the inclusion of the so-called *aut dedere aut judicare* (‘to extradite or prosecute’) principle in a number of treaties addressing international or transnational crimes.<sup>11</sup>

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<sup>8</sup> ICC Preparatory Committee, “UK Discussion Paper: International Criminal Court, Complementarity”, 29 March 1996, para. 2 (<http://www.legal-tools.org/doc/45b7f5/>).

<sup>9</sup> Laura Clarke, “Complementarity as Politics”, in *St. John University’s Journal of International and Comparative Law*, 2012, vol. 2, no. 2, p. 39; see also Mohamed M. El Zeidy, “The Principle of Complementarity: A New Machinery to Implement International Criminal Law”, in *Michigan Journal of International Law*, 2002, vol. 23, no. 4.

<sup>10</sup> Alex Mills, “Rethinking Jurisdiction in International Law”, in *The British Yearbook of International Law*, 2014, vol. 84, no. 1, p. 209.

<sup>11</sup> Cedric Ryngaert, “The Concept of International Jurisdiction”, in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, Cheltenham, Northampton, 2015, pp. 53–54. See, for example, International Committee of the Red Cross (‘ICRC’), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Articles 49–50 (<http://www.legal-tools.org/doc/baf8e7/>); ICRC, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Articles 50–51 (<http://www.legal-tools.org/doc/0d0216/>); ICRC, Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, Articles 129–130

This idea of a duty to exercise jurisdiction is also recognized in the field of international human rights law. The State obligation to prosecute – and with it, the obligation to investigate and to punish when applicable – has been recognized as an existing obligation both in universal and regional human rights law instruments. In that sense, the United Nations Human Rights Committee has expressed that a State Party to the International Covenant on Civil and Political Rights “is under a duty to investigate thoroughly alleged violations of human rights, [...] and to prosecute criminally, try and punish those held responsible for such violations”.<sup>12</sup> Similarly, in the context of the American Convention on Human Rights, the Inter-American Court of Human Rights held that:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.<sup>13</sup>

Conversely, for international criminal law, different explanations have been developed regarding the source of such obligation *vis-à-vis* international crimes. Bassiouni, for instance, claimed that recognizing international crimes as *jus cogens* carries with it the duty to prosecute or extra-

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(<http://www.legal-tools.org/doc/365095/>); ICRC, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Articles 146–147 (<http://www.legal-tools.org/doc/d5e260/>); ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, Articles 11, 85–86 and 88 (<http://www.legal-tools.org/doc/d9328a/>); United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Articles 9 and 11 (<http://www.legal-tools.org/doc/0d0674/>); United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Articles 4 and 6 (<http://www.legal-tools.org/doc/713f11/>); United Nations, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, Article 6(2)(b) (<http://www.legal-tools.org/doc/7d6ae4/>).

<sup>12</sup> Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, 27 October 1995, CCPR/C/55/D/563/1993, para. 8.6 (<http://www.legal-tools.org/doc/df4554/>).

<sup>13</sup> Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment, Merits, 29 July 1988, Series C, No. 4, para. 176 (<http://www.legal-tools.org/doc/18607f/>).

dite as an *erga omnes* obligation.<sup>14</sup> The ICTY Appeals Chamber in *Blaškić* noted that States “are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law”.<sup>15</sup> In the ICC context, it is in the Preamble of the Rome Statute where a paragraph was included “recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. However, it is unlikely for some authors that the Statute “can be read as creating a positive duty to prosecute at the national level”.<sup>16</sup>

Regardless of the specific legal nature of the reference to a “duty” to prosecute in the Rome Statute’s Preamble, when assessing Article 17 and complementarity, the ICC Appeals Chamber has relied upon that paragraph to acknowledge the role of domestic jurisdictions in the complementarity regime.<sup>17</sup> In the same line, the 2010 Kampala Review Conference of the Rome Statute adopted a resolution on complementarity recognizing the “primary responsibility of States to investigate and prosecute the most serious crimes of international concern”.<sup>18</sup> Regarding this duty in the context of a State referral, the Appeals Chamber in *Katanga* stated that “the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the duty to exercise its jurisdiction”.<sup>19</sup> It also considered that the “general prohibition of relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction”.<sup>20</sup>

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<sup>14</sup> M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 63.

<sup>15</sup> ICTY, *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14, para. 29 (<http://www.legal-tools.org/doc/c5e5ab/>).

<sup>16</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, p. 78 (<http://www.legal-tools.org/doc/9ab0aa/>).

<sup>17</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 25 September 2009, para. 84–85, see above note 6.

<sup>18</sup> ICC ASP, Complementarity, Resolution RC/Res.1, 8 June 2010, para. 8 (<http://www.legal-tools.org/doc/de6c31/>).

<sup>19</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 25 September 2009, para. 85, see above note 6.

<sup>20</sup> *Ibid.*, para. 86.

This approach is similar to that of the International Court of Justice ('ICJ') in interpreting the *aut dedere aut judicare* clause enshrined in Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the *Habré* case, the ICJ determined that a State can relieve itself of its obligation to prosecute by acceding to an extradition request. However, the ICJ considered that this does not mean both alternatives were to be given the same weight; in turn, it determined that an extradition is an option given by the Convention while prosecution is an international obligation.<sup>21</sup>

In the complementary regime, the deference to domestic jurisdiction allows States to comply with the obligation to prosecute while encouraging them to abide by that obligation. This recognition of the State sovereign right, and duty, to exercise jurisdiction has a direct impact on the understanding of the scope of the Court's role in closing the impunity gap. As once stated by the first ICC Prosecutor, Luis Moreno-Ocampo:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.<sup>22</sup>

However, the protection of the State's sovereign right, and duty, to exercise criminal jurisdiction is not the only element reconciled in the principle of complementarity. It is clear that when suggesting a balanced approach to the principle of complementarity, the States did not intend the Court to be a merely residual forum.<sup>23</sup> On the contrary, this principle implies the international community's prerogative to assert its interest in ending impunity by internationally prosecuting crimes when States fail to do so in an effective manner domestically. As will be shown, the international community's interest in the effective prosecution of international crimes is embodied in the Rome Statute, and it is linked to the special transcendence of international crimes.

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<sup>21</sup> International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports, para. 95 (<http://www.legal-tools.org/doc/4f7831/>).

<sup>22</sup> ICC, "Ceremony for the solemn undertaking of the chief Prosecutor of the International Criminal Court, Statement made by Mr. Luis Moreno-Ocampo", 16 June 2003, p. 2 (<http://www.legal-tools.org/doc/733fde/>).

<sup>23</sup> Report of the *Ad Hoc* Committee, para. 33, see above note 4.

In this regard, the Preamble of the Rome Statute contains two sentences specifically recognizing this international interest in the prosecution of international crimes: first, that “the most serious crimes of concern to the international community as a whole must not go unpunished” and second, that the international community is “[d]etermined [...] [to establish a permanent court] with jurisdiction over the most serious crimes of concern to the international community as a whole”. The international commitment to end impunity was indeed the underlying reason for establishing an international criminal court. Nonetheless, it could be argued that the ICC complementarity regime’s deference to domestic jurisdictions may have limited the potential of the Court and thus weakened the fight against impunity. However, this author submits that it is actually quite the opposite.

The balance of these two interests in the complementarity regime did not only serve as the vehicle that made it possible to secure the States’ engagement in creating a permanent court; it has also given legitimacy to the exercise of that international jurisdiction. This legitimacy was given when the States themselves changed the *status quo* and recognized through complementarity that the international community has a permanent prerogative to exercise criminal jurisdiction if they have failed to exercise theirs and, therefore, allowing the international community to pursue its interest for justice. Said interest to end impunity for international crimes relies on these offences’ special transcendence in the international community. As embodied in the Rome Statute: “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”.

The international transcendence of the crimes does not challenge the understanding that, in principle, “the national prosecution is the most effective way to address issues of the punishment of international crimes, if the State has the political will to do so”.<sup>24</sup> Effective domestic prosecution of international crimes is an ideal scenario under the complementarity regime. However, the principle acknowledges that these are the most serious crimes of concern to the international community as a whole and, as such, accountability for those crimes cannot depend solely on whether the State concerned is willing and able to genuinely prosecute them.

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<sup>24</sup> Lijun Yang, “On the Principle of Complementarity in the Rome Statute of the International Criminal Court”, in *Chinese Journal of International Law*, 2005, vol. 4, no. 1, p. 125.

Here it is noticeable how complementarity plays a key role in guaranteeing a double filter, securing that either domestically or internationally, justice is served. Given the inconceivable horror and cruelty of the crimes under the jurisdiction of the Court, it is easy to understand why it is deemed necessary for the international community to have this ultimate possibility to prosecute these crimes. The prosecution of such atrocity crimes has a profoundly important deontological basis as it is “a moral obligation to the victims, to denounce and repudiate the violations, and to re-assert basic moral values”.<sup>25</sup>

In addition to the State sovereign right and the interest of the international community, a third element can be argued as part of the rationale behind the principle of complementarity: the protection of the human rights of the accused.<sup>26</sup> While the ICC is not an international human rights court *stricto sensu*, as it deals with individual criminal responsibility rather than State responsibility for human rights violations, its activities have to satisfy international standards of human rights law<sup>27</sup> as stipulated in Article 21(3) of the Rome Statute. The complementarity regime is not exempt from this requirement. In fact, Article 17(2) of the Rome Statute specifically requires the Court to consider principles of due process recognized by international law when assessing a case’s admissibility. In particular, when tasked to determine the unwillingness of the State to genuinely prosecute the case.

Accordingly, Article 17(2)(c) requires the Court to consider whether the domestic proceedings were not, or are not, being conducted independently or impartially and whether they were conducted in a manner inconsistent with an intent to bring the person concerned to justice. These provisions suggest some relevance to due process and fair trial considerations within the complementarity regime embodied in Article 17. Nevertheless, it is not settled the scope and weight of such considerations with regards to an admissibility decision.

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<sup>25</sup> Darryl Robinson, “Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court”, in *European Journal of International Law*, 2003, vol. 14, no. 3, pp. 489–490.

<sup>26</sup> Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State sovereignty and the Fight against Impunity”, in Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of the United Nations Law*, vol. 7, January 2003, p. 597.

<sup>27</sup> Rolf Einar Fife, “The International Criminal Court: whence it came, where it goes”, in *Nordic Journal of International Law*, January 2000, vol. 69, no. 1, p. 67.

When referring to due process in the present chapter, it should be understood as the minimum guarantees necessary to ensure a fair trial as enshrined in Article 14 of the International Covenant on Civil and Political Rights. As stated by the Human Rights Committee in its General Comment 32 concerning Article 14: “the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law”.<sup>28</sup> With this in mind, in the next section of this chapter, the plausibility of due process considerations when assessing complementarity as a question of admissibility is addressed.

### **11.3. Due Process Considerations when Assessing Complementarity**

The ICC was built to deem admissible a case in almost every possible scenario in which the unwillingness or inability of the domestic jurisdiction could lead to impunity. This notion is enshrined in Article 17(1)(a) of the Rome Statute as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

The paragraph that follows in Article 17 under numerals (2) and (3) enunciates a range of circumstances or elements to consider when determining the unwillingness or inability of the State to investigate or prosecute. This, in principle, appears to suggest that the Court would have exercised its jurisdiction over a case only when the action or inaction of the States are conducted with an opposite intent of bringing the person to justice, in other words, sham proceedings.<sup>29</sup> That being said, the remaining question would be, what if, on the contrary, the State acts in a way that would blatantly disregard the fair trial rights of the accused as to result in a wrongful conviction ultimately? Should this be considered in any way when assessing admissibility? Should the ICC tolerate due process violations, declare the inadmissibility of the case and refer it to the State?

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<sup>28</sup> General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 2 (<http://www.legal-tools.org/doc/17c458/>).

<sup>29</sup> Fife, 2000, p. 67, see above note 27.

Before addressing these questions, the issue must be put into context to underline its practical relevance first. It must be borne in mind that to prosecute an acting Head of State or even a militia leader while in power tends to be challenging both domestically and internationally. Thus, a natural scenario to consider is that of a country in a transition process where the opposing party or group gets to power and immediately starts prosecuting the former government members or the now defeated militia. The likelihood that it could become a modern variant of ‘victor’s justice’ is high, especially in States where long-term or highly intense conflicts have taken place.

In the situation in Libya before the ICC, specifically the case against *Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi*, Libya challenged the admissibility of the case against Gaddafi. In response, Gaddafi’s Defence submitted, *inter alia*, that the “exclusion of fair trial considerations from the determination on admissibility would violate the right of Gaddafi to benefit from the protections enshrined in article 67(1) of the Statute in full equality with other defendants tried before the Court”.<sup>30</sup> Similarly, as a response to Libya’s challenge to the admissibility of the case against Al-Senussi, his Defence submitted, *inter alia*, that Libya was both unwilling and unable genuinely to carry out the proceedings against Al-Senussi. Although the specific question was posed in these two particular cases, the Court did not provide a conclusive answer.

In the *Gaddafi* admissibility challenge, the Pre-Trial Chamber relied on the lack of sufficient evidence “with sufficient degree of specificity and probative value to demonstrate that Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr. Gaddafi”.<sup>31</sup> The Chamber did consider elements such as the failure to secure a legal representation for Gaddafi in order to conclude that this and other “legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr. Gaddafi”.<sup>32</sup> In that regard, the Pre-Trial Chamber opted to assess the factual and legal issues as inability under Article 17(3), and not as unwillingness under 17(2), while openly stating that various fair trial considerations were

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<sup>30</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 157 (<http://www.legal-tools.org/doc/339ee2/>).

<sup>31</sup> *Ibid.*, para. 209.

<sup>32</sup> *Ibid.*, para. 215.

discussed in the context of its determination on Libya's inability. The Pre-Trial Chamber refrained from addressing the willingness requirement and the issues raised by the Defence about the impossibility of a fair trial for Gaddafi in Libya.<sup>33</sup>

Similarly, in the appeal against this decision, the Appeals Chamber concluded that the Pre-Trial Chamber did not err in its finding regarding the lack of evidence suggesting that Libya was investigating the same case and as a result refrained from addressing the arguments against the Pre-Trial Chamber findings on the unavailability of Libya's national judicial system.<sup>34</sup> In the *Al-Senussi* admissibility challenge by Libya, the Pre-Trial Chamber emphasized that:

alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.<sup>35</sup>

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<sup>33</sup> *Ibid.*, paras. 216–217.

<sup>34</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, ICC-01/11-01/11/547-Red, para. 213 (<http://www.legal-tools.org/doc/0499fd/>).

<sup>35</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 235 ('*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*') (<http://www.legal-tools.org/doc/af6104/>).

While the Pre-Trial Chamber rightly considered the requirement of independence or impartiality in Article 17(2)(c) must be read together with the requirement of those proceedings being inconsistent with the intent to bring the person concerned to justice, it did not clarify the existent ambiguity as to what should be understood by ‘bringing a person to justice’. In the appeal against this decision, the Appeals Chamber reaffirmed the cumulative nature of these two requirements in Article 17(2)(c) and elaborated on the meaning of the concept of ‘proceedings being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’. The Appeals Chamber considered that it should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely for his or her criminal responsibility.<sup>36</sup> In this respect, the Appeals Chamber stated that:

The concept of being “unwilling” genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute. This is provided for most specifically in article 17(2)(a), which expressly states that, in order to determine unwillingness, the Court shall consider whether, “[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility” (emphasis added). The fact that the other two sub-paragraphs of article 17 (2) do not expressly refer to shielding or protecting the person concerned cannot detract from the fact that they are sub-paragraphs of a provision defining unwillingness. The primary reason for their inclusion is therefore likewise not for the purpose of guaranteeing the fair trial rights of the suspect generally.<sup>37</sup>

It is indeed interesting and at least somewhat questionable how the Appeals Chamber construed the concept of “intent to bring the person to justice” under Article 17(2)(c) in the excerpt above. The Appeals Chamber

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<sup>36</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, Appeals Chamber, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 27 July 2014, ICC-01/11-01/11-565, paras. 1–2 (*Prosecutor v. Saif Al-Islam Gaddafi*) (<http://www.legal-tools.org/doc/ef20c7/>).

<sup>37</sup> *Ibid.*, para. 218.

relied solely on Article 17(2)(a), which specifically refer to cases where proceedings were or are being undertaken to shield the person concerned to conclude that the whole concept of being “unwilling” to genuinely investigate under Article 17(2) must somehow be understood through the lenses of Article 17(2)(a). While the *chapeau* in Article 17(2) provides that “in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable” and then it continues setting forth sub-paragraphs (a), (b) and (c); what the Appeals Chamber proposes here is that somehow Article 17(2)(a) is the overarching provision defining the whole Article 17(2) and thus “inconsistent with an intent to bring the person concerned to justice’ under Article 17(2)(c) must be read as referring to situations where the proceedings are or were conducted for the purpose of the shielding the person concerned as provided in Article 17(2)(a). As a result, this interpretation deprives sub-paragraphs (b) and (c) and the situations described therein its self-standing with regard to sub-paragraph (a).

Notwithstanding the Appeals Chamber’s finding that an Article 17(2)(c) determination “is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*”,<sup>38</sup> the Appeals Chamber accepted that:

there may be circumstances whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be inconsistent with an intent to bring the person to justice.<sup>39</sup>

This mention of “inconsistent with an intent to bring the person to justice” seems rather contradictory to the Appeal Chamber’s proposed understanding of this concept as referring to proceedings which will lead to a suspect evading justice. However, what is clear is that even if it might not be a separate ground,<sup>40</sup> or ground on its own for admissibility, due process considerations are relevant and have an impact on the determination under Article 17(2)(c).

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<sup>38</sup> *Ibid.*, para. 2.

<sup>39</sup> *Ibid.*, para. 3.

<sup>40</sup> Marta Bo, “The Situation in Libya and the ICC’s understanding of complementarity in the context of UNSC-referred cases”, in *Criminal Law Forum*, 2014, vol. 25, no. 3, p. 535.

In the context, as mentioned earlier, to better delimitate the actual relevance of due process considerations, the following sub-sections explore different approaches regarding the scope and weight of due process violations when assessing the admissibility of a case.

### 11.3.1. Due Process Thesis

Curiously enough, the ‘due process thesis’ was coined by one of the leading voices against this thesis, namely, Kevin Jon Heller, who presumably used that name for the first time in his article titled ‘The Shadow Side of Complementarity’. In summary, this thesis submits that “a State’s failure to guarantee a defendant due process makes a case admissible under article 17”.<sup>41</sup> The scholars that support this thesis, which appears to be the most accepted,<sup>42</sup> based it on the argument that due process violations and, therefore unfair trials, render a case admissible under the unwillingness test.<sup>43</sup>

The first submission in defence of this approach is the wording of the *chapeau* of Article 17(2) that order the Court to regard the principles of due process recognized by international law when determining the unwillingness in a particular case.<sup>44</sup> Similarly, on the other side of the same coin, a suggested alternative in support of the due process thesis has been drawn from the ‘inability’ element considering that a State is, in fact, unable to prosecute or investigate if it is unable to guarantee due process to the defendant.<sup>45</sup> Both interpretations are supported with Article 21(3) that reads:

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<sup>41</sup> Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National due Process”, in *Criminal Law Forum*, 2006, vol. 17, p. 256 (<http://www.legal-tools.org/doc/433a02/>).

<sup>42</sup> *Ibid.*, p. 257.

<sup>43</sup> See, Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008, p. 131; Mark Ellis, “The International Criminal Court and Its Implication for Domestic Law and National Capacity Building”, in *Florida Journal of International Law*, 2002, vol. 15, no. 2, p. 241; Oscar Solera, “Complementary Jurisdiction and International Criminal Justice”, in *International Review of the Red Cross*, 2002, vol. 84, no. 845, p. 166; Carsten Stahn, “Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, p. 713; Federica Gioia, “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court”, in *Leiden Journal of International Law*, 2006, vol. 19, no. 4, pp. 1110–1113.

<sup>44</sup> Rome Statute, Article 17, see above note 1.

<sup>45</sup> Heller, 2006, p. 258, see above note 41.

“the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.

Authors opposed to this position consider that this interpretation is not consistent with either the drafting history or the statutory interpretation.<sup>46</sup> In sum, for them, inability cannot be interpreted beyond the terms of Article 17(3) that circumscribes it to “total or substantial collapse or unavailability of its national judicial system”<sup>47</sup> and the impossibility to obtain the accused or the necessary evidence. With respect to unwillingness, the counterargument is very straightforward, “unwillingness means what it says, that a state does not want to try someone it should” and, therefore, “violating someone’s due process rights denotes not unwillingness, but if anything, its opposite in an extreme form”.<sup>48</sup>

Moreover, this position against the due process thesis shields its arguments by bringing to the discussion the dichotomy between, on the one hand, international criminal courts and tribunals, and, on the other, international human rights courts. Particular remarks have been stressed on the nature of the ICC admissibility system, rightfully asserting that the Court “was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights”.<sup>49</sup> Similarly, it has been affirmed that the ICC’s objective is to foster accountability preferably via domestic jurisdiction, and not to become a watchdog in respect of the domestic prosecution of core crimes.<sup>50</sup> Mégret and Giles further elaborate on this in the following terms:

The ICC was not established or designed to provide an antidote to domestic violations of due process. Such violations fall under the bailiwick of international human rights courts

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<sup>46</sup> Frédéric Mégret and Marika Giles, “Holding the Line of Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 4, p. 574.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Prosecutor v. Saif Al-Islam Gaddafi*, 27 July 2014, para. 219, see above note 36. See also Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 344.

<sup>50</sup> Beitel Van der Merwe, “The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions”, in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 56.

and monitoring bodies, which have never proposed a substitution of jurisdiction as the ordinary remedy for violations of due process.<sup>51</sup>

Although this point of view undoubtedly has merits and accurately addresses some of the most sensitive issues that could be raised from applying an unqualified due process thesis, it does not suffice to disregard due process violation considerations completely. In fact, by arguing that the ICC is not a human rights court and should not turn into one when taking into account fair trial principles, some opponents to the due process thesis recognize that this does not mean either that human rights will not play a role.<sup>52</sup> Therefore, this constitutes an essential flaw of this position that seeks to exclude due process considerations from the admissibility assessment since human rights could not play a role if they are not considered at all.

### **11.3.2. Genuine Search of Justice Approach**

A particular approach within the due process thesis framework focuses on a correlation between the notion of genuineness used throughout Article 17 and the concept of justice therein used. This approach, welcomes a clear notion of complementarity recognizing that “it underlines that only those national criminal proceedings undertaken with the serious intent of eventually bringing the offender to justice shall bar the exercise of jurisdiction by the Court”.<sup>53</sup> However, it does stand on a particular interpretation of justice within Article 17 of the Rome Statute that is more likely to suggest a process-based concept rather than a result-oriented one.<sup>54</sup>

According to this view, this interpretation finds its basis in the wording of Article 17(2)(c) where it refers that proceedings “were not or are not being conducted independently or impartially” as qualifiers to the intent to bring the person concerned to justice. In other words, when read in connection to the ‘independently and impartially’ requirements, the notion of justice in Article 17(2)(c) cannot be interpreted as accomplished by merely securing a conviction but it rather suggests that justice requires a sentence

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<sup>51</sup> Mégret and Giles, 2013, p. 578, see above note 46.

<sup>52</sup> Elinor Fry, “Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections”, in *Criminal Law Forum*, 2012, vol. 23, no. 1–3, p. 47.

<sup>53</sup> Benzing, 2003, p. 605, see above note 26.

<sup>54</sup> Stahn, 2012, p. 345, see above note 49.

based in a fair process. This was the approach taken by the Defence of Saif Al-Islam Gadaffi when it argued that:

if the word ‘justice’ is interpreted narrowly in the sense of securing a conviction, article 17(2)(b) and (c) would unnecessarily duplicate article 17(2)(a) of the Statute, which governs proceedings being undertaken for the purpose of shielding the person concerned from criminal responsibility. It is submitted that, even if a narrow interpretation of the word ‘justice’ is adopted, article 17(2)(c) of the Statute still requires that proceedings be conducted ‘independently or impartially’.<sup>55</sup>

There have been some considerations at the Court that, while not responding to the question directly, when considered all together, can be read in support of this argument. For instance, in the *Lubanga* case, the Appeals Chamber affirmed that:

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.<sup>56</sup>

Another example of a relevant consideration that could serve as an indication of the Court’s likelihood of accepting this view can be found in the *Katanga and Ngudjolo* case where the Trial Chamber, in its decision on a motion challenging admissibility, affirmed that a State can express its unwillingness to prosecute a particular case without breaching the complementarity principle. The Court further elaborated that “the reasons for such a decision may be because the state considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial.”<sup>57</sup> In other words, the Court accepted, at least in the context of state referral,

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<sup>55</sup> Heller, 2006, p. 155, see above note 41.

<sup>56</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Decision on the appeal against the Decision on the Defence Challenge to Jurisdiction, 14 December 2016, ICC-01/04-01/06-772, para. 37 (<http://www.legal-tools.org/doc/1505f7/>).

<sup>57</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 80 (<http://www.legal-tools.org/doc/e4ca69/>).

that the State's inability to hold a fair trial or conduct an effective investigation can fulfil the unwillingness criterion.

This approach's critiques are consistent with a fundamental understanding that the Court, which is not a human rights court, should not be involved in supervising domestic fair trial standards *per se*. This view argues that Article 17(3) of the Rome Statute only accepts objective criteria when determining that a State is unable to prosecute. For instance, Heller stresses that "it is difficult to argue that we would ordinarily describe a functioning national judicial system that lacks certain due process protections as one that has 'collapsed' or become 'unavailable'".<sup>58</sup> A position supported by Marta Bo, who argues a textual, contextual, and teleological interpretation of Article 17(3) together with the preparatory works of the Rome Statute, seem to bar the Court from basing a finding of 'inability' on due process violations.<sup>59</sup>

It is interesting to observe that this 'genuine search of justice' approach focuses on genuineness as the main aspect of both applicable criteria outlined in Article 17, namely 'unwillingness' and 'inability'. This is relevant to note that one of the counterarguments to this approach sustains precisely that genuineness is not an independent requirement but a simple adverb subordinate to those two requirements.<sup>60</sup> Hence, the genuineness element can only be assessed to the scope that the main requirements can be, and that is, according to this view, limited by paragraphs 2 and 3 to those cases where the national proceedings are intended to make it more difficult to convict the defendant.<sup>61</sup>

Lastly, in general terms, from the 'genuine search of justice' approach, the actual suitability of the Court and its mandate to engage in the proposed assessment is criticized. In that sense, the Office of the Prosecutor ('OTP') in its response to Libya's challenge of admissibility took a general position against the 'due process thesis' and any of its derivatives by asserting that:

The Rome Statute was not intended, and ought not to be read as, an international instrument that binds States to adopt particular processes. Indeed, it expressly recognizes and respects

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<sup>58</sup> Heller, 2006, p. 264, see above note 41.

<sup>59</sup> Bo, 2014, p. 532, see above note 40.

<sup>60</sup> Heller, 2006, p. 265, see above note 41.

<sup>61</sup> *Ibid.*

the multiplicity of legal systems. Thus, the Court cannot reject an admissibility challenge, despite the willingness and ability of the State and the identity of the case, solely on the ground that attributes of the State's domestic procedures are not fully consistent with those of other legal systems including the Rome Statute.<sup>62</sup>

In that same vein, it is submitted that “if domestic due process considerations are deemed to form part of the test for ability, it creates a non-sensical result in that the ICC must investigate, for example, whether domestic proceedings are or were conducted impartially and independently”.<sup>63</sup> In doing so, the Court would have to assess domestic jurisdiction's compliance with international human rights standards in a manner proper to international human rights courts, and, consequently, as argued by the OTP, inconsistent with the mandate of the Court.

### 11.3.3. Modified Due Process Thesis

The modified due process thesis is a moderate version that entails a particular concession from a complete opposition of any due process consideration in the ICC's admissibility assessment. Heller reinforces his original thesis that “the failure of a national investigation or prosecution to live up to international standards of due process does not make a case admissible before the ICC” and, at the same time, he explains how under this view, the State's failure to provide due process can be relevant for the admissibility test.<sup>64</sup>

While he reassures that his thesis is correct, Heller acknowledges that it ignores the situation “where deficiencies in a national investigation or prosecution makes it more difficult to convict a suspect because the state's own criminal-justice system requires due process”.<sup>65</sup> The premise is slightly different from what has been discussed throughout this chapter, but as already mentioned, there is indeed some sort of acceptance that the flaws in the domestic proceedings are somehow relevant to the admissibility test.

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<sup>62</sup> ICC, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 5 June 2012, ICC-01/11-01/11-167-Red, para. 28 (<http://www.legal-tools.org/doc/db0af9/>).

<sup>63</sup> Van der Merwe, 2015, p. 48, see above note 50.

<sup>64</sup> Kevin Jon Heller, “Why the Failure to Provide Saif with Due Process is Relevant to Libya's Admissibility Challenge”, in *Opinio Juris*, 2 August 2012 (available on its web site).

<sup>65</sup> *Ibid.*

Heller argues that the failure of the executive branch to provide the defendant with the rights guaranteed to him nationally would amount to a behaviour, intentional or not, that would make it more difficult to convict and, therefore, admissible under Article 17(2)(c).

The distinctive element in this thesis is found in a circumstance where the State would make it more difficult to convict the defendant when the independent judiciary, faced with a case in which the executive has violated the accused's rights and guarantees, as recognized domestically, would have to dismiss the charges in light of the national law as a sanction to the flawed prosecution. Since the judiciary's sanctions could render it impossible to prosecute the defendant subsequently, the executive's behaviour of the executive would perfectly fall within the wording of Article 17(2)(c), suggests Heller.<sup>66</sup>

This is certainly a more open approach than to deny any incidence of the due process completely; nevertheless, the reliance on domestic parameters raises serious concerns. There are two essential presumptions made in Heller's premise that, as argued here, render his thesis incompatible with international criminal justice. The first condition presumed in the thesis is that the State would have the level of independence and the institutional steadiness required for the judiciary to drop the charges against an accused allegedly responsible for the commission of an international crime because the executive violated his or her rights. The second condition, also presumed in Heller's premise, is the existence of such protection to the accused under national law. While it is expected that most of the countries have included a range of rights and guarantees for the accused consistent with international human rights norms, that case is not necessarily true in all States.

This approach's relativism has produced its own critics, particularly because it "compares the domestic adjudicative steps taken in the relevant case with the local applicable standards".<sup>67</sup> This methodology would create several complexities and erroneous outcomes due to essentially two reasons. First, because it does not have a basis in international treaty law or human rights law, and second, as a consequence of the first, because the

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<sup>66</sup> Mégret and Giles, 2013, p. 582, see above note 46.

<sup>67</sup> Nidal Jurdi, "The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya", in *Leiden Journal of International Law*, 2017, vol. 30, no. 1, p. 206.

test on admissibility would differ widely between one state and another, this being inconsistent with the Court and fundamental considerations such as equality before the law.<sup>68</sup>

#### 11.3.4. Qualified Due Process Thesis

The qualified due process thesis is a moderate position, but, in this case, it is a concession from the supporters of the due process thesis. As explained in Section 11.3.3., the modified due process thesis is a more flexible postulate of the one ruling out due process considerations entirely from the admissibility determination. The qualified due process thesis, in turn, is an acknowledgment of the sensitivities raised by the due process thesis *vis-à-vis* the mandate and nature of the Court.

Although the idea of accepting due process considerations when determining admissibility may find support among scholars, there is, likewise, a certain consensus that these considerations should be made bearing in mind the distinct role of the ICC from that of an international human rights court or human rights body.<sup>69</sup> Therefore, while in principle accepting the due process thesis, scholars have added certain qualifications that they understand to be necessary and even *sine qua non* to reconcile the specific mandate of the Court to foster accountability for international crimes with a more general responsibility of considering human rights violations.

The qualification element in this thesis is founded on the notion that there should be a threshold when applying the due process thesis, given the fact that certain human rights violations may not impact the genuine character of the justice process. This distinction was somehow drawn in the *Abdullah Al-Senussi* case admissibility decision where the Trial Chamber I weighed the problem of legal representation as a potentially fatal obstacle to the case,<sup>70</sup> implying, *a contrario*, that another due process violation may not be as fatal. Similarly, this is supported by the Appeals Chamber's consideration that "there may be circumstances whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect".<sup>71</sup>

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<sup>68</sup> *Ibid.*

<sup>69</sup> Stahn, 2012, p. 345, see above note 49.

<sup>70</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 11 October 2013, para. 307, see above note 35.

<sup>71</sup> *Prosecutor v. Saif Al-Islam Gaddafi*, 27 July 2014, para. 3, see above note 36.

The problem with this approach is that “it does not provide tangible criteria regarding when a due process violation becomes so egregious as to prevent providing a genuine form of justice”<sup>72</sup> neither clarifies, consequently, in which circumstances such violations do not affect the genuineness of justice. The lack of such criteria has opened the door for many considerations that vary according to the degree to which the author agrees or disagrees with the original due process thesis. In that sense, two notable proposals are presented within the qualified thesis framework as the common ground from both, those in a position more open to supporting considerations on due process violations and, on the contrary, the most sceptical ones.

The optimistic view suggests that “there is room for a moderate form of the due process thesis in case of flagrant violations of core elements of internationally recognized fair trial rights”.<sup>73</sup> In turn, the most sceptical propose that the litmus test “is not whether the right to a fair trial has been violated in itself, but whether the degree to which it has been violated is such that one cannot realistically say that there has been a trial at all”.<sup>74</sup> Nevertheless, from a practical point of view, both approaches leave doubts on the applicable yardstick to determine whether the respective threshold is met.

#### **11.4. Procedural Implications: Challenging Inadmissibility?**

The acceptance of any due process consideration when determining a case’s admissibility raises the question of whether the Rome Statute provides the defendant with the necessary procedural guarantees to ensure that the Court makes such considerations. This is usually a neglected issue in the whole academic discussion about the due process and complementarity debate. While Article 19 of the Rome Statute allows the accused to challenge the case’s admissibility on the grounds referred in Article 17,<sup>75</sup> the remaining question is whether the defendant has a right to challenge the inadmissibility of the case.

As part of his argumentation against the due process thesis, Heller submits that this “provision does not allow a defendant to challenge a de-

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<sup>72</sup> Jurdi, 2017, pp. 212–213, see above note 67.

<sup>73</sup> Fry, 2012, p. 38, see above note 52.

<sup>74</sup> Mégret and Giles, 2013, p. 585, see above note 46.

<sup>75</sup> Rome Statute, Article 19, see above note 1.

termination that his or her case is inadmissible”.<sup>76</sup> He further elaborates that:

A defendant faced with the prospect of an unfair national proceeding would want the ICC to intervene, given the comprehensive due process protections provided by the Rome Statute. As written, however, article 19 provides that defendant with no recourse: if the Court decides that his or her case is inadmissible – for whatever reason – he or she is simply out of luck.<sup>77</sup>

However, the aforementioned position entails two different scenarios that need to be distinguished from one another in order reach a proper conclusion. Heller is right to say that Article 19 provides the defendant in the circumstance that he describes with no recourse to, in any way, make the Court ‘intervene’. Indeed, the defendant has an internationally recognized human right to a fair trial,<sup>78</sup> but that does not imply in any way a right to be tried domestically or internationally. Therefore, the defendant “lacks the power to enforce a specific forum choice”.<sup>79</sup> If Article 19 of the Rome Statute could be interpreted in a way that suggests any right at all for the accused to be tried in a specific jurisdiction, it would be more inclined to concede a right to be tried in its forum.<sup>80</sup>

The situation addressed before is a scenario where the defendant would be attempting to trigger somehow the exercise of the Court’s jurisdiction to prevent any domestic due process violation. In that context, such possibility has no basis in the Rome Statute and, moreover, would be completely inconsistent with the principle of complementarity and the Court’s mandate. A different scenario in which the due process thesis and its derivatives are framed would be with respect to a defendant challenging a decision on admissibility that results in a referral to the State after the Court was already seized with the case. In the latter described scenario, the answer to whether the defendant has a right to challenge the inadmissibility

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<sup>76</sup> Heller, 2006, p. 276, see above note 41.

<sup>77</sup> *Ibid.*

<sup>78</sup> Patrick Robinson, “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY”, in *Berkeley Journal of International Law Publicist*, 2009, vol. 3, p. 1.

<sup>79</sup> Stahn, 2012, p. 337, see above note 49.

<sup>80</sup> Mark Kersten and Mathias Holvoet, “Who Gets to Serve Justice: Saif Gaddafi And ICC Due Process”, on *Justice in Conflict*, 15 November 2011 (available on its web site).

of his or her case is more likely to be an affirmative one for the two main reasons explained below.

First, while Heller submits Article 19 provides no recourse for challenging the case's inadmissibility, it does not mean that there is no other relevant provision that permits the defendant to challenge the Court's decision that determined such 'inadmissibility'. From a joint reading of Article 82(1)(a) of the Rome Statute and Rule 154 of the Rules of Procedure and Evidence ('RPE') it is clear that any party may appeal a decision with respect to admissibility even without requiring leave from the Court. Given that Article 82(1) is addressed to either party, it is argued in this chapter that the term 'admissibility' must be understood as including both, the decisions that determine the case admissible as well as those that declare its inadmissibility. Second, an interpretation suggesting that the possibility to appeal should be limited to the 'challenge to admissibility' of Article 19 despite the existence of an unqualified provision permitting the defendant to appeal would not be consistent with either the general principles of interpretation such as the principle of effectiveness or systemic interpretation, or with the right to be heard.

In this context, unlike in the first scenario drawn from Heller's view, the right to be heard is applicable and should be guaranteed by the Court to the defendant consistent with the provision of the Rome Statute. In the first hypothesis where a defendant attempts to trigger the Court's jurisdiction somehow to prevent himself from domestic due process violation, the right to be heard cannot be considered because the Court does not have an obligation to guarantee such right to a person outside its effective jurisdiction. On the contrary, in the second scenario, the Rome Statute regime is still applicable to the defendant. Therefore, the Court is obliged to provide the defendant with internationally recognized human rights relevant to criminal procedures, the right to be heard included among them.

### **11.5. Conclusion**

Complementarity has proven to be as complex as the relationship itself between the Court and the States that the principle ought to regulate. As a transversal element that impacts the whole ICC framework, it is closely related to the very understanding of the Court's nature and mandate. Therefore, the interplay of complementarity and due process is intrinsically guided by the purpose of the Court and the role that it plays in the international community. In other words, does the objective to end impunity for which

the ICC was created, aims solely to secure a conviction or whether it implies fostering an effective administration of international criminal justice?

The acceptance of the due process thesis or any of its variants suggests an inclination towards an effective administration of justice rather than merely aiming at securing a conviction. While the ICC is neither an international human rights court, in the sense that it does not judge or assess human rights compliance by States,<sup>81</sup> nor is it in any way an appeals jurisdiction for criminal cases, this does not mean that the Court is not concerned with the observance of international human rights standards. That is to say, while it is true that the role of the Court is very different from that of human rights courts and treaty bodies in terms of how its mandate relates to human rights, this does not mean that the ICC should not give the utmost deference to internationally recognized human rights in all its proceedings.

It must be asserted that the Court, as an international organization bearing the interest and values of the international community and therefore the humanity as a whole, cannot construe the search of justice as a mere race for a conviction to the point of even exposing the accused to the imminent possibility of a manifestly wrongful conviction. In that sense, the Court should not order, for instance, a referral to a domestic jurisdiction when there is enough evidence to assert that the proceedings would be an exercise of victor's justice with flagrant violation of the accused rights. On the contrary, in such a scenario, the Court has to prevent the situation from becoming a vendetta undermining the law.<sup>82</sup>

In that same spirit, the defendant should not be deprived of the possibility of challenging a decision that has declared the inadmissibility of their case, and that, consequently, exposes them to due process violations in a domestic jurisdiction. As has been argued in this chapter, the Rome Statute permits the appeal of such decisions by the defendant. If the Court were to limit this possibility, that would impact not only the defendant but the Court itself. By denying a challenge of inadmissibility or, in any case, any due process consideration when determining admissibility, the Court would “render itself complicit, directly or indirectly”<sup>83</sup> with the imminent due

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<sup>81</sup> Fife, 2000, p. 69, see above note 27.

<sup>82</sup> Ruti Teitel, “The ICC and Saif: After International Intervention, Avoiding Victor's Justice”, in *Opinio Juris*, 2 January 2012 (available on its web site).

<sup>83</sup> Van der Merwe, 2015, p. 56, see above note 50.

process violations. Thus, the values of international criminal justice and the legitimacy of the Court itself are at stake.

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## The Dynamics of Complementarity and Preliminary Examinations

Adedeji Adegunle \*

### 12.1. Introduction

The Rome Statute of the International Criminal Court ('ICC Statute') defines the jurisdiction of the ICC as complementary to national jurisdictions.<sup>1</sup> Although referred to obliquely in the Preamble to the ICC Statute and affirmed in Article 1 of the ICC Statute, the complementarity principle affirms the primacy of national criminal jurisdictions over international crimes and conforms to orthodox principles of State sovereignty.<sup>2</sup> The principle is implemented through the requirements for admissibility of cases under Article 17 of the ICC Statute, paragraph (1) of which is reproduced below:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, Preamble (paragraphs 6 and 10) and Article 1 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>2</sup> Linda E. Carter, "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?", in *Washington University Global Studies Law Review*, 2013, vol. 12, no. 3, p. 463.

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.<sup>3</sup>

Given the limited resources of the Court and also the impracticability of exercising jurisdiction over every case of serious crime, the principle of complementarity enables the Office of the Prosecutor ('OTP') to allocate resources in the selection of appropriate cases that would otherwise be ignored by the State that has primary jurisdiction.<sup>4</sup> Thus, in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*<sup>5</sup> the Appeals Chamber of the ICC described the complementarity principle as one which strikes a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the ICC on the one hand, and the goal of the ICC Statute to "put an end to impunity" on the other hand.<sup>6</sup>

In its narrow sense, complementarity operates where a State fails to exercise primary jurisdiction, as an alternative or threat in the form of ICC jurisdiction. However, the concept is also understood in a wider sense to mean the process of encouraging national measures against impunity. Positive complementarity, as this wider sense is known, means that the OTP will engage national authorities and other stakeholders to exercise domestic jurisdiction and also exploit the comparative strengths of national versus international jurisdiction through burden sharing. The ICC is not meant to 'compete' with States for jurisdiction, but is guided by the principles of partnership and vigilance.<sup>7</sup> The origins of the term 'positive complementarity', its precise meaning and boundaries are unclear.<sup>8</sup> An informal expert

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<sup>3</sup> ICC Statute, Article 17, see above note 1.

<sup>4</sup> ICC-OTP, "Informal Expert Paper: The Principle of Complementarity in Practice", 2003, para. 1 ('OTP, Expert Paper, 2003') (<http://www.legal-tools.org/doc/90915d/>).

<sup>5</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment, 25 September 2009, ICC-01/04-01/07-1497 (<http://www.legal-tools.org/doc/0727d6/>).

<sup>6</sup> *Ibid.* at p. 10, paras. 14–19.

<sup>7</sup> OTP, Expert Paper, 2003, paras. 3–4, see above note 4.

<sup>8</sup> Carsten Stahn, "Complementarity: A Tale Of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 89; it has also been characterized as proactive management strategy, see William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice", in *Harvard International Law Journal*,

brief prepared for the OTP in 2003, and subsequent speeches of the first Prosecutor of the ICC,<sup>9</sup> underscored the preference of the OTP for a positive approach to complementarity in the sense of actively encouraging domestic prosecution of international crimes even in situations where the ICC could exercise jurisdiction.<sup>10</sup> Also, in 2010, noting, among others, the resource constraints of the ICC, the Assembly of States Parties of the ICC Statute (‘ASP’) conceptualized positive complementarity as actions taken by States, international organizations and civil society aimed at strengthening national jurisdictions without involving the Court in capacity building, financial support and technical assistance.<sup>11</sup> This limited view of positive complementarity is, however, not shared by several other writers who have sought to explain positive complementarity as a proactive and managerial tool,<sup>12</sup> a tool for allocation of responsibilities between States and the ICC,<sup>13</sup> a resource allocation tool,<sup>14</sup> an expressive tool<sup>15</sup> and a negotiation strategy.<sup>16</sup> The OTP implements the positive complementarity principle as a matter of policy during the preliminary examination of situations. In its 2013 Policy Paper on Preliminary Examinations,<sup>17</sup> the OTP observed that “[w]here potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine

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2008, vol. 49, no. 1, pp. 73–75; see also Mark Kersten, “Justice in Conflict: The ICC in Libya and Northern Uganda”, Ph.D. thesis, London School Of Economics, 8 September 2014, pp. 243–244, advances the view that positive complementarity is a tool to protect the institutional interests of the ICC.

<sup>9</sup> See, for example, ICC-OTP, “Statement of the Prosecutor Luis Moreno-Ocampo to the Diplomatic Corps”, 12 February 2004 (<http://www.legal-tools.org/doc/6dvm3d/>).

<sup>10</sup> OTP, Expert Paper, 2003, paras. 5–15, see above note 4.

<sup>11</sup> See ICC ASP, “Taking stock of the principle of complementarity: bridging the impunity gap; Report of the Bureau on stocktaking: Complementarity”, 18 March 2010, ICC-ASP/8/51, paras. 10–16 (<http://www.legal-tools.org/doc/c508a8/>).

<sup>12</sup> Stahn, 2008, p. 110, see above note 8.

<sup>13</sup> Burke-White, 2008, pp. 54–57, see above note 8.

<sup>14</sup> Margaret M. de Guzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court”, in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 270; see also Burke-White, 2008, p. 75, see above note 8.

<sup>15</sup> Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of ICC Preliminary Examinations”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 416; Guzman, 2012, pp. 312–319, see above note 14.

<sup>16</sup> Kersten, 2014, pp. 209–210, see above note 8.

<sup>17</sup> ICC-OTP, “Policy Paper on Preliminary Examinations”, 1 November 2013 (‘OTP, Preliminary Examinations Paper, 2013’) (<http://www.legal-tools.org/doc/acb906/>).

national investigations and prosecutions by the States concerned in relation to these crimes".<sup>18</sup> It added that in engaging with national authorities, the OTP will ensure objectivity and avoid the risk of tainting possible future admissibility proceedings.<sup>19</sup>

While the preliminary examination is of great importance to the discretion exercised by the OTP in identifying potential cases,<sup>20</sup> the process is not well addressed by the ICC Statute.<sup>21</sup> However, by providing the framework for identifying potential cases that are admissible and within the jurisdiction of the ICC,<sup>22</sup> the preliminary examination is an expedient process of practicalizing the complementarity principle.<sup>23</sup> Through sheer practice and experience, the OTP has developed an elaborate process of eliciting information by engaging authorities, victims, civil society stakeholders and institutions in situation countries in the course of preliminary examinations with a view to determining whether a reasonable basis for commencing investigation can be established. Despite the publication of a policy on preliminary examination and annual reports of activities undertaken in ongoing examinations, it still qualifies as the most controversial aspect of the

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<sup>18</sup> *Ibid.*, para. 101, p. 24.

<sup>19</sup> *Ibid.*

<sup>20</sup> Criteria defining a 'potential case' include, "(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s) [...] without prejudice to such individual criminal responsibility as may be attributed as a result of subsequent investigations", OTP, Preliminary Examinations Paper, 2013, paras. 43 and 44, incorporating the decisions pursuant to Article 14 of the Pre-Trial Chamber respectively in the *Situation in the Republic of Côte d'Ivoire*, 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", 3 October 2011, ICC-02/11-14-Corr, paras. 190–191 and 202–204 (<http://www.legal-tools.org/doc/e0c0eb/>) and in the *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para. 50 (<http://www.legal-tools.org/doc/f0caaf/>).

<sup>21</sup> It is mentioned only once in the ICC Statute in Article 15(6). Given the importance of preliminary examinations, it is remarkable that neither the ICC Statute nor Rules developed under the Statute provides any guidance on the process beyond what is contained in Articles 53(1) and 17.

<sup>22</sup> See ICC Statute, Article 53(1), see above note 1.

<sup>23</sup> The preliminary examination process has essentially been developed by the practice and policy of the OTP. Apart from OTP, Preliminary Examinations Paper, 2013, see above note 17, see also ICC-OTP, "Policy Paper on Case Selection and Prioritisation", 15 September 2016 ('OTP, Case Selection Paper, 2016') ([www.legal-tools.org/doc/182205/](http://www.legal-tools.org/doc/182205/)).

work of the OTP.<sup>24</sup> Indeed, several questions continue to dog the process. Why, for example, are some preliminary examinations swiftly conducted while some become so protracted and inconclusive? Should a reasonable timeline be imposed? Are there other criteria used by the OTP in selecting potential cases apart from those mentioned in Article 17? What success can be attributed to positive complementarity as a strategy adopted so far by the OTP in examinations? What effect does its implementation have on timely justice and the accountability of perpetrators?

The examination of these issues in this chapter is divided into four sections. After this introduction, Section 12.2. examines the objectives of preliminary examinations discussing arguments in the process, which seek to widen objectives of preliminary examinations beyond those articulated in the Policy Paper on Preliminary Examinations. Section 12.3. reviews preliminary examination as a tool of prosecutorial discretion as well as arguments that indefinite time limits in the conduct of preliminary examinations pose difficulties. In Section 12.4., the chapter reviews instances where preliminary examinations were concluded, as well as cases where they have been protracted, with a view to contextualizing the issues. Finally, Section 12.5. forms the conclusion.

## 12.2. What Objectives Are Served by the Preliminary Examinations?

Despite the respectable body of literature on preliminary examinations<sup>25</sup> it has in recent works been described as “magical legalism”<sup>26</sup> and “a mysteri-

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<sup>24</sup> De Guzman, 2012, p. 271 see above note 14.

<sup>25</sup> In addition to De Guzman, 2012, see above note 14, and Stahn, 2017, see above note 15, see also David Bosco, “Discretion And State Influence At The International Criminal Court: The Prosecutor’s Preliminary Examinations”, in *American Journal of International Law*, 2017, vol. 111, no. 2, p. 395; Sara Wharton and Rosemary Grey, “The Full Picture: Preliminary Examinations at the International Criminal Court”, in *Canadian Yearbook of International Law*, 2018, vol. 56, pp. 1–57; James A. Goldston, “More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 383–406; Kai Ambos and Ignaz Stegmüller, “Prosecuting International crimes at the International Criminal Court: is there a Coherent and Comprehensive Prosecution strategy?”, in *Crime, Law and Social Change*, 2013, vol. 58, pp. 391–413; Allison Marston Danner, “Enhancing The Legitimacy And Accountability Of Prosecutorial Discretion At The International Criminal Court”, in *American Journal of International Law*, 2003, vol. 97, no. 3, p. 510–552; Héctor Olásolo, “The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?”, in *International Criminal Law Review*, 2003, vol. 3, pp. 87–150. See also Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination*, vol. 1 and 2, Torkel Op-

ous core activity”.<sup>27</sup> The Pre-Trial Chamber of the ICC recently described the preliminary examination as “the pre-investigative assessment through which the Prosecutor analyses the seriousness of the information ‘received’ or ‘made available’ to her against the factors set out in Article 53(1)(a)-(c) of the Statute”.<sup>28</sup>

The orthodox view about the preliminary examination is that it should be strictly employed to determine whether there is basis for commencing an investigation. Its purpose, as summarized by Olásolo, is to “shape the specific personal, territorial and temporal parameters of ICC jurisdiction”.<sup>29</sup> In a preliminary examination, the OTP has in essence three options, namely (i) to proceed to open an official investigation; (ii) to close a preliminary examination; or (iii) to “leave a preliminary examination in some ‘half-way house’, long term ‘purgatory’”.<sup>30</sup> Closer analysis of this simplistic model, which Kersten dubs the “checklist approach”, however, reveals underlying and complex layers of discretion and political choices open to the OTP. A second and wider view of the objective of the preliminary examination seeks to exploit its potential impact on national accountability measures and peace measures.<sup>31</sup> According to this viewpoint, which highlights what some writers have called an “expressivist”,<sup>32</sup> “expres-

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sahl Academic EPublisher (‘TOAEP’), Brussels, 2018 (vol. 1: <http://www.toaep.org/ps-pdf/32-bergsmo-stahn>; vol. 2: <http://www.toaep.org/ps-pdf/33-bergsmo-stahn>).

<sup>26</sup> An assumption that the mere threat of criminal prosecution (preliminary examination) would be enough to move domestic political actors to initiate accountability measures: see Christian M. De Vos, “Magical Legalism’ and the International Criminal Court: A Case Study of the Kenyan Preliminary Examination”, in Bergsmo and Stahn (eds.), 2018, p. 286, see above note 25.

<sup>27</sup> Wharton and Grey, 2018, p. 4, see above note 25.

<sup>28</sup> ICC, *Request under Regulation 46(3) of the Regulations of the Court*, Pre-Trial Chamber, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 82 (<http://www.legal-tools.org/doc/73aeb4/>).

<sup>29</sup> Olásolo, 2003, p. 94, see above note 25.

<sup>30</sup> Described also as the “checklist approach”, see Mark Kersten, “Casting a Larger Shadow: Pre-Meditated Madness, the International Criminal Court, and preliminary examinations”, in Bergsmo and Stahn (eds.), 2018, p. 661, see above note 25.

<sup>31</sup> Lieneke Louman, “Report: Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices – Part 1”, in *Post-Conflict Justice*, 26 October 2015 (available on its web site).

<sup>32</sup> See Carsten Stahn, Morten Bergsmo and CHAN Ho Shing Icarus, “On the Magic, Mystery and Mayhem of Preliminary Examinations”, in Bergsmo and Stahn (eds.), 2018, pp. 6, 13, see above note 25.

sive”<sup>33</sup> or “consequentialist”<sup>34</sup> dimension, “States do not necessarily fear preliminary examinations because of their coercive consequences, but rather due to their stigma and reputational damage that come with public ‘naming and shaming’ of situation countries”.<sup>35</sup>

The preliminary examination, therefore, presents an opportunity (i) to condemn criminality and gross violations of human rights; (ii) to incentivize domestic investigations or prosecutions; (iii) to demonstrate that the ICC remains vigilant despite domestic action; (iv) to address State inaction in relation to atrocities that fall within ICC jurisdiction and (v) to generally send strong signals about the seriousness of alleged crimes.<sup>36</sup>

This approach is, to some extent, deducible from the policy and practice adopted by the OTP. The Policy Paper on Preliminary Examinations, for example, recounts that the OTP will deploy preliminary examination for early warning purposes and issue statements with a view to preventing the escalation of violence, putting perpetrators on notice and encouraging national proceedings.<sup>37</sup>

However, using the preliminary examination as leverage for national proceedings or to prevent crimes or escalation of violence is problematic and objectionable on the following grounds.

Firstly, States may initiate national proceedings primarily with a view to preventing ICC jurisdiction – as a time-saving measure – and not for reasons of accountability. Secondly, rather than preventing the escalation of conflict, a preliminary examination can embolden perpetrators and thus spike conflict. For example, even in cases where the OTP issued statements aimed at preventing violence, there is very little proof that such statements actually dissuade perpetrators from committing further acts of violence.<sup>38</sup> Thirdly, leveraging undermines the primary purpose of a pre-

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<sup>33</sup> De Guzman, 2012, p. 270, see above note 14.

<sup>34</sup> Stahn, 2017, pp. 419–424, see above note 15 for a discussion of the relative strengths and weaknesses of this approach.

<sup>35</sup> Stahn, Bergsmo and CHAN, 2018, p. 13, see above note 32.

<sup>36</sup> See further Kersten, 2018, pp. 679–680, see above note 30, where he canvasses for more creative strategies at the preliminary examination phase in order to positively influence the behaviour of the Court’s potential targets arguing that “the most likely phase in which the Court could have a significant effect on the behaviour of warring actors may be the preliminary examination stage”.

<sup>37</sup> OTP, Preliminary Examinations Paper, 2013, paras. 104–106, see above note 17.

<sup>38</sup> Authors like De Vos criticise this approach as ‘magical legalism’, see Christian De Vos, 2018, pp. 306–308, see above note 26; while Kersten, 2018, p. 667, see above note 30, cau-

liminary examination, which is to enable the OTP to determine whether to open an investigation. An evident risk is that of the uncertainty of the desired effect of influencing national peace or accountability measures, which might drag out the preliminary examination and delay a decision on investigations. A deliberate delay in the process while engaging with national authorities can be counter-productive. As has been the case with some protracted situations, where a preliminary examination is open for too long, without corresponding action, public perception of the ICC's capacity to put an end to impunity is weakened as the Court easily comes to be seen as powerless or ineffective.<sup>39</sup> Finally, the propriety or ability of an international criminal court in assuming the guise of human rights bodies or deviating from its core mandate to fight impunity through the criminal justice system has been questioned.<sup>40</sup>

The importance of preliminary examinations lies in the fact that it is the main tool by which the OTP develops the case selection portfolio. Potential cases identified during a preliminary examination are included in this portfolio and may subsequently form the focus of an investigation.<sup>41</sup> While not the responsibility or role of the OTP to investigate and prosecute each and every alleged criminal act within a given situation or every person allegedly responsible for such crimes, it is important to know what informs the choice of the OTP when it decides to investigate or prosecute or keep a situation in a prolonged state of preliminary examination. To be fair, the OTP has strived to be transparent about how and why it reaches these decisions through the publication of policy and strategy briefs, annual reports of preliminary examinations as well as briefs on specific situations. Some understanding of how the OTP conceives the objectives of preliminary examinations can therefore be gleaned from these publications. The OTP has, for example, consistently denied that it is guided by other parameters aside from the provisions of the ICC Statute and legal considerations. In its 2016

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tions that there is still limited empirical research on the extent to which a preliminary examination manages to produce the desired effects.

<sup>39</sup> Human Rights Watch, "Pressure Point: The ICC's Impact on National Justice, Lessons from Colombia, Georgia, Guinea, and the United Kingdom", May 2018, p. 3 (<http://www.legal-tools.org/doc/442f1c/>); see also Kevin Jon Heller, "The OTP's Remarkable Slow-Walking of the Afghanistan Examination", in *Opinio Juris*, 1 December 2013 (available on its web site).

<sup>40</sup> See Stahn, 2017, pp. 421–424, see above note 15; Louman, 2015, para. 9, see above note 31.

<sup>41</sup> OTP, Case Selection Paper, 2016, para. 10, see above note 23.

Policy Paper on Case Selection and Prioritisation, for example, the OTP declared:

The principle of impartiality, which flows from articles 21(3) and 42(7) of the Statute, means that the Office will apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned. No adverse distinction may be made on grounds prohibited under the Statute. In particular, the Office shall apply its methods and criteria equally to all persons without any distinction based on official capacity pursuant to article 27(1) or other grounds referred to in Article 21(3).<sup>42</sup>

However, it is the application of these provisions, particularly the manner they have conferred unwieldy powers on the OTP, that has agitated concern in regard to consistency and objectivity of the OTP in preliminary examinations, and motivated suggestions for clearer guidelines on the OTP's powers.<sup>43</sup> The OTP has, for example, stated that the steps to be taken in a preliminary examinations under Article 53 of the ICC Statute apply not only when the OTP initiates an investigation *proprio motu* under Article 15 but also where a matter is referred by a State Party or the United Nations Security Council ('UNSC') under Article 13(a) and (b) respectively.<sup>44</sup> On the contrary, however, it has been demonstrated that the OTP's approach to preliminary examinations in referred situations differs markedly from situations opened under Article 15.<sup>45</sup> Furthermore, the OTP has declared that activities during a preliminary examination are not time-bound.<sup>46</sup> This has been justified<sup>47</sup> in light of (i) the need for the OTP to

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<sup>42</sup> *Ibid.*, para. 19

<sup>43</sup> Danner, 2003, pp. 541–543, see above note 25; James A. Goldston, 2010, pp. 10–12, see above note 25; William Schabas, "The Banality of International Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 545–551; Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace", in *Third World Quarterly*, 2013, vol. 34, no. 5, pp. 806–807.

<sup>44</sup> ICC-OTP, "Regulations of the Office of the Prosecutor", 23 April 2009, Regulation 25 ('OTP Regulations') (<http://www.legal-tools.org/doc/a97226/>); see also OTP, Preliminary Examinations Paper, 2013, para. 73, see above note 17.

<sup>45</sup> Bosco, 2017, pp. 400–404, see above note 25; also, expatiating on a theory of political deference, Kersten observes that the OTP has "selected those cases that would produce a record conducive to better relations with major powers and the UN Security Council, while avoiding interventions into situations where it could potentially shed light on alleged crimes committed by major powers or on its allies", see Kersten, 2014, p. 209, see above note 8.

<sup>46</sup> OTP, Preliminary Examinations Paper, 2013, para. 89, see above note 17.

monitor certain situations over time as they continue to develop; (ii) the potentially lengthy period of time needed to monitor national proceedings before making a decision on admissibility; and (iii) the prioritization necessarily resulting from the limited resources available to it. However, in spite of these reasons, lengthy and protracted preliminary examinations have been criticized as unfair and in contravention of the OTP's obligations to investigate impartially and effectively under Article 54(1)(b) of the ICC Statute.<sup>48</sup> These criticisms are examined in the following section.

### 12.3. Prosecutorial Discretion and Preliminary Examination

A respectable circle of opinion holds that the ICC Statute confers too wide a discretion on the ICC Prosecutor in terms of determining which case comes before the Court; that the OTP often takes political factors into consideration when making decisions on admissibility; and that this mainly accounts for protracted preliminary examination of situations.<sup>49</sup>

Although prosecutorial discretion features as part of the domestic criminal justice system of several countries,<sup>50</sup> the discretion of the OTP in relation to situations and selection of cases is in a sense unprecedented. This is because international prosecutors under previous *ad hoc* international criminal judicial bodies were not tasked with the burden of selecting and investigating cases. On the contrary, and quite uniquely under the ICC Statute, the OTP sets the context for both investigation and prosecution of

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<sup>47</sup> Wharton and Grey, 2018, p. 40, see above note 25.

<sup>48</sup> Anni Pues, "Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 452; David Bosco, "Putting the Prosecutor on a Clock? Responding to Variance in the Length of Preliminary Examinations", in *American Journal of International Law (Unbound)*, 2018, vol. 112, pp. 158–162.

<sup>49</sup> Alexander K. A. Greenawalt, "Justice Without Politics? Prosecutorial Discretion And The International Criminal Court", in *International Law And Politics*, 2007, vol. 39, p. 650; William A. Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, pp. 547–550; Olasolo, 2003, pp. 141–143, see above note 25; see also Bosco, 2017, see above note 25, pp. 411–413, who asserts that in delaying potential investigations the Prosecutor may have abused the wide discretion of the preliminary examination phase by deferring to its most weighty members (and other powerful States) while moving quickly where the geopolitical stakes are low and where powerful governments have no objection to the Court's work.

<sup>50</sup> See Phillip Stenning, Victoria Colvin and Heather Douglas, "Introduction", in Victoria Colvin and Philip Stenning (eds.), *The Evolving Role of the Public Prosecutor: Challenges and Innovations*, Routledge, New York, 2019, pp. 7–9.

international crimes.<sup>51</sup> It is noteworthy also that while national prosecutors are not insulated from political considerations, when they exercise political judgment it is usually within the confines of a defined political hierarchy, and it is often apparent in particular cases whose interest is being served. This is not the case with the OTP, which is independent and expected to be guided by legal considerations. Such expectations of legalism, however, sometimes constrain the OTP when confronted with political choices to colour its decisions with vague legal concepts, which raise more questions than answers about why and to whose purpose the discretion has been exercised.<sup>52</sup>

The ICC Statute prescribes in Article 53(1) the matters that the Prosecutor must consider before determining whether there is a reasonable basis to start an investigation. These are whether: (i) the crime is within the jurisdiction of the Court; (ii) the case is or would be admissible under Article 17; and (iii) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.<sup>53</sup>

The manner in which the OTP applies these criteria, particularly (ii) and (iii), to different situations has been described as “contrived”<sup>54</sup> and “controversial”.<sup>55</sup> Commenting, for example, on the criterion of “gravity as applied by the OTP, Schabas observed that the concept of gravity in reality helps to justify political determinations reflected in the cases selected by the OTP”.<sup>56</sup>

This is explained further by Kersten:

the ICC’s decision- making reflects a negotiation of the Court’s own interests with the interests of those political actors it depends upon. The Court may be used and instrumentalized by states and organizations such as the Security Coun-

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<sup>51</sup> This combination of roles was justified by the International Law Commission when considering the 1994 draft of the ICC Statute as practical and cost efficient. It was assumed that States would have undertaken some preliminary examination before referral under Article 26 of the 1994 Draft Statute (the corresponding provision to Article 53). See Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/10, 2 May-22 July 1994, p. 92, para. 3 (<http://www.legal-tools.org/doc/f73459/>).

<sup>52</sup> Schabas, 2010, pp. 539–541, see above note 49.

<sup>53</sup> ICC Statute, Article 53, see above note 1.

<sup>54</sup> Schabas, 2010, p. 549, see above note 49.

<sup>55</sup> De Guzman, 2012, p. 271, see above note 14.

<sup>56</sup> Schabas, 2010, p. 549, see above note 49.

cil. But an analysis of OTP decision-making must take into account the fact that the Court has an interest in being instrumentalized by states and by the Security Council, insofar as it believes that where the interests of such political actors overlap with the interests of the Court, its legitimacy and standing in international politics will be promoted and strengthened.<sup>57</sup>

Analyses of previous and ongoing preliminary examinations by Bosco<sup>58</sup> also show that the OTP tends to conduct preliminary examinations more swiftly in situations initiated through referral by a State Party or the UNSC than when initiated under its *proprio motu* powers. These variations in length and outcomes of preliminary examinations have therefore prompted a political deference theory which posits that the OTP considers political factors such as the likelihood that States will support investigations but also, more speculatively, their willingness to support eventual enforcement of arrest warrants.<sup>59</sup> While true that preliminary examinations of referral situations are shorter and that their outcomes seem more predictable than when the OTP initiates on its own, the reasons for this may not necessarily be political but a pragmatic view by the OTP that it has on its shoulders a more onerous burden of objectivity when evaluating situations under its *proprio motu* powers. Thus, while the decision by the OTP to initiate an investigation under its *proprio motu* powers is subject to confirmation by the Pre-Trial Chamber of the ICC,<sup>60</sup> a decision to proceed with an investigation in the case of a State referral (for example, Uganda) or UNSC referral (for example, Libya) is not.

The table below tracks the comparative length of the preliminary examination phases to the extent discernible from publications of the OTP.

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<sup>57</sup> Kersten, 2014, p. 211, see above note 8; see also Gegout, 2013, p. 807, see above note 43.

<sup>58</sup> Bosco, 2017, pp. 400–401, see above note 25. Mark Kersten also alleges that in such cases not only are the preliminary examinations faster but that the OTP in the selection of potential perpetrators blindsided tends to focus less on state actors, *ibid.*, pp. 206–208.

<sup>59</sup> Bosco, *ibid.*, p. 407 and Greenawalt, 2007, p. 660, see above note 49.

<sup>60</sup> Article 15(3) of the ICC Statute requires the OTP to request for the Pre-Trial Chamber's authorisation in order to proceed. The appellate chamber's decision in Afghanistan clarifies that the Pre-Trial Chamber is not expected under Article 15(4) of the ICC Statute to review the Prosecutor's analysis of the factors under Article 53(1)(a) to (c) of the ICC Statute. ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 (<http://www.legal-tools.org/doc/x7kl12/>).

12. The Dynamics of Complementarity and Preliminary Examinations

<b>Situation</b>	<b>Phase one: Preliminary Analyses<sup>61</sup></b>	<b>Phase two: Jurisdiction</b>	<b>Phase three: Admissibility</b>	<b>Phase four: Interests of Justice</b>	<b>Conclusion of Preliminary Examination</b>
<b>Ongoing preliminary examinations</b>					
Colombia (initiated in June 2004 under Article 15(1) of the ICC Statute)	June 2004	N/A	Since March 2005 <sup>62</sup>		
Guinea (initiated on 14 October 2009 under Article 15(1) of the ICC Statute)	2009	2009–2010	February 2010–present <sup>63</sup>		
Iraq/United Kingdom (initiated in 2004 under Article 15(1) of the ICC statute)	May 2005	9 February 2006 (terminated)			
Iraq/United Kingdom (13 May 2014–present)	January–May 2014	May 2014	2017–present		

<sup>61</sup> Not applicable as a matter of policy to situations referred by States or the UNSC under Article 13(a) and (b) of the ICC Statute.

<sup>62</sup> ICC-OTP, “Situation in Colombia. Interim Report”, November 2012, para. 27 (<http://www.legal-tools.org/doc/7029e5/>). In 2019 (14 years since 2005) the OTP expressed satisfaction with the scope and genuineness of domestic proceedings embarked upon by Colombia and hinted at closing the preliminary examination in 2020; see ICC-OTP, “Report of Preliminary Examination Activities”, 2019, para. 132 (‘OTP, Preliminary Examination Report, 2019’) (<http://www.legal-tools.org/doc/lq7j94/>).

<sup>63</sup> Investigation by the Guinean authorities lasted seven years and it has taken another three years to prepare for trial.

Palestine (initiated on 16 January 2015 via declaration under Article 12(3) of the ICC Statute) <sup>64</sup>		16 January 2015	2018		20 December 2019
Ukraine (initiated on 25 April 2014 via declaration under Article 12(3) of the ICC Statute)	N/A	April 2014	2019		
Nigeria (initiated in 2010 under Article 15(1) of the ICC Statute)	N/A	2010	5 August 2013		
<b>Situations converted to full investigation</b>					
Central African Republic ('CAR') (referred on 22 December, 2004) <sup>65</sup>	N/A				May 2007
Burundi (25 April 2016)	25 May 2015	25 April 2016	N/A	N/A	17 August 2017

<sup>64</sup> On 22 May 2018 a formal referral on the situation in Palestine was received by the OTP from the State of Palestine.

<sup>65</sup> Focus of the preliminary examination was on alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002.

## 12. The Dynamics of Complementarity and Preliminary Examinations

Central African Republic II ('CAR II') (initiated on 7 February 2014 <sup>66</sup> under Article 15(1) but subsequently referred in May 2014) <sup>67</sup>			N/A	N/A	September 2014
Côte d'Ivoire (initiated on 1 October 2003 under Article 15(1)) <sup>68</sup>	N/A	N/A	N/A	N/A	19 May 2011
Democratic Republic of the Congo (initiated via referral in April 2004—under Articles 13(a) and 14 of the ICC Statute) <sup>69</sup>	April 2004				June 2004

<sup>66</sup> ICC-OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic", 7 February 2014 (<http://www.legal-tools.org/doc/6b4438/>).

<sup>67</sup> The focus of CAR II is on alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 August 2012.

<sup>68</sup> Although the Côte d'Ivoire situation was initiated since 2003, the OTP disclosed very little information about situations between before 2011 in accordance with its prevailing policy at the time. See ICC-OTP, "Report on the activities performed during the first three years (June 2003-June 2006)", 12 September 2006, para. 10 ('OTP, three-year Report, 2006') (<http://www.legal-tools.org/doc/c7a850/>).

<sup>69</sup> In the OTP three-year report of 2006, the DRC situation was described as one of the gravest admissible situations under the jurisdiction of the Court. See *ibid.*, p. 6.

Kenya (initiated under Article 15(1) of the ICC Statute)	6 March 2008 <sup>70</sup>				26 November 2009
Libya (referred on 26 February 2011 <sup>71</sup> by UNSC Resolution on under Article 13(b) of the ICC Statute)	28 February 2011				Investigation opened on 3 March 2011 <sup>72</sup>
Mali (referral initiated on 18 July 2012 under Article 13(a) of the ICC Statute)			Admissibility requirements met by October 2012 <sup>73</sup>		Investigation opened on 16 January 2013 <sup>74</sup>

<sup>70</sup> ICC-OTP, *Situation in the Republic of Kenya*, Pre-Trial Chamber, Request for authorisation of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3, para. 7 (<http://www.legal-tools.org/doc/c63dcc/>).

<sup>71</sup> UNSC Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011 (<http://www.legal-tools.org/doc/00a45e/>).

<sup>72</sup> ICC-OTP, “First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)”, 4 May 2011 (<http://www.legal-tools.org/doc/76ba00/>).

<sup>73</sup> ICC-OTP, “Report of preliminary examination activities”, 22 November 2012, para. 182 and 184 (<http://www.legal-tools.org/doc/0b1cfc/>).

<sup>74</sup> ICC-OTP, “Situation in Mali: Article 53(1) Report”, 16 January 2013 (<http://www.legal-tools.org/doc/abb70f/>).

Sudan (Darfur) (referred on 31 March 2005 by UNSC Resolution 1593 (2005) under Article 13(b) of the ICC Statute)	31 March 2005				Investigation opened on 6 June 2005
Uganda (referral initiated on 29 January 2004 under Article 13(a) ICC Statute)					28 July 2004
Afghanistan (initiated under Article 15(1) of the ICC Statute)	Preliminary examination made public in 2007	2007–2013	2014–2017	2017	3 November 2017

**Table 1: Duration (phases) of OTP preliminary examinations.**

Table 1 shows that the OTP spends considerably more time on admissibility issues than other phases.<sup>75</sup> This is not surprising considering that it is at the admissibility phase that the OTP also has to evaluate the relative importance of the situation and also the availability and genuineness of national enforcement action.<sup>76</sup> Often the choice the OTP has to make at this stage is whether to call out as non-genuine or non-existent a State's claim that it will initiate or has initiated accountability measures or deter-

<sup>75</sup> See also Lovisa Badagard and M. Klamberg, "The Gatekeeper Of The ICC: Prosecutorial Strategies For Selecting Situations And Cases At The International Criminal Court", in *Georgetown Journal Of International Law*, 2017, vol. 48, p. 667.

<sup>76</sup> As pointed out in an earlier section, the OTP applies the concept of positive complementarity during the admissibility phase of the preliminary examination. OTP, Preliminary Examinations Paper, 2013, paras. 78–79, see above note 17.

mine that with ICC support national accountability measures could be strengthened.<sup>77</sup>

If the discretion of the OTP in determining the admissibility of a situation under Article 17, including the evaluation of the existence or genuineness of domestic actions, is based on strict legal parameters, perhaps some preliminary examinations would have been less complicated and even shorter. However, the ICC would not only be going contrary to Article 1 of the ICC Statute on the complementary nature of its jurisdiction but clearly would have required more resources to cope with the volume of cases.

Indeed, as stated by the OTP:

In the course of its preliminary examination activities, the Office seeks to contribute to two overarching goals of the Statute, the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes, thereby potentially obviating the need for the Court's intervention. Preliminary examination activities therefore constitute one of the most cost-effective ways for the Office to fulfil the Court's mission.<sup>78</sup>

Apart from effective management of resources, writers like Burke suggest that proactive complementarity can help guide the OTP in selecting the situations in which it can have the greatest impact. Where there is reason to believe that a State can be encouraged to prosecute crimes on its own, the Prosecutor may not need to formally open an investigation and commit significant resources to a case.<sup>79</sup> It would appear, however, that the OTP has not applied this principle of positive complementarity consistently, particularly where the situation is a referral by a State or the UNSC. In such cases, the OTP appears to have wasted little time in concluding not only that the situation State lacked capacity to undertake domestic accountability measures, but also that there was no need to encourage the State to undertake such measures.<sup>80</sup> On the other hand, in preliminary examinations

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<sup>77</sup> In the words of Danner, the admissibility regime “forces the Prosecutor to decide whether and when to pit the credibility of the Court against a state, whose leaders presumably will hotly deny that they are unwilling to prosecute”, Danner, 2003, p. 522, see above note 25.

<sup>78</sup> ICC-OTP, “Report of Preliminary Examination Activities 2017”, 4 December 2017, para. 16 (<http://www.legal-tools.org/doc/e50459/>).

<sup>79</sup> Burke-White, 2008, p. 73 see above note 8.

<sup>80</sup> See William Schabas, “Complementarity in Practice; Some Uncomplimentary Thoughts”, 23 June 2007, pp. 10–14 (<http://www.legal-tools.org/doc/63e4f5/>).

initiated under Article 15, the OTP dwells longer on encouragement of domestic measures. The next section reviews the application of positive complementarity in some protracted situations. It examines the validity of views, which doubt the objectivity of the OTP and which reason that other considerations were responsible perhaps in greater measure than complementarity for the protracted nature of these situations.<sup>81</sup> The section also examines the practicability of introducing timelines in the examination of situations.

#### **12.4. The Office of the Prosecutor's Discretion and Positive Complementarity**

A policy paper on the selection of cases issued in 2016 by the OTP recalls that the goal of the Statute to combat impunity and prevent the recurrence of violence, as expressed in its Preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice. As such, the Office will continue to encourage genuine national proceedings by relevant States with jurisdiction. In particular, it will seek to co-operate with States who are investigating and prosecuting individuals who have committed or have facilitated the commission of ICC Statute crimes.<sup>82</sup>

There is a wide gulf, however, between evaluating the capacity and willingness of national institutions to bring perpetrators to justice, on the one hand, and encouraging and assisting national institutions to do this, on the other. The OTP, in particular, runs the risk of being too involved in the national efforts and thus lose the capacity for objectivity or of being accused of deliberately slowing down the preliminary examination deliberately.<sup>83</sup>

##### **12.4.1. Situation in the Islamic Republic of Afghanistan**

The preliminary examination of Afghanistan, which lasted for 10 years, has been criticized for what seemed like delay tactics and excessive deference to the United States on the part of the OTP.<sup>84</sup> Since January 2007, when the preliminary examination of Afghanistan was made public and up till its closure in 2017, no concrete domestic action to make perpetrators account-

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<sup>81</sup> Pues, 2017, p. 436, see above note 48; Heller, 2013, see above note 39.

<sup>82</sup> OTP, Case Selection Paper, 2016, see above note 23.

<sup>83</sup> OTP, Expert Paper, 2003, see above note 4, para. 14.

<sup>84</sup> Bosco, 2017, pp. 409–413, see above note 25.

able had been initiated by the Afghan government or other countries like the United States, which had jurisdiction to investigate the alleged potential crimes identified by the OTP. The OTP, on its part, had since 2011 encouraged national accountability measures. It was not until 2013 that the preliminary examination formally entered the admissibility phase and, even then, despite the allusion of the OTP to the existence of “national accountability measures, critics deny that there was any such activity”.<sup>85</sup> Indeed, in its 2016 Report of Preliminary Examination Activities the OTP lamented that “the (Afghan) Government has not provided any information on national proceedings to the Office, despite multiple requests for such information from the Office since 2008, including two requests submitted during the reporting period”.<sup>86</sup>

The preliminary examination of Afghanistan was no doubt complex and difficult, raising fundamental questions about co-operation. Information was not forthcoming from the Afghan authorities as well as from several other states like the United States. In light of these issues, it has been suggested that the preliminary examination (and investigation) in Afghanistan will ultimately prove to be symbolic or “expressivist”.<sup>87</sup> According to a critic, between 2013 (the admissibility phase) and 2017, when the OTP eventually decided to seek authorization to open investigation, the OTP had invoked positive complementarity as a convenient stop-gap while it weighed political implications of closing the examination or launching an investigation.<sup>88</sup> The OTP certainly gave some tonic to these criticisms by the opacity in some of its updates on the Afghan situation. The 2013 report, for example, alluded to the existence of some national activity on accountability<sup>89</sup> while ignoring amnesty measures in 2007 to perpetrators of human

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<sup>85</sup> See ICC-OTP, “Report of Preliminary Examination Activities 2013”, November 2013, para. 56 (<http://www.legal-tools.org/doc/dbf75e/>) (‘OTP, Preliminary Examination Report, 2013’). See further the report by Human Rights Watch criticising the OTP for delaying investigation, saying the Afghan government was not making efforts to make perpetrator accountable. Human Rights Watch, “Afghanistan: ICC Prosecutor Finds Grave Crimes; Finding Should Trigger Full Analysis, Fact-Finding Mission”, 1 December 2013 (available on its web site).

<sup>86</sup> ICC-OTP, “Report of Preliminary Examination Activities 2016”, para. 217 (<http://www.legal-tools.org/doc/f30a53/>) (‘OTP, Preliminary Examination Report, 2016’).

<sup>87</sup> Stahn, Bergsmo and CHAN, 2018, p. 6, see above note 32.

<sup>88</sup> Heller, 2013, see above note 39.

<sup>89</sup> OTP, Preliminary Examination Report, 2013, para. 56, see above note 85.

rights abuses as well as the failure to implement a government's Action Plan for Peace, Reconciliation and Justice crafted since 2005.<sup>90</sup>

#### **12.4.2. Situation in Kenya**

Unlike Afghanistan, the preliminary examination of Kenya was comparatively shorter. However, in terms of lessons, the Kenyan situation pointedly demonstrates the need for clearer and objective parameters in monitoring national measures during preliminary examinations.

The situation in the Republic of Kenya came under preliminary examination when violence erupted after the national elections held in December 2007, following the declaration by the Electoral Commission of Kenya that incumbent President Mwai Kibaki of the Party of National Unity was re-elected over the main opposition candidate Raila Odinga of the Orange Democratic Movement. This led to widespread killings and violence. On 5 February 2008, ICC Prosecutor Luis Moreno-Ocampo signalled in a statement the concern of the OTP about information relating to alleged crimes committed in Kenya. This statement and others which followed were apparently intended to catalyse national enforcement measures.<sup>91</sup> The OTP followed up on 6 March 2008 by a letter requesting, pursuant to Article 15(2), additional information for the purpose of analysing the seriousness of the situation, from selected sources, namely the Government of Kenya, the Kenya Human Rights Commission, the Kenya National Commission on Human Rights, and the opposition party, the Orange Democratic Movement.

As these steps by the OTP were being taken, a Panel of Eminent African Personalities constituted by the African Union and led by Mr. Kofi Annan was also undertaking peace efforts. One of the outcomes of this initiative was the establishment, among other mechanisms, of a Commission of Inquiry into the Post-Election Violence ('CIPEV'). In its final report of 15 October 2008, the CIPEV recommended the setting up of a special tribunal to seek accountability against persons bearing the greatest responsi-

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<sup>90</sup> Human Rights Watch, 2013, see above note 85; The Amnesty policy was however noted in OTP, Preliminary Examination Report, 2016, para. 2015 see above note 86.

<sup>91</sup> De Vos, 2018, p. 298, see above note 26.

bility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.<sup>92</sup>

The Commission also prepared a list of persons suspected to bear the greatest responsibility for these crimes and it recommended that, failing the establishment of the special tribunal, the list should be forwarded to the OTP with a view to proceeding with an investigation and possible prosecution.<sup>93</sup> Despite efforts by the government to establish the tribunal, it never materialized and, on 5 November 2008, the ICC Prosecutor disclosed his intention to request authorization from the Court to initiate an investigation.

De Vos notes, in regard to the Kenyan situation, a dire failure on the part of the ICC Prosecutor to make the best use of opportunities presented by the CIPEV investigation and queries the sense of examination process conducted remotely from The Hague.<sup>94</sup> Of course, this view does not suggest that the CIPEV report was sufficient to make the OTP seek authorization to investigate; it is rather a criticism of its failure to initiate independent findings and to develop further into potential evidence the findings in the CIPEV report and that of similar bodies.<sup>95</sup> The engagement of the OTP with national authorities to encourage national measures consisted more of diplomatic negotiations with the Kenyan government and public releases by the OTP. In this, the OTP assumed that the mere threat of criminal prosecution was sufficient to incentivise domestic political actors to action, while failing to sufficiently engage with the country's complex political and social contexts.<sup>96</sup> These views are corroborated by the report of a body of experts engaged by the OTP to assist with its internal review of the Kenya situation.<sup>97</sup> The experts observe, in particular, that:

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<sup>92</sup> Commission of Inquiry into Post-Election Violence, Report of The Commission of Inquiry into Post-Election Violence, 15 October 2008, p. 472 ('CIPEV Report') (<http://www.legal-tools.org/doc/a1063a/>).

<sup>93</sup> *Ibid.*, para. 5, p. 473.

<sup>94</sup> De Vos, 2018, p. 286, see above note 26.

<sup>95</sup> Paradoxically the African Union and some critics accuse the Prosecutor of moving too fast and not using positive complementarity to encourage national measures. See Benson Olugbuo, "Challenges in the Relationship Between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, TOAEP, Brussels, 2018 p. 361 (<http://www.toaep.org/ps-pdf/32-bergsmo-stahn>).

<sup>96</sup> De Vos, 2018, p. 312, see above note 26.

<sup>97</sup> While the full report is unavailable, an Executive Summary of the Report forms Annex 1 to the Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons

Decision making by Prosecutor was too often premised on non-prosecutorial considerations, such as bringing peace to the region, making an impact to demonstrate the relevance of the ICC. While these are appropriate collateral consequences of proper prosecutorial functioning, they cannot take precedence over the primary ICC OTP mandate.<sup>98</sup>

This lapse and the time-wasting strategy of the Kenyan government enabled political forces in and outside the Kenyan government to wage a ruthless campaign of obfuscation and witness intimidation,<sup>99</sup> which eventually led to the withdrawal of charges brought against the indicted persons.

### 12.4.3. Situation in Nigeria

Nigeria has been the subject of preliminary examination since 2010 in connection with the armed conflict in the north-east involving the Boko Haram terrorist group. As of August 2020, the examination had stayed 7 years in the third or admissibility phase.<sup>100</sup> The preliminary examination has focused on the crimes committed in the regions of central and northern Nigeria by Boko Haram and the Nigerian Security Forces. During the assessment by the OTP in Nigeria, the domestic authorities conducted a mass trial of Boko Haram suspects<sup>101</sup> and also initiated in 2017 evidence gathering measures through the constitution of a Special Board of Inquiry instituted by the Nigerian Army<sup>102</sup> and a Presidential Investigation Panel to Review

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drawn from the Kenya situation, 26 November 2019 is available (<http://www.legal-tools.org/doc/32p2hy/>).

<sup>98</sup> ICC-OTP, “Annex. 1, Kenya Cases: Review and Recommendations Executive Summary of the Report of the External Independent Experts”, 2019, para. 9, see above note 97.

<sup>99</sup> De Vos, 2018, p. 310, see above note 26.

<sup>100</sup> The preliminary examination proceeded to admissibility phase on 5 August 2013. See ICC-OTP, “Situation in Nigeria; Article 5 Report”, 5 August 2013 (<http://www.legal-tools.org/doc/508bd0/>).

<sup>101</sup> Such trials took place in October 2017, February 2018 and July 2018, during which most of the 1,669 Boko Haram suspects detained in Kainji were tried. Majority of defendants were discharged without trial for lack of evidence. *Ibid.*, para. 237; see also “Trial of Boko Haram Suspects: Lessons for judiciary”, in *PUNCH*, 22 February 2018.

<sup>102</sup> Joseph Anruke, “Army sets up panel to investigate alleged ex-judicial killings, rights violations by personnel”, in *Vanguard*, 8 March 2017. Proceedings of this Panel were screened from public glare and although they were investigative in nature it does not appear the Panel had any mandate to identify specific perpetrators or crimes.

### Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement.<sup>103</sup>

Despite these measures, two related questions have consistently featured in the admissibility assessments of the Nigerian situation. These are whether, for the purpose of complementarity:

- the proceedings in the situation States must focus on the exact incident(s) or suspects identified by ICC; and
- the laws under which these proceedings are conducted must relate to ICC offences.

Thus, where kidnapping, torture or rape occurs in the context of a crime against humanity, is it sufficient to charge persons with domestic offences with the possibility of aggravated punishment on account of the context in which the offence is committed?

While acknowledging that Nigeria has not domesticated the ICC Statute, the OTP seems willing to regard prosecutions for domestic offences if they are sufficiently related<sup>104</sup> (not necessarily identical) and if the defendants are of a sufficiently high rank or status to be in the category of persons most responsible for these offences.<sup>105</sup>

However, in its 2019 Report on Preliminary Examination Activities, the OTP observed that:

In particular, according to the information available, it does not appear that the authorities are investigating and/or prosecuting cases concerning substantially the same conduct or cases that are otherwise similar to those identified by the Office. *To date, the repeated commitment of the Nigerian authorities to provide the Office with relevant information in this respect has not materialised.*<sup>106</sup>

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<sup>103</sup> “Osinbajo Inaugurates Panel on Human Rights Abuse in the Military”, in *CHANNELS TV Report*, 11 August 2017; Lawrence Eckson, “Osinbajo says it’s armed forces, FG’s duty to meet up with human rights norms”, *Federal Ministry of Information and Culture - Federal Republic of Nigeria*, 12 August 2017 (available on its web site).

<sup>104</sup> The OTP appeared to be satisfied for example that for the alleged violations by members of the Nigerian Defence Forces, proceedings against individual members of the Nigerian Armed Forces under a Court Martial will meet the standard of admissibility.

<sup>105</sup> ICC-OTP, “Report on Preliminary Examination Activities 2017”, para. 235, see above note 78.

<sup>106</sup> OTP, Preliminary Examination Report, 2019, para. 199, see above note 62 (emphasis added).

It is instructive that some of these domestic measures have attracted scathing criticisms from several observers. Amnesty International, for instance, noted that most of the Boko Haram suspects tried were arraigned on secondary counts such as giving assistance to Boko Haram members or attending meetings of Boko Haram – an indication it said that the perpetrators who bear the greatest responsibility for the gravest crimes have not been brought to justice.<sup>107</sup>

#### **12.4.4. Addressing the Length of Preliminary Examinations**

The three situations above were initiated under Article 15 of the ICC. In terms of the duration of its preliminary examination, Kenya – the first situation to be initiated by the OTP under Article 15 – is the shortest. But in terms of lessons learnt, in hindsight, the complexity of the situation was apparently misjudged by the OTP. A clear case of complexity is Afghanistan, where the examination lasted 14 years and which, despite the authorization to open investigation, presents formidable obstacles to the OTP. The Nigerian situation appears on the surface to be less complex – despite several panels and court proceedings, accountability for those that bear the most responsibility for serious crimes has been marginal.

Some commentators have expressed concerns about the protracted nature of some preliminary examinations and have suggested timelines for preliminary examinations.<sup>108</sup> They argue that protracted examinations mean delayed justice for defendants and victims; may affect the integrity and preservation of evidence; and could compromise the OTP's duty in Article 54(1)(b) of the ICC Statute to “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>109</sup> On the other hand, the OTP considers that “the absence of a time frame [provides] the required flexibility to adjust the parameters of the assessment or analysis phase to the specific features of each particular situ-

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<sup>107</sup> Amnesty International Nigeria, “Willingly Unable: ICC Preliminary Examination And Nigeria’s Failure To Address Impunity For International Crimes”, 2018, pp. 16–18 (available on its web site); see also Human Rights Watch, “Nigeria: Flawed Trials of Boko Haram Suspects”, 17 September 2018 (available on its web site).

<sup>108</sup> For example, Pues, 2017, p. 436, see above note 48; Kersten, 2018, pp. 11–13, see above note 30, and Louman, 2015, paras. 14–18, see above note 31.

<sup>109</sup> Pues, 2017, p. 452 see above note 48; Bosco, 2018, p. 161 see above note 47; Ambos and Stegmiller, 2013 p. 422, see above note 25.

ation”.<sup>110</sup> Nevertheless, the fact that timelines are not expressly provided in the ICC Statute for the duration of a preliminary examination should not enable the OTP to exercise its discretionary powers in ways that may offend other provisions of the ICC Statute.

Depending on the facts and circumstances of each situation, the OTP may decide (i) to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in Article 53(1)(a)-(c); (ii) to continue to assess relevant national proceedings; (iii) to continue to collect information in order to establish sufficient factual and legal basis to render a determination; or (iv) to initiate the investigation, subject to judicial review as appropriate.

The complexities of time limits are also captured by Stahn and Bergsmo when they observed that:

The problem with [setting time limits] is that the appropriate length of preliminary examination is context-specific. Reasonable limits are difficult to define in abstract terms. They require a hypothesis. It may be preferable to develop internal benchmarks, and better channels of communication where situations are pending for years. New technologies may facilitate the determination of the crime-base and context. Admissibility assessments are often most complex and time-consuming. It is important to move to such assessments as quickly as possible.<sup>111</sup>

The above statement questions the sequential or phased conduct of examinations. It has been observed by Stahn, for example, that with the sequential approach, the analysis may get stuck at one phase, like jurisdiction, for years, without considering information relating to other phases.<sup>112</sup>

The idea of introducing timelines or fixed durations to preliminary examinations may be problematic and inconvenient, but it raises the need for the OTP to review its approach and methods in examinations. In addition to the criticism of a rigid sequential approach, it has also been suggested that the OTP should set clear and publicized benchmarks and targets for

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<sup>110</sup> OTP, Preliminary Examinations Paper, 2013, para. 89, see above note 17, only instructs in vague terms that preliminary examinations may be terminated depending on “the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes”.

<sup>111</sup> Stahn, Bergsmo and CHAN, 2018, p. 20, see above note 32.

<sup>112</sup> Stahn, 2017, p. 12, see above note 15.

national authorities (and itself) during the admissibility phase.<sup>113</sup> This suggestion obviously seeks to address the opaqueness of the decision-making process of the OTP, however, it is equally important to be definite about the consequences of a failure to meet set targets.

In my view, monitoring and evaluation by the OTP of national initiatives is an integral tool of positive complementarity. At this stage, the examination has identified some possible crimes and discussion started with a situation country. Part of the discussion should, in my view, be agreeing on timelines, failing which where the OTP is unable to determine that there is willingness or ability to initiate national accountability measures in regard to the identified crimes, the OTP should, having regard to other criteria, open an investigation. After all, it is still open to the defendant to bring admissibility challenges until the period of trial.

### 12.5. Conclusion

Preliminary examination activities of the OTP remain a crucial but controversial aspect of the ICC. Apart from its primary objective of identifying potential cases and perpetrators, there is also a consequential impact of the announcement of a situation country or publication of the periodic reports on situation countries in diplomatic, political or legal affairs. As much as it has strived to keep the primary objectives of preliminary examinations in sight, the way the OTP has conducted and managed some examinations in the exercise of its discretion has been controversial and subjected to allegations that it readily defers to political powers. One of the sources of controversy relates to the disparate length of examinations especially where the admissibility phase is protracted ostensibly in the application of the principle of positive complementarity. Afghanistan and possibly Nigeria are examples of former and current situations examined in this chapter, which have given rise to suggestions for timed examinations. In light of arguments that timelines for the *whole process* will be inconvenient or impracticable, and bearing in mind that admissibility can be raised subsequently, under Article 19(2)(b) of the ICC Statute, the following measures are recommended:

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<sup>113</sup> See Wharton and Grey, 2018, p. 43, see above note 25; Human Rights Watch, 2018, p. 20, see above note 39; Stahn, Bergsmo and CHAN, 2018, p. 21, see above note 32; Ambos and Stegmiller, 2013, p. 428, see above note 25.

- in determining admissibility, the OTP should apply a timed process for determining the existence of national accountability measures or the willingness and ability to initiate them;
- in lieu, or in addition, the OTP should adopt a practice of elaborating detailed benchmarks in monitoring national measures and publicizing these benchmarks to ensure transparency; and
- lastly, the OTP should refrain from rigid compartmentalization or sequencing of the examination phases since obviously two or more of the phases, that is, jurisdiction and admissibility, can be activated simultaneously.

**SECTION C:  
VICTIMS AND WITNESSES**



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# Trauma in the Witness Stand: Effective Evaluation of Trauma-Impacted Testimony at the International Criminal Court

Ellie Smith\*

## 13.1. Introduction

International crimes can engender devastating and long-term psychological consequences for their victims.<sup>1</sup> For affected individuals who give evidence before the International Criminal Court ('ICC' or 'the Court'),<sup>2</sup> current or historic trauma symptoms can affect the nature of their testimony in two discrete ways:<sup>3</sup> (i) it may affect recall of the event(s) and hence their

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<sup>1</sup> See Yael Danieli, "Massive Trauma and the Healing Role of Reparative Justice", in *Journal of Traumatic Stress*, 2009, vol. 22, no. 5, p. 351.

<sup>2</sup> Under the Rome Statute of the International Criminal Court, 17 July 1998, Article 68(3) ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>3</sup> Given the nature of the crimes that fall within the Court's remit, it is likely that a significant number of victims will have suffered some sort of trauma response at the time of the event itself. As a result, even if they are relatively symptom free at the time of testifying, they could still experience difficulties in remembering an event in its entirety or with coherence: According to a cross-sectional, population-based survey of over 1,300 victims in the Former Yugoslavia, conducted ten years after the conflict, a third of those sampled had suffered from Posttraumatic Stress Disorder ('PTSD') in the aftermath of violations. Twenty-two

ability to provide a complete, coherent, accurate and chronological testimony of their experience(s); and (ii) it may affect the manner in which their testimony is given, and hence judicial perceptions of credibility in respect of it.

In this chapter, the author examines how the Court assesses the credibility and veracity of testimony that has been affected by psychological trauma, and in particular, how it has used expert clinical witnesses to guide its deliberations. The possibility for future progress in the area is considered in light of emerging clinical knowledge.<sup>4</sup>

The author has approached the issue from a victimological perspective, with the focus of analysis on the intersection of the psychological consequences of the crime and the victims' interaction with the criminal justice system – in this case, the ICC. A detailed description of the legal evidentiary context is beyond the scope of this chapter, but should be borne in mind by the reader where possible.

The effective evaluation of trauma-impacted testimony will necessarily involve some degree of judicial engagement with psychological and traumatological specialism. Victim and trauma expertise is available to the Court through its in-house practitioners, as well as via the instruction of external experts, and victims themselves are likely to interact with clinical specialists during the course of their involvement in any investigation or trial. Before going on to examine the Court's approach to the evaluation of trauma-impacted testimony, and by way of establishing the context for the Court's endeavour, it is therefore appropriate to briefly describe the various points at which expert clinical input might arise.

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percent of the study sample were still experiencing PTSD symptoms at the time of the survey; Metin Basoglu *et al.*, "Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions", in *Journal of the American Medical Association*, 2005, vol. 294, no. 5, p. 580.

<sup>4</sup> It is beyond the scope of this chapter to examine the various ways in which specific trauma symptoms or responses in victims might affect their ability to coherently articulate a full and chronological account of their experiences, although this is done elsewhere. For further information, see Ellie Smith, "Victims in the Witness Stand: Socio-cultural and Psychological Challenges to the Achievement of Testimony", in Kinga Tibori, Julia Szabo and Megan Hirst (eds.), *Victim Participation in International Criminal Justice*, Springer, 2017, pp. 315–340; in the specific case of sexual violence, see also Ellie Smith, "Investigating Rape at the International Criminal Court and the impact of Trauma", in *Issues in International Criminal Justice*, 2012, p. 99.

Article 68(1) of the Rome Statute requires the Office of the Prosecutor ('OTP') to take appropriate measures to protect victims' psychological well-being during the conduct of its investigations. To this end, potential witnesses are screened by a Court-funded psychologist prior to being interviewed by an investigator or before being selected as a possible witness for the trial,<sup>5</sup> and those who are deemed to be at risk of harm by their continued engagement with the process may be excluded from the formal investigation and/or trial. Where the expert believes that a victim is able to withstand interview and/or is otherwise psychologically capable of engaging in the prosecutorial process, support is provided to the victim or witness prior to the interview, during it and/or in its aftermath, as required.

Once physically before the Court, the Victims and Witnesses Unit ('VWU' or 'the Unit') is mandated to provide protective and supportive measures to victims appearing as witnesses to ensure their security, as well as their physical and psychological well-being.<sup>6</sup> The Unit is able, in particular, to assist victims in obtaining medical and counselling assistance,<sup>7</sup> support victims who have been called to testify,<sup>8</sup> provide facilitative measures for victims of sexual violence,<sup>9</sup> and assist and support all child witnesses.<sup>10</sup> To this end, the VWU employs staff with expertise in psychology in criminal proceedings and trauma,<sup>11</sup> including trauma arising as a result of sexual violence,<sup>12</sup> and in children with trauma.<sup>13</sup> The Unit is also empowered to offer training to the Court in issues including trauma and sexual violence.

The victims, their legal representative, the Defence or the Chamber itself can request the provision of special measures to better facilitate the delivery of testimony, including the attendance of a psychologist during

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<sup>5</sup> In the context of crimes of sexual violence, for example, see OTP, "Policy Paper on Sexual and Gender-based Crimes", June 2014, para. 70 (<http://www.legal-tools.org/doc/7ede6c/>).

<sup>6</sup> Rome Statute, Article 43(6), see above note 2; ICC, Rules of Procedure and Evidence, 9 September 2002, Rules 16–19 ('ICC RPE') (<http://www.legal-tools.org/doc/8bcf6f/>).

<sup>7</sup> ICC RPE, Rule 17(2)(a)(iii), *ibid.*

<sup>8</sup> ICC RPE, Rule 17(2)(b)(ii), *ibid.*

<sup>9</sup> ICC RPE, Rule 17(2)(b)(iii), *ibid.*

<sup>10</sup> ICC RPE, Rule 17(3), *ibid.*

<sup>11</sup> ICC RPE, Rule 19(d), *ibid.*

<sup>12</sup> Rome Statute, Article 43(6), see above note 2; ICC RPE, Rule 19(e), *ibid.*

<sup>13</sup> ICC RPE, Rule 19(f), see above note 6.

testimony and/or clinical debriefing afterwards.<sup>14</sup> In its consideration of special measures to enable testimony, the Court must, of course, consider the right of the defendant to a fair trial,<sup>15</sup> including the right to be appraised of the evidence against them, together with the need more broadly for transparency of process.

In addition to internal expertise, the OTP, the Defence, victims' legal representative(s), or the judges themselves may call a psychological specialist as an expert witness. An 'expert witness' is not defined in the Rome Statute. According to the Court's jurisprudence, however, an expert witness is understood to be "a person who, by virtue of some specialized knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute".<sup>16</sup> When determining whether an expert's report or testimony is admissible, the Chamber must be satisfied that the proposed witness is an expert in the field, decide whether the testimony would be of assistance to the Court and consider whether the testimony falls within the expertise of the witness.<sup>17</sup>

Significantly, while expert witnesses are generally afforded a 'wide latitude' to offer opinions based upon their expertise,<sup>18</sup> their report or testimony must not "usurp the functions of the Chamber as the ultimate arbiter of fact and law".<sup>19</sup>

### 13.1.1. Definitions

'Trauma' is used here in a broad sense to refer to an adverse psychological response to an overwhelming violent or catastrophic event or events.<sup>20</sup>

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<sup>14</sup> ICC RPE, Rules 88(1) and (2), *ibid.*

<sup>15</sup> Rome Statute, Article 68(1), see above note 2.

<sup>16</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159, para. 7 ('*Ntaganda*, 9 February 2016') (<http://www.legal-tools.org/doc/a9ab38/>); see also, for example, ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, 7 August 2013, ICC-01/09-01/11-844, para. 11 ('*Ruto and Sang*, 7 August 2013') (<http://www.legal-tools.org/doc/6196e6/>).

<sup>17</sup> *Ibid.*, para. 12.

<sup>18</sup> *Ntaganda*, 9 February 2016, para. 9, see above note 16.

<sup>19</sup> *Ibid.*, para. 8, and subsequently at paras. 16, 28–31; *Ruto and Sang*, 7 August 2013, para. 12, see above note 16.

<sup>20</sup> A similar definition is used in Cathy Caruth, *Unclaimed Experience: Trauma, Narrative and History*, John Hopkins University Press, Baltimore, 1996. The definition is adjusted here to the specific context.

‘Trauma-impacted testimony’ is used in this chapter to refer to the testimony of a victim that has been affected by traumatic symptoms, whether in relation to the content and nature of the testimony proffered or the manner in which testimony is given.

‘Clinical’ is used here in the medical sense, to refer, in the specific context, to psychological theory, practice and methods.

Finally, it must be noted that while much of the Court’s attention in its consideration of issues of trauma to date has focused on the impact(s) of post-traumatic stress disorder (‘PTSD’), the absence of a PTSD diagnosis does not necessarily mean that a victim is symptom free or that they will not experience difficulties in engaging with the various organs of the Court and its officers.<sup>21</sup>

In order to situate the practice of the ICC within its context, and as a means of understanding the prior state of knowledge and practice on the subject in the field of international criminal justice as the starting point from which the ICC approaches the issue, this chapter begins with a brief inquiry into the way in which trauma-impacted evidence was evaluated by the ICC’s predecessors, the *ad hoc* Tribunals: the International Criminal Tribunal for the former Yugoslavia and Rwanda (‘ICTY’ and ‘ICTR’ respectively).

### **13.2. Background: Trauma-Impacted Evidence at the *Ad Hoc* Tribunals**

Many of the eye-witnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. The possible traumatism of these witnesses [...] [may] affect his or her ability fully or adequately to recount the sequence of events in a judicial context.<sup>22</sup>

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<sup>21</sup> The Court itself has recently heard evidence on this point: see for example the expert testimony of Dr. Daryn Reicheter during the *Bemba* sentencing hearing: ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript, 16 May 2016, ICC-01/05-01/08-T-368-ENG ET WT 16-05-2016 1/116 SZ T, p. 88, lines 15–89, line 9 (<http://www.legal-tools.org/doc/297cf6/>).

<sup>22</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4-T, para. 142 (‘*Akayesu*, 2 September 1998’) (<http://www.legal-tools.org/doc/b8d7bd/>).

The *ad hoc* Tribunals recognized the possibility that trauma might affect the memories of victim-witnesses,<sup>23</sup> and thereby the reliability of their testimony.<sup>24</sup> While the burden of proving that victim testimony had been compromised by trauma rested with the party alleging it,<sup>25</sup> responsibility for determining the veracity and probative value of victim testimony remained, of course, with the Trial Chamber.<sup>26</sup> So how did the ICTY and ICTR approach this issue?

Notably, the Tribunals eschewed any automatic presumption of unreliability where a victim was thought or known to be suffering from symptoms of trauma. In the case of *Kunarac*, for example, the Appeals Chamber of the ICTY noted in its examination of identification evidence provided by one victim of sexual violence that “there is no recognized rule of evidence that traumatic circumstances necessarily render a witness’s evidence unreliable”,<sup>27</sup> whilst in *Furundžija*, the ICTY Trial Chamber, in response to the Defence’s claim that evidence provided by a victim known to be suffering from PTSD was thereby rendered unreliable, noted in its judgement that “even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given”.<sup>28</sup>

Instead, the mechanisms each professed to approach their evaluation of victim evidence on the basis that trauma was likely to have been suf-

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<sup>23</sup> In its judgement in the case of *Bagilishema*, for example, the Trial Chamber of the ICTR observed that “differences between earlier written statements and later testimony in court may be explained by many factors, such as the lapse of time, the language used, the questions put to the witness and the accuracy of interpretation and transcription, and the impact of trauma on the witnesses”, ICTR, *Prosecutor v. Ignace Bagilishema*, Trial Chamber, Judgement, 7 June 2001, ICTR-95-1A-T, para. 24 (<http://www.legal-tools.org/doc/6164a4/>); see in relation to the ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T, para. 113 (*Furundžija*, 10 December 1998’) (<http://www.legal-tools.org/doc/e6081b/>).

<sup>24</sup> In the case of *Kunarac*, for example, the Appeals Chamber of the ICTY noted that “in principle, there could be cases in which the trauma experienced by a witness may make her unreliable as a witness”: ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Appeals Chamber, Judgement, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 324 (*Kunarac*, 12 June 2002’) (<http://www.legal-tools.org/doc/029a09/>).

<sup>25</sup> The Appeals Chamber in the *Kunarac* case situated the burden on the party contesting the testimony concerned, going on to say that “It must be demonstrated *in concreto* why ‘the traumatic context’ renders a given witness unreliable”, *ibid.*, para. 324.

<sup>26</sup> *Ibid.* In particular, the Court is required “to provide a reasoned opinion adequately balancing all the relevant factors”.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Furundžija*, 10 December 1998, para. 109, see above note 23.

ferred by victim-witnesses, that this in turn had the potential to affect their recall and articulation of events to some degree, and that as a result, a level of inconsistency in their evidence was both understandable and acceptable. In the *Akayesu* judgement, for example, the Trial Chamber of the ICTR, in describing its approach to the examination of testimony provided by victim-witnesses of torture and rape, observed that:

[t]he Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from posttraumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses [...] on the assumption that this might possibly have been the case. Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption.<sup>29</sup>

In its judgement in *Furundžija*, the Trial Chamber of the ICTY, in considering the reliability of testimony provided by a witness who had suffered multiple sexual assaults, noted that:

survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses.<sup>30</sup>

In practice, in their operation of this approach both Tribunals drew distinctions between inconsistencies in witness testimony between peripheral or minor details, and material or core elements of the traumatic event, considering that the former would not adversely affect the reliability of witness testimony so long as core aspects remained consistent.<sup>31</sup> In its examination of testimony provided by victims of sexual violence perpetrated

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<sup>29</sup> *Akayesu*, 2 September 1998, paras. 142–143, see above note 22.

<sup>30</sup> *Furundžija*, 10 December 1998, para. 113, see above note 23; reiterated also in ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Trial Chamber, Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T, 22 February 2001, paras. 564, 679 (*'Kunarac, 22 February 2001'*) (<http://www.legal-tools.org/doc/a4cb81/>).

<sup>31</sup> See, for example, in *Akayesu*, 2 September 1998, para. 299, see above note 22, and in relation to the inability of a witness to recall exact dates and times of an assault, para. 455; in *Furundžija*, 10 December 1998, para. 114, see above note 23, in relation to the Court's assessment of the evidence provided by witness, known to be suffering from symptoms of PTSD; *Kunarac*, 12 June 2002, paras. 230–237, see above note 24, referring to minor discrepancies where core or material elements remain consistent.

against Muslim women in the former Yugoslavia, for example, the ICTY Appeals Chamber in the *Kunarac* trial was asked to reconsider the reliability of evidence provided by a witness who had been unable to recall the location of a wound on the alleged perpetrator, including which limb he wore a cast on. The Appeals Chamber observed in this regard that “the discrepancies identified by the Appellant in the witnesses’ testimony are minor when compared with the consistent statements made regarding the presence of the Appellant in [the] house”,<sup>32</sup> going on to note that her failure to recall the detail was insufficient to put in doubt her claim to have been raped by the accused.<sup>33</sup> The approach was echoed in the ICTR, noting in its judgement in *Akayesu*, for example, that inconsistencies between the pre-trial statement provided by a witness and her subsequent testimony in court concerning whether Tutsi women were stripped on the way to or at their final destination were “not of material consequence and that they are not substantial enough to impeach the credibility of the witness”.<sup>34</sup>

While, however, both Tribunals were palpably alert to the possibility that trauma symptoms could affect a witness’s recall of events, an evaluation of their approach to the assessment of the impact of trauma on the witness’s deportment and demeanour in the delivery of testimony is more problematic in the absence of clear evidence. The jurisprudence of the ICTR, at least, indicates that while the assessment of a witness’s demeanour was a key element in the Trial Chamber’s determination of a witness’s credibility, the specific processes that the Chamber followed, together with its findings in relation to those processes, were not always made evident in its judgements. In the case of *Nizeyimana*, for example, the Appeals Chamber of the ICTR noted that “a trial chamber’s assessment of the witness’s demeanour may be implicit in the Trial Chamber’s assessment of the witness’s credibility”.<sup>35</sup> A similar observation was made by the Appeals Chamber in *Nahimana*, noting that: “The Trial Chamber undoubtedly assessed the credibility of Prosecution witnesses by observing their demeanour”.

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<sup>32</sup> *Kunarac*, 12 June 2002, para. 234, see above note 24.

<sup>33</sup> *Ibid.*, para. 236.

<sup>34</sup> *Akayesu*, 2 September 1998, para. 455, see above note 22.

<sup>35</sup> ICTR, *Prosecutor v. Ildéphonse Nizeyimana*, Appeals Chamber, Judgement, 29 September 2014, ICTR-00-55C-A, para. 177 (<http://www.legal-tools.org/doc/01d4df/>).

our in court and by evaluating their testimonies, even though it does not always mentioned [sic] this expressly.”<sup>36</sup>

Where demeanour was explicitly mentioned in their judgements, however, both Tribunals evidenced a preference for testimony that was delivered “in a confident manner”,<sup>37</sup> or “clearly and without hesitation”.<sup>38</sup> In contrast, the Chambers perceived negatively any witness behaviour or demeanor that it considered demonstrated “the witness’s possible aggressiveness, reluctance to answer questions, lack of emotion, silences and arrogance”.<sup>39</sup>

Having briefly examined how the *ad hoc* Tribunals approached the evaluation of trauma-impacted testimony, thereby indicating the intellectual ‘starting point’ for the ICC, it is appropriate now to consider how the Court has dealt with the issue.

### 13.3. Trauma and the Assessment of Testimony at the ICC

Like the *ad hoc* Tribunals before it, the ICC is alert to the possibility that trauma can, in some cases, affect the ability of victim-witnesses to recall and produce complete, accurate and chronological testimony of the events suffered. In its judgement in the *Lubanga* case, for example, Trial Chamber I noted in relation to its assessment of witness credibility and the evidence provided by a number of former child soldiers that “witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account”.<sup>40</sup>

The phrase is ostensibly reiterated by the Court in its judgement in the *Katanga* case, two years later.<sup>41</sup> A similar approach is also evident in

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<sup>36</sup> ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Appeals Chamber, Judgement, 28 November 2007, ICTR-99-52-A, para. 195 (<http://www.legal-tools.org/doc/4ad5eb/>).

<sup>37</sup> *Furundžija*, 10 December 1998, paras. 116–117, see above note 23.

<sup>38</sup> *Kunarac*, 22 February 2001, para. 679, see above note 30.

<sup>39</sup> ICTR, *Prosecutor v. Nyiramasuhuko et al. (Butare)*, Appeals Chamber, Judgement, 14 December 2015, ICTR-98-42-A, para. 148 (<http://www.legal-tools.org/doc/b3584e/>).

<sup>40</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgement, 14 March 2012, ICC-01/04-01/06-2842, para. 103 (*‘Lubanga, 14 March 2012’*) (<http://www.legal-tools.org/doc/677866/>).

<sup>41</sup> ICC, *Prosecutor v. Germain Katanga*, Trial Chamber, Judgement, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 83 (*‘Katanga, 7 March 2014’*) (<http://www.legal-tools.org/doc/f74b4f/>).

the *Bemba* case, where the Chamber observed that “witnesses who suffered trauma may have had particular difficulty in providing a coherent, complete and logical account”.<sup>42</sup>

In therefore assuming that some level of traumatization in the victim-witnesses was likely, and that this in turn could account for and accommodate a degree of inconsistency in the evidence provided, the approach of the Court in these cases effectively echoes that of the *ad hoc* Tribunals.

Moreover, like the *ad hoc* Tribunals before it, the Court has also drawn a distinction in practice between inconsistencies in a victim’s testimony that it deems to be substantial or core, and those which it considers to be peripheral or minor, determining that the latter would not affect the reliability of a victim’s testimony so long as core elements of the account remained consistent.

In describing its approach to the evaluation of oral evidence, for example, Trial Chamber I noted in its judgement in *Lubanga* that:

The Chamber has assessed whether the witness’s evidence conflicted with prior statements he or she had made [...] In each case the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witness.<sup>43</sup>

In addition, in its judgement in *Bemba* the Court was required to consider the reliability of a witness in light of an inconsistency between the testimony they provided in Court and a previous statement. The inconsistency in question concerned the time of evening that the witness said the first attack had taken place. In that case the Chamber noted that due to:

the *relatively limited nature* of the inconsistency, the length of time that has elapsed between the events and testimony, the traumatic circumstances, [the witness’s] demeanour when testifying about this incident, and his otherwise consistent description thereof, the Chamber finds that the inconsistency identified by the Defence [...] does not undermine the reliability of [the witness’s] account.<sup>44</sup>

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<sup>42</sup> *Ibid.*, para. 230.

<sup>43</sup> *Lubanga*, 14 March 2012, para. 102, see above note 40.

<sup>44</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Judgement, 21 March 2016, ICC-01/05-01/08-3343, para. 483 (emphasis added) (<http://www.legal-tools.org/doc/edb0cf/>).

Turning now to the manner in which testimony is delivered: while it is clear that witness deportment and demeanour is an indicator of credibility in the minds of the judges of the ICC, as with the *ad hoc* Tribunals, there is limited explicit evidence of the Court's approach to credibility assessment in specific cases. In particular, there is no full explication of factors that the Court considers relevant to its evaluation of a witness's demeanour and deportment, including the extent to which they have considered the potential impacts of trauma on the victim's manner, demeanour and delivery.

Notably, the Court has heard expert evidence on the issue. During her evidence in the *Lubanga* case, for example, Dr. Schauer noted that where victims deported themselves poorly in the witness stand, spoke too quickly, sweated, trembled or showed other signs of nervousness, these may be natural reactions of individuals speaking about highly distressing events, and should not necessarily be interpreted by the Court as indicators of dishonesty or fabrication.<sup>45</sup>

In its subsequent judgement, the Chamber noted in broad terms that in its evaluation of the oral testimony of witnesses it considered the entirety of the witness's account, including the manner in which evidence was given.<sup>46</sup> There is, however, no reference in the judgement to the evidence provided by Dr. Schauer on the point, and no indication in individual cases of whether and how a witness's demeanour and manner whilst giving evidence was considered to impact upon the perceived credibility of testimony provided. As a result, it is unclear what factors the Court took into consideration in its deliberations of individual credibility or the degree to which the expert's evidence informed their conclusions.

In practice, however, and again in line with the approach of the *ad hoc* Tribunals, where specifically mentioned in its judgements, the Court has illustrated a preference for evidence that it perceives as being delivered clearly, confidently and willingly by the witness. In its judgement in *Bemba*, for example, the Chamber noted that:

whenever relevant and necessary, the Chamber considered the witnesses' conduct during their testimony, including their readiness, willingness and manner of responding to questions

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<sup>45</sup> Jennifer Easterday, "Expert Reports on the Psychological Impact of Child Soldiering", in *International Justice Monitor*, 15 May 2009.

<sup>46</sup> *Lubanga*, 14 March 2012, para. 102, see above note 40.

put to them by the parties, the Legal Representatives and the Chamber.<sup>47</sup>

By contrast, the Court perceives negatively evidence that it considers to have been delivered reluctantly or with a lack of emotion. In the *Katanga* case, for example, witness P-28's somewhat detached and distant demeanour whilst giving evidence about an attack in Bogoro in February 2003 negatively affected the Chamber's perception of his credibility.<sup>48</sup>

### 13.4. Discussion

In considering the impact of trauma on the memory and consequent credibility of victim-witnesses, the Court, like the *ad hoc* Tribunals before it, has been prepared to assume a degree of non-specific trauma in the victim, and then to employ that assumption to account for non-material inconsistencies in a victim's evidence where it finds the victim to be otherwise credible.

From the perspective of the victim, at least, it is clearly positive that the Court recognizes that trauma can affect a victim's memory, and at the same time does not simply assume that a witness lacks credibility or is rendered unreliable because they have suffered traumatic symptoms. The Court's approach, however, is inconsistent with what we know about how trauma affects memory, demeanor and the content of testimony, and as such is problematic in terms of the proper evaluation and assessment of the reliability and veracity of witness testimony.

In simply assuming the presence of some degree of trauma in victim-witnesses, the determinations of the Court in relation to the reliability of a victim's memory proceed in the absence of any expert clinical evidence that a given victim was, in fact, suffering from, or had suffered from, adverse psychological symptoms as a result of traumatic experiences, and that significantly, those symptoms had affected the memory of the witness in any specific way. While many of those appearing as witnesses before the Court may well have experienced, and continue to experience, trauma symptoms, the diagnosis of those trauma symptoms and the identification of their likely memory impacts require clinical expertise. As it stands, however, the Court's approach in assuming a level of trauma lacks a sound evidential base.

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<sup>47</sup> *Bemba*, 21 March 2016, para. 230, see above note 44; and see also *Katanga*, 7 March 2014, para. 87, see above note 41.

<sup>48</sup> *Katanga*, 7 March 2014, para. 134, see note above 41.

Moreover, the Court's presumption of a non-specific traumatic element presents challenges. It is clear, for example, that trauma responses in victims vary enormously, and victims of the same or similar events might experience very different trauma symptoms. Different symptoms, in turn, are known to affect a victim's memory in different ways, and as a result, the variation between the quality of memory in victims can be significant. Both the assumption of a non-specific degree of trauma, and the apparent ascription by the Court of a common acceptable level or degree of inconsistency in the testimonies of traumatized victims is therefore unsustainable. Should the Court in fact, for example, attach greater evidential weight to the testimony of a victim who suffers from daily flashbacks of an event when compared to the testimony of someone who avoids all triggers of the same incident, or even of someone without any trauma symptoms?

And crucially for the proper evaluation of testimony, in the absence of any diagnosis of specific trauma symptoms in witnesses, there has been no assessment by the Court of the degree of consistency between existing trauma symptoms on the one hand and the purported difficulties of the witness in recollecting the event(s). Without an understanding of the specific nature of the trauma symptoms experienced by a victim, the effect of those symptoms on the memory of the victim and the degree of consistency between the symptoms experienced and the memory pattern displayed, the effective evaluation of the impact of trauma on the memory of that victim is unrealistic.

Notably, there has also been a dearth of expert clinical evidence to guide the Court in this area, whether to support the assumptions made about the existence of trauma in specific witnesses, to indicate the nature of particular symptoms of trauma in victim-witnesses, to describe the possible impact(s) of those symptoms on the abilities of individual victims to recall and produce testimony or to guide any deliberation of whether symptoms were consistent with the pattern of memory presented. In the absence of such expert evidence, any assumption by judges concerning the presence and mode of operation of trauma symptoms on the memories of witnesses lacks a credible basis, rendering any conclusions that flow from that assumption questionable.

At the same time, any appreciation of the possible effects of trauma on victim manner, deportment and demeanour in the witness stand are difficult to discern. To date, the Court has not sought to explicitly examine witness deportment or the manner in which testimony is delivered by refer-

ence to any trauma impact – specific or otherwise – and it is unclear whether it is equipped to do so in terms, for example, of understanding how factors such as shame, depressive symptoms or emotional numbing might affect the way in which traumatic experiences are narrated.

The approach taken by the Court to the evaluation of potentially trauma-impacted evidence has therefore been problematic, and without expert guidance its foray into the area has proven misguided. Up until now, in cases where a victim's memory or the articulation of their experience(s) have been affected by trauma, the Court has appeared to lack the necessary tools, framework and understanding to enable an effective evaluation. How, then, might it begin to move forward?

### **13.5. Finding a Way Forward? Expert Evidence in the *Ntaganda* Trial**

The effective assessment of trauma-impacted testimony is a complex issue that will necessarily entail significant engagement by the Court with psychological expertise. Promisingly, the need for such engagement arises within a seemingly receptive context. The Court is broadly alive and responsive to the psychological challenges and needs of victims within the judicial process, and has demonstrated a clear readiness to engage with psychological experts to inform its approach on other issues. It has, for example, heard expert psychological evidence or otherwise benefitted from the provision of in-house expertise on the impacts of trauma in relation to the assessment of protection needs during the investigation and evidence-testing stage;<sup>49</sup> in considering witness vulnerability and corresponding support needs to enable testimony;<sup>50</sup> in the provision of expert evidence of individual violation or victimhood;<sup>51</sup> and in relation to the nature, scale and

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<sup>49</sup> Rome Statute, Article 68(1), see above note 2.

<sup>50</sup> Dr. Elizabeth Schauer, for example, provided expert evidence to the Court in the *Lubanga* case to support the provision of testimony by former child soldiers suffering from trauma; see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Instructions to the Court's expert on child soldiers and trauma, 9 February 2009, ICC-01/04-01/06-1671 (<http://www.legal-tools.org/doc/539135/>).

<sup>51</sup> See for example ICC, *Prosecutor v. Bosco Ntaganda*, Prosecution's list of expert witnesses, 16 April 2015, ICC-01/04-02/06-560, p. 6 (<http://www.legal-tools.org/doc/210cb9/>), instructing Maeve Lewis, a psychotherapist with expertise in working with survivors of sexual violence. The extent to which expert psychological evidence is employed as a means of establishing the veracity of a specific reported violation is unknown due to the confidential nature of medico-legal reports at the ICC.

impact of trauma both for the purpose of determining an appropriate sentence,<sup>52</sup> and in relation to assessing reparations.<sup>53</sup>

In addition, while the Court has yet to identify and articulate a suitable or effective approach to the evaluation of trauma-impacted testimony, it has, at least, demonstrated a willingness to hear expert evidence on the potential effects of trauma on memory and the coherent articulation of traumatic experiences.

In the *Bemba* case, for example, Dr. Akinsulure-Smith, an expert instructed by the Prosecution to describe the psychological harms caused by sexual violence, was asked to explain “the link between PTSD and accuracy in recollecting memory of traumatic events”.<sup>54</sup> In response, Dr. Akinsulure-Smith indicated that PTSD could give rise to problems in declarative memory,<sup>55</sup> including a propensity for non-chronological recall.<sup>56</sup> The issue was not, however, developed substantively or explored further in questioning, and there was no explicit reference in the Court’s subsequent judgement to the evidence provided. Instead, the language employed by the Chamber replicates that used in its earlier judgements.

Notably, Dr. Akinsulure-Smith had not been primarily instructed to provide evidence on the issue of trauma-impacted memory. The cursory

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<sup>52</sup> In the case of *Bemba*, for example, for the purpose of informing its consideration of an appropriate sentence, the Court determined that it would hear the evidence of Dr. Daryn Reicherter, on the “‘longitudinal and intergenerational impact of crimes’, including aspects which have not previously featured in the evidentiary record thus far, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects”: ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, 4 May 2016, ICC-01/05-01/08-3384, para. 12 (<http://www.legal-tools.org/doc/bd56fb/>).

<sup>53</sup> In the *Lubanga* case, for example, the Trust Fund has engaged with a number of experts during its consideration of the nature and scale of reparations in the case, including in its examination of the extent of psychological harm(s) suffered; noted, for example, in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan, 3 November 2015, 01/04-01/06-3177, para. 32 (<http://www.legal-tools.org/doc/2a256c/>).

<sup>54</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Transcript, 30 November 2010, ICC-01/05-01/08-T-39-ENG, p. 5, lines 21–22 (*Bemba*, 30 November 2010) (<http://www.legal-tools.org/doc/b72dbb/>).

<sup>55</sup> Or autobiographical memory, referring to our ability to provide chronological biographical memory of events.

<sup>56</sup> Declarative (or ‘explicit’) memory here refers to the autobiographical memory of an event. For further information, see Smith, 2017, para. 10.4.3, see above note 4; *Bemba*, 30 November 2010, p. 5, lines 13, 23–26, see above note 54.

manner in which her evidence on the point is dealt with is therefore, perhaps, understandable, although unfortunate.

In the *Ntaganda* trial, however, Dr. John Yuille, Professor Emeritus in the Department of Psychology, University of British Columbia, and a forensic psychologist, was expressly instructed by the Prosecution to provide expert evidence on the psychological effects of trauma on memory, victims' corresponding ability to recall and narrate their experience(s) in a court setting, the causes of variances in memory amongst victims who had experienced trauma, and specific factors affecting memory patterns and functioning in those victims.<sup>57</sup> In the event, he provided evidence over the course of two days. His testimony marked the first time that expert evidence on trauma-impacted testimony had been heard in any real depth either at the Court or at any other international criminal tribunal. His evidence therefore merits specific attention, and is recounted here in some detail:

Dr. Yuille began by describing the great variation in memory between victims of traumatic events, ranging, he said, from those with “detailed vivid and fairly accurate memories [...] [to those with] no memory at all, and everything in between”.<sup>58</sup>

In seeking to explain possible differences in memory between victims of the same or similar events, Dr. Yuille described to the Court how a survivor's memory could be affected not only by the nature, extent and duration of the trauma (described by him as ‘precipitating’ factors, influencing the trauma response in the victim), but also by the personality or individual characteristics of the victim (‘predisposing’ factors, which might affect the way in which the victim responded to a traumatic event, where, for example, another victim with different personality traits might respond in another way), as well as what the victim subsequently did with the

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<sup>57</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Prosecution's list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness, 16 April 2015, ICC-01/04-02/06-560, para. 10(vi) (<http://www.legal-tools.org/doc/210cb9/>); specific instructions to the expert are referenced in the transcripts of the expert's evidence: ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber, Transcript, 18 April 2016, ICC-01/04-02/06-T-84-ENG, p. 10, lines 15–17 (*Ntaganda*, 18 April 2016') (<http://www.legal-tools.org/doc/6e8319/>).

<sup>58</sup> *Ntaganda*, 18 April 2016, p. 13, lines 15–18, see above note 57. See also *ibid.*, p. 15, lines 9–11.

memory of the traumatic event(s) – that is, the degree to which they had been able to integrate and deal with the trauma (‘perpetuating’ factors).<sup>59</sup>

Dr. Yuille provided a number of examples in his testimony to illustrate these three factors.

In relation to precipitating factors, he indicated that traumatic events that involved, brought about or otherwise exacerbated feelings of helplessness and a lack of control in the victim could adversely affect the trauma response and symptomatology in the victim. Traumatic forms often identified with the generation of such sensations in the victim, he opined, included sexual violence, as well as instances of constant shelling and bombardment in battle contexts.<sup>60</sup> Dr. Yuille also described to the Court the phenomenon of ‘script memory’ in victims of repeated and/or similar act abuse, again including repeated acts of sexual violence. A script memory would develop, he noted, where the typical elements or patterns to episodes of abuse merged in the mind of the survivor to form a composite or generic memory of the violence experienced. As a result, he said, specific episodes might not be recalled by the victim unless or to the extent that aspects of a particular assault deviated from that script.<sup>61</sup>

In relation to predisposing factors, the expert indicated that the degree to which a victim suffered a traumatic response to an event might depend upon personality traits in the victim such as their arousal sensitivity – the degree to which a given event would arouse an emotional response in them. He went on to note that at one end of that dimension, a person who was hypersensitive – one who was easily aroused – would become traumatized relatively easily, while at the other end of the dimension, a person who was hyposensitivity – someone who did not respond easily to stimulation – would be less likely to experience the same event as traumatizing, or as less traumatizing.<sup>62</sup> In addition, he noted that the specific content of a victim’s memory would be affected by whether their natural response to the traumatic event was one of ‘fight or flight’. A victim with a ‘fight’ response, he noted, would be more focused at the time of the event on the attacker(s) and the source of the trauma itself, and so would have a better memory of those factors than an individual with a natural flight response, whose focus

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<sup>59</sup> *Ibid.*, see, in particular, pp. 13–19.

<sup>60</sup> *Ibid.*, p. 23.

<sup>61</sup> *Ibid.*, p. 35, lines 6–24.

<sup>62</sup> *Ibid.*, p. 15, lines 5–20.

instead was likely to be on possible escape routes (the locations of doors or windows, for example) or the presence of others in the room or vicinity.<sup>63</sup>

In relation to perpetuating factors, Dr. Yuille observed that the extent to which trauma symptoms persisted in the victim would be affected by the degree of resilience present in the victim – the extent to which he or she was able to recover from the event(s) suffered.

Finally, Dr. Yuille outlined the way in which certain trauma symptoms might affect the ability of victims to recall and integrate traumatic events. To this end, he observed that while, for example, some survivors might experience frequent flashbacks of the event, such that they regularly relived the experience, others would avoid the memory and any potential triggers of it. The former, he indicated, were likely to have a better-than-normal memory of the event (hypermnnesia), while the latter would likely have poor or almost no memory of the event.<sup>64</sup> The expert went on to observe in this respect that:

[s]ome victims of trauma will have a well organized, detailed, chronological memory, and they will be able to answer questions. That's a very different person from the one [...] for whom their memories are still in fragments, and they're going to have a lot of trouble recalling events, they won't be in chronological order.<sup>65</sup>

Dr. Yuille's evidence therefore both poses a problem for the Court, and at the same time, offers one possible solution to that problem.

In hearing expert testimony of the varied impacts of trauma on a victim's ability to recall and articulate their experiences, it is clearly difficult for the Court to continue to maintain either its assumption of non-specific trauma responses in victims or its ascription of a common or standard level of inaccuracy in victims' recall. In the absence of these assumptions, however, the Court is required to discern an alternative approach to the evaluation of trauma-impacted testimony. Any alternative must, it is suggested, be intellectually sustainable in terms of what we know about the psychological effects of trauma on victim memory and articulation.

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<sup>63</sup> *Ibid.*, p. 18, lines 14–19, line 2.

<sup>64</sup> *Ibid.*, p. 13, lines 16–18; and see also p. 23, lines 4–11; p. 33.

<sup>65</sup> *Ibid.*, p. 26, lines 1–5.

Dr. Yuille's evidence offers a framework by which the testimony of traumatized individuals might be effectively examined. In his evidence, he observes that:

since you're going to get different patterns of memory with different witnesses, it becomes essential to see if any particular pattern makes sense, that is, if the predisposing and precipitating and the perpetuating factors are present that are consistent with the pattern of memory that's being reported by the victim.<sup>66</sup>

Such an approach would require recourse to expert psychological reporting and evidence in relation to individual victim-witnesses suffering from trauma to attest to the sequelae evident in the victim (from the time of the event – as reported by the victim themselves – to the time of examination), together with the potential effects of those symptoms on patterns of memory. Specific personality traits in the individual that might also affect the nature and content of recall could also be indicated, and expert opinion sought on the extent to which an event had been integrated by the victim, together with the likely effect on the coherence and chronology of any account given.

Moreover, while the evidence provided by Dr. Yuille was limited to the effects of trauma on memory, his suggested approach to victim testimony – and in particular, the need for an appreciation of the degree of consistency between symptoms suffered and difficulties demonstrated during testimony – will apply equally to the evaluation of witness deportment and demeanour.

Only when it is in possession of this knowledge can the Court properly consider whether any inconsistencies in the account provided by the victim, any reported difficulties in memory or difficulties in deportment and delivery are consistent with the operation of known trauma symptoms on the individual. Determination of witness credibility can then be made on the basis of a true appreciation of the state of the victim's memory, as opposed to a broad assumption about the effects of possible trauma impacts.

That said, such an approach is not without its challenges. At a fundamental level, the Court cannot delegate the determination of witness credibility to a psychological expert. The judges of the Court must therefore ensure that they retain their power to determine such issues. In order to

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<sup>66</sup> *Ibid.*, p. 15, lines 20–24.

fulfil that role, however, they must be properly informed and have a sound understanding of the way(s) in which trauma might have affected a victim's memory, narrative and demeanour during testimony. A balance would therefore need to be struck to ensure that the Court's truth-seeking function is not usurped.

Notably, similar balances are successfully struck and maintained in relation to the clinical documentation of physical or psychological harm for the purpose of providing evidence of abuse. In such cases, an expert report is obtained to testify to the degree of consistency between the abuse that is reported by a victim and the physical and psychological harms and scars that are evident. The report is proffered by way of expert guidance to the Court in its deliberations, and therefore serves the purpose of enabling the Court in its truth-seeking role, rather than usurping that function.

Finally, within the context of mass victimization and multiple witnesses, recourse to psychological expertise by the Court in these circumstances would need to be employed relatively sparingly in order to avoid undue delay and expense, and used only, for example, where testimony that relates to key contested facts is in issue and where, in the opinion of Counsel or the victims' legal representative (with the assistance of the Court's trauma specialists, as necessary), trauma may be interfering with the retrieval and delivery by the victim of specific aspects of their experience.

### **13.6. Conclusion**

Psychological trauma at the individual, familial and collective levels is a sadly inevitable and manifest consequence of the perpetration of crimes that fall within the remit of the ICC.

To date, however, the examination by the Court of testimony, deportment and witness credibility by reference to possible trauma impacts has been relatively rudimentary. Whilst the potential for trauma to impact upon memory and demeanour has clearly entered the consciousness of the Court, the possible nature and form(s) of that impact remain as yet unexplored in its judgments. In the absence of any understanding of specific trauma sequelae in witnesses and the possible impact of those sequelae on recall and deportment, the Court is ill-equipped to adequately evaluate the evidence of witnesses suffering from trauma. Proper evaluation of testimony requires a degree of understanding of the quality of the witness's

memory,<sup>67</sup> including an appreciation of the way in which the particular trauma response experienced by the witness might affect their recall and articulation of the event(s), the extent to which they have been able to integrate traumatic experience(s), and the way in which the personality of the victim informed their trauma symptoms. Most significantly, it must entail an assessment of the consistency of the memory and delivery patterns demonstrated by the victim with the trauma response they have experienced and, in some cases, continue to experience.

This is not intended as a criticism of the Court: in the context of the nature of memory in the aftermath of trauma, at least, clinical understanding is still emerging.<sup>68</sup> The effective assessment of victim testimony, however, means that the Court must keep pace, and the decision of the ICC to hear expert evidence of the potential impacts of trauma on victims' memories in the *Ntaganda* trial is a promising step in this direction. Dr. Yuille's evidence provides one possible framework by which testimony affected by trauma might be evaluated, and offers an opportunity for an improved understanding of the interpretation of evidence that has or may have been impacted by trauma. If it is going to effectively evaluate the testimony provided by traumatized victims, the Court must choose either to follow the framework proposed or to consider and devise its own.

In either case, some degree of further engagement with psychological expertise will be required. The future judgment of the Court in *Ntaganda*, and in particular, what it reveals about the Court's progress in dealing with and assessing the evidence of traumatized individuals, is therefore highly significant and is awaited with interest.

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<sup>67</sup> *Ibid.*, p. 15, lines 18–20.

<sup>68</sup> *Ibid.*, p. 21.



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## Five Categories of Victims and the Consequences on the International Criminal Court

Christoph Safferling and Gurgen Petrossian\*

### 14.1. Introduction

Both natural and human created disasters provoke mass victimization in the civilization affected. In comparison to the human disaster, the natural disaster, however, does not know of any perpetrator<sup>1</sup> who could be held responsible for the damages created. In the aftermath of the brutalities of the Second World War, the international community was forced to generate new international rules for the protection of human rights and attribute criminal responsibility for damage or harm induced by human beings. As stated by Justice Robert H. Jackson, the United States Chief Prosecutor, in his opening address for the United States before the International Military Tribunal in Nuremberg with regard to the crimes charged: “civilisation cannot tolerate their being ignored because it cannot survive their being repeated”.<sup>2</sup> In following a general trend in national criminal justice systems, as well as in international human rights law, and in further developing the experiences both from Nuremberg and from the United Nations (‘UN’) *ad hoc* tribunals,

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<sup>1</sup> See Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation*, University of Pennsylvania Press, 1995, p. 184; Crystal Park and Elin Blake, “Resilience and Recovery Following Disasters: The Meaning Making Mode”, in Stefan Schulenberg (ed.), *Positive Psychological Approaches to Disaster: Meaning, Resilience, and Posttraumatic Growth*, Springer, Berlin, Heidelberg, 2020, p. 15; Chase, Stovall-McClough and Marylene Cloitre, “Traumatic Reactions to Terrorism: The Individual and Collective Experience”, in Leon A. Schein *et al.* (eds.), *Psychological effects of catastrophic disasters: Group approaches to treatment*, Routledge, New York, 2018, p. 118.

<sup>2</sup> *Trial of German Major War Criminals: Opening Speeches of the Chief Prosecutors*, William S. Hein, H.M.S. Office, London, 1946, p. 3.

the International Criminal Court ('ICC' or 'Court') aims at integrating victims into the criminal proceedings and thus activate and empower those persons who have suffered most from the atrocities.<sup>3</sup>

Over 16,000<sup>4</sup> victims have participated at the different stages of the criminal proceedings of the ICC since the establishment of the Court.<sup>5</sup> Almost one-third of them were participating only in the case against *Jean-Pierre Bemba* and with the acquittal of Mr. Bemba, the victims lost their participating legal status as victims at the ICC.<sup>6</sup> For the victim who suffered harm because of a crime and who is being told about the possibilities of participation at the ICC's proceedings, it is difficult to understand from the first approach how the system of participation is functioning. It is true that in the past 20 years since the establishment of the ICC, there have been many misconceptions of how the system of victim participation works.<sup>7</sup> Firstly, there is an assumption that victims may directly participate, which is not always the case. Secondly, it is difficult to understand how the ab-

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<sup>3</sup> Christoph Safferling, "The Role of the Victim in the Criminal Process: A paradigm shift in national German and international Law?", in *International Criminal Law Review*, 2011, vol. 11, p. 205; Gerson Trüg, "Die Position des Opfers im Völkerstrafverfahren vor dem IstGH – Ein Beitrag zu einer opferbezogenen verfahrenstheoretischen Bestandsaufnahme", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2013, vol. 25, no. 1, p. 53; Gurgen Petrossian, "Opferbeteiligung auf internationaler Ebene", in Markus Abraham *et al.* (eds.), *Verletzte im Strafrecht*, Nomos, Baden-Baden, 2020, p. 127.

<sup>4</sup> *Lubanga*: 425 victims; *Katanga*: 297 victims; *Ntaganda*: 2132 victims; *Bemba*: 5229 victims; *Gbagbo*: 718 victims; *Ongwen*: 4100 victims; *Al Mahdi*: 280 victims; *Al Hassan*: 882 victims; *Yekatom and Ngaïssona*: 1085 victims; *Harun and Ali Kushayb*: 6 victims; *Banda*: 103 victims; *Kony*: 41 victims; *Ruto and Sang*: 628 victims; *Kenyatta*: 725 victims (the data refers to 30 September 2019).

<sup>5</sup> For a wider discussion of victims' issues at the ICC, see also: Christoph Safferling and Gurgen Petrossian, *Victims Before the International Criminal Court. Definition, Participation, Reparation*, Springer, Heidelberg, 2021; cf. also ICC, "Report of the Court on Key Performance Indicators", 25 November 2019, p. 38 ('Report of the Court on Key Performance Indicators, 2019'); ICC, "Third Court's report on the development of performance indicators for the International Criminal Court", 15 November 2017, p. 52.

<sup>6</sup> See the critical approach of Judge Van den Wyngaert in ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's Judgement pursuant to Article 74 of the Statute, 8 June 2018, ICC-01/05-01/08-3636-Red, para. 30 (<http://www.legal-tools.org/doc/40d35b/>); *ibid.*, Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2 (<http://www.legal-tools.org/doc/c13ef4/>).

<sup>7</sup> See, for example, International Federation of Human Rights (FIDH), "Five myths about victim participation in ICC proceedings", December 2014.

stract participation<sup>8</sup> mechanism functions at the ICC, whereas, thirdly, the principled question arises how meaningful the participation of the victims at the ICC is.

This chapter focuses on two important aspects, on the one hand, the need of clarification between broad and narrow approaches for the recognition of victims and, on the other hand, the need of specification of the victims at the ICC in order to determine the affected victims at the different stages of the ICC.

The relatively new instrument of victim participation at the ICC is still a problematic issue under the legal framework of the Rome Statute of the ICC ('Rome Statute').<sup>9</sup> The ICC's special form of victim participation and compensation was hailed as a revolution in criminal procedure. But what happens to the thousands of victims who are strongly encouraged to take part in these trials when the defendants are acquitted? Victims then also lose their right to compensation. The problems are further intensified by the fact that a participation and compensation claim is open to registered, respectively recognized victims only. Victims' participation consists of the possibility of the victims to exercise certain procedural rights during the proceedings before the ICC, which must be conducted in a manner that "is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".<sup>10</sup> The compensation claim is a separate process against the convicted person, in which the victim requires compensation for the damage suffered. Rule 85 of the ICC Rules of Procedure and Evidence ('ICC RPE') in connection with Article 68(3) of the Rome Statute define those persons who might generally be recognized as 'victim' by the Court.

Taking into consideration the possible victimization of a large number of persons because of the macro-criminal context of international crim-

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<sup>8</sup> The involvement of victims is, in part, an abstract topic where legal representatives take more action and consider an appropriate participation in consultation with the victims.

<sup>9</sup> Theoretical and practical issues, such as recognition of victim, the fair trial principal, the balance between the victims and the accused, direct and active participation issues of thousands of victims, reparation issues, which mostly are not always possible, see Christoph Saferling and Gorgen Petrossian, "Wiedergutmachung für Opfer von Makroverbrechen: Die Praxis des Internationalen Strafgerichtshofes im Überblick", in *Menschenrechtsmagazin*, 2020, on the duration of the trials because of the victims' issues, *et cetera*.

<sup>10</sup> Hector Olásolo, *Essays on International Criminal Justice*, Hart Publishing, Oxford, Portland, 2012, p. 158; see ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Fourth Decision on Victims' Participation, 12 December 2008, ICC-01/05-01/08-320, paras. 87–94 ('*Bemba*, 12 December 2008') (<http://www.legal-tools.org/doc/1652d9/>).

inal law, and taking into account also the increasing number of victims interested in participating in ICC proceedings,<sup>11</sup> it is important to determine the particular crime-related victims for an efficient,<sup>12</sup> speedy and objective criminal justice. At the same time, the broad definition of the victim, given by the ICC RPE, enables the participation of hundreds of people who are directly or indirectly victimized because of the macro-criminal context of the accused's acts. In some cases, hundreds of victims' applications, the exercise of procedural rights by hundreds of victims,<sup>13</sup> may lead to delays and lengthy duration of the judicial proceedings,<sup>14</sup> and thus threaten the fair trial principle.<sup>15</sup>

At the same time, the rejection of the victim status by the Court does not mean the general rejection of the victimhood. The person who suffered harm remains a victim independent of the Court's decision. The aim of the Court is the identification of a nexus between a victim and the charges brought against the accused. If the victim is not related to the charges and is not recognized as a victim under the general term 'victim', further frustration arises for the person who suffered harm because of the macro-crime, while being rejected as a victim and excluded from participation.

The ICC recognizes two types of victims: victims of a situation and victims of a case. However, this is not enough to illustrate the problems of victims' participation during the different stages of the ICC proceedings. Before it will be possible to minimize the circle of particular crime-related victims and to analyse the classification of the victims, in order to explain the nexus between the victims and the charges brought against the accused, several aspects of victims' recognition by the ICC should be discussed.

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<sup>11</sup> Report of the Court on Key Performance Indicators, 2019, p. 38, see above note 5; *Lubanga*: 120 victims; *Katanga*: 365 victims; *Ruto and Sang*: 628 victims; *Kenyatta*: 725 victims; *Gbagbo and Blé Goudé*: 728 victims; *Ntaganda*: 2131 victims; *Bemba*: 5229 victims; *Ongwen*: 4107 victims. The tendency continues with the new cases at the ICC in the *Al Hassan* and *Yekatom and Ngaïssona* cases.

<sup>12</sup> Not the broad understanding of the victims in the situation.

<sup>13</sup> Even if they are mostly represented by the legal representatives.

<sup>14</sup> Martin Kuijer, "The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings", in *Human Rights Law Review*, 2013, vol. 13, no. 4, pp. 777–780.

<sup>15</sup> *Ibid.*, p. 780; Christine van den Wyngaert, "Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", in *Case Western Reserve Journal of International Law*, 2011, vol. 44, p. 481.

## 14.2. Victims Under Broad and Narrow Approaches

Due to the victim-oriented movements around the world in the mid-1980s,<sup>16</sup> the Declaration of Basic Principles of Justice for Victims and Abuse of Power became known as the ‘Magna Carta for victims,’<sup>17</sup> which started to change the offender-centric conception and rebalance the victim-offender nature in criminal justice.<sup>18</sup> This declaration allowed victims to be *internationally* and *effectively* recognized for their suffering, loss, injury and trauma caused by crime. At the same time, the Declaration opened the doors for victims to be involved in a criminal justice process, while before the main interaction was between the accused and the state prosecutor and the victims were left ignored in criminal justice.<sup>19</sup>

On the international level, there are different institutions, criminal tribunals or human rights bodies striving to either punish the perpetrator or to compensate the victim(s) for a human rights violation. In each case, it is necessary to establish ‘victim status’. Table 1 describes the specific violations which can give rise to victimhood under the jurisdiction of certain international instruments.

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<sup>16</sup> See Sam Garkawe, “The (Human) Rights of Crime Victims Do Not Necessarily Infringe the Rights of Accused and Convicted Persons”, in Wing-Cheong Chan (ed.), *Support for victims of crime in Asia*, Routledge, New York, London, 2008, pp. 54–55.

<sup>17</sup> Romani Carlos Fernández de Casadevante, *International Law of Victims*, Springer, Berlin, Heidelberg, 2012, pp. 9–10; Irvin Waller, *Rights for Victims of Crime: Rebalancing Justice*, Lanham, Rowman and Littlefield Publishers, 2010, pp. 5, 45–46.

<sup>18</sup> Christoph Safferling, *Internationales Strafrecht: Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht*, Springer, Berlin, Heidelberg, 2011, p. 299.

<sup>19</sup> Albin Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe*, Springer International Publishing, Cham, 2017, p. 25–26; Stefanie Hubig, “Die historische Entwicklung des Opferschutzes im Strafverfahren”, in Friesa, Fastie and Brigitte Zypries (eds.), *Opferschutz im Strafverfahren: Psychosoziale Prozessbegleitung bei Gewalt- und Sexualdelikten: ein interdisziplinäres Handbuch*, Babara Budrich, Opladen, Berlin, Toronto, 2017, pp. 78–79; Thomas Weigend, *Deliktsoffer und Strafverfahren*, Duncker and Humblot, Berlin, 1989, p. 13; William F. McDonald, “Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim”, in *American Criminal Law Review*, 1976, vol. 13, p. 650.

Regional human rights courts <sup>20</sup>		International Criminal Court	Hybrid international tribunals	
IACHR	ECHR		ECCC <sup>21</sup>	STL <sup>22</sup>
Violation of human rights prescribed by the special conventions		<ul style="list-style-type: none"> <li>• The crime of genocide</li> <li>• Crimes against humanity</li> <li>• War crimes</li> <li>• The crime of aggression</li> </ul>	<ul style="list-style-type: none"> <li>• National criminal law</li> <li>• The crime of genocide</li> <li>• Crimes against humanity</li> <li>• War crimes</li> <li>• Destruction of cultural property</li> <li>• Crimes against internationally protected persons</li> </ul>	<ul style="list-style-type: none"> <li>• The attack of 14 February 2005 against Rafiq Hariri</li> <li>• Other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005</li> </ul>
<b>Broad</b>				<b>Narrow</b>

**Table 1: Jurisdiction of international courts.**

The comparison between international regional human rights systems and international criminal law shows the broadness of the possible victimhood in the human rights law, while in international criminal law, it is much narrower. In the regional human rights courts, the complainant needs to demonstrate his or her harm for the admissibility of the case, harm which is sustained as a consequence of the violation of human rights law as

<sup>20</sup> The American Convention on Human Rights, 22 November 1969 (<http://www.legal-tools.org/doc/1152cf/>) and the European Convention on Human Rights, 4 November 1950 (<http://www.legal-tools.org/doc/8267cb/>) respectively.

<sup>21</sup> The crimes are considered under time limitation – from 17 April 1975 to 6 January 1979, see the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, 10 August 2001, Articles 3–8 (<http://www.legal-tools.org/doc/40d072/>).

<sup>22</sup> The crime is considered under time limitation from 1 October 2004 to 12 December 2005, see Article 1 of the Statute of Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), 30 May 2007 (<http://www.legal-tools.org/doc/da0bbb/>).

they are found in the relevant conventions.<sup>23</sup> The complainant must, in addition, however, meet the temporal, territorial and personal requirements for each case. So, the circle of possible victims is much broader than in the international criminal courts mentioned here. The same mechanism of identification is also required at the international criminal law level.<sup>24</sup>

The ICC exercises jurisdiction over international crimes, namely the crime of genocide, crimes against humanity, war crimes and – theoretically – also the crime of aggression. The victims of the mentioned crimes should furthermore fulfil the requirements set by the Court. In determining victim-status, the ICC examines the temporal, territorial and personal requirements on a case by case basis.<sup>25</sup> At the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) and the Special Tribunal for Lebanon (‘STL’), the jurisdiction is narrower, therefore the circle of the victims is accordingly also narrower.

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<sup>23</sup> See European Court of Human Rights (‘ECtHR’), *Shesti Mai Engineering OOD v. Bulgaria*, Judgment, 20 September 2011, Application No. 17854/04, para. 114 (<http://www.legal-tools.org/doc/jkcoew/>); ECtHR, *Andrejeva v. Latvia*, Judgment, 18 February 2009, Application No. 55707/00, para. 111 (<http://www.legal-tools.org/doc/445cad/>); ECtHR, *Nikolova and Verlichkova v. Bulgaria*, Judgment, 20 December 2007, Application No. 7888/03, para. 82 (<http://www.legal-tools.org/doc/f47867/>); ECtHR, *Kadikis v. Latvia*, Judgment, 4 August 2006, Application No. 62393/00, para. 67 (<http://www.legal-tools.org/doc/d162ei/>); ECtHR, *Van Geyselghem v. Belgium*, Judgment, 21 January 1999, Application No. 26103/95, para. 40 (<http://www.legal-tools.org/doc/1995f5/>); ECtHR, *Podkolzina v. Latvia*, Judgment, 9 July 2002, Application No. 46726/99, para. 49 (<http://www.legal-tools.org/doc/e3991d/>); see also Szilvia Altwicker-Hamori, Tilmann Altwicker and Anne Peters, “Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL)*, 2016, vol. 76, pp. 14–15; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights*, Cambridge University Press, 2015, pp. 2–26; Inter-American Court of Human Rights (‘IACtHR’), *Aloeboetoe et al. v. Suriname*, 10 September 1993, paras. 96–97; IACtHR, *Heliodoro Portugal v. Panama*, 12 August 2008, para. 180 (<http://www.legal-tools.org/doc/4c42c7/>); Raphaële Rivier, “Inter-American Mechanisms”, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, p. 757.

<sup>24</sup> ICC, *Situation in Uganda*, Pre-Trial Chamber, Decision on Victims’ Applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 14 (‘*Situation in Uganda*, 10 August 2007’) (<http://www.legal-tools.org/doc/8f9181/>).

<sup>25</sup> If the human rights courts and the ICC have broader jurisdiction for the determination of the victims, the hybrid international criminal courts, such as the ECCC and the STL, allow determining the victims of the narrower cases.

### 14.2.1. Direct Victimhood

Taking into consideration the large number of victims of international crimes and their demands and due to the globally active victim-oriented movements,<sup>26</sup> the delegates at the Rome Conference agreed to codify the victim participation-scheme in the criminal proceedings before the ICC by virtue of Article 68(3) of the Rome Statute.

The victimization because of an international crime is by its very nature a collective experience.<sup>27</sup> A fundamental question arises by distinguishing the recognition of victims under the broad or narrow approaches. The broad approach includes all those victims who might be directly or indirectly affected because of any crime under the jurisdiction of the Court. This leads to the idea that if a national, religious, ethnical or racial group was targeted in a genocide, every person related to the group might be directly or indirectly affected because of the crime, and presumes a victimization of all members of the group. In contrast, the narrow approach includes only those who were directly affected because of the crime.

In order to participate in the proceedings at the ICC, victims have to individually apply pursuant to Rule 89 of the ICC RPE in order for their status as victims to be recognized. Pursuant to Rule 85 of the ICC RPE, the general requisites for the recognition and identification of victims are four-fold:

- the legal personality of the victim;
- the harm sustained;
- a crime within the jurisdiction of the Rome Statute;
- the causality of the crime within the jurisdiction of the Rome Statute and the harm sustained.

The norm, Rule 85(a) of the ICC RPE, reads as follows:

‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

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<sup>26</sup> See Craig Paterson and Andrew Williams, “Towards Victim-oriented Police? Some Reflections on the Concept and Purpose of Policing and Their Implications for Victim-Oriented Police Reform”, in *Journal of Victimology and Victim Justice*, 2018, vol. 1, no. 1, p. 88; Marlene Young and John Stein, “The History of the Crime Victims’ Movement in the United States”, 2004, pp. 5–9.

<sup>27</sup> Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 165.

Another additional criterion for victim participation is the linkage to ‘personal interests’, set forth by Article 68(3) of the Rome Statute. This means that it is not enough to have suffered harm because of the criminal conduct; victims can only apply for participation, if they can claim that their ‘personal interests’ are affected during the particular stage of the proceedings.<sup>28</sup> The ICC definition on victims accordingly encompassed four types of victimhood:

- those individuals who directly suffered harm;
- dependents or family of a direct victim, who suffered indirectly because of the primary victimization;
- individuals injured while intervening to prevent violations; and
- ‘collective’ victims such as organizations and entities.<sup>29</sup>

#### 14.2.2. Indirect Victimhood

The wording of the victim definition embodied in the ICC RPE does not include the limitation to direct and indirect harm for a natural person.<sup>30</sup> On this matter, the ICC Appeals Chamber emphasized that, in order to be recognized as a victim, the harm sustained should be *personal* harm, which also encompasses direct as well as indirect victims.<sup>31</sup> Harm suffered by one

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<sup>28</sup> Safferling, 2011, p. 205, see above note 3; compare Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court*, Brill, Boston, 2017, p. 214.

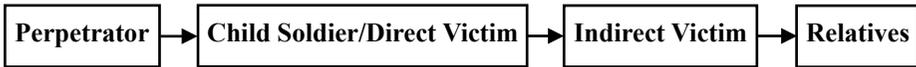
<sup>29</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, Nijhoff, Leiden, 2013, p. 123.

<sup>30</sup> Luke Moffett, *Justice for Victims Before the International Criminal Court*, Routledge, London, New York, 2016, p. 91.

<sup>31</sup> ICC, *Prosecutor v. Thomas Lubanga*, Appeals Chamber, Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paras. 1, 32 (*‘Lubanga*, 11 July 2008’) (<http://www.legal-tools.org/doc/75cf1a/>); see also ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 17 (<http://www.legal-tools.org/doc/c8c749/>); ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Pre-Trial Chamber, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, ICC-01/14-01/18-141, para. 33 (*‘Yekatom and Ngaïssona*, 5 March 2019’) (<http://www.legal-tools.org/doc/2e5193/>); ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber, Decision on victims’ participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449, para. 47 (*‘Ntaganda*, 6 February 2015’) (<http://www.legal-tools.org/doc/efbc86/>).

victim,<sup>32</sup> as a result of the commission of a crime, can give rise to harm experienced by other victims.<sup>33</sup> Accordingly, indirect victims are also those who suffered harm as a result of the (later) criminal conduct of direct victims.<sup>34</sup>

This establishes a ‘chain of victims’, which can be described as shown in Figure 1:



**Figure 1: Chain of victims.**

The term ‘indirect victim’ encompasses persons who actually suffered psychological injury, for example, as a result of the injury of their loved ones, whether temporary or permanent.<sup>35</sup> This could be a close relative of the direct victim,<sup>36</sup> or someone who suffered harm when attempting

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<sup>32</sup> Compare ECtHR, *Tănase v. Moldova*, Grand Chamber, Judgement, 27 April 2010, para. 104 (<http://www.legal-tools.org/doc/a9a80f/>); ECtHR, *Burden v. U.K.*, Grand Chamber, Judgement, 29 April 2008, para. 33 (<http://www.legal-tools.org/doc/189490/>).

<sup>33</sup> *Lubanga*, 11 July 2008, para. 32, see above note 31; see also Special Tribunals of Lebanon, *Prosecutor v. Salim Jamil Ayyash et al.*, Pre-Trial Chamber, Decision on Victims’ Participation in the Proceedings, 8 May 2012, STL-1101/PT/PTJ, para. 45 (‘STL, *Ayyash et al.*, 8 May 2012’) (<http://www.legal-tools.org/doc/417b5d/>).

<sup>34</sup> Compare ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on Indirect Victims, 8 April 2009, ICC-01/04-01/06-1813, para. 52 (<http://www.legal-tools.org/doc/c1cf65/>) that this category of victims should be excluded:

The charges confirmed against the accused in this case are confined to the conscription, enlistment or use of children to participate actively in hostilities. Indirect victims, therefore, are restricted to those whose harm is linked to the harm of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise. Although a factual overlap may exist between the use of the child actively to participate in hostilities and an attack by the child on another, the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the harm inflicted on the child when the offence was committed.

*Ibid.*, para. 50; see also ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 24 May 2018, ICC-01/12-01/18-37-tENG, para. 51 (‘*Al Hassan*, 24 May 2018’) (<http://www.legal-tools.org/doc/50a479/>); *Ntaganda*, 6 February 2015, para. 48, see above note 31.

<sup>35</sup> ECCC, *Prosecutor v. Kaing Guek Eav (Case 001)*, Supreme Court Chamber, Appeal Judgement, 3 February 2012, 001/18-07-2007-ECCC/SC, para. 417 (‘ECCC, *Kaing Guek Eav*, 3 February 2012’) (<http://www.legal-tools.org/doc/681bad/>).

<sup>36</sup> The indirect victims should proof *prima facie* the close relationship with the direct victim.

to avert harm from the direct victim, or someone who suffered harm as a result of the subsequent (criminal) conduct by direct victims.<sup>37</sup> At the same time, the damage or injury should be the direct consequence of the crime.<sup>38</sup> The harm may be seen as a damage or an injury because of the crime, which may be physical, psychological, respectively mental or material, respectively economical. The most important of the aforementioned requirements is the causality between the crime committed and the harm suffered. This essentially means that the harm suffered was a result of the commission of the crime.

The use of the wording, such as “interests” in Article 68(3) of the Rome Statute, as well as “any crime”, “indirect harm”, “psychological harm”, embodied in Rule 85 of the ICC RPE, establishes a rather broad concept and enables to enlarge the number of victims willing to participate in ICC proceedings. If the wording “indirect harm” and “psychological harm” may be seen as exact conditions for the participation, the personal interest, which serves two interrelated purposes,<sup>39</sup> must be interpreted during the different stages of the ICC proceedings on a case by case basis. Distinguishing aforementioned, the broad approach of recognition of victims may be artificially enlarged, which causes in many cases repetition of applications or family applications overload of the Court. At the same time arises a question of meaningful participation of the victims who were not directly affected by the crime. In comparison to the broad definition of victims at the ICC, the STL gives a much narrower definition of victim’s participation. It reads as follows:

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<sup>37</sup> Olásolo, 2012, p. 155, see above note 10; see also Bassiouni, 2013, p. 123 see above note 29; if the primary income earner is disappeared or unable to work because of injuries sustained, then certainly the family suffers loss as well, or individuals who are injured trying to pull a victim from harm’s way, loss of employment, or imprisonment for challenging authorities for persecuting a targeted group.

<sup>38</sup> ECCC, *Kaing Guek Eav*, 3 February 2012, para. 417, see above note 35.

<sup>39</sup> In the negative, it excludes victims’ participation in proceedings the outcome of which does not affect their interests, in the positive, it grounds the right of the victims to participate before the Court once the other criteria have been met, see in Mark Klamburg (ed.), *Commentary on the Law of the International Criminal Court*, FICHL Publication Series No. 29, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 520 (<http://www.toaep.org/ps-pdf/29-klamburg>).

Victim is a natural person who has suffered physical, material or mental harm as a direct result of an attack within the Tribunal's jurisdiction.<sup>40</sup>

This definition enables to recognize only those victims for the participation who have *directly* suffered harm because of the crime within the jurisdiction of the STL. Therefore, the indirect victims are not eligible for participation.<sup>41</sup> The so-called 'chain of victims' is limited to direct victims. This kind of limitation will reduce the large number of victims and bring about a concentration on the victims who suffered most because of the specific crime that is being prosecuted. Through this narrow approach, soaring expectations of victims and victim organizations could be brought down to a realistic level, as the participation scheme is strictly thawed to the criminal proceeding. Alongside the criminal proceeding, of course, other measures have to be found to give victims a voice and the opportunity to verbalize their concerns and needs.

### 14.3. Individual Victimhood at the ICC Trial Stages

The ICC employs a special terminology in order to distinguish victims in two separate participatory stages: *situation* victims and *case* victims.<sup>42</sup> From a chronological procedural perspective, a situation relates to the preliminary examination stage, which is the initial phase of all prosecutorial activities, including those that result from a referral by the United Nations Security Council or by a State Party.<sup>43</sup> At this stage, the Office of the Prosecutor ('OTP') still identifies individuals, who may be charged for specific crimes, and create cases. The involvement of the situation-victims in the investigations enables the OTP to ascertain what crimes might indeed have been committed by certain individuals. The next stage (case) is the phase where, following the issuance of an arrest warrant, specific allegations of

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<sup>40</sup> STL, Rules of Procedure and Evidence, 20 March 2019, STL-BD-2009-01-Rev.10, Rule 2(A) (<http://www.legal-tools.org/doc/qop639/>).

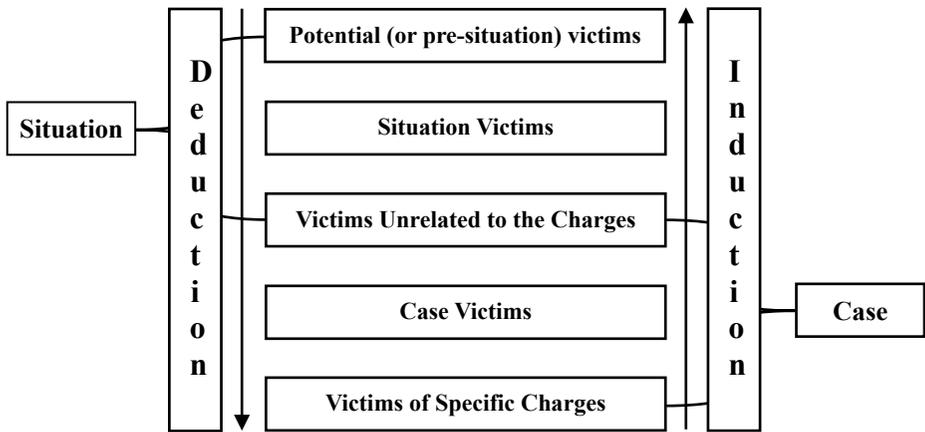
<sup>41</sup> Compare STL, *Ayyash et al.*, 8 May 2012, para. 50, see above note 33, considering that family members having special bond of affection with or dependence on the direct victim, can also be considered to have suffered harm as a direct result of the Attack.

<sup>42</sup> ICC, *Situation in the Democratic Republic of the Congo* ('DRC'), Pre-Trial Chamber, Public Redacted Version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, 17 January 2006, ICC-01/04-101, para. 66 ('*Situation in the DRC*, 17 January 2006') (<http://www.legal-tools.org/doc/2fe2fc/>).

<sup>43</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 401.

ICC crimes are lodged against individual defendant(s).<sup>44</sup> Therefore, certain victims are chosen among the situation victims in order to participate in the case against a specific individual (case victims).

In order to establish a better link between the victims and their form of participation, it is helpful to divide victims into categories using the deduction-induction methodology. The methodology of deduction explains the reasoning process from a wider and more general approach to a very specific case, and induction conversely from specific to wider approaches.<sup>45</sup> The role of deduction and induction with regard to participation of victims is shown in Figure 2.



**Figure 2: Deduction and induction of participation of victims.**

The use of this methodology allows determining the specific victims in the different stages at the ICC proceedings in order to individualize the victims and relate them to a specific crime. This, of course, runs contrary to the collective nature of the crime and minimizes the number of victims for participating in the proceedings. In a way, this process matches inversely proportional the identification of the actor who is being put on trial. International crimes in general have several perpetrators on different hierar-

<sup>44</sup> See Rome Statute of the International Criminal Court, 17 July 1998, Article 58(1) (<http://www.legaltools.org/doc/7b9af9/>); Bill Moore, *Courting History: The Landmark International Criminal Court's First Years*, Human Rights Watch, New York, 2008, p. 186.

<sup>45</sup> See Friedrich Stadler, "Induction and Deduction in the Philosophy of Science: A Critical Account since the Methodenstreit", in Friedrich Stadler (ed.), *Induction and Deduction in the Sciences*, Springer Netherlands, 2004, pp. 1–15.

chical levels. The OTP individualizes and decides who will actually be prosecuted, out of the many persons responsible. This selection process can depend either on political considerations, or on the strength of the evidence available. Both adhere to the appearance of arbitrariness.

As soon as the temporal, territorial, personal and material requirements are met, the victims gain different victim statuses. We have identified five different victim's statuses: the most general being the pre-situation victim, who might develop into a situation-victim (ii, see Section 14.3.2. below), who can prove to be unrelated to the charges (iii) or turn into a case-victim (iv), or even more specific, a victim of a certain charge (v). This approach illustrates the process of victims gaining participatory status at the different stages at the ICC.

#### 14.3.1. Potential Victims

The commission of an international crime presumes the existence of hundreds, sometimes thousands of victims. Throughout the preamble of the Rome Statute, the ICC indicates that the focus of justice lies primarily in ensuring peace and security for the victims and the potential victims.<sup>46</sup> Accordingly, if an international crime is perpetrated within a limited geographical area, there is also an assumption that the community living inside and outside of the aforementioned geographical area is affected as a result of the crime committed. Therefore, it is possible to distinguish between the potential victims in two separate sub-categories: those who have already been directly or indirectly victimized because of the crime committed, and those who might be victimized if the commission of the crime continues.<sup>47</sup> From the perspective of international criminal law, direct or indirect victims fall within the category of potential victims as long, as they are not included in the ICC proceedings. This is based on Article 9 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for

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<sup>46</sup> Mark Findlay, "Enunciating Genocide: Crime, Rights and the Impact of Judicial Intervention", in Dawn L. Rothe *et al.* (eds.), *The Realities of International Criminal Justice*, Brill, 2013, p. 308.

<sup>47</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Trial Chamber, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, IT-95-13/1, para. 32 (<http://www.legal-tools.org/doc/9d99b6/>); Olivia Swaak-Goldman, "Crimes against Humanity", in Gabrielle K. MacDonald and Olivia Swaak-Goldman (eds.), *Substantive and procedural aspects of international criminal law: The experience of international and national courts*, vol. 1, Kluwer Law International, 2000, p. 155.

Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>48</sup> which endorses the fact that the person shall be considered a victim, regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted. This consequently means that victims, who are not recognized as victims by the ICC or by other international instruments, are not precluded from being referred to as victims. At the same time, the European Court of Human Rights ('ECtHR') developed the idea that the established situation may violate the rights of so-called potential victims.<sup>49</sup> This, however, indicates that potential victims may not claim victimhood by direct violation.<sup>50</sup> Anyway, the ICC does not recognize victimhood in the event of a continuation of the commission of a crime due to a potential violation of Rule 85 of the ICC RPE. This is endorsed by the wording of "[...] who have suffered harm as a result of the commission of any crime [...]" (emphasis added). At the same time, the ICC automatically considers close family members of the direct victims to be potential victims.<sup>51</sup> On the other hand, direct and indirect victims are potential victims, as long as the temporal and territorial requisites are not met or identified.<sup>52</sup>

Example: the political dissident group X is targeted for elimination by the government of State A. The possible acts of crimes against humanity are taking place in State A. However, it is still not clear in which regions of State A the possible acts of crimes against humanity are taking place. This

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<sup>48</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (<http://www.legal-tools.org/doc/bcf508/>).

<sup>49</sup> See ECtHR, *Klass v. Germany*, Judgement, 6 September 1978, Application No. 5029/71, paras. 37–38 (<http://www.legal-tools.org/doc/f46bdd/>); ECtHR, *Marckx v. Belgium*, Judgement, 13 June 1979, Application No. 6833/74, paras. 27–28 (<http://www.legal-tools.org/doc/5a5809/>); ECtHR, *Vijayanathan and Pusparajah v. France*, Judgement, 27 August 1992, Application No. 17550/90; 17825/91, para. 46 (<http://www.legal-tools.org/doc/5b12ef/>); ECtHR, *Open Door and Dublin Well Woman v. Ireland*, Judgement, 29 October 1992, Application No. 14234/88; 14235/88, para. 44 (<http://www.legal-tools.org/doc/bff082/>).

<sup>50</sup> Fernández de Casadevante, 2012, see above note 17.

<sup>51</sup> See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, 2016, p. 271; Markus T. Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford University Press, 2015, pp. 119–121.

<sup>52</sup> See the first stages of the investigations in Dermot Groome, "Evidence in Cases of Mass Criminality", in Emmanouela Mylonaki, and Ilias Bantekas (eds.), *Criminological approaches to international criminal law*, Cambridge University Press, 2014, pp. 117–118.

accordingly means that, since the affected geographical area and the time period of the acts are not determined, the members of the political group X may be considered as potential victims.

### 14.3.2. Situation Victims

The specific term ‘situation’, used by the Rome Statute, describes both a geographical area under investigation, and a temporal period of the investigation pursuant to Articles 12 to 15 of the Rome Statute owing to a possible occurrence of an international crime.<sup>53</sup> For this purpose, the OTP, pursuant to Article 54 of the Rome Statute, investigates incriminating and exonerating circumstances and dispatches investigators to local areas to gather evidence. In its first decision on victim participation of 17 January 2006, the ICC Pre-Trial Chamber found that, in order to be involved in the investigation stage pursuant to Article 68(3) of the Rome Statute, which, according to the findings of the Court, is part of the judicial proceedings,<sup>54</sup> the victims must demonstrate the conditions set out by Rule 85 of the ICC RPE.<sup>55</sup> For the recognition of the situation of a victim’s status, the Pre-Trial Chamber still has to clarify whether:

- the victim applicant is a natural person or an organization or institution;

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<sup>53</sup> See for example ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgement on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, paras. 27–46 (<http://www.legal-tools.org/doc/x7kl12/>); ICC, *Situation in Kenya*, Pre-Trial Chamber, 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, 31 March 2010, ICC-01/09-19-Corr (<http://www.legal-tools.org/doc/f0caaf/>); “Report of the International Commission of Inquiry on Darfur to the Secretary-General”, 25 January 2005, p. 156, paras. 565–589 (<http://www.legal-tools.org/doc/1480de/>); see also Safferling, 2012, pp. 92–95, see above note 28.

<sup>54</sup> *Situation in the DRC*, 17 January 2006 para. 63, see above note 42; ICC, *Situation in the DRC*, Appeals Chamber, Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial, 19 December 2008, ICC-01/04-556, para. 56 (*‘Situation in the DRC*, 19 December 2008’) (<http://www.legal-tools.org/doc/dca981/>); ICC, *Situation in Kenya*, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, ICC-01/09-24, para. 9 (*‘Situation in Kenya*, 3 November 2010’) (<http://www.legal-tools.org/doc/0e64a3/>).

<sup>55</sup> *Situation in the DRC*, 17 January 2006, paras. 66–68, see above note 42.

- a crime within the jurisdiction of the Court appears to have been committed;
- the victim applicant has suffered harm; and
- such harm arose ‘as a result’ of the alleged crime.

This, however, does not mean that, in order to participate in the trial proceedings, the victim should apply twice, that is, once for recognition as a situation-victim and once for recognition as a case-victim. The transfer from situation to case depends on the decision of the Court and the ‘personal interests’ of certain victims pursuant to Article 68(3) of the Rome Statute. Within the framework of Article 54 of the Rome Statute, an involvement of situation-victims in the investigation stage may assist in the selection of an accused and the clarification of the facts.<sup>56</sup> At the same time, the subsequent decisions on victims in Northern Uganda and Darfur took a view which grants a general right to victims of situations to participate in the investigations.<sup>57</sup> The Rome Statute and the ICC RPE foresee different scenarios of judicial proceedings related to the situation stage where victims’ personal interests may be affected and where judicial scrutiny is required, such as Articles 53, 56(3) and 57(3)(c) of the Rome Statute and Rule 93 of the ICC RPE.<sup>58</sup> Despite the critical approach of the OTP in recognizing victims’ status during the investigation stage, the Pre-Trial Chamber considers several scenarios which may arise during the investigation stage. However, by the decision on victims of 18 January 2008, the Trial Chamber in the *Lubanga* case came to the conclusion that the status of a victim should be granted only to those victims who are victims of the crimes mentioned in the arrest warrant.<sup>59</sup> Thereby, the status of a victim

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<sup>56</sup> Liesbeth, Zegveld, “Compensation for the Victims of Chemical Warfare in Iraq and Iran”, in Alan Stephens et al. (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in the making*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 375; see also *Situation in Uganda*, 10 August 2007, para. 84, see above note 24.

<sup>57</sup> Christine Chung, “Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?”, in *Journal of International Human Rights*, 2008, vol. 6, p. 471.

<sup>58</sup> ICC, *Situation in Uganda*, Pre-Trial Chamber, Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda, 9 March 2012, ICC-02/04-191, para. 12 (<http://www.legal-tools.org/doc/26b39a/>).

<sup>59</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 92–95 (*Lubanga*, 18 January 2008’) (<http://www.legal->

may not be granted at the investigation stage but, at the same time, the participation of those persons is not excluded at the investigation stage. The Appeals Chamber noticed that it is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the absence of specific facts.<sup>60</sup> It is for the Pre-Trial Chamber to determine how best to rule upon applications for participation in compliance with the relevant provisions of the Court.<sup>61</sup> The Pre-Trial Chamber must do so, bearing in mind that participatory rights can only be granted under Article 68(3) of the Statute, once the requirements of that provision have been fulfilled.<sup>62</sup> On 3 November 2010, the Pre-Trial Chamber, based upon the decision of the Appeals Chamber,<sup>63</sup> came to the conclusion that three different hypotheses should be taken into account, in order to consider the victim application at the situation stage on its merits:

- the Chamber is seized of a request that is not submitted by victims of the situation;
- the Chamber decides to act *proprio motu*; and
- the Chamber is seized of a request emanating from victims of the situation who have filed an application for participation in the proceedings with the Registry.<sup>64</sup>

Accordingly, the Chamber should determine within the scope of the first and third hypotheses, as to whether the issue raised could lead to or be linked to judicial proceedings. Based upon the second hypothesis, the judi-

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tools.org/doc/4e503b/); see also *Yekatom and Ngaïssona*, 5 March 2019, para. 21, see above note 31.

<sup>60</sup> *Situation in the DRC*, 19 December 2008, para. 57, see above note 54.

<sup>61</sup> For example, if the crime alleged meets the jurisdictional requirements and the Pre-Trial Chamber determines that a harm has occurred, then the Pre-Trial Chamber has to determine that the harm has a causal connection to the alleged crime before the Court, see Michael Kelly, “The Status of Victims Under the Rome Statute of the International Criminal Court”, in Thorsten Bonacker and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, T. M. C. Asser Press, Springer, 2013, p. 51.

<sup>62</sup> ICC, *Situation in Darfur*, Appeals Chamber, Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009, ICC-02/05-177, para. 57 (<http://www.legal-tools.org/doc/95100b/>).

<sup>63</sup> *Lubanga*, 18 January 2008, para. 95, see above note 59.

<sup>64</sup> *Situation in Kenya*, 3 November 2010, para. 15, see above note 54.

cial proceedings will take place as the Chamber has decided to act on its own.<sup>65</sup> Firstly, however, the requirements of Rule 85 of the ICC RPE have to be identified in order to prove the interest of victims pursuant to Article 68(3) in order to ascertain whether they are affected in the particular situation. A distinction should be made between those applying for participation in the proceedings and those applying solely for the purposes of reparations.<sup>66</sup> If the wishes of the victims are not mentioned, the applications must be considered as a desire for reparations only.

Generally, it is possible to conclude that situation victims are those who already suffered harm as a consequence of a possible international crime within a determined geographical area and temporal period.<sup>67</sup>

Example: after the conclusion of preliminary investigations by OTP, it was estimated that region B of State A was mainly affected during N time, where the political group X was mostly active. Accordingly, the ‘situation victims’ are those members of political group X, who were targeted in region B of State A in N time period.

### 14.3.3. Victims Unrelated to the Charges

The Trial Chamber in the case of *Lubanga* came to the conclusion that Rule 85 of the ICC RPE requires that the alleged harm must be the result of any crime within the jurisdiction of the Court.<sup>68</sup> Thus, there is no requirement of a link between the crimes alleged against a defendant and the harm suffered by those who apply for participation as victims. This means that, as soon as the accused is identified, the victim who demonstrates his or her interest in accordance with Article 68(3) of the Rome Statute may attend the proceedings if he or she meets the requirements set by Rule 85 of the ICC RPE. In comparison to potential victims and situation victims, where the territorial and temporal parameters have already been identified, this stage presumes the requirement *ratione personae*, that the accused is al-

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<sup>65</sup> *Ibid.*, para. 16.

<sup>66</sup> Compare Carla Ferstman, “Reparations, Assistance and Support”, in Kinga Tibori-Szabó and Megan Hirst (eds.), *Victim Participation in International Criminal Justice: Practitioners’ Guide*, International Criminal Justice Series, vol. 11, TMC Asser Press, 2017, p. 401.

<sup>67</sup> ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber, Decision on the Victims’ Participation, 24 April 2015, ICC-01/13-18, para. 12 (<http://www.legal-tools.org/doc/118fc5/>).

<sup>68</sup> *Lubanga*, 18 January 2008, paras. 92–95, see above note 59; Olásolo, 2012, p. 148, see above note 10; see also *Yekatom and Ngaïssona*, 5 March 2019, 5 March 2019, para. 21, see above note 31.

ready known. At this stage, two different victim categorizations may arise: first, the victims who are related to the alleged crimes but not the defendant; and secondly, the victims who suffered harm as a result of other crimes committed by the defendant, which are not considered as part of the charges. This provision of general participation of victims at the proceedings in a given case, of not having any causality between the harm, the alleged crime and the defendant, was later rejected by the Appeals Chamber on the basis that only the victims of the crimes charged may demonstrate that the trial affects their personal interests.<sup>69</sup>

However, the personal interest of the victims (Article 68(3) of the Rome Statute) still may be directly or indirectly connected to the criminal allegations levelled against the defendant as a consequence of the dangerousness of the crime in its macro-context. If the Pre-Trial Chamber held the opinion that the causal link “is satisfied if the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least appear compatible”,<sup>70</sup> the Appeals Chamber estimated that all requirements must be met in order to grant the procedural rights to the victims. Accordingly, the victims may not participate in further stages if the causality between them and the defendant is determined only by the circumstances of the alleged crime or only by the person of the defendant. Therefore, for the purpose of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute must be linked to the specific charges confirmed against the accused.<sup>71</sup>

Example: the OTP accuses defendant K, member of a special police force of State A of committing crimes against humanity, more specifically the murder of members of political group X. Accordingly, those victims who were robbed and raped by defendant K may not gain the procedural rights in the case against defendant K. At the same time, those indirect vic-

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<sup>69</sup> *Lubanga*, 11 July 2008, paras. 62, 65–66, see above note 31.

<sup>70</sup> Kelly, 2013, p. 51, see above note 61; *Situation in Uganda*, 10 August 2007, paras. 11–12, see above note 24.

<sup>71</sup> *Lubanga*, 11 July 2008, para. 65, see above note 31; ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 29 August 2011, ICC-01/09-02/11-267, para. 60 (*‘Muthaura et al.*, 29 August 2011’) (<http://www.legal-tools.org/doc/f6f688/>); Franziska Eckelmans, “The ICC’s Practice on Victim Participation”, in Thorsten Bonacker and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, TMC Asser Press, 2013, p. 201.

tims, whose relatives were killed as members of X not by defendant K but by other policemen, may not participate in the case against defendant K.

#### 14.3.4. Case Victims

After distinguishing the victims unrelated to the charges as victims of the case, Judge René Blattmann considered this approach to be contrary to the principles of criminal law, such as the principle of legality, where the status of victim and subsequent rights of participation are not linked to the charges confirmed against the accused.<sup>72</sup> Therefore, the Appeals Chamber rejected the idea of a broad determination of the victims and stated that harm alleged by the victim and the concept of personal interests under Article 68(3) of the Rome Statute must be linked to the charges confirmed against the accused.<sup>73</sup> This, however, resulted in another critical approach regarding victims. In particular, the determination of the victim depends on the charges and therefore, if the Prosecution chooses to present a narrow, streamlined selection of charges against an accused for whatever reason, the victims' rights to participate will effectively be curtailed.<sup>74</sup> Accordingly, less victims will have the possibility to participate in the proceedings.

Case victims represent all those victims who are determined as victims under the different charges which have been confirmed by the Pre-Trial Chamber. Accordingly, it is possible to conclude that, at this stage, after determination of temporal, territorial and personal elements, the material element comes into question, which enables classification of the victims of macro-crimes from the narrow perspectives.

Example: the OTP accused defendant K of multiple acts of genocide, acts of crimes against humanity and acts of war crimes: therefore, all victims who have suffered harm because of the acts committed by the defendant against them as members of the respectively protected groups are to be considered case victims.

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<sup>72</sup> *Lubanga*, Judge Blattmann's Dissenting Opinion, 18 January 2008, para. 21, see above note 59; ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber, Decision on the 138 Applications for Victims' Participation in the Proceedings, 11 August 2011, ICC-01/04-01/10-351, paras. 21–22 (<http://www.legal-tools.org/doc/17ef31/>).

<sup>73</sup> *Lubanga*, 11 July 2008, para. 65, see above note 31; see also Elisabeth Baumgartner, "Aspects of victim participation in the proceedings of the International Criminal Court", in *International Review of the Red Cross*, 2008, vol. 90, no. 870, p. 423.

<sup>74</sup> Matthew Gillett, "Victim Participation at the International Criminal Court", in *Austrian International Law Journal*, 2009, vol. 29, no. 16, p. 38.

### 14.3.5. Victims of Specific Charges

Even if the case victims and victims of specific charges may share similarities, it is important to distinguish the two categories from each other in order to articulate the fact that victims are chosen according to the charges brought against the accused.<sup>75</sup> This will also enable to allocate the victims of reparations. As soon as the guilt of the accused is determined by the Court with regard to a specific charge, the victims of the specific charge may receive the reparations in the future. The category of victims of specific charges represents, from the methodology of deduction, the narrowest group of victims who are affected as a result of the commission of specific crimes under the jurisdiction of the ICC. At this stage all requirements, particularly territorial, temporal, personal and material ones, are met.

Example: the OTP accuses defendant K of acts of rape as crimes against humanity. Therefore, the victims of specific charges are those victims who, as members of a civilian population, have suffered harm because of rape committed by defendant K.

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<sup>75</sup> *Yekatom and Ngaïssona*, 5 March 2019, para. 21, see above note 31; ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 20 (<http://www.legal-tools.org/doc/0fdd1e/>); *Muthaura et al.*, 29 August 2011, para. 40, see above note 71; *Bemba*, 12 December 2008, para. 30, see above note 10; *Al Hassan*, 24 May 2018, para. 27, see above note 34.

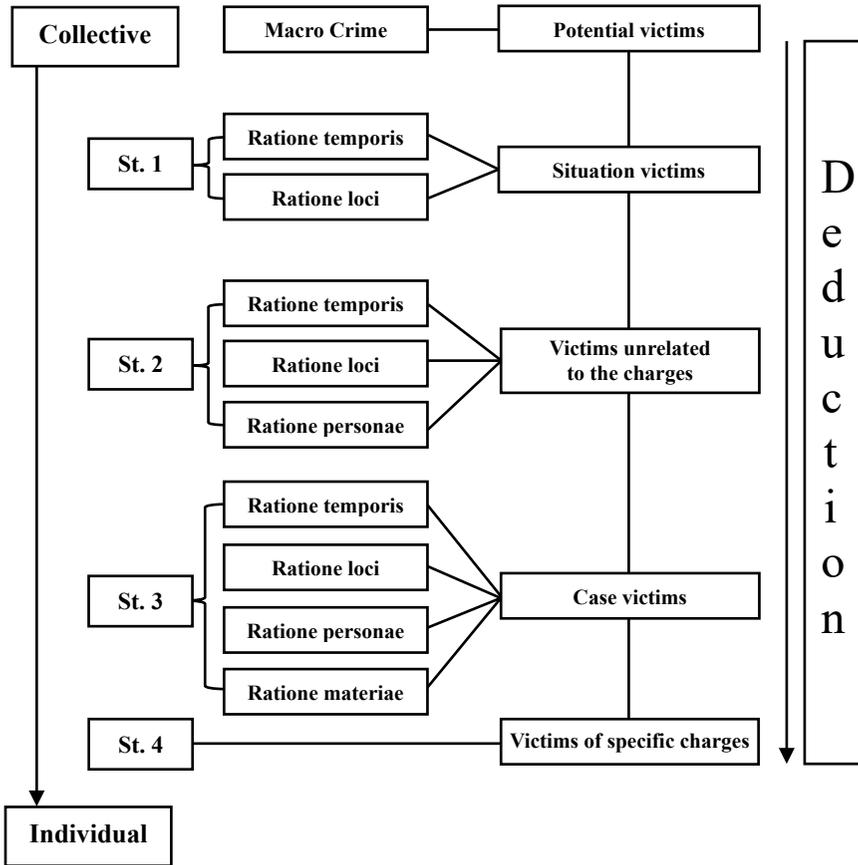


Figure 3: Deduction of participation of victims.

#### 14.4. Conclusion

We have seen the different stages of the proceedings, where the interests of victims are mostly affected. Bearing in mind the large number of victims willing to participate in international criminal justice, it is still a challenge to develop an appropriate mechanism where every victim of the international crime may directly participate.

Whereas the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power prescribes the general definition of the victims of national crimes and articulates that the person shall be considered a victim, regardless of whether the perpetrator of the violation

is identified, apprehended, prosecuted or convicted, the picture changes at the international level, where different categories of victims exist. Generally speaking, the person who suffered harm because of a macro-crime is a victim. However, in order to participate at the trial before the ICC, the victim must go through different stages where temporal, territorial, personal and material requirements have to be identified. Besides that, in order to start the process of participation, the victim's status should be recognized pursuant to Rule 85 of the ICC RPE, where the legal personality of the victim, the harm suffered by the victim and the causality of the victim to the crimes under the jurisdiction of the ICC have to be determined. The recognition of the victim's status opens the door to the victim for general participation in the proceedings. The next step is the selection for participation in different stages pursuant to Article 68(3) of the Rome Statute. The participation in the aforementioned stages depends on the 'interest' of the victim and, particularly, how the interests of the victim are affected in the special procedural circumstances.<sup>76</sup> Accordingly, during this process, the victims are 'selected' from stage to stage.<sup>77</sup>

It is true to mention that the victim definition at the ICC gives an opportunity to hundreds of people being directly or indirectly involved as victims at the ICC judicial proceedings because of the large scale of crimes perpetrated, however, not everyone meets the requirements for the further participation. From the victim's perspective, it is hard to understand the rejection of his or her status as a victim in one of the mentioned stages, which obviously leads to frustrations and infringes the right of being recognized as a victim.<sup>78</sup> In order to avoid the negative consequences and frustrations, the Court should give the classifications to each victim related to a specific procedural stage. On the other hand, it is obvious that the participation of large numbers of victims at the ICC leads to procedural difficulties, possible overlaps and in some cases, there is a doubt of meaningfulness of the participation of those victims. Accordingly, the ICC should deal with the quality of the participation of victims and not with the quanti-

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<sup>76</sup> Safferling, 2012, p. 312, see above note 27.

<sup>77</sup> ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Prosecution's Response to the Directions and Decision of the Appeals Chamber of 2 February 2007, 13 February 2007, ICC-01/04-01/06-825, paras. 27–29 (<http://www.legal-tools.org/doc/8394c0/>).

<sup>78</sup> While rejecting the victim its right to be recognized as a victim, it victimizes the victim twice, see Gurgun Petrossian, "Ist Negationismus eine Form der Fortsetzung des Völkermordes?", on *Grundundmenschensrechtsblog*, 25 July 2019 (available on its web site).

ty of victims. Until now, the practice of the Court was focused merely on the victims of the specific charges brought against the accused. Consequently, this approach led to fewer victims, who had the chance to be recognized as a victim before the Court. Nevertheless, this tactic still creates a high number of applications and a multitude of victim recognitions.



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## Judicial Protective Measures for Victims and Witnesses *vis-à-vis* External Actors at the International Criminal Court

Juan Pablo Pérez-León-Acevedo\*

### 15.1. Introduction

Judicial protective measures for victims and witnesses *vis-à-vis* external actors at the International Criminal Court ('ICC' or 'Court') endeavour to protect the identity and privacy of the victims and witnesses from unwarranted intrusions from the public and media. These measures are an exception to the accused's right to public hearings. Judicial protective measures concern the criminal proceedings as such and provide the general level of protection which is necessary to ensure the safety and security of the immense majority of witnesses.<sup>1</sup> Prior to trial, disclosure of the identity of victims and witnesses to the accused, but not necessarily to the public and media, has to take place. Non-disclosure of the identity of witnesses and victims to the public and media becomes more restricted during trial due to the enhanced importance of the accused's rights at the trial stage.

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<sup>1</sup> David Tolbert and Frederick Swinnen, "The Protection of, and Assistance to, Witnesses at the ICTY", in Hiram Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff, Leiden, 2006, p. 219.

Under the ICC's law and practice, 'special measures' constitute an important category of protective measures. Special measures are tailored to facilitate the testimony of certain vulnerable or traumatized victims and witnesses such as victims of sexual violence and children. These measures seek to avoid re-traumatization of those victims and witnesses and limit the defence's right to examine and/or cross-examine witnesses.

There are strong reasons that explain the importance of the adoption of judicial protective measures in favour of victims and witnesses *vis-à-vis* external actors in terms of the past, present and future of the ICC and, in particular, concerning matters related to victims and witnesses at the ICC. Four main reasons may be invoked.

First, normative provisions on judicial protective measures in the ICC Statute,<sup>2</sup> which have been fleshed out and/or complemented in the ICC Rules of Procedure and Evidence ('ICC RPE' or 'Rules'),<sup>3</sup> clearly exemplify the significance of the victims and witnesses of international crimes as recognized by the drafters of the Statute of the ICC ('ICC Statute') and other ICC legal instruments. Indeed, the second paragraph of the Preamble of the ICC Statute powerfully reflects this in the following terms: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". At the Nuremberg Forum 2018, due attention was indeed drawn to the victims. For example, Heiko Maas highlighted that victims of international crimes may be considered the main justification for the existence of international criminal law, Fabricio Guariglia considered that the ICC Statute is victim-centred, and Amanda Ghahremani highlighted that the ICC owns its existence to victims and survivors.<sup>4</sup>

Second, appropriate practices of judicial protective measures at the ICC may contribute towards better facing and handling some dimensions of the legitimacy crisis experienced by the ICC. A sound application of

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<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>3</sup> ICC, Rules of Procedure and Evidence, 9 September 2002 ('ICC RPE') (<http://www.legal-tools.org/doc/8bcf6f/>).

<sup>4</sup> See Alexander Heinze, "The 20th Anniversary of the Rome Statute. A Review Essay about the Nuremberg Forum 2018", in *Criminal Law Forum*, 2019, vol. 30, no. 1, pp. 5, 9, 14; see also International Nuremberg Principles Academy, "Conference Report: Nuremberg Forum 2018: '20th Anniversary of the Rome Statute: Law, Justice and Politics'", 2020 (available on its website).

these protective measures may increase the legitimacy of the ICC among important constituencies of international criminal justice, namely, victims, witnesses and their families and communities. However, these protective measures should be adopted by the ICC in such a manner not to breach other legitimate rights and interests such as the rights of the accused and the efficiency of the proceedings. The adoption of judicial protective measures thus requires the ICC to balance and/or reconcile competing rights and interests. In turn, this arguably reflects the fact that, in several areas, the ICC should, when feasible and appropriate, aim to adopt decisions and policies that take into account a wide array of actors and their respective rights, interests and expectations.

Third, the ICC's law and practice on judicial protective measures may have a fundamental impact on and meaningfully contribute towards international criminal law and international criminal procedure<sup>5</sup> in terms of consistent rules, principles and practices amidst institutional fragmentation and diversification.<sup>6</sup> On the one hand, the ICC's law and practice on judicial protective measures have been built on the practices and legal instruments of previous international and hybrid criminal courts and tribunals. On the other hand, due to its global scope and permanent nature, the ICC's law and practice on judicial protective measures may develop standards and provide lessons to be taken into account by current and future international, regional, hybrid or national criminal courts.

Fourth, since judicial protective measures by definition endeavour to protect the victims and witnesses when these participate or provide their testimonies at the ICC, these measures arguably seek to protect or guarantee certain rights such as the rights to security and privacy in the setting of international criminal proceedings. Indeed, Article 21(3) of the ICC Statute imposes on the ICC this obligation: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction". Thus, the need for the consistency of the ICC's practice, which includes protective

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<sup>5</sup> On international criminal procedure foundations, see *inter alia*: Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, pp. 421–481; Göran Sluiter *et al.*, "Introduction", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1–37.

<sup>6</sup> On the fragmentation and diversification of international criminal law, see generally Larissa Van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Brill, 2012.

measures, with international human rights standards was taken into account in the creation of the ICC. Such consistency is also crucial to both the present and future of the ICC in terms of legitimacy and effectiveness.

By bearing in mind these general considerations, the present chapter examines the ICC's law and practice on judicial protective measures for victims and witnesses *vis-à-vis* external actors. The ICC Statute, Rules and case law are examined. Protective measures consisting in non-disclosure of the identities of witnesses to the accused, namely 'full anonymity', are not as such examined. This chapter consists of three parts. First, general remarks on protective and special measures are provided. Second, protective measures are discussed. Third, special measures are examined, including a special focus on sexual and gender-based violence.

## 15.2. General Framework

With regard to the goals of international criminal justice pursued by international and hybrid criminal courts and the ICC, protective measures are important. Protective measures: (i) help to determine the truth and establish a record because those who possess relevant information about the facts and receive protective measures can testify in international crimes contexts where finding cooperative witnesses may be difficult; and (ii) help to provide justice for victims since they secure victims' interests when these provide evidence.<sup>7</sup>

Protective and special measures at the ICC can be granted not only to victims who are witnesses but also to those who, under Article 68(3) of the ICC Statute, can be victim participants. This is important because victims can intervene not only as witnesses but also as victim participants at the ICC unlike international criminal tribunals that preceded the ICC where victims were only witnesses. Such scope of application of these measures, namely, for witnesses and victim participants, is supported by the *travaux préparatoires* of the ICC Statute,<sup>8</sup> Article 68(1), and relevant literature.<sup>9</sup> In this regard, Article 68(1) indicates:

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<sup>7</sup> Guido Acquaviva and Mikaela Heikkilä, "Protective and Special Measures for Witnesses", in Sluiter *et al.*, 2013, pp. 855–856, see above note 5.

<sup>8</sup> See "Article 68, Protection of the Victims and Witnesses and their Participation in the Proceedings: Proposal Submitted by Canada", 6 July 1998, A/CONF.183/C.1/WGPM/L.58/Rev.1 and A/CONF.183/C.1/WGPM/L.58/Rev.1 (<http://www.legal-tools.org/doc/2bf5a5/>).

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender [...] and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>10</sup>

Article 68(1) is *mutatis mutandis* similar to provisions of other international and hybrid criminal tribunals, which to a larger or lesser extent regulate judicial protective measures for victims and witnesses *vis-à-vis* external actors. As fleshed out in the respective RPE and applied in the jurisprudence of international and hybrid criminal courts, these provisions include Articles 21 and 22 of the respective Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda ('ICTY' and 'ICTR') as well as normative provisions of instruments of hybrid criminal tribunals such as Article 17(2) of the Statute of the Special Court for Sierra Leone ('SCSL'), Article 33 of the new of the Law of the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), and Article 28 of the Statute of the Special Tribunal for Lebanon ('STL'). Due to the fact that Article 68(1) is framed in a broad manner, the ICC judges may propose protective measures not explicitly or specifically authorized under the Rules.<sup>11</sup> This is important to enable ICC judges to address requests for protective measures and/or issue suitable protective measures in the specific circumstances of each case. Protective measures generally involve an order preventing the release of the identity of witnesses or victims to the public, information agencies, press and media,<sup>12</sup> namely external actors.

As remarked consistently by the ICC, including in very recent jurisprudence, Article 68(1) imposes the "Court's obligations with regard to the

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<sup>9</sup> See, for example, Yaiza Alvarez-Reyes, "The Protection of Victims Participating in International Criminal Justice", in Kigan Tibori-Szabó and Megan Hirst (eds.), *Victim Participation in International Criminal Justice*, T.M.C. Asser Press, The Hague, 2017, pp. 171–203; Acquaviva and Heikkilä, 2013, pp. 819–858, see above note 7.

<sup>10</sup> ICC Statute, Article 68(1), see above note 2.

<sup>11</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1058.

<sup>12</sup> *Ibid.*

protection of victims and witnesses” with due attention to defence rights.<sup>13</sup> Indeed, the ICC’s practice in 2020 has also referred to “the special circumstances under the Coronavirus Pandemic”,<sup>14</sup> which evidences the need to take into account exceptional situations in matters of protective measures. Under Article 68(2), protective measures “[are] an exception to the principle of public hearings” and a Chamber “may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means”.<sup>15</sup>

Even though Rules 87 and 88 of the ICC RPE include measures that the ICC may order to facilitate the testimony of victims and witnesses at it, these Rules have different purposes.<sup>16</sup> Such differentiation can be identified in the *travaux préparatoires* of the ICC RPE. The Australian proposal for the Rules contained the said functional differentiation.<sup>17</sup> The final version of the Rules shows this. By presenting such functional differences, the normative provisions on protective measures and special measures may complement each other and better facilitate the interventions of witnesses and victims at the ICC.

Accordingly, it is generally possible to differentiate Rule 87 protective measures and Rule 88 special measures as follows. Protective measures under Rule 87 aim to protect the identity or location of victims, witnesses or other persons at risk from the public or media. In turn, special measures under Rule 88 are more flexible and enable the ICC to design measures aimed at facilitating the testimony of certain vulnerable witnesses and victims. Rules 87 and 88 are similar to rules of other international and hybrid criminal courts such as Rules 75 and 79 of the respective RPE of the ICTY, ICTR and SCSL as well as Rule 133 of the STL RPE and Rule 29 of the ECCC Internal Rules.

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<sup>13</sup> ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 24 (<http://www.legal-tools.org/doc/27mzgg/>).

<sup>14</sup> *Ibid.*

<sup>15</sup> ICC Statute, Article 68(2), see above note 2.

<sup>16</sup> Helen Brady, “Protective and Special Measures for Victims and Witnesses”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publisher, 2001, pp. 434, 440.

<sup>17</sup> Preparatory Commission for the International Criminal Court, “Proposal submitted by Australia on Rules of Procedure and Evidence: Part 6 of the Rome Statute”, 26 July 1999, PCNICC/1999/WGRPE/DP.19 (<http://www.legal-tools.org/doc/954b0a/>).

The ICC may order both special measures and protective measures for the testimonies of vulnerable and traumatized witnesses as Trial Chamber I determined in *Lubanga*.<sup>18</sup> There is no normative provision that lays down that vulnerable and traumatized witnesses and victims can *only* benefit from the issuance of special measures. Such a provision would be indeed inconsistent with the protection of these witnesses and victims. To protect the rights of vulnerable and traumatized witnesses and victims, both special and protective measures can be ordered in their favour at the ICC. In ICC cases such as *Katanga and Ngudjolo Chui*, court protective measures under Rules 87 and 88 of the ICC RPE were actually granted for 19 Prosecution witnesses and two victim participants who were also witnesses.<sup>19</sup> In accordance with Rules 87(3) and 88(2), the ICC Chambers may hold *in camera* proceedings when deciding on the grant of protective or special measures.

Under Regulation 42(1) of the Regulations of the Court, once protective and special measures are ordered, they “shall continue to have full force and effect” concerning other ICC proceedings and “shall continue after proceedings have been concluded, subject to revision by a Chamber”.<sup>20</sup> This part of Regulation 42(1) holds relevance since witnesses cannot be left unprotected once they have testified but, instead, their situation has to be assessed to decide on the continuation of protective measures after the proceedings are over. Regulation 42(1) also establishes that the respective Chamber has to “seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made”.<sup>21</sup> Such a normative provision is im-

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<sup>18</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Various Issues Related to Witness’ Testimony During Trial, 29 January 2008, ICC-01/04-01/06-1140, para. 35 (*‘Lubanga Witness Decision’*) (<http://www.legal-tools.org/doc/8367f1/>); ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 128 (*‘Lubanga Victims’ Participation Decision’*) (<http://www.legal-tools.org/doc/4e503b/>).

<sup>19</sup> ICC, *Prosecutor v. Ngudjolo Chui*, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tEng, para. 23, fn. 43–44 (*‘Ngudjolo Chui Judgment’*) (<http://www.legal-tools.org/doc/2c2cde/>).

<sup>20</sup> ICC, Regulations of the Court, 23 June 2004, Regulation 42(1) (<http://www.legal-tools.org/doc/95b297/>).

<sup>21</sup> *Ibid.*, Regulation 42(4). See also ICC, *Prosecutor v. Banda*, Trial Chamber IV, Decision on the “Prosecution’s Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to

portant. On the one hand, there is an explicit reference to the person's consent, namely, witnesses are recognized to have an active role concerning protective measures. On the other hand, it is acknowledged that protective measures are not static but dynamic as they can be lifted, increased or changed according to new circumstances.

Thus, while the ICC Statute and ICC RPE provide the general framework on protective measures, the ICC's practice is crucial to develop, flesh out and clarify the respective norms as well as fill normative gaps. This is, in turn, necessary for the present and future of the judicial regime of protective measures at the ICC.

### 15.3. Protective Measures

#### 15.3.1. Elements and Requirements

The elements and requirements of judicial protective measures for victims and witnesses *vis-à-vis* external actors are necessary aspects to be considered by the ICC when the Court applies any protective measure. Under Article 68(1) of the ICC Statute, the ICC is indeed obligated to protect witnesses. This obligation is also present at instruments of other international and hybrid criminal tribunals such as Article 22 of the ICTY Statute, Article 21 of the ICTR Statute, Article 17(2) of the SCSL Statute, Article 33 new of the ECCC Law, and Article 28 of the STL Statute. Based on the respective normative framework, the ICC's practice has construed relevant case law. Both the ICC's law and jurisprudence are examined as follows.

Under Rule 87(1), Chambers may order protective measures *proprio motu* or at the request of the Prosecutor, Defence, witnesses or victims or their legal representatives. Such normative provision is sound to expand the procedural avenues through which protective measures can be ordered. It also shows that the process of adoption of protective measures concerns a variety of actors at the ICC. When Rule 87(1) was drafted, references to legal representative of witnesses were debated.<sup>22</sup> There was an agreement on the lack of an obligation to provide lawyers for victims who intervene as witnesses; however, if the witness has a lawyer, the latter may request protective measures on behalf of the witness.<sup>23</sup> This situation is contemplated

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Rule 81(4) of the Rules of Procedure and Evidence", 13 July 2012, ICC-02/05-03/09-368, paras. 6–9 (<http://www.legal-tools.org/doc/05d055/>).

<sup>22</sup> Brady, 2001, p. 441, see above note 16.

<sup>23</sup> *Ibid.*

in Rule 87. The Victims and Witnesses Unit (‘VWU’) lacks the standing to request protective measures: it holds only a ‘consultative’ status (Rule 87(1)). This is criticized herein. Through a normative amendment of the ICC RPE, the VWU should be able to ask protective measures at least on an exceptional basis. Because of its familiarity with the witnesses’ situation, the VWU is generally the most qualified unit to request protective measures and it is not “coloured by having a stake in the proceedings”.<sup>24</sup>

The ICC RPE provide for the procedural steps to ask protective measures. In particular, Rule 87(2) lays down the procedure to request protective measures, which is overall the following. Requests cannot be submitted *ex parte*. This corresponds to the *telos* of Rule 87, namely, Rule 87 protective measures seek to protect witnesses from external actors (the public and media) rather than from the parties (especially the defendant). Otherwise, the defendant would not know the identity of the witness.

Yet, exceptional circumstances may require ordering *ex parte* protective orders. These exceptional circumstances have to be examined on a case-by-case basis. An example could be a situation in which the accused person’s lawyer or the accused’s family members threaten witnesses or victims.<sup>25</sup> Indeed, this type of threats could be more difficult to handle in ongoing armed conflicts where security conditions are particularly weak, which affect those who testify or intervene at the ICC. Witnesses or victims who apply for a protective measure have to serve the request on the parties (Prosecutor and Defence) who may respond. A request affecting a particular victim or witness must be served on him or her and the other party for their potential responses. The request and any responses can be filed under seal. A specific procedure applies when the Chamber proceeds on its own initiative as Rule 87(2)(d) makes it explicit.

However, Rule 88 on special measures is sufficiently flexible to enable the Prosecutor or witness to file an *ex parte* application to request the ICC to order a protective measure as a ‘special’ measure. This is important to reach a fine balance between different interests at stake. Thus, it not only respects the general rule of prohibition of *ex parte* applications for protective measures but it also allows the ICC on a case-by-case basis “to engi-

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<sup>24</sup> *Ibid.*, p. 442.

<sup>25</sup> *Ibid.*, p. 444.

near the most suitable measures [...] including allowing an *ex parte* application in extreme cases”.<sup>26</sup>

Protective measures requests need to be based on objective grounds such as the existence of real threats against a particular person. Otherwise, requests for protective measures would be denaturalized or trivialized. Although the ICC Chambers may consider personal beliefs of the existence of threats or subjective fears, they alone are insufficient to grant protective measures.<sup>27</sup> Furthermore, the ICC’s jurisprudence has remarked that decisions on protective measures are necessarily fact-specific and there is no unique or uniform model of decision-making for all cases.<sup>28</sup>

In its determination of appropriate protective measures, the VWU evaluates “the level of any threat, the likelihood of harm and the overall risk to the particular applicant; and it then considers each application on its individual merits, on a fact-sensitive rather than a mechanical or formulaistic basis”.<sup>29</sup> In turn, the ICC Chambers have interpreted criteria developed by the VWU in matters of protective measures. This is helpful to better coordinate or standardize criteria relevant to protective measures across the different units and organs of the ICC. Accordingly, the ICC’s jurisprudence has considered that the VWU’s ‘high likelihood of harm’ test “should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death”.<sup>30</sup> Such jurisprudential remark appropriately takes into account the difficult situation faced by a witness or a victim. Protective measures are granted on a fact-sensitive rather than mechanical basis in accordance with the judicial verification of a likelihood of harm analysed flexibly.<sup>31</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> International Criminal Law Services, “International Criminal Law and Practice Training Materials: Witnesses and Victims”, 2011, p. 36.

<sup>28</sup> For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 77 (*Lubanga* Decision on Disclosure Issues’) (<http://www.legal-tools.org/doc/a44dab/>).

<sup>29</sup> *Ibid.*, para. 78.

<sup>30</sup> *Ibid.*, para. 79.

<sup>31</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 79 (<http://www.legal-tools.org/doc/a44dab/>).

As the ICC has determined in its jurisprudence, protective measures need to be both necessary and proportionate as well as they have to respect the accused person's right to a fair trial.<sup>32</sup> These requirements are cumulative rather than just alternative. At the ICC, necessity and witness security are thus required to order protective measures.<sup>33</sup> Necessity demands the presence of an established danger of harm or death as demonstrated through evidence.<sup>34</sup> Moreover, necessity demands that protective measures are not "routinely granted".<sup>35</sup> This is crucial in order not to denaturalize or trivialize the issuance of protective measures.

In turn, the ICC has correctly found that the public and open character of the proceedings is fundamental.<sup>36</sup> Not only does such approach follow international criminal procedure standards but it also contributes towards the overall fairness of the proceedings at the ICC. Nevertheless, the ICC has also made exceptions to the principle of public hearings to appropriately protect the witnesses.<sup>37</sup> Subject to judicial revision, protective and special measures remain in force as for other ICC proceedings and continue after these have been finalized.<sup>38</sup> This is important not to leave witnesses

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<sup>32</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Décision Prononçant des Mesures de Protection au Profit du Témoin 323 lors de sa Déposition à l'audience, 27 January 2010, ICC-01/04-01/07-1795-Red, para. 6 (<http://www.legal-tools.org/doc/2b591b/>); ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Ordonnance Relative aux Mesures de Protection de Certains Témoins Cités à Comparaitre par le Procureur et par la Chambre, 9 December 2009, ICC-01/04-01/07-1667-Red, para. 6 (*'Katanga and Ngudjolo Chui Ordonnance'*) (<http://www.legal-tools.org/doc/436dd2/>).

<sup>33</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Prosecution's Application for an Order Governing Disclosure of Non-public Information to Members of the Public and an order Regulating Contact with Witnesses, 3 June 2008, ICC-01/04-01/06-1372, para. 8 (<http://www.legal-tools.org/doc/95dc35/>).

<sup>34</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Prosecution and Defence Applications for Leave to Appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, ICC-01/04-01/06-1557, para. 27 (<http://www.legal-tools.org/doc/a2f21d/>).

<sup>35</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber, Transcripts, 24 March 2009, ICC-01/04-01/06-T-153-ENG, p. 63 (<http://www.legal-tools.org/doc/9f1d28/>).

<sup>36</sup> ICC, *Prosecutor v. Bemba*, Appeals Chamber, Order on the reclassification as public of documents, ICC-01/05-01/08-498-Conf and ICC-01/05-01/08-503-Conf, 24 February 2010, ICC-01/05-01/08-701 (<http://www.legal-tools.org/doc/4113f1/>). See also ICC, *Katanga and Ngudjolo Chui* Ordonnance, para. 4, see above note 32.

<sup>37</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber, Transcript, 16 January 2009, ICC-01/04-01/06-T-104-ENG, pp. 3–4 (<http://www.legal-tools.org/doc/032a0ff/>).

<sup>38</sup> ICC, Regulations of the Court, Regulation 42, see above note 20.

and victims unprotected. The ICC's jurisprudence has remarked that when less restrictive protective measures are sufficient and feasible, the Chambers must select these measures over those that are more restrictive.<sup>39</sup> Accordingly, protective measures should only restrict the accused person's rights provided that this is necessary.<sup>40</sup> Under the principle of proportionality, which guides Article 68(1) of the ICC Statute and is fundamental to balance competing rights and interests, protective measures should restrict parties' rights only as far as necessary, and considering the nature and purpose of the respective proceedings.<sup>41</sup>

Article 68 of the ICC Statute as well as Rules 87 and 88 of the ICC RPE are open-ended, namely, the list of protective measures is illustrative rather than exclusive or exhaustive. This considers a number of factors such as rights of witnesses and victims including well-being, safety, dignity and privacy; ongoing or new technological innovations or developments that the ICC may employ; and varied circumstances at the ICC.<sup>42</sup> Protective measures at other international and hybrid criminal tribunals<sup>43</sup> are similar to those at the ICC.

### 15.3.2. Examples of Protective Measures

As applied and expanded in practice, certain examples of protective measures are contained in the Statutes and RPE of international and hybrid criminal tribunals such as the ICTY, ICTR, SCSL, ECCC and STL.<sup>44</sup> Similarly, some examples of protective measures may be identified in the law of the ICC. This reflects the approaches adopted by the drafters of the ICC legal instruments. In terms of the present and the future of the regime of protective measures at the ICC, the practice of the Court is particularly important in order to appropriately address current and coming situations that

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<sup>39</sup> ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006, ICC-01/04-01/06-773, para. 33 (<http://www.legal-tools.org/doc/883722/>).

<sup>40</sup> Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights-Procedure and Evidence*, Martinus Nijhoff, 2008, p. 221.

<sup>41</sup> ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on matters of confidentiality and the Request for extension of the page limit, 19 June 2007, ICC-01/04-342-tEN, p. 7 (<http://www.legal-tools.org/doc/028c61/>).

<sup>42</sup> Brady, 2001, p. 446, see above note 16.

<sup>43</sup> See Acquaviva and Heikkilä, 2013, pp. 835–847, see above note 7.

<sup>44</sup> See *ibid.*

involve the protection of witnesses and victims during their participation or intervention in the ICC judicial proceedings. The practice of the ICC, including case law adopted in 2020, shows that one judicial decision may concern one or more protective measures.<sup>45</sup> Among others, the following protective measures may be identified in the ICC's law and practice.

First, the ICC Chambers may order proceedings to be held *in camera* under Rule 87(3)(e). Article 68(2) of the ICC Statute explicitly authorizes, *inter alia*, proceedings *in camera* or presentation of evidence through electronic or other special means:

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.<sup>46</sup>

Article 68(2) enables the ICC to depart from standard public hearings to protect victims and witnesses and, if needed, adopt 'special measures'. These measures can include the partial or total reading of a witness's statement in open court or in private if "these steps do not detract from the fairness of the proceedings" as the ICC has determined.<sup>47</sup> For instance, the ICC has ordered closed sessions when certain witnesses would enter or exit the courtroom and when asked potentially identifying questions.<sup>48</sup> Yet, the accused's right to a public hearing acquires particular importance during trial. In the end, the determination of the accused person's criminal liability

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<sup>45</sup> See, for example, ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision on Witness [REDACTED] Request for Protective Measures, 26 August 2020, ICC-01/14-01/18-630-Red (<http://www.legal-tools.org/doc/9sbql6/>).

<sup>46</sup> ICC Statute, Article 68(2), see above note 2.

<sup>47</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of two Witnesses, 15 January 2009, ICC-01/04-01/06-1603, para. 17 ('*Lubanga* Decision on Prosecution's Application') (<http://www.legal-tools.org/doc/5e9498/>).

<sup>48</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Decision on the Application for the Institution of Protective Measures for Witnesses a/0381/09, a/0018/09, pan/0363/09 and Victim a/0363/09 issued on 27 January 2011, 22 February 2011, ICC-01/04-01/07-2663-Red, para. 15 ('*Katanga and Ngudjolo Chui* Decision on Protective Measures') (<http://www.legal-tools.org/doc/680d68/>).

is precisely at stake in the trial stage. This is why there must be a fine balance between protective measures and the defence rights, particularly during trial. Thus, *inter alia*, the ICC Trial Chambers have case-by-case reviewed applications concerning protective measures, including the use of closed sessions.<sup>49</sup>

During ICC trials, testimonies have been frequently heard in private session, which determined that the public could not follow; however, the Chambers have ordered that portions that include no information that may cause security risks to be reclassified as public.<sup>50</sup> As Schabas noted, rather than an exception to the rule, however, “restriction on the principle of public hearings seems to be the rule”.<sup>51</sup> Such situation is particularly problematic during trial where the guilt or innocence of the accused person is determined.

The excessive use of *in camera* hearings may be criticized herein. To begin with, this practice does not seem to be fully coherent with Article 21(3) of the ICC Statute, which requires the ICC to be consistent with international human rights, including the accused’s right to a public hearing. This is indeed a pivotal right of the accused as Article 67(1) of the ICC Statute explicitly recognizes: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees in full equality [...]”.<sup>52</sup>

Moreover, the excessive use of *in camera* hearings affects the principle of public hearings, which is pivotal to international criminal procedure. Closed sessions are arguably the most or one of the most extreme protective measure. To allow a closed session at the ICC, there must be a serious and well-established risk and, once this measure is granted, the parties must follow specific judicial instructions on preparation and conduct of closed

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<sup>49</sup> For example, ICC, *Lubanga* Witness Decision, paras. 25, 35, see above note 18.

<sup>50</sup> For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 116 (*‘Lubanga Judgment’*) (<http://www.legal-tools.org/doc/677866/>); ICC, *Ngudjolo Chui* Judgment, para. 64, see above note 19.

<sup>51</sup> Schabas, 2016, p. 1058, see above note 11.

<sup>52</sup> ICC Statute, Article 67(1), see above note 2.

sessions.<sup>53</sup> Private hearings may give the wrong impression. Their frequent use may undermine the overall legitimacy of the ICC. Publicity of hearings is a fundamental part of the accused's rights and, thus, guarantees the right to fair and impartial trial and proceedings. Although the European Court of Human Rights has considered that witness protection may limit public proceedings, it has concluded that *in camera* proceedings can only be ordered if this is strictly necessary.<sup>54</sup>

Second, documents relating to the ICC Office of the Prosecutor can be classified as confidential. Article 68(1) is the legal foundation for this measure. This can importantly help in the protection of the psychological well-being, dignity and privacy of the witness. These rights are actually listed in Article 68(1). The ICC has applied the protective measure under analysis in its jurisprudence.<sup>55</sup> Nonetheless, the ICC has aimed to strike a balance between witness protection and the ICC's obligation to ensure public proceedings as enshrined in Articles 64(7) and 67(1).<sup>56</sup> Since necessity and witness security lead the provision of non-public information, this kind of information should only be shown to members of the public if it is truly necessary for the preparation and presentation of a party's or participant's case.<sup>57</sup>

Third, the Chambers may order that the testimony be given by electronic or other special means to distort image or voice as provided for in Rule 87(3)(c) of the ICC RPE and evidenced in the case law of the ICC.<sup>58</sup> For instance, three dual status victim participants, namely victims who are both victim participants and witnesses in the same case, provided their wit-

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<sup>53</sup> ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 23 ('*Bemba* Decision on Directions for Conduct of Proceedings') (<http://www.legal-tools.org/doc/ac5449/>).

<sup>54</sup> European Court of Human Rights, *Diennet v. France*, Judgment, 26 September 1995, Application No. 18160/91, paras. 34–35.

<sup>55</sup> For example, ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Decision on the "Prosecution Request to Hear Witness CAR-OTP-PPPP-0036's Testimony Via Video-link", 3 February 2012, ICC-01/05-01/08-2101, para. 12 ('*Bemba* Decision on Video-link Testimony') (<http://www.legal-tools.org/doc/8f13c6/>).

<sup>56</sup> *Ibid.*

<sup>57</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Prosecution's Application for an Order Governing Disclosure of Non-Public Information to Members of the Public and an Order Regulating Contact with Witnesses, 3 June 2008, ICC-01/04-01/06-1372, paras. 8–9 (<http://www.legal-tools.org/doc/95dc35/>).

<sup>58</sup> For example, ICC *Katanga and Ngudjolo Chui* Decision on Protective Measures, see above note 48.

ness testimonies in *Lubanga* and were given in-court protective measures that included voice and face distortion as well as pseudonyms.<sup>59</sup> In *Katanga and Ngudjolo Chui*, the Chamber ordered the distortion of the images and voices of witnesses prior to their public broadcast because other witnesses were harassed upon their return to their home country (Democratic Republic of Congo) and the witnesses feared facing similar problems.<sup>60</sup>

The use of electronic means for testimony was conceived if a witness cannot “attend the Court due to illness, injury, age or other justifiable reason”.<sup>61</sup> Under Rule 67(1) of the ICC RPE, such testimony can only be permitted if it enables the witness to be examined by the parties (Prosecutor and Defence) as well as the competent Chamber. However, victims or their lawyers are not (explicitly) mentioned. Under Rule 67(3) of the ICC RPE, the facilities for this testimony need to be “conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness”.<sup>62</sup> According to the ICC’s jurisprudence, evidence *via* video-link is “generally enjoined to protect the psychological well-being and dignity of its witnesses, subject to the fundamental dictates of a fair trial”.<sup>63</sup> This jurisprudential approach clearly reflects the need to balance the protection of witnesses and the respect for due process when the ICC issues protective measures. The ICC’s jurisprudence has determined that the Chamber’s authorization of a witness to give *viva voce* (oral) testimony *via* video technology is linked to the witness’s personal circumstances, including his or her well-being.<sup>64</sup>

Pursuant to Article 69(2), the principle of live testimony ‘in person’ applies at the ICC but there are exceptions such as “recorded testimony of a witness by means of video or audio technology, as well as the introduction

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<sup>59</sup> ICC, *Lubanga* Judgment, para. 21, see above note 50.

<sup>60</sup> ICC, *Katanga and Ngudjolo Chui* Decision on Protective Measures, para. 15, see above note 48.

<sup>61</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 109, fn. 14 (<http://www.legal-tools.org/doc/816405/>).

<sup>62</sup> ICC RPE, Rule 67(3), see above note 3. See *Lubanga* Witness Decision, para. 41, see above note 18.

<sup>63</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the Defence Request for a Witness to Give Evidence Via Video-Link, 9 February 2010, ICC-01/04-01/06-2285-Red, para. 15 (<http://www.legal-tools.org/doc/fd3f00/>).

<sup>64</sup> *Ibid.*, para. 16; ICC, *Bemba* Decision on Video-link Testimony, para. 7, see above note 55.

of documents or written transcripts”<sup>65</sup> and other protective measures under Article 68(2), all of which “shall not be prejudicial to or inconsistent with the rights of the accused”. The “introduction of documents or written transcripts” under Article 69(2) diverts from the situation at courts in common law countries.<sup>66</sup> Indeed, such feature arguably corresponds to the presence of civil law elements in the ICC’s procedure. Article 69(2) prefers oral witness testimony; however, concerning protective measures, Article 68(2) and the Rules contain some exceptions.<sup>67</sup>

Under Rule 68(2), the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony may be allowed by the Chamber if the absent witness was examined by the Prosecutor and Defence and the testimony: concerns proof of a matter other than the accused’s acts and conduct; comes from someone who has died, must be presumed dead or is unavailable to testify orally due to unsurmountable obstacles; and comes from someone subject to interference. Thus, the said testimony or evidence can be introduced but subject to specific requirements at the ICC, which arguably take into account different interests and rights at stake. Under Rule 68(3), if the witness is present, the conditions are that the witness should not object the submission of previously recorded testimony, and the Prosecutor, the Defence and the Chamber need to have the opportunity to examine the witness.

In all these Rule 68 scenarios, the respect for the accused’s rights is required, which is consistent with *inter alia* Article 67 of the ICC Statute. The ICC has found that “any challenges to hearsay evidence may affect its probative value, but not its admissibility [...] it will exercise caution in using such evidence”.<sup>68</sup> This is welcome herein because it is arguably a balanced approach to evidentiary matters at the ICC. In the ICC’s practice, certain judges have employed the expression ‘indirect evidence’ concerning what could constitute ‘hearsay’ in the common law tradition, indicating that ‘indirect evidence’ generally has less probative value or weight than that of

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<sup>65</sup> ICC Statute, Article 69(2), see above note 2.

<sup>66</sup> Schabas, 2016, p. 1083, see above note 11.

<sup>67</sup> *Ibid.*, pp. 1080–1081.

<sup>68</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Confirmation of the Charges, 30 September 2008, ICC-01/04-01/07-717, paras. 137, 139 (<http://www.legal-tools.org/doc/67a9ec/>).

direct testimony.<sup>69</sup> Although there is no explicit provision on deposition in the ICC instruments, Rule 68 of the ICC RPE may cover it.<sup>70</sup>

Under Rules 67(1) and 67(2) of the ICC RPE, the Chambers may authorize witnesses to give oral testimony through live audio or video technology provided that such testimony allows the witness to be examined by both parties and the Chamber when testifying, in accordance with the rules on witness examination as they would apply if the witness were in court. These normative provisions are overall balanced as they take into account different interests at stake. Under Article 67(1)(e) and as applied in the ICC's practice, there is a rebuttable presumption that testimony *via* video link is consistent with the accused person's right to examine or have examined witnesses against him or her.<sup>71</sup> This testimony is not limited to exceptional circumstances as long as the accused person's rights are not affected.<sup>72</sup>

Fourth, the ICC may order that the names or other identifying information of the protected person be expunged from the records.<sup>73</sup> Such measure is particularly important to protect witnesses and victims from external actors. In the ICC's practice, for instance, the Pre-Trial Chamber in *Abu Garda* ordered the confidentiality of witness identity *vis-à-vis* the public and media, namely, the name and address of the witness were expunged from the public records.<sup>74</sup> In the ICC's practice, the non-disclosure of victims' identities to the public and media during pre-trial has sought to minimize risks related to their participation in the proceedings, which for example took place in *Katanga and Ngudjolo Chui*.<sup>75</sup>

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<sup>69</sup> ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 51 (<http://www.legal-tools.org/doc/07965c/>).

<sup>70</sup> Mark Klamberg, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Stockholm University Press, 2012, p. 319.

<sup>71</sup> ICC, *Lubanga* Witness Decision, para. 41, see above note 18.

<sup>72</sup> *Ibid.*, para. 10.

<sup>73</sup> ICC RPE, Rule 87(3)(a), see above note 3.

<sup>74</sup> ICC, *Prosecutor v. Abu-Garda*, Pre-Trial Chamber I, Decision on the Prosecutor's Application for Protective Measures Dated 22 September 2009, 9 October 2009, ICC-02/05-02/09-117-Red, p. 4 (<http://www.legal-tools.org/doc/a5f4af/>).

<sup>75</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/047-01/07-474, paras. 20–22 (<http://www.legal-tools.org/doc/285b52/>).

Nonetheless, the accused person's fundamental right to due process guarantees is particularly pressing during the trial stage as compared to pre-trial or investigation.

In the ICC's practice, redactions have been "reviewed by the Chamber and some were lifted during the course of the trial" until further disclosure was no more possible "under the present circumstances".<sup>76</sup> Based on concerns for the safety of witnesses or their families, many witnesses are referred to in the judgments by numbers rather than by names and certain identifying details have been removed.<sup>77</sup> Thus, this measure protects witnesses from external actors (the public and media). In any event, the parties to and participants in the ICC proceedings knew or were aware of the relevant identifying information.<sup>78</sup>

In the ICC's practice, redactions of victim participation applications have also been granted as a protective measure. For example, the Prosecutor and the Defence have been given redacted copies of victim participation applications, expunging all identifying information of the applicants.<sup>79</sup> This clearly shows that the beneficiaries of protective measures are not only witnesses at the ICC. Related to the non-divulgence of witnesses' identities, summary evidence under Article 68(5) of the ICC Statute has been used and it has been regarded as a witness protection measure. The reason for this is that such measure enables the Prosecutor not to divulge the witnesses' identities prior to the confirmation hearing provided that the accused's rights and a fair and impartial trial are protected.<sup>80</sup>

According to Article 68(5) and Rule 81(4), the non-disclosure of the identity of victims or witnesses to the Defence, however, only applies to the proceedings before the commencement of the trial. This means that the accused knows the identity of witnesses during trial at the ICC, namely, there is no witness anonymity during ICC trials. Such situation is consistent with most laws and practices of international and hybrid criminal courts that only allow anonymous witnesses during pre-trial. The STL's law is an exception to the said trend because the STL RPE exceptionally allow

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<sup>76</sup> For example, ICC, *Lubanga* Judgment, para. 117, see above note 50.

<sup>77</sup> *Ibid.*, para. 115.

<sup>78</sup> *Ibid.*; ICC, *Ngudjolo Chui* Judgment, paras. 63–65, see above note 19.

<sup>79</sup> See ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on Victims' Applications for Participation a/0010/06 *et al.*, 10 August 2007, ICC-02/04-101, paras. 2–3 (<http://www.legal-tools.org/doc/8f9181/>).

<sup>80</sup> ICC, *Lubanga*, paras. 44, 54, 51, above note 57.

anonymous witnesses during trial. Indeed, Article 68(5) establishes that “the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof”.<sup>81</sup> Conversely, the ICC legal instruments contain no similar obligation to disclose the identities of victims or witnesses to the public and/or media during trial.

Finally, other important protective measures include: (i) participants in the proceedings may be judicially prohibited to disclose information leading to the identification of the protected persons to a third party under Rule 87(3)(b); and (ii) the filing of proceedings is conducted under seal under Rules 87(2) and 88(4).<sup>82</sup> Additionally, Chambers may order pseudonyms for witnesses under Rule 87(3)(d). For instance, the ICC has granted Prosecutor’s applications to have voice and images distorted and to use pseudonyms for protected witnesses.<sup>83</sup> Furthermore, the ICC’s jurisprudence has considered as protective measures: “a witness should be able to control his or her testimony, and, if so, to what extent; breaks in the evidence should be allowed as and when requested; a witness can require that a particular language is used”.<sup>84</sup>

At the ICC, the party or participant who calls the witness mainly bears the obligation to identify, protect and respect the well-being and dignity of witnesses; however, the other party, participants and the ICC hold related responsibilities.<sup>85</sup> As international human rights jurisprudence has acknowledged, protective measures aim to safeguard the right of victims and witnesses to protection of certain rights during criminal proceedings but subject to requirements such as necessity and respect for the accused’s rights.<sup>86</sup> The importance of protective measures for victims and witnesses certainly corresponds to their nature as “the legal means by which the

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<sup>81</sup> ICC Statute, Article 68(5), see above note 2.

<sup>82</sup> See also ICC, *Situation in the DRC*, Appeals Chamber, Judgement on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 13 July 2006, ICC-01/04-169, paras. 21–23 (<http://www.legal-tools.org/doc/8c20eb/>).

<sup>83</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber, Transcript, 16 January 2009, ICC-01/04-01/06-T-104-ENG, pp. 1–5 (<http://www.legal-tools.org/doc/032a0f/>).

<sup>84</sup> ICC, *Lubanga* Witness Decision, para. 35, see above note 18.

<sup>85</sup> *Ibid.*, para. 36.

<sup>86</sup> For example, European Court of Human Rights, *T. v. The United Kingdom*, Judgment, 16 December 1999, Application No. 24724/94, paras. 83–89 (<http://www.legal-tools.org/doc/55f63d/>).

Court can secure participation of victims in the proceedings”.<sup>87</sup> Nevertheless, these measures shall be fact-specific (case-by-case) and no uniform model applies to all cases.<sup>88</sup>

How to strike the sound or appropriate balance concerning the intrinsic tension between protective measures for victims and witnesses and the rights of the defence is pivotal for the present and future of the ICC in terms of good practices on participation and intervention of victims and witnesses. Under Article 68(1) of the ICC Statute, protective measures are subject to the accused person’s rights: “These measures shall not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial”.<sup>89</sup> Thus, the ICC Statute is overall consistent with not only international criminal procedure standards and trends but also international human rights law standards. Pursuant to Article 21(3) of the ICC Statute, the ICC is actually expected to be consistent with international human rights. The adoption of protective measures in favour of victims and witnesses throughout diverse procedural stages needs to be considered.

However, protective measures ordered by the ICC cannot justify that the accused person’s rights are (seriously) restricted. Otherwise, the legitimacy of the ICC would be severely compromised. As Zappalà powerfully noted, “the rights of the accused are not ‘just’ human rights guarantees; they are part and parcel of the epistemological mechanism for fact finding in criminal proceedings”.<sup>90</sup> The ICC Appeals Chamber itself has highlighted that protection of witnesses and victims must ensure the defence’s rights.<sup>91</sup>

In conclusion, the law and practice of the ICC show the importance of protective measures to benefit victims and witnesses when they intervene at the ICC. These measures have been and should be implemented with due respect for the rights of the accused. The next section examines the category of special measures at the ICC.

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<sup>87</sup> ICC, *Lubanga* Victims’ Participation Decision, paras. 128–129, see above note 18.

<sup>88</sup> ICC, *Lubanga* Decision on Disclosure Issues, para. 77, see above note 28.

<sup>89</sup> ICC Statute, Article 68(1), see above note 2.

<sup>90</sup> Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, p. 145.

<sup>91</sup> ICC, *Prosecutor v. Ngudjolo Chui*, Appeals Chamber, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, ICC-01/04-02/12-140, para. 16 (<http://www.legal-tools.org/doc/e34abb/>).

## 15.4. Special Measures

### 15.4.1. Normative Framework and Practice

As the laws and practices of international and hybrid criminal tribunals such as the ICTY, ICTR, SCSL, ICC, ECCC, and STL show, special measures seek to protect vulnerable witnesses and victims.<sup>92</sup> As this section discusses, the ICC legal instruments pay attention to the need for specific normative provisions on protective measures in favour of vulnerable victims and witnesses. In turn, the ICC's practice holds particular relevance in order to interpret, integrate, apply and flesh out those norms in manners to guarantee the protection of vulnerable victims and witnesses. This is especially important and pressing in light of the past, current and (likely) future ICC investigations and cases that deal with heinous crimes, which are committed against the most vulnerable members of societies and/or communities and/or which leave individuals terribly traumatized. As said, other international and hybrid criminal tribunals have also applied these measures.<sup>93</sup>

Thus, the adoption of proper special measures is by definition pivotal to the present and future success of the protective measures regime at the ICC, which in turn impacts on the performance of the ICC as a whole. In terms of goals of international criminal justice pursued by, *inter alia*, the ICC, special measures are useful: (i) to decrease stress levels that vulnerable witnesses and victims experience when they give information and, thus, the quantity and quality of evidence increase; and (ii) to provide confidentiality to victims of, *inter alia*, sexual crimes and, thus, avoid their rejection by their families and/or communities.<sup>94</sup>

In this context, Article 68(1) puts a particular focus on victims of sexual or gender-based violence, or violence against children by stating that the ICC “shall have regard to all relevant factors, including age, gender [...] and health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children”.<sup>95</sup> Accordingly, some categories or groups of victims and witnesses are considered to be in extreme danger because of their quite vulnerable situation or the particularly heinous nature of the crimes and harm

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<sup>92</sup> See Acquaviva and Heikkilä, 2013, pp. 847–850, see above note 7.

<sup>93</sup> See *ibid.*

<sup>94</sup> *Ibid.*, p. 855.

<sup>95</sup> ICC Statute, Article 68(1), see above note 2.

inflicted on them. This scenario certainly relates to the sort of crimes and atrocities that fall under the ICC's jurisdiction as well as the security situation that witnesses and victims may face back home amidst ongoing conflicts or in post-conflict contexts. In turn, this requires the ICC's special consideration of the needs of particularly traumatized or vulnerable witnesses and victims, especially concerning measures to facilitate their testimonies.

Thus, the said factors help to identify "a particular group of victims, the survivors, who are always at risk of re-victimization".<sup>96</sup> Under Article 68(1), the Prosecutor is obligated to take protective measures "particularly during the investigation and prosecution of such crimes".<sup>97</sup> To implement this general obligation, there are some normative provisions that deal with relevant institutional matters. For instance, Articles 36(8)(b) and 42 of the ICC Statute require the involvement of personnel and investigators who have legal and psychological expertise on trauma and crime against women and children. Similar to other international and hybrid criminal courts, qualified personnel at the ICC is indeed important to help to apply and implement the ICC normative provisions on special measures.

Article 68(2) establishes that: "In particular, such measures ['conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means'] shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness".<sup>98</sup> Testimony given *via* closed-circuit television that prevents direct visual contact between the witness and the accused as well as the support of witnesses by someone close to her or him in the courtroom constitute good examples of special measures for particularly vulnerable or traumatized victims such as victims of sexual or gender violence; however, these should be granted only in exceptional circumstances in accordance with Article 68(2).<sup>99</sup> The exceptional nature of special measures enables the ICC to fulfil its mandate to protect witnesses and victims but without compromising the overall fairness or integrity of the proceedings, all of which is key for, *inter alia*, the legitimacy of the ICC as a whole.

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<sup>96</sup> David Donat-Cattin, "Article 68", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck *et al.*, 2016, p. 1689.

<sup>97</sup> ICC Statute, Article 68(1), see above note 2.

<sup>98</sup> *Ibid.*, Article 68(2).

<sup>99</sup> Acquaviva and Heikkilä, 2013, p. 830, see above note 7.

Special measures and certain rights of the accused person may be in tension and even conflict at the ICC. Scholars have remarked that the adoption of special measures in the testimony of vulnerable or traumatized victims such as victims of sexual or gender violence limits the accused person's right to examine witnesses.<sup>100</sup> Yet, Article 67(1)(e) explicitly includes this right. For instance, disclosure in advance of the questions sought to be covered by the parties may be ordered to protect vulnerable and traumatized victims.<sup>101</sup> Similar to other issues related to witness testimonies at the ICC, it is key for the Chambers to strike a balance between the necessary protection of traumatized or vulnerable witnesses *via* special measures *and* the respect for the rights of the accused person. In doing so, the ICC can effectively guarantee the rights of both witnesses and the accused.

Academic literature has correctly identified that Rule 88 of the ICC RPE stems from Article 68(2) of the ICC Statute.<sup>102</sup> This is a good example of how the ICC RPE have fleshed out or complemented the more general provisions of the ICC Statute in witness protection matters. Pursuant to Rule 88, the ICC can order 'special measures', which include but are not limited to "measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2".<sup>103</sup> The drafters of Rule 88 concluded that the phrase "a witness or a victim or his or her legal representative, if any" recognizes that the lack of an obligation to provide legal representation for a victim witness means no obstacle to him or her being legally represented under certain circumstances.<sup>104</sup>

Under Rule 88, the Prosecutor, Defence, a witness or a victim or his/her legal representative may request the ICC Chambers to order special measures. Rule 88 also enables the ICC Chambers to order special measures *proprio motu*. In accordance with Rule 88, the ICC may order special measures such as measures to facilitate the testimony of "a traumatized victim or witness, a child, an elderly person or a victim of sexual violence". A legitimate question to pose is whether Rule 88 could or should have explicitly mentioned additional categories of vulnerable witnesses or

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<sup>100</sup> William Schabas and Yvonne McDermott, "Article 67", in Triffterer and Ambos, 2016, pp. 1670–1671, see above note 96.

<sup>101</sup> ICC, *Lubanga* Witness Decision, para. 37, see above note 18.

<sup>102</sup> Brady, 2001, p. 447, see above note 16.

<sup>103</sup> ICC RPE, Rule 88(1), see above note 3.

<sup>104</sup> Brady, 2001, p. 447, see above note 16.

victims. A reference to ‘disabled persons’ was indeed proposed by Italy.<sup>105</sup> To prevent further discussions and delays, future Rule 86 (‘General principle’) was proposed by Canada.<sup>106</sup> Rule 86 is a general and comprehensive provision that includes the needs of, *inter alia*, persons with disabilities when they intervene as witnesses and/or victim participants at the ICC. Rule 86 is located in Section III (‘Victims and witnesses’) of Chapter IV (‘Provisions relating to various stages of the proceedings’) of the ICC RPE and it has a general scope of application concerning victims and witnesses at the ICC. Rule 86 lays down that the Chambers and other ICC organs “shall take into account the needs of all victims and witnesses in accordance with article 68, in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence”.<sup>107</sup>

In-court protective measures for girls and women have been adopted under Rules 87 and 88 in the ICC’s practice.<sup>108</sup> For instance, the Trial Chamber in *Katanga and Ngudjolo Chui* explicitly indicated that it would be “particularly vigilant in preserving the psychological well-being and privacy of Victim a/0363/09, who is a minor”.<sup>109</sup> Such remark illustrates the importance of protecting witnesses or victims who are minors at the ICC due to their intrinsic vulnerability related to their age, personality development, and other characteristics. As the Chamber added, Rule 88 seeks to provide the ICC with enough flexibility to order necessary and appropriate measures tailored to particular circumstances.<sup>110</sup> In application of the powers and functions of the Trial Chamber (Article 64), the ICC has pointed out that it will take appropriate steps to protect victims and witnesses, “particularly those who have suffered trauma or who are in a vulnerable situation”.<sup>111</sup>

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<sup>105</sup> Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence concerning Part 6 of the Statute, “Proposal by Italy concerning the Rules of Procedure and Evidence relating to Part 6 of the Statute (the Trial)”, 13 March 2000, PCNICC/2000/WGRPE(6)/DP.3, Rule 6(29)(e) (<http://www.legal-tools.org/doc/dd6292/>).

<sup>106</sup> Brady, 2001, p. 448, see above note 16.

<sup>107</sup> ICC RPE, Rule 86, see above note 3.

<sup>108</sup> ICC, *Ngudjolo Chui* Judgment, para. 23, fn. 43–44, see above note 19.

<sup>109</sup> ICC, *Katanga and Ngudjolo Chui* Decision on Protective Measures, para. 15, see above note 48.

<sup>110</sup> *Ibid.*

<sup>111</sup> ICC, *Lubanga* Witness Decision, para. 35, see above note 18.

Special measures beneficiaries should consent to these measures. This is important because witnesses or victims are not only considered as mere beneficiaries of these measures but they can also be treated as individuals who are heard in the decision-making process leading to the adoption of special measures in their favour. However, Rule 88(1) establishes that the consent of special measures beneficiaries is not absolute: “The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure”.<sup>112</sup> Thus, it is recognized that the said consent may be impossible to obtain in certain circumstances. The application proceeding for a special measure under Rule 88 differs from Rule 87 proceeding because the former allows an application for a special measure to be made, if necessary, on an *ex parte* basis or *in camera* or both.<sup>113</sup> In case of an *inter partes* application for a special measure, the procedure established in Rule 87(2)(b)-(d) applies.

Following Rule 88(2), special measures may include, “but are not limited to, an order that a counsel, a legal representative, a psychologist or a family member is permitted to attend during the testimony of a traumatized victim or witness”,<sup>114</sup> which is also applicable to a child, an elderly person or a victim of sexual violence.<sup>115</sup> Pursuant to Rule 88(5), the Chamber is obligated to be vigilant in controlling the manner of questioning witnesses to “avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence”.<sup>116</sup> These normative provisions are certainly witness-friendly or victim-friendly. Rule 88(5) importantly adds that “violations of the privacy of a witness or victim may create risk to his or her security”. As determined in *Lubanga*, the ICC Trial Chambers in order to protect traumatized or vulnerable witnesses may ask the parties and participants to disclose, in advance, the questions or topics to be posed or covered during their questioning.<sup>117</sup> This corresponds to the particularly vulnerable or traumatic situation of some witnesses and victims and help to avoid secondary victimization. The testimony of vulnerable

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<sup>112</sup> ICC RPE, Rule 88(1), see above note 3.

<sup>113</sup> *Ibid.*, Rule 88(2).

<sup>114</sup> Brady, 2001, p. 449, see above note 16.

<sup>115</sup> *Ibid.*

<sup>116</sup> ICC RPE, Rule 88(5), see above note 3.

<sup>117</sup> ICC, *Lubanga* Witness Decision, para. 33, see above note 18.

witnesses can be handled confidentially and access to this testimony “is to be limited to the parties and participants in the proceedings”.<sup>118</sup>

Article 69(2) allows exceptions to ‘in person’ testimony. Rule 68 was precisely adopted pursuant to this Article. Rule 68 involves special measures to facilitate the testimony of particularly vulnerable victims and witnesses and thus, Rule 68 (‘Prior recorded testimony’) may be used together with Rule 88.<sup>119</sup> This illustrates the possibility of combining normative provisions to aid the interventions of witnesses and victims at the ICC. Regardless of a Pre-Trial Chamber’s authorization, the Trial Chambers may order the production of a recorded audio or video witness testimony under Article 69(2) and Rule 68. This exception to the principle of testimony in person is subject to certain conditions laid down in Rule 68, which apply even if the witness is present at the ICC. The exceptions to the live testimony ‘in person’ arguably constitute victim-friendly measures because victims and witnesses are spared from having to face the accused directly and personally in the courtroom. Thus, further traumatization or secondary victimization is prevented, which is particularly necessary in the context of testimonies related to gross atrocities at the ICC. Trial Chamber I in *Lubanga* appropriately found that Rule 68 concerns:

[...] the ‘testimony of a witness’ in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts or other documented evidence of ‘such’ testimony [...] Rule 68 permits the introduction of witness statements, in addition to video- or audio-taped records or transcripts, of a witness’s testimony because these are all clear examples of the ‘documented evidence’ of a witness’s testimony.<sup>120</sup>

Such jurisprudential remark shows a certain degree of flexibility in testimony and evidentiary issues at the ICC, which overall facilitates the intervention of witnesses. In any event, as importantly remarked in *Katanga and Ngudjolo Chui*, the introduction of previously recorded testimony *in lieu* of ‘live’ evidence is subject to certain factors. These include, in partic-

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<sup>118</sup> *Ibid.*, para. 35.

<sup>119</sup> Brady, 2001, p. 455, see above note 16.

<sup>120</sup> ICC, *Lubanga* Decision on Prosecution’s Application, para. 18, see above note 47. See also ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Admissibility of Four Documents, 13 June 2008, ICC-01/04-01/06-1399, para. 22 (<http://www.legal-tools.org/doc/2855e0/>).

ular, the testimony relates to issues not materially in dispute; the evidence is not central to core issues in the case; the evidence is corroborative of other evidence; and this measure must not be prejudicial to or inconsistent with the accused person's rights.<sup>121</sup> Such criteria are important to allow previously recorded testimony but within determined limits.

Live questioning of witnesses in open court is fundamental. Live questioning is not only a principle of international criminal procedure but it is also important to ensure fair proceedings. As discussed previously, written statements may, however, be introduced under Rule 68. Arguably, this also reflects the influence of civil law tradition elements at the ICC. In turn, it is also a victim-friendly measure. As the ICC Trial Chambers in *Lubanga* and *Bemba* have pointed out, oral testimony unlike written statements “can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part observing the demeanour of the witness”.<sup>122</sup>

Nevertheless, these same Chambers have also recognized that read written statements may present material advantages such as: witnesses do not unnecessarily repeat their evidence after this was recorded; and the admissibility of non-oral evidence may be useful in the context of lengthy trials.<sup>123</sup> This illustrates the importance of achieving balanced or flexible approaches to testimonies at the ICC. Rule 112(4) (‘Recording of questioning in particular cases’) is also linked to Rule 68 because Rule 112(4) allows the Prosecutor to select the procedure to question, particularly when this “would assist in reducing any subsequent traumatising of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence. The Prosecutor may make an application to the relevant Chamber”.<sup>124</sup>

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<sup>121</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Corrigendum to the Decision on the Prosecution Motion for Admission of Prior Recorded Testimony of Witness P-02 and Accompanying Video Excerpts, 27 August 2010, ICC-01/04-07-2289, para. 14 (<http://www.legal-tools.org/doc/3125f4/>).

<sup>122</sup> ICC, *Lubanga* Decision on Prosecution's Application, paras. 21–22, see above note 47; ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the ‘Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108’, 16 September 2010, ICC-01/05-01/08-886, para. 5 (<http://www.legal-tools.org/doc/2abdab/>).

<sup>123</sup> *Ibid.*; ICC, *Lubanga* Decision on Prosecution's Application, paras. 21–22, see above note 47.

<sup>124</sup> ICC RPE, Rule 112(4), see above note 3.

Due to the potentially confrontational nature of questioning by the “party not calling the witness”, the competent Chamber must protect the psychological well-being and dignity of witnesses and victims under Article 68(1) and Rule 88(5) as applied in the ICC’s practice.<sup>125</sup> As determined by the ICC, this includes matters on the accused’s guilt or innocence such as the reliability or credibility of the evidence.<sup>126</sup> Overall, these normative provisions and jurisprudence help to better protect witnesses when intervening at the ICC.

The Chamber may allow leading, closed and challenging questions; however, unwarranted insinuations and questions concealing speeches are not allowed and cross-examination must respect the dignity of witnesses.<sup>127</sup> The adoption of certain limits to witness examination constitutes a witness-friendly or a victim-friendly measure and thus, it facilitates the respect for the rights of witnesses and victims. As the ICC has also remarked, “cross-examination must at all times remain civil and respectful to the witness. The Chamber will not allow parties to assault the dignity or exploit the vulnerability of witnesses during cross-examination”.<sup>128</sup> This is necessary to avoid an aggressive cross-examination and hence, the risks of re-victimization or secondary victimization of victim witnesses are reduced or eliminated at the ICC. Additionally, Rule 69 states that inter-party agreements on evidence may be accepted subject to “the interests of justice, in particular the interests of the victims”.<sup>129</sup>

A “Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses” (‘Protocol’) was adopted by the VWU in *Bemba* to consider vulnerable witnesses’ needs.<sup>130</sup> The Protocol has been followed in other cases such as *Gbagbo*.<sup>131</sup> The

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<sup>125</sup> ICC, *Bemba* Decision on Directions for Conduct of Proceedings, para. 15, see above note 53.

<sup>126</sup> ICC, *Lubanga* Witness Decision, para. 32, see above note 18.

<sup>127</sup> ICC, *Katanga and Ngudjolo Chui*, Trial Chamber II, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, 20 November 2009, ICC-01/04-01/07-1665, paras. 74–76 (<http://www.legal-tools.org/doc/ddb123/>).

<sup>128</sup> *Ibid.*, para. 75.

<sup>129</sup> ICC RPE, Rule 69, see above note 3.

<sup>130</sup> ICC, *Prosecutor v. Bemba*, Registrar, Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses, 25 October 2010, ICC-ICC-01/05-01/08-974-Anx2 (‘*Bemba* Protocol’) (<http://www.legal-tools.org/doc/2684c2/>).

<sup>131</sup> For example, ICC, *Prosecutor v. Gbagbo*, Registrar, Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses, 16 April 2012, ICC-02/11-01/11-93-Anx2 (<http://www.legal-tools.org/doc/0af9c5/>).

adoption and application of such kind of protocols show that special measures (and protective measures in general) are a joined effort of the different organs of the ICC, including the VWU and Chambers. Under the said Protocol, vulnerable witnesses are defined as those who face an increased risk to: “a. Suffer psychological harm through the process of testifying and/or b. Experience psychosocial or physical difficulties, which affect their ability to testify”.<sup>132</sup> This Protocol also notes that witness vulnerability may be determined by factors relating to the nature of the crime committed, namely, crimes and violence against children, sexual violence crimes and excessively violent crimes.<sup>133</sup>

Overall, the adoption of special measures is very important in witness matters at the ICC. In turn, the balance between the respect for the rights of the accused and the need for special measures in favour of traumatized or vulnerable witnesses and victims characterizes the ICC’s instruments and practice. Special measures have been generally ordered and adopted on a case-by-case basis and with due respect for the accused person’s rights.

#### **15.4.2. Special Measures for Victims and Witnesses of Sexual Violence**

Article 68(1) of the ICC Statute puts a particular focus on victims of sexual or gender-based violence by stating that the ICC “shall have regard to all relevant factors, including [...] gender [...] and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence”.<sup>134</sup> Article 68(2) establishes that: “In particular, such measures [“conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means”] shall be implemented in the case of a victim of sexual violence [...]”.<sup>135</sup> Article 68(2) presumes that sexual violence victims should testify *in camera*. Should these victims decide to testify in public, such presumption may be overturned.<sup>136</sup>

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<sup>132</sup> ICC, *Bemba* Protocol, para. 5, see above note 130.

<sup>133</sup> *Ibid.*, para. 6. See also Acquaviva and Heikkilä, 2013, p. 849, see above note 7.

<sup>134</sup> ICC Statute, Article 68(1), see above note 2.

<sup>135</sup> *Ibid.*, Article 68(2).

<sup>136</sup> Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005, pp. 242–243.

As seen previously, Rule 88 of the ICC RPE stems from Article 68(2)<sup>137</sup> and, under such rule, the ICC can order ‘special measures’ including, but not limited to, “measures to facilitate the testimony of [...] a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2”.<sup>138</sup> Rule 88(5) obliges the Chamber to be vigilant in controlling the manner of questioning witnesses to “avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence”.<sup>139</sup> In the ICC’s practice, witness vulnerability may be determined by factors relating to the nature of the crime committed, namely, crimes and violence against children, sexual violence crimes and excessively violent crimes.<sup>140</sup> According to consistent jurisprudence of the ICC, including recent decisions rendered in 2020, victims of sexual violence “should benefit from special and increased protection in proceedings before the Court”.<sup>141</sup> As remarked by very recent jurisprudence of the ICC, these protective measures seek to avoid, *inter alia*, the risk that a victim of sexual violence “will face stigmatisation in her community, which will negatively affect her personal life on a permanent basis”.<sup>142</sup>

With regard to cases of sexual and gender-based violence, instruments of certain international and hybrid criminal tribunals contain specific rules and principles, including normative provisions on testimonial evidence. This is the situation of Rule 96 of the RPE of the ICTY, the ICTR and the SCSL. Thus, Rule 96 of the ICTY RPE provides for that:

In cases of sexual assault:

- (i) no corroboration of the victim’s testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

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<sup>137</sup> Brady, 2001, p. 447, see above note 16.

<sup>138</sup> ICC RPE, Rule 88(1), see above note 3.

<sup>139</sup> *Ibid.*, Rule 88(5).

<sup>140</sup> ICC, *Bemba* Protocol, para. 6, see above note 130. See also Acquaviva and Heikkilä, 2013, p. 849, see above note 7.

<sup>141</sup> ICC, *Prosecutor v. Al Hassan*, Trial Chamber X, Public redacted version of ‘Decision on Prosecution request relating to protective measures for P-0543’, 18 May 2020, ICC-01/12-01/18-765-Red2, para. 24 (<http://www.legal-tools.org/doc/3xcml2/>).

<sup>142</sup> *Ibid.*

- (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted in evidence.<sup>143</sup>

Likewise, special evidentiary rules applicable in sexual violence crimes are also included in the ICC RPE. Indeed, these specific ICC RPE were largely influenced by similar RPE of the ICTY, ICTR and SCSL. Accordingly, under Rule 70 of the ICC RPE:

- (i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.<sup>144</sup>

Thus, Rule 70 aims to prevent misinterpretation of certain actions by victims and witnesses of sexual crimes, which were perpetrated in oppressive and extreme circumstances generally present in contexts of sexual violence. Additionally, under Rule 71 ('Evidence of other sexual conduct') "subject to article 69, paragraph 4 [relevance or admissibility of evidence], a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness".<sup>145</sup>

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<sup>143</sup> ICTY, Rules of Procedure and Evidence, 11 February 1994, Rule 96 (<http://www.legal-tools.org/doc/rkps3b/>). See also ICTR, Rules of Procedure and Evidence, 29 June 1995, Rule 96 (<http://www.legal-tools.org/doc/93961e/>); and SCSL, Rules of Procedure and Evidence, 16 January 2002, Rule 96 (<http://www.legal-tools.org/doc/4c2a6b/>).

<sup>144</sup> ICC RPE, Rule 70, see above note 3.

<sup>145</sup> *Ibid.*, Rule 71.

Under Rule 72, should a party want to introduce or elicit evidence (including means of questioning of a victim or a witness) that the victim or witness consented to an alleged crime of sexual violence, an *in camera* procedure needs to be held to determine the admissibility or relevance of the said evidence. The victim is not present during this *in camera* procedure and, thus, the victim is protected from confrontation with untested painful statements.<sup>146</sup> Rule 72 additionally endeavours to protect sexual crime victims from a hard examination when consent should not be an issue but it also permits the accused to submit evidence of consent when this may be relevant. Hence, Rule 72 arguably reaches a fine balance between the competing rights of sexual crime victims and the accused person.

Concerning evidence of the victim's consent of a sexual crime, the Chamber must hear *in camera* the views of the Prosecutor, Defence, witness and victim or his/her legal representative and needs to consider "whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause"<sup>147</sup> under Rule 72(2). In accordance with Rule 72(3), even if the Chamber admits the evidence, it "shall state on the record the specific purpose for which the evidence is admissible".<sup>148</sup> Taking into account that consent is not a legal element of any sexual crime in the ICC Statute, the Prosecutor can arguably be focused on the coercive environment and hence prevent that the issue of consent is invoked.<sup>149</sup> In this regard, such normative provisions are certainly victim-friendly or witness-friendly.

Article 69(4) establishes that "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".<sup>150</sup> Pursuant to Article 69(4) and Rule 71, the competent Chamber shall not admit evidence of prior or subsequent sexual conduct of a victim or a witness. Such normative provisions are key to prevent bias against witnesses and, thus, avoid potential re-traumatization of victims and witnesses. Furthermore, Rule 70 lays down that: "Credibility, character or predisposition to

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<sup>146</sup> De Brouwer, 2005, pp. 266–267, see above note 136

<sup>147</sup> ICC RPE, Rule 72(2), see above note 3.

<sup>148</sup> *Ibid.*, Rule 72(3).

<sup>149</sup> De Brouwer, 2005, p. 266, see above note 136.

<sup>150</sup> ICC Statute, Article 69(4), see above note 2.

sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness”.<sup>151</sup>

In light of the principle of non-discrimination, which is explicitly acknowledged in Article 21(3) of the ICC Statute,<sup>152</sup> Rule 71 incorporates the presumption whereby prior or subsequent sexual conduct cannot be admitted into evidence. Nonetheless, this is a rebuttable presumption. The ICC RPE do not totally ban evidence of prior or subsequent sexual conduct. Thus, the reference to Article 69(4) in Rule 71, namely, the potential and exceptional admission of previous or subsequent sexual conduct of the victim, may be criticized.<sup>153</sup>

Additionally, Rule 63(4) provides for the general principle of non-corroboration with a particular focus on sexual crimes: “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence”.<sup>154</sup> The need for such an explicit provision corresponds to the fact that victims of sexual or gender-based violence have in many domestic systems been treated in a different manner than victims of other crimes.<sup>155</sup> Due to the global impact of the ICC’s law and practice, Rule 63(4) and the other ICC RPE on sexual and gender-based violence-related evidence may encourage or influence national jurisdictions to undertake legislative and jurisprudential reforms whereby the testimony of victims of sexual offences is (much) better handled and assessed.

Under Rule 63(4), there is no distinction between victims of sexual crimes and victims of other crimes, namely, the former are as reliable as witnesses of other crimes. Once again, this is coherent with the principle of non-discrimination stated in Article 21(3) and, in turn, with international human rights standards. It is important to note that Rule 63(3) needs to be

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<sup>151</sup> ICC RPE, Rule 70, see above note 3.

<sup>152</sup> De Brouwer, 2005, p. 268, see above note 136.

<sup>153</sup> *Ibid.*, p. 269.

<sup>154</sup> ICC RPE, Rule 63(4), see above note 3.

<sup>155</sup> See Donald Piragoff, “Evidence”, in Lee, 2001, pp. 349, 355, above note 16. See also Preparatory Commission for the International Criminal Court, “Proposal submitted by Australia”, 26 January 1999, PCNICC/1999/DP.1 (<http://www.legal-tools.org/doc/79ba83/>); Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, “Proposal by Costa Rica concerning the Rules of Procedure and Evidence”, 24 February 1999, PCNICC/1999/WGRPE/DP.3 (<http://www.legal-tools.org/doc/1cf608/>).

applied in connection with normative provisions on relevance or admissibility of evidence, in particular, Article 69(4). Should a single victim provide relevant, credible and probative evidence on sexual crimes, the accused person may be found guilty at the ICC because there is no need for corroboration.

ICC special protective measures for vulnerable victims such as women and children also have parallels in other areas of (international) law, which evidences the need for a special treatment of particularly vulnerable or traumatized witnesses when they intervene in criminal justice proceedings. Moreover, these developments are arguably manifestations of a sort of humanization of criminal proceedings at both international and national levels. For instance, Articles 23–24 of the European Union Directive 2012/29 on Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime have paid attention to the right to protection of victims who have specific protection needs, including child victims, during criminal proceedings.

In turn, the Inter-American Court of Human Rights has drawn attention to the right of sexual violence victims to be heard in criminal proceedings related to serious human rights violations, which may in turn constitute international crimes. International human rights jurisprudence is important because, *inter alia*, the ICC has to interpret and apply law in a consistent manner with international human rights under Article 21(3) of the ICC Statute. By considering the World Health Organization Guidelines for Medico-Legal Care for Victims of Sexual Violence and the UN Human Rights Commissioner Istanbul Protocol, the Inter-American Court of Human Rights has identified guidelines on sexual violence victims and witnesses, including: (i) the victim's statement should be given in a safe and comfortable environment to protect the victim's privacy and should be recorded to avoid repetition; (ii) the victim should be provided with medical, psychological, legal and advisory services; and (iii) a medical and psychological examination needs to be given by trained personnel of the sex chosen by the victim.<sup>156</sup>

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<sup>156</sup> Inter-American Court of Human Rights, *Fernández-Ortega et al. v. Mexico*, Judgment, 30 August 2010, Series C No. 215, paras. 193–194 (<http://www.legal-tools.org/doc/0732b7/>).

## 15.5. Conclusions

Despite some flaws, limitations and gaps, the law and practice of the ICC are overall consistent with the main objectives pursued by protective measures in general and special measures for victims and witnesses in particular as determined by scholars such as de Brouwer<sup>157</sup> and in some international instruments.<sup>158</sup> These objectives are detailed as follows. First, the minimization of serious risks to the security of victims and witnesses because they often live in volatile societies characterized by ongoing armed conflicts and perpetration of international crimes.<sup>159</sup> Second, prevention of serious incursions into the privacy and dignity of victims and witnesses, which is achieved *via* confidentiality measures and acquires particular relevance in sexual violence cases.<sup>160</sup> Third, reduction of trauma associated with giving testimony, namely, to prevent that victims suffer re-victimization or secondary victimization.<sup>161</sup> This illustrates how holistic manifestations of justice that include restorative and/or remedial elements may be integrated into criminal justice systems at the national or international levels, which are predominantly led by retributive and/or deterrent justice paradigms. Fourth, encourage victims and witnesses to testify because they would otherwise be reluctant to provide testimony at courts.<sup>162</sup> This also relates to what Philipp Ambach appropriately reminded at the Nuremberg Forum 2018: victims hold the right to provide information.<sup>163</sup> Indeed, without victims and witnesses, trials at the ICC would not even take place.<sup>164</sup> As remarked by Amanda Ghahremani at the Nuremberg Forum 2018 and also pointed out by Alexander Heinze in his review essay: international criminal justice and the ICC would not exist without victims and survivors.<sup>165</sup>

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<sup>157</sup> de Brouwer, 2005, pp. 231–235, see above note 136.

<sup>158</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, Article 6(d) (<http://www.legal-tools.org/doc/b3fde4/>); Council of Europe, “Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure”, 28 June 1985.

<sup>159</sup> De Brouwer, 2005, p. 232, see above note 136.

<sup>160</sup> See *ibid.*, pp. 231–234.

<sup>161</sup> *Ibid.*, pp. 231 and 235.

<sup>162</sup> *Ibid.*, pp. 232 and 235.

<sup>163</sup> See Heinze, 2018, p. 13, see above note 4.

<sup>164</sup> De Brouwer, 2005, p. 235, see above note 136.

<sup>165</sup> See Heinze, 2018, pp. 14, 26, see above note 4.

Therefore, the examined ICC's law and practice on protective and special measures have arguably benefited victims when intervening as witnesses and victim participants. The said ICC's law and practice, generally speaking, meet the general obligation of any national, hybrid or international criminal court to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Importantly, the ICC's law and practice have overall paid due attention to the need to respect other competing rights and interests such as the accused's rights and efficient proceedings when protective measures are ordered.

At a more general level, the ICC's law and practice on judicial protective measures in favour of victims and witnesses *vis-à-vis* external actors constitute a good example of how the ICC has transitioned from an ambitious project to a fully operational institution in the first 20 years. The ICC's law on protective measures, namely, the 'past' or 'origins' of the ICC, reflects the intentions of the drafters to design a permanent international criminal justice institution in which victims and witnesses are duly protected when taking part in the ICC's proceedings. The respective normative provisions built on the law and practice of previous international and hybrid criminal tribunals.

Due to the particularly dynamic nature and features of protective measures, the practice of any criminal court (national, hybrid or international) is especially decisive. Notwithstanding some (intrinsic) tensions with the rights of the accused and the flow of the proceedings, the ICC's practice on protective measures is arguably and in balance positive. The ICC should thus focus on continuously improving this practice to appropriately respond to current, emerging and future challenges. In this manner, not only victims and witnesses but also the ICC as an institution would be better off.



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## The Development of Witness Evidence Law at the International Criminal Court

Hilde Farthofer\*

### 16.1. Introduction

The procedural law of the International Criminal Court ('ICC' or 'Court') established in 1998 differs from national as well as international judicial systems. The Chamber noted that the provisions included in the Rome Statute of the ICC ('ICC Statute') could not be compared with the legal framework of the *ad hoc* or other international tribunals. The Statute of the ICC has its own regime, which is based on elements from the common as well as the civil law tradition and therefore has to develop its own approaches.<sup>1</sup>

There are only a few provisions on the handling of evidence in the Statute and the Rules of Procedure and Evidence ('RPE ICC').<sup>2</sup> Therefore, within the last 20 years, the Court had to develop its own approach regarding, *inter alia*, the collection and presentation of evidence. The duty to collect exonerating as well as incriminating evidence rests on the Prosecution but also the Defence has the right to assemble and present evidence and will be supported by the Registry and the Victims and Witnesses Unit. The application of the statutory rules on evidence needs to be done carefully

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>). For example, ICC, *Prosecutor v. Gbagbo et al.*, Trial Chamber I, Transcript, 4 February 2016, ICC-02/11-01/15-T-14-ENG, p. 2, lines 5–9 ('*Gbagbo et al.*, 4 February 2016') (<http://www.legal-tools.org/doc/9bfb6c/>).

<sup>2</sup> ICC, Rules of Procedure and Evidence, 9 September 2002 ('RPE ICC') (<http://www.legal-tools.org/doc/a6a02b/>).

due to its potential negative impact on the rights of the accused and the potential infringement of the principle of equality of arms. The Court has to balance between the right to present evidence and the right to expeditious trial. Therefore, on some occasions the Court may restrict the presentation of evidence to guarantee the uninterrupted flow of proceedings. The Chamber has to strike the right balance between the different rights and principles, in particular, the rights of the accused, the victims and the witnesses.

The different evidence can be divided into two main groups, the testimonial and the documentary evidence. Both groups are subdivided into different types, in particular regarding the admissibility of the individual evidentiary item. In the *Lubanga* decision, the Trial Chamber determined that “the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence ‘freely’”.<sup>3</sup> The free assessment of evidence of the Chamber is stipulated in Rule 63(2) RPE ICC. In the synopsis with the wording of Article 69(3) ICC Statute it becomes clear that the judges could request any item which could be used to provide relevant information. This formulation is ambiguous and, thus, leads to the inevitable conclusion that all items could be permissible without constraints. The term evidence includes everything that could be used to prove or disapprove the existence of an alleged fact and could help to establish the truth. The term has to be differentiated from the term information or material, which includes everything without the restriction that it is admissible as evidence at criminal proceedings.<sup>4</sup>

The following chapter is focused on testimonial evidence due to its essential role in international criminal proceedings. On the one hand, the witness can provide first-hand evidence, but on the other side, his or her testimony could be influenced, *inter alia*, by personal interests, bribery and threat of force. These highlights that the witness is a blind spot in criminal procedure due to his or her vulnerability. At the same time, this evidence is

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<sup>3</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para. 24 (*Lubanga*, 13 June 2008’) (<http://www.legal-tools.org/doc/2855e0/>).

<sup>4</sup> Kai Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, Oxford University Press, 2016, pp. 446 ff.

indispensable for the primary purpose of the Court, the establishment of the truth.

## 16.2. Testimonial Evidence

The content of Article 69(2) ICC Statute underlines the primacy of testimonial over documentary evidence. The Appeals Chamber determined in the sentence against Bemba that “[t]his sentence makes in-court personal testimony the rule, giving effect to the principle of orality”.<sup>5</sup> The *viva voce* testimony, which is the preferred evidence in international criminal trials, is an expression of the principle of orality, but at the same time, for several reasons, the drafters of the ICC Statute have decided to enshrine some exceptions in the legal framework of the Court. The Chamber can permit the introduction of prior recorded testimony, pursuant to Rule 68 RPE ICC, if the following requirements are fulfilled: the Prosecution, as well as the Defence, must have been able to question the witness during recording the testimony. The testimony may not be about the acts and conduct of the accused.<sup>6</sup> The death of the witness between its prior recorded statement and the scheduled date for its appearance before the Court is one reason why some exceptions are needed. It is at the discretion of the Chamber to “receive testimony of witnesses by means other than in-court testimony, as long as this does not violate” the legal framework of the Court.<sup>7</sup>

On this account, the representative of the Kenyan government at the Assembly of State Parties (‘ASP’) raised objections in the fourteenth session of the ASP regarding the application of the amended Rule 68 RPE ICC on situations and cases, which were pending at the ICC before the amendment entered into force.<sup>8</sup> Rule 68 RPE ICC was amended in November

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<sup>5</sup> ICC, *Prosecutor v. Bemba Gombo* (‘Bemba’), Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 76 (<http://www.legal-tools.org/doc/7b62af/>).

<sup>6</sup> Rule 68(2)(b) and (c) RPE ICC, see above note 2.

<sup>7</sup> ICC, *Prosecutor v. Katanga and Chui*, Trial Chamber II, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954, para. 4 (<http://www.legal-tools.org/doc/f0c39b/>).

<sup>8</sup> ICC-ASP, “Request by Kenya for the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled ‘Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly’”, Annex II, 27 October 2015, ICC-ASP/14/35.

2013 by the ASP, which restricted the application of the amended Rule 68 RPE ICC:

[A]mendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings.<sup>9</sup>

The amended Rule 68 RPE ICC was applied to the case of *Ruto and Sang*. The Office of the Prosecutor opened its *proprio motu* investigation into the situation of Kenya in 2010, the trial against Ruto and Sang started on 10 September 2013. Rule 68 provided in its former version the requirement of cross-examination of a witness if the Defence or the Prosecution wanted to introduce a written statement or recorded testimony. This prerequisite was deleted for enhancing the efficacy of proceedings. In May 2015, the Office of the Prosecutor requested the admission of prior recorded testimony of witnesses, comprising transcripts and written statements.<sup>10</sup> In 2015, the Trial Chamber decided that the application of the amended Rule 68 did not infringe Article 24(2) and Article 51(4) ICC Statute. The Court clarified that Article 24(2) ICC Statute cannot be applied to the amendments of Rule 68, because “if Article 24(2) of the Statute governed all amendments to the Rules, as argued by the Defence, then Article 51(4) would be rendered almost entirely redundant”.<sup>11</sup> The Appeals Chamber confirmed the decision of the Trial Chamber.<sup>12</sup>

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<sup>9</sup> ICC ASP, Amendments to the Rules of Procedure and Evidence, 27 November 2013, ICC-ASP/12/Res.7, para. 2 (<http://www.legal-tools.org/doc/c50839/>).

<sup>10</sup> ICC, *Prosecutor v. Ruto and Sang*, Office of the Prosecutor, Public redacted version of “Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses”, 29 April 2015, ICC-01/09-01/11-1866-Conf and Annexes, 21 May 2015, ICC-01/09-01/11-1866-Red (<http://www.legal-tools.org/doc/889086/>).

<sup>11</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr, para. 22 (<http://www.legal-tools.org/doc/d7bb01/>).

<sup>12</sup> ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, ICC-01/09-01/11-2024, paras. 30 ff. (<http://www.legal-tools.org/doc/5e0d03/>).

That reflects the close bonds between the testimonial and the documentary evidence. In general, the documentary evidence is provided through a witness, also through the accused when testifying.<sup>13</sup> Only in exceptional cases, after requesting the Chamber, it will be allowed to submit documentary evidence, as for example a written statement from a deceased witness, from the bar table without calling the author to testify.<sup>14</sup> There is no obligation for the Chamber to accept ‘bar table’ evidence, but a refusal should be limited to items which have to be rejected on compelling reasons, regarding its admissibility and relevance.<sup>15</sup> The permission of the direct submission by the counsel depends on the relevance, the probative value and the balance between the probative value of the item and its prejudicial effect. The approach has to be pursued on a case-by-case basis.<sup>16</sup> Any limitation of the principle of orality caused by evidence from the ‘bar table’, for example, by accepting a written statement from a deceased witness, could only be done by taking into account the rights of the accused.

### 16.2.1. Questioning a Witness

There are different forms of questioning a witness. According to Rule 66 RPE ICC, all witnesses have to undertake a solemn declaration before testifying in court. The witness has to swear that he or she will answer truthfully and completely all questions posed by the parties and the judges. There are only a few exceptions to this rule. The Chamber could decide to refrain from the oath-taking if the witness is, for example, under the age of 18 or is in a mental state that makes it impossible that he or she fully understands the content and consequences of the oath, under Rule 66(2) RPE ICC.

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<sup>13</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on the Defence request for admission of three items used during the testimony of the accused, 22 May 2018, ICC-01/04-02/06-2288 (<http://www.legal-tools.org/doc/0e7ba5/>).

<sup>14</sup> “‘Bar table’ evidence refers to evidence tendered by counsel from the bar, and not through the usual method of witnesses testifying from the witness box under oath or affirmation”: ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on the Prosecution’s Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, para. 1 (<http://www.legal-tools.org/doc/e1a55f/>).

<sup>15</sup> ICC, *Prosecutor v. Katanga and Chui*, Trial Chamber II, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 12 (<http://www.legal-tools.org/doc/7710b6/>).

<sup>16</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981, para. 33 (<http://www.legal-tools.org/doc/c692ec/>).

### 16.2.1.1. Common Law Oriented Questioning

The legal framework of the ICC is not merely based on common law but instead contains a mixture of adversarial and inquisitorial principles. The regulatory structures of the *ad hoc* Tribunals are more oriented to the adversarial system and, therefore, apply the common law procedural rules regarding testimonial evidence.

The Chamber noticed that none of the terms, for example, to pose leading questions, to conduct examination-in-chief or cross-examination, to declare a witness hostile, and to be a Prosecution or a Defence witness, are mentioned in the Statute or the RPE ICC.<sup>17</sup> “Witnesses are called in front of the Chamber in order to be questioned, potentially by all parties and also by the judges, on facts and with the precise obligation, under the threat of perjury, to tell the truth”.<sup>18</sup>

The Defence addressed this issue. It argued that the only way to challenge the credibility of the witness would be to pose leading questions during court proceedings. “A leading question is a question that suggests the answer to the person being interrogated that may be answered by a mere yes or no”.<sup>19</sup> Firstly, the Chamber opposed this view and decided that “[n]o leading questions whether by the calling or non-calling party will be permissible”.<sup>20</sup> The Chamber explained its decision with the fact that a leading question comprises the potential risk of influencing – directly or indirectly – the testimony of the witness. This would undermine the truth-finding process, the critical purpose of the trial.<sup>21</sup>

Some months later, the same Chamber constrained its oral decision and determined that “leading questions may be (and have been) allowed if deemed conducive to the determination of the truth”.<sup>22</sup> This view contra-

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<sup>17</sup> Even Rule 140(2) RPE ICC, see above note 2, merely mentions the right to question the witness by: (a) the calling party; (b) both parties on relevant matters of the testimony, the liability and the credibility of the witness; and (c) the Trial Chamber.

<sup>18</sup> *Gbagbo et al.*, 4 February 2016, p. 2, lines 14–16, see above note 1.

<sup>19</sup> The Presiding Judge of the Trial Chamber VI in the case against *Ntaganda* defined the term during the session on 29 January 2016: ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Transcript, 29. January 2016, ICC-01/04-02/06-T-59-Red-ENG, p. 29, lines 12–14 (<http://www.legal-tools.org/doc/bad72d/>).

<sup>20</sup> *Gbagbo et al.*, 4 February 2016, p. 3, lines 8–9, see above note 1.

<sup>21</sup> *Ibid.*, p. 3, lines 10–14.

<sup>22</sup> ICC, *Prosecutor v. Gbagbo et al.*, Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498, para. 16 (<http://www.legal-tools.org/doc/7c836b/>).

dicts the first approach taken by the judges. The Chamber in the *Ntaganda* case restricted the acceptance of leading questions to the following cases:

On preliminary matters necessary to provide background or context, as well as any other matter which is not contested or when the opposing party agrees to leading questions, or where such questions are otherwise deemed appropriate by the Chamber, the calling party may put information to a witness by way of leading questions. If a witness is not desirous of providing the expected evidence and has been declared hostile by the Chamber, the calling party may ask leading questions.<sup>23</sup>

A uniform interpretation of the law is crucial to preserve the integrity of the Court.<sup>24</sup> The Chamber should establish a particular order on these issues in the direction on the conduct of the proceedings in order to avoid ambiguities and to prevent any infringement of the rights of the accused and other participants of the trial.<sup>25</sup>

The term cross-examination is used on several occasions by the Chambers, but it does not automatically result in an absolute right to examine a witness called by the opponent party.<sup>26</sup> It is limited to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness. The cross-examination derives from the common law system and has to be distinguished from the right to confront a witness.<sup>27</sup> The legal frame-

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<sup>23</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 26 (<http://www.legal-tools.org/doc/03357c/>).

<sup>24</sup> *Inter alia*, Lorenzo Gradoni *et al.*, “General Framework of International Criminal Procedure”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 70, and Michael G. Karnavas, “The Serendipitous Nature of the ICC Trial Proceedings Risks the ICC credibility”, in Martin Böse *et al.*, (eds.), *Justice without Borders: Essays in Honour of Wolfgang Schomburg*, Brill, Leiden, Boston, 2018, pp. 202 ff.

<sup>25</sup> ICC, “Chambers Practice Manual”, 2019, para. 83 (‘Chambers Practice Manual’) (<http://www.legal-tools.org/doc/dh0zyq/>).

<sup>26</sup> For example, ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on Defence request for admission of documents used during the testimony of Witness P-0963, 16 June 2016, ICC-01/04-02/06-1400-Red, para. 6 (<http://www.legal-tools.org/doc/4460bd/>) and ICC, *Prosecutor v. Bemba*, Trial Chamber III, Defence Motion Regarding Prosecution Disclosure, 17 August 2012, ICC-01/05-01/08-2269-Red, para. 3 (<http://www.legal-tools.org/doc/cefd58/>).

<sup>27</sup> See, *inter alia*, Christoph Safferling, “The Structure of the Trial”, in *International Criminal Procedure*, Oxford University Press, 2012, pp. 452 ff. and Ambos, 2016, pp. 465 ff., see above note 4.

work of the *ad hoc* Tribunals, which are common law based, includes a different approach, *inter alia*, in Rule 85(B) RPE of the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Thus, examination-in-chief, cross examination and re-examination shall be allowed in each case.

The right to examine the witness is enshrined in various international documents, for example in Article 6(3)(d) of the European Convention on Human Rights and Article 14(3)(e) of the International Covenant on Civil and Political Rights.<sup>28</sup> The right to examine or to have examined a witness is part of the minimum guaranteed rights of an accused to a fair trial. Both regulations do not indicate how the examination has to be conducted.

According to the legal framework of the ICC, the questioning of witnesses is controlled by the judges who have the duty and the right to establish orders and modes on a case-by-case basis.<sup>29</sup> The Chamber emphasized, for example, that it has the discretion to recall a witness to request for clarification further information on an issue already presented in court. This right could also be exercised against the expressed will of both parties.<sup>30</sup>

Another common law based legal term, that is, the term hostile witness, was used by the Prosecution to support a request to the Chamber for issuing a subpoena against a witness. The Defence opposed the request and argued that the testimony of a potentially hostile witness has no value and therefore, the witness has only minimal evidential utility. The Chamber noted that even if a witness is hostile, in other words that the testimony will be of more significant benefit for the opponent than for the calling party, it does not exclude him or her from being essential to establish the truth.<sup>31</sup>

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<sup>28</sup> European Convention on Human Rights, 4 November 1950 (<http://www.legal-tools.org/doc/8267cb/>); International Covenant on Civil and Political Rights, 16 December 1966 (<http://www.legal-tools.org/doc/2838f3/>).

<sup>29</sup> ICC, Regulations of the Court, 26 May 2004, ICC-BD/01-05-16, Regulation 43 (<http://www.legal-tools.org/doc/8a1f87/>).

<sup>30</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on presentation of evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Statute, 23 January 2018, ICC-01/04-02/06-2191, paras. 11 ff. (<http://www.legal-tools.org/doc/c5b5e4/>).

<sup>31</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, paras. 186 ff. ('*Ruto and Sang*, 17 April 2014') (<http://www.legal-tools.org/doc/e28d64/>).

Likewise, the introduction of hearsay evidence was not only discussed by the Chambers of the ICC<sup>32</sup> but also by the Chambers of the *ad hoc* Tribunals.<sup>33</sup> The Chamber noticed that hearsay evidence should not be “ruled out *ab initio*” but rather should be assessed with caution.<sup>34</sup> “[T]he fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less”.<sup>35</sup> Therefore, the hearsay evidence is not excluded, but rather open to the free assessment of the Chamber, as enshrined in Rule 63(2) RPE ICC. The way how the witness can be examined differs in common and civil law. The same concerns emerge with the general handling of witnesses by the calling as well as by the opposing party.

### 16.2.1.2. Dealing with Witnesses

In particular, after mass atrocities are committed the potential information providers are faced with the risk to be subjected to acts of revenge.<sup>36</sup> The Prosecution, as well as the Defence, have to bear in mind the risks but also the potential influence the witness could be exposed to. The ICC established some guidelines to regulate the contact of both parties to the witnesses who had agreed to testify in court.<sup>37</sup>

After one party of the trial had announced that it has the intention to call a particular person as a witness, every contact to the potential witness by the opposing party is forbidden. This does not have to be expressed but could be otherwise apparent. If the Prosecution or the Defence want to contact and subsequently interview the witnesses of other parties or participants, they previously had to inform the calling party of its intention. Any

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<sup>32</sup> *Inter alia*, ICC, *Prosecutor v. Katanga and Chui*, Pre-Trial Chamber I, Submissions of the Defence of Mr Mathieu Ngudjolo in the Context of the Confirmation Hearing, 28 July 2008, ICC-01/04-01/07-699-tENG, paras. 24 ff. (<http://www.legal-tools.org/doc/ddf85c/>) and *Lubanga*, 13 June 2008, para. 22, see above note 3.

<sup>33</sup> *Inter alia*, ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, IT-95-14/1, para. 15 (<http://www.legal-tools.org/doc/3dd452/>).

<sup>34</sup> ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 238 (<http://www.legal-tools.org/doc/edb0cf/>).

<sup>35</sup> ICC, *Prosecutor v. Chui*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 7 April 2015, ICC-01/04-02/12-271-Corr, para. 226 (<http://www.legal-tools.org/doc/efb111/>).

<sup>36</sup> *Inter alia*, Open Society Justice Initiative, “Witness Interference in Cases before the International Criminal Court”, November 2016 (available on its web site).

<sup>37</sup> Chambers Practice Manual, Annex, pp. 36 ff., see above note 25.

contact is subjected to the consent of the witness. The calling party ought not to exercise influence on the witness to refuse or to agree to a meeting with the opposing party.<sup>38</sup>

An often-discussed issue, which also reflects the differences between the two legal systems – the adversarial and the inquisitorial, is the so-called witness proofing. This practice derives from common law.<sup>39</sup> The Trial Chamber in the *Lubanga* case addressed this issue and highlighted the differences between witness proofing and witness familiarization. The latter allows the Prosecution, as well as the Defence, to prepare their witnesses, that is, that the witness will be familiarized with the courtroom and the court proceedings. The Victims and Witnesses Unit (‘VWU’) should be responsible for the process of witness preparation with consultative support of the calling party.<sup>40</sup>

In contrast, witness proofing means the substantive preparation of the witness on the issues of its testimony prior to the trial. One argument brought forward against witness proofing is the risk that the witness loses its spontaneity, an important element of the testimony.<sup>41</sup> Other opponents of this practice indicate that the calling party could influence the witness and therefore, it would be an obstacle for the truth-seeking process of the Court. Moreover, this influence could lead to the commission of the offences enshrined in Article 70(1)(c) ICC Statute. The first alternative, the influence of a witness, is assessed very broadly by the Chamber and thus comprises all acts and omissions which could lead to false or incomplete testimony. The Trial Chamber supported this view. Article 70 ICC Statute does not explicitly prohibit the practice of witness proofing, but this cannot lead to the conclusion that it would be permissible under the legal framework of the Court.<sup>42</sup>

The Pre-Trial Chamber assessed that influencing a witness, in the sense of Article 70(1)(c) ICC Statute, “proscribes any conduct that may

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<sup>38</sup> *Ibid.*, Annex, paras. 26 ff.

<sup>39</sup> Gideon Boas *et al.*, *International Criminal Law Practitioner Library, Volume III: International Criminal Procedure*, Cambridge University Press, 2011, pp. 284 ff.

<sup>40</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, paras. 29 ff. (‘*Lubanga*, 30 November 2007’) (<http://www.legal-tools.org/doc/ac1329/>).

<sup>41</sup> *Ibid.*, para. 52 and Karnavas, 2018, p. 228, see above note 24.

<sup>42</sup> *Lubanga*, 30 November 2007, para. 36, see above note 40.

have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness”.<sup>43</sup> Furthermore, the offence can be committed “by instructing, correcting or scripting the answers to be given in court, or providing concrete instructions to the witness to dissemble when giving evidence, such as to act with indecision or show equivocation”.<sup>44</sup>

However, proponents of witness proofing are of the view that the judicial system of the ICC would include enough safeguards to prevent the influence of a witness, for example, through the cross-examination and the right to question of the presiding judge. Furthermore, it would enable fair and expeditious conduct of the witness at the trial. The Court should permit this practice in particular regarding a vulnerable witness.<sup>45</sup>

In the *Lubanga* trial, the Chamber excluded the application of witness proofing. Furthermore, the judges clearly expressed that the system of the ICC is not comparable to the legal framework of the *ad hoc* Tribunals. On the other side, the Chamber determined an exception to this rule. The limited preparation of a witness by the Prosecution or the Defence could be accepted, as long as it furthered the unobstructed and expeditious flow of proceedings. Hence, the witness can read its written statements to refresh their minds and can be confronted with questions, which are potentially asked by the calling but also by the opposing party.<sup>46</sup>

The Chamber explained that neither the Statute nor the RPE ICC would enshrine any article or rule which permits the implementation of witness proofing before the Court.<sup>47</sup> According to Article 64(3)(a) ICC Statute, the judges should adopt such procedural regulations, which are necessary to guarantee an expeditious and fair trial. This does not imply that the Court has to implement any rules which would allow the application of the practice of witness proofing.<sup>48</sup> Moreover, taking into account the

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<sup>43</sup> ICC, *Prosecutor v. Bemba et al.*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 30 (<http://www.legal-tools.org/doc/a44d44/>).

<sup>44</sup> ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Judgement pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, paras. 46 ff. (*Bemba et al.*, 19 October 2016) (<http://www.legal-tools.org/doc/fe0ce4/>).

<sup>45</sup> War Crimes Research Office, “Witness proofing at the International Criminal Court”, Washington College of Law, July 2009, pp. 32 ff. and 38 ff.

<sup>46</sup> *Lubanga*, 30 November 2007, para. 50, see above note 40.

<sup>47</sup> *Ibid.*, paras. 44 ff.

<sup>48</sup> Another view was taken by War Crimes Research Office, 2009, pp. 39 ff., see above note 45.

jurisdiction of the Court regarding the influence of a witness, the risk increases to be prosecuted, not only for the Prosecution or the Defence but also for the witness to be convicted for false testimony.

Furthermore, the Chamber made clear that the only competent organ to familiarize the witness with the in-court procedure and the duties and rights, as for example, to tell the truth or to request protection measures, will be the VWU.

From a systematic perspective, the attribution of the practice of witness familiarisation to the VWU is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor the Defence and that they should therefore not be considered as witnesses of either party, but as witnesses of the Court.<sup>49</sup>

This debate reflects the problem which is caused by the establishment of a mixed procedural system. The lawyers deriving from either the common or the civil law tradition are trained in their own legal system and, therefore, have difficulties to approach legal principles coming from other traditions. The Court has to be very cautious not to produce misunderstandings, which leads to an infringement of the rights of the participants of the trial or to be convicted, under Article 70 ICC Statute. The decision of the Court to hand over the issue of witness familiarization to the VWU is preferable,<sup>50</sup> in particular, seen in synopsis with the broad interpretation of the formulation influencing a witness by the Chamber. The testimonies of the various witnesses serve different purposes, why they are divided into different groups.

### **16.2.2. Different Types of Witnesses**

The four groups of witnesses are: experts, victims and ordinary witnesses, direct perpetrators, and Rule 82 RPE ICC witnesses. The latter are persons who provide confidential information protected under Article 54(3)(e) ICC Statute. Everyone, with exception of the expert witness, who has information on a specific event or the conduct and the role the accused has taken in the commission of the crime could be compelled as a witness to testify before the Court.

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<sup>49</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 26 (<http://www.legal-tools.org/doc/dd3a88/>).

<sup>50</sup> *Lubanga*, 30 November 2007, paras. 33 ff., see above note 40.

### 16.2.2.1. The Expert Witness

Experts have a particular role to play in the proceedings. They are persons “who, by virtue of some specialized knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute”.<sup>51</sup> The fields where an expert witness could be needed are unlimited. It ranges from the historical, social and political background of the region,<sup>52</sup> where the crimes were committed, to ballistic, genetic, forensic and psychiatric analysis.<sup>53</sup>

The opinion of the expert does not have to be based on their own experiences or first-hand knowledge.<sup>54</sup> It is not within the scope of an expert witness to provide legal opinions, but rather to assist the Court. The clarification of legal aspects falls in the exclusive competence of the judges. A proposed expert witness could be rejected if his or her written statement is based on legal interpretations and not on the expertise in a particular field, for example, the impact of the commission of crimes on a direct perpetrator, for instance on a child soldier.<sup>55</sup>

The Registry compiles a list of experts, according to Regulation 44(1) of the Regulations of the Court (‘Reg. ICC’), which is accessible to all organs of the Court, the Prosecution and the Defence. The expert could also be recruited from outside, but then the party has to provide the curriculum vitae and all publications of the proposed expert to the Court and the opposing party. The expert can be called jointly or separately by the Prosecution and the Defence. Both parties can challenge the evidence provided by the counter-expert.

The written statement of the expert must be disclosed to the opposing party within a reasonable time before testifying in court, thereby the Prose-

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<sup>51</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, 9 February 2016, ICC-01/04-02/06-1159, para. 7 (<http://www.legal-tools.org/doc/a9ab38/>) and ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, 7 August 2013, ICC-01/09-01/11-844, para. 11 (<http://www.legal-tools.org/doc/6196e6/>).

<sup>52</sup> For example, an expert on the social and political context of the conflict in Kenya, *ibid.*

<sup>53</sup> ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Transcript, 23 May 2018, ICC-02/04-01/15-T-177-ENG (<http://www.legal-tools.org/doc/73cb57/>); the expert witness testified on the mental health problems of child soldiers.

<sup>54</sup> *Ntaganda*, para. 9, see above note 51.

<sup>55</sup> *Ibid.*, paras. 21 ff.

cution or Defence has enough time for its preparation. The party can request the Court to extend this timeframe if the reasons for the delay are sufficiently and motivated, pursuant to Regulation 35 Reg. ICC. The Chamber will thus have to weigh the interest in having the additional information against the need for the opposing party to usefully prepare its response to it.<sup>56</sup>

#### **16.2.2.2. Rule 82 (Rules of Procedure and Evidence) Witness**

Rule 82(3) RPE ICC, together with Article 54(3)(e) ICC Statute, stipulates a different type of witness who is privileged concerning his or her testimony. Only after the authorization of the information provider, the witness is allowed to testify before court and, with the consent of the supplier, could present evidence which falls under Article 54(3)(e) ICC Statute. It becomes clear that this kind of witness cannot be compelled to answer questions of the parties, not even of the calling party or the judges. Even if the access to the witness and the documentary evidence is restricted, the Chamber has the right to evaluate this evidence freely, pursuant to Rule 63(2) RPE ICC, that is, to determine its relevance and admissibility without reservations.<sup>57</sup>

The evidence of Rule 82 RPE ICC could hardly be challenged by the Defence. The witness gives no information on the assessment or the origin of the provided evidence. The aim of Article 54(3) ICC Statute is to facilitate the co-operation between the ICC and intergovernmental organizations or States in order to obtain confidential information which could affect the information provider if published, but could also be used to push further investigations. The Chamber determined that it has to bear in mind the possible infringement of the right to a fair trial when assessing the probative value of this kind of evidence.<sup>58</sup>

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<sup>56</sup> ICC, *Prosecutor v. Katanga and Chui*, Trial Chamber II, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401 1412 and 1456), 7 October 2009, ICC-01/04-01/07-1515, para. 26 (<http://www.legal-tools.org/doc/b9ed5f/>) and ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on in-court protective measures for Witness D-0243, 1 December 2017, ICC-01/04-02/06-2136, paras. 7–8 (<http://www.legal-tools.org/doc/59c360/>).

<sup>57</sup> ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on Motion by the Defence to exclude anonymous hearsay testimony of the Prosecution witness, 9 November 2006, ICC-01/04-01/06-693-Anx1 (<http://www.legal-tools.org/doc/e4597e/>).

<sup>58</sup> *Ibid.*

### 16.2.2.3. The Victim and Ordinary Witness

If a victim has to testify in court, there are several methods to protect him or her against re-traumatization and retaliating acts. Article 69(2) ICC Statute establishes an exception of the principle of *viva voce* testimony. A witness can be allowed to testify utilizing audio and video link technology, according to Rule 67 RPE ICC. The use of this technology is not limited to the cases where a witness refuses to testify directly before the Court or is unable to do so, but rather must be approached on a case-by-case basis. The key factors leading the decision are the physical and psychological well-being and dignity of the witness.<sup>59</sup> The discretion of the Chamber on this issue is merely limited if the video-linked testimony would impair the rights of the accused to a fair process. Therefore, there is no exceptional justification needed to impose this measure, but rather the personal situation of the witness has to be respected by the judges.<sup>60</sup>

In particular, the video-linked testimony shall be established in cases of victims of sexual violence. The questioning of a victim of sexual violence will be guided by the Court. The Chamber shall not permit the introduction of evidence on prior or subsequent sexual conduct of the victim under Rule 71 RPE ICC. Furthermore, Rule 72(d) RPE ICC determines that such evidence could not be used to put, *inter alia*, the credibility of the victim in doubt. Before questioning the victim on the issue of consent to a sexual act, the opposing party has to notify the judges. However, this does not mean that the testimony of a victim of sexual violence could not be challenged concerning, *inter alia*, the place and date where the alleged rape shall have taken place.<sup>61</sup>

### 16.2.2.4. Self-Incrimination

The last group of specific witnesses are persons, in particular the accused, who are at risk of self-incrimination or to incriminate family members

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<sup>59</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the Defence request for a witness to give evidence via video-link, 9 February 2010, ICC-01/04-01/06-2285-Red, paras. 15 ff. (<http://www.legal-tools.org/doc/fd3f00/>).

<sup>60</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Public redacted version of ‘Decision on Defence’s request to hear the testimony of Witnesses D-0057, D-0201 and D-0211 via video-link’, 17 August 2017, ICC-01/04-02/06-2011-Red, para. 5 (<http://www.legal-tools.org/doc/294e66/>).

<sup>61</sup> ICC, *Prosecutor v. Ntaganda*, Transcript, 30 August 2018, ICC-01/04-02/06-T-264-Red2-ENG, pp. 35 ff., lines 24 ff. (<http://www.legal-tools.org/doc/96296d/>).

when testifying before the Court. Under Rule 75(1) RPE ICC, the term family comprises the husband, the spouse, the parents and children, but not other family members of the person concerned. The Chamber has to assess if the witness refuses to answer a question because they do not want to incriminate a family member or because he or she wants to give selective answers, according to Rule 75(2) RPE ICC.

The accused has the right to remain silent and, thus, cannot be compelled to testify.<sup>62</sup> Regarding the duty to undertake a solemn declaration, the accused has the right to make an unsworn or written statement, pursuant to Article 67(1)(h) ICC Statute: “However, once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating”.<sup>63</sup>

The right to make an unsworn statement is not unlimited. In a ‘no case to answer’ submission, the Defence requested the right of the accused to make an unsworn statement. Firstly, the counsel proposed that he will make a statement on the subject matter but decided later on that he will only make a closing statement.<sup>64</sup> The Prosecution strongly opposed this request, pointing out that the decision on a ‘no case to answer’ submission, which is a purely procedural issue, should be based on the evidence comprised in the record of the case. Therefore, the closing argument of the accused is irrelevant for the decision finding process of the judges.<sup>65</sup>

The ‘no case to answer’ proceeding derives from the common law tradition and was used by the *ad hoc* Tribunals to shorten proceedings after the closure of the prosecution case due to the lack of proof that the defendant has committed the alleged crime.<sup>66</sup> Usually a ‘no case to answer’ deci-

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<sup>62</sup> RPE ICC, Article 67(1)(g), see above note 2.

<sup>63</sup> ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, 13 September 2011, ICC-01/04-01/07-3153, para. 7 (*Katanga and Chui*, 13 September 2011’) (<http://www.legal-tools.org/doc/5e1944/>).

<sup>64</sup> ICC, *Prosecutor v. Gbagbo et al.*, Notice of Charles Blé Goudé’s intention to exercise his right to make an oral unsworn statement pursuant to article 67(1)(h) of the Rome Statute, 19 November 2018, ICC-02/11-01/15-1223 (<http://www.legal-tools.org/doc/7a5fa3/>).

<sup>65</sup> ICC, *Prosecutor v. Gbagbo et al.*, Prosecution’s Response to “Notice of Charles Blé Goudé to exercise his right to make an oral unsworn statement pursuant to article 67(1)(h) of the Rome Statute”, 20 November 2018, ICC-02/11-01/15-1224, paras. 5 ff. (<http://www.legal-tools.org/doc/a81b6f/>).

<sup>66</sup> Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 4th. ed., Cambridge University Press, 2019, p. 438, and Vladimir Tochilovsky, “The Nature and Evolution of the Rules of Procedure and Evidence”, in Karim A. A. Khan *et al.*, *Principles of*

sion of the Court results in the acquittal of the accused. In the case of *Ruto and Sang* the Chamber decided otherwise and “declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses”.<sup>67</sup>

If a ‘no case to answer’ decision will be taken, the trial ends after the Prosecution presentation of evidence if the no case to answer motion is not taken by the Defence on an earlier stage of the proceeding. This leads to the problem that the accused is deprived of his or her right to make a statement in his or her defence. According to Article 67(1) ICC Statute, the accused has the right to express himself in the determination of any charge, but not at each stage of proceedings. The regulation guarantees the accused to have the possibility to be heard before the Court in his or her defence. According to the majority of the Chamber in the *Gbagbo and Blé* case, a ‘no case to answer’ proceeding will be requested, precisely because there is nothing to defend. A statement of the accused at this stage of proceeding would not change the outcome of the decision and thus, the Chamber rejected the motion of the Defence.<sup>68</sup> The Presiding Judge dissented from the majority, arguing that “addressing his or her own Judge is a fundamental, inalienable right of each accused”.<sup>69</sup>

The Chamber has the right to determine the appropriate moment of a statement by the accused but not whether such declaration is allowed or not.<sup>70</sup> The judges have to balance the different rights of the accused, that is, on the one hand, the right to a fair and expeditious trial and, on the other hand, the right to be heard and to defend himself or herself in person. In particular, the judges have to take into account the time lapse, the accused is held in custody.

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*Evidence in International Criminal Justice*, Oxford University Press, 2010, pp. 178 ff. and ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), 3 June 2014, ICC-01/09-01/11-1334, para. 11 (<http://www.legal-tools.org/doc/128ce5/>).

<sup>67</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, para. 464 (<http://www.legal-tools.org/doc/6baecd/>).

<sup>68</sup> ICC, *Prosecutor v. Gbagbo et al.*, Transcript, 22 November 2018, ICC-02/11-01/15-T-230-ENG, p. 20, lines 20 ff. (<http://www.legal-tools.org/doc/610762/>).

<sup>69</sup> *Ibid.*, p. 21, lines 6 ff.

<sup>70</sup> ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on unsworn statement by the accused pursuant to Article 67(1)(h) of the Rome Statute, 1 November 2013, ICC-01/05-01/08-2860, para. 7 (<http://www.legal-tools.org/doc/2c293f/>).

The witness has to be informed of the right to silence in case of self-incrimination prior to the first questioning, even if the investigation is carried out by a State.<sup>71</sup> As soon as the Defence, the accused or the witness recognize that there is a potential risk of self-incrimination, the Prosecutor or the Court has to be informed. The latter has to decide on the implementation of measures listed in Rule 74(7) RPE ICC. The measures encompass *inter alia* the *in-camera* hearing of the witness and the order not to disclose the identity of the witness.

Another provided option is the conclusion of an agreement between the Court and the witness, according to Article 93(2) ICC Statute and Rule 74 RPE ICC. The assurance guarantees the witness that he or she will not be prosecuted or subjected to any restrictions for acts or omissions which are part of the testimony. The purpose behind this regulation is to facilitate the appearance of witnesses who otherwise would not testify before the Court.

The accused cannot benefit from these regulations due to his or her particular role in the trial: “The testimony of the accused may thus be used as evidence against them in the present case”.<sup>72</sup> However, the Chamber noted that in other trials before the ICC the principle of *ne bis in idem*, under Article 20 ICC Statute, would prevent that the testifying accused will be subjected to a new trial.<sup>73</sup> Furthermore, the Court has to provide the witness with legal assistance, according to Rule 74(10) RPE ICC. The Chamber determined in the case of child soldiers who faced the risk to be prosecuted when returning to their home country that the:

only way that the court can give a truly effective assurance to any of the witnesses who are to come that they will not be prosecuted for previous crimes on account of his or her testimony, is to implement Rule 74, subrule 2 with all of the attendant difficulties that would follow over the lack of a public trial.<sup>74</sup>

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<sup>71</sup> ICC Statute, Article 93, see above note 1, together with Rules 190 and 74 RPE ICC, see above note 2.

<sup>72</sup> *Katanga and Chui*, 13 September 2011, para. 8, see above note 63.

<sup>73</sup> *Ibid.*, para. 12.

<sup>74</sup> ICC, *Prosecutor v. Lubanga*, Transcript, 30 January 2009, ICC-01/04-01/06-T-113-Red-ENG, p. 9, lines 11–16 (<http://www.legal-tools.org/doc/17a7be/>).

### 16.3. The Duty of the Witness

If the witness does not want to appear before the Court, he or she can be summoned to testify. The Chamber noted that if the Court would not have this power, the witness is “wholly free to refuse to come to court on the appointed day and give his testimony”.<sup>75</sup> Referring to the Preamble and Article 4(1) ICC Statute, the Chamber clearly pointed out that to exercise its function and to fulfil its purpose – that is, to put an end to impunity – it is a crucial point that the issuing of subpoena of a witness who refuses to be an attendant at the Court must be within the power of the Chamber.<sup>76</sup>

The order of the Court shall be implemented through the co-operation with States. The State has the general obligation to impose adequate measures against the witness to guarantee its attendance at the Court. All national procedural law has regulations which may be applied to compel a witness to attend a trial and to testify before the federal court. This law should also be used to implement summons of a Chamber of the ICC.<sup>77</sup>

At the Court, the witness has to testify truthfully and completely. After a warning, the Court can impose a fine if the witness refused to answer all or specific questions. The disobedience of a direction of the Court has to be committed deliberately.<sup>78</sup>

The offences against the administration of justice, including false testimony and presenting false or forged evidence are enshrined in Article 70 ICC Statute. False testimony is determined as withholding true information to give an incomplete and partly untrue statement or the affirmation of false facts.<sup>79</sup> Article 70(1)(a) ICC Statute does not encompass inconsistent testimony, for example, regarding matters concerning age. Such inconsistencies

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<sup>75</sup> *Ruto and Sang*, 17 April 2014, para. 61, see above note 31.

<sup>76</sup> *Ibid.*, para. 94.

<sup>77</sup> *Ibid.*, paras. 102 ff.

<sup>78</sup> ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, 8 October 2010, ICC-01/04-01/06-2582, para. 46 (‘*Lubanga*, 8 October 2010’) (<http://www.legal-tools.org/doc/8f3b61/>).

<sup>79</sup> *Bemba et al.*, 19 October 2016, para. 24, see above note 44.

affect the credibility of the witness but do not meet the requirements of an offence against the administration of justice.<sup>80</sup>

#### **16.4. The Rights of the Witness**

Apart from the duties, the witness has rights that must be respected by the Court and by the participants of a trial. The communication between the witness and, for example, a priest is protected.<sup>81</sup>

##### **16.4.1. Privileges**

All witnesses must testify, if he or she does not fall under the exceptions stipulated in Article 69(5) ICC Statute and Rule 73 RPE ICC. In particular, professional relationships to the accused but also to the victims and to the witnesses are privileged. These privileges are mainly based on international human rights law, for example, the right to privacy according to Article 12 of the Universal Declaration of Human Rights. Confidentiality can be lifted by the consent of the witness.

###### **16.4.1.1. Counsel-Client Relationship**

The client-counsel relationship is of particular importance for the development of the evidence law because any infringement into this relationship interferes with the right of the accused to a fair trial, which includes the right to prepare his or her defence. There were attempts to interfere in the right of confidentiality in the course of proceedings before the *ad hoc* Tribunals<sup>82</sup> and also before the ICC in the case of *Bemba et al.*<sup>83</sup>

In particular, the lawyer-client relationship is explicitly protected pursuant to Rule 73(1) RPE ICC. However, the Appeals Chamber:

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<sup>80</sup> ICC, *Prosecutor v. Katanga and Chui*, Trial Chamber II, Transcript, 22 September 2010, ICC-01/04-01/07-T-190-Red-ENG, p. 5, lines 1–16 (<http://www.legal-tools.org/doc/d745c0/>).

<sup>81</sup> United Nations Office of the High Commissioner, “Manual on Human Monitoring, Chapter 14: Protection of Victims, Witnesses and Other Cooperating Persons”, 2011.

<sup>82</sup> For example, ICTY, *Prosecutor v. Prlić*, Trial Chamber III, Order Clarifying the Relationship between Counsel and an Accused Testifying within the Meaning of Rules 85(C) of the Rules, 11 June 2009, IT-04-74-T D6-1152703 BIS (<http://www.legal-tools.org/doc/d99d80/>).

<sup>83</sup> ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Motion on the inadmissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence, 10 August 2015, ICC-01/05-01/13-1140 (<http://www.legal-tools.org/doc/4f03ae/>).

is of the view that it is the definition of ‘privilege’, as provided for in rule 73(1) of the Rules itself, that excludes therefrom communications made in furtherance of criminal activities, rather than the application of an ‘exception’ to a presumption of privilege attached to all lawyer-client communications.<sup>84</sup>

The Prosecution requested the prohibition of any contact between the Defence lawyer and the accused until he or she has testified in court. The Chamber noted that in principle, the accused should be subjected to all rules applicable to a witness. However, the witness preparation protocol cannot be used concerning a testifying accused because of its particular role in the proceeding. The communication between the defendant and the Defence counsel is privileged and should not be infringed.<sup>85</sup>

Rule 73(2)(b) RPE ICC stipulates that the confidentiality of the communication between the lawyer and the defendant is essential due to the nature of the relationship. The extent of the term lawyer is not undisputed. There should be no doubt that the lawyer and the staff working under his or her direct control are encompassed. However, the Chamber in the *Bemba et al.* case determined that the protection includes the counsel, the co-counsel and the assistants to counsel, according to Regulation 68 Reg. ICC, but refused the extension of the term to other persons who assist the counsel. The judges explicitly determined that “it does not entitle every person working in the defence team to privileged communication with the accused”.<sup>86</sup> Therefore, for example, the investigators of the Defence are not enclosed.

Any infringement of the communication between a lawyer and his or her client should be well balanced. The principle of equality of arms could easily be violated as well as the rights of the victims and witnesses if the interference within this communication would merely be granted for the

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<sup>84</sup> ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, para. 434 (<http://www.legal-tools.org/doc/56cfc0/>).

<sup>85</sup> ICC, *Prosecutor v. Ntaganda*, Decision on further matters related to the testimony of Mr Ntaganda, 8 June 2017, ICC-01/04-02/06-1945, para. 14 (<http://www.legal-tools.org/doc/9b2378/>).

<sup>86</sup> ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on “Defence Motion on Privileged Communications”, 3 June 2014, ICC-01/05-01/08-3080, paras. 19 and 21 (<http://www.legal-tools.org/doc/44855d/>).

commission of an offence, for example, according to Article 70 ICC Statute. The principle of equality of arms guarantees that neither party of the trial is brought into a disadvantageous position.<sup>87</sup> Any lifting of the privilege should be proportionated, in particular, because it comprises not only the relationship between counsel and accused but also between victims and their legal representatives and witnesses and their legal advisors.

#### **16.4.1.2. Physician-Patient Relationship**

There are some further professional relationships, which have to be kept confidential and the resulting communication is not open to the free assessment of the Court. The determination whether such a protected communication exists should be assessed by the Chamber concerning the prerequisites enshrined in Rule 73 RPE ICC.

The threshold established will be reached if the communication is based on the confidentiality of the relationship and both parties rely on the privacy and non-disclosure of its content. The confidentiality of the relation must be intrinsic. Finally, the Chamber has to balance the privilege with the primary purpose of a trial, that is, to establish the truth.

Rule 73(3) RPE ICC comprises the physician-patient relationship, which should be regarded as privileged until it will be proven otherwise. This relationship is particularly important because it is based on the innermost core of privacy. If this right is infringed, it could result in a limited health care because of lack of confidence by the patient. Therefore, the threshold to violate the personal rights of the victims and witnesses, as well as the accused, should be imposed on a very high level.<sup>88</sup> Thus, it should only be permitted in exceptional cases where it is proven that the communication between a patient and a medical practitioner is used to commit or conceal a crime or the patient had consented to the disclosure. The term medical practitioner should be interpreted in a broad sense. Hence, the privilege cannot be circumvented easily because “[w]ithout this relationship, the patient may be deterred from revealing certain information, which could be detrimental to his or her health, or the health of those around him

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<sup>87</sup> Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, Intersentia, 2012.

<sup>88</sup> See for example, ICC, *Prosecutor v. Lubanga*, Registrar, Victims and Witnesses Unit report on confidentiality of medical records and consent to disclose medical records, 15 October 2009, ICC-01/04-01/06-2166 (<http://www.legal-tools.org/doc/5cb1e5/>).

or her and, consequently, may violate an individual's right to the highest attainable standard of health.”<sup>89</sup>

#### 16.4.1.3. Religious Clergy

A particular relationship is based on religion, that is, the communication between a person and a member of the religious clergy. According to Rule 73(3), it is protected against disclosure. In particular, this right will be granted to statements made by the person concern in the context of a sacred confession. This right should only be limited in exceptional cases because of the potential infringement of the right to privacy and the freedom of religion. Any discrimination of a religious movement made by the judges could easily damage the integrity of the Court.<sup>90</sup> The ICC should not only protect the trust relationship of registered religious communities but also of religious movements. In the future, the Chamber will be exposed to this problem due to the increase of religious extremism and religious-based terrorism.

#### 16.4.1.4. United Nations Officials

The privileges of this group of witnesses derive neither from the Statute nor the Rules of Procedure and Evidence but rather from the Convention on the Privileges and Immunities of the United Nations<sup>91</sup> ('Convention') and the Relationship Agreement between the United Nations and the International Criminal Court ('Agreement').<sup>92</sup>

According to Article V, Section 20 Convention, the privilege could only be perpetuated if it is necessary *inter alia* to protect security issues of the United Nations ('UN') but not on mere personal interests. An official of the UN can neither be contacted directly nor interviewed without the permission of the UN. For this reason, it is a prerequisite that the UN waives the obligation of confidentiality of the person concerned, according to Arti-

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<sup>89</sup> *Ibid.*, para. 3.

<sup>90</sup> Karnavas, 2018, pp. 202 ff., see above note 24.

<sup>91</sup> Convention on the Privileges and Immunities of the United Nations, 13 February 1946 (<http://www.legal-tools.org/doc/f68109/>).

<sup>92</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP-3-Res1, 4 October 2004 (<http://www.legal-tools.org/doc/9432c6/>).

cle 16(1) Agreement. The consent of the UN official for testifying in Court is not required.<sup>93</sup>

Pursuant to Article 18(4) Agreement, the protective measures should be applied if there is a risk for the UN officials and their families, originated from the contact to the International Criminal Court. The measures encompass, *inter alia*, the interview by video-link or out of the region or State where the alleged crimes were committed.<sup>94</sup>

In the *Lubanga* case, it became apparent that this privilege in conjunction with the entering into the commitment of a non-disclosure agreement, under Article 54(3)(e) ICC Statute, should be assessed very carefully. The information was not only incriminatory but also exonerating. The Prosecution refrained from the disclosure to the Defence, referring to Article 54(3)(e) ICC Statute. The Chamber emphasized that:

[t]he prosecution has incorrectly used Article 54(3)(e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence.<sup>95</sup>

Trial Chamber I decided to stay proceedings because of misuse of proceeding by the Prosecution which has not disclosed exonerating evidence to the Defence.<sup>96</sup>

#### 16.4.2. Witness Protection

The right of the accused to examine the witness, enshrined in Article 67(1)(e) ICC Statute, is limited by the right of the witness to be protected against retaliating measures due to his or her testimony before the Court. Article 68(1) ICC Statute requires the Court to establish standards to protect the safety, physical and psychological well-being, dignity, and privacy

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<sup>93</sup> UN, “Best Practices Manual for United Nations – International Criminal Court Cooperation”, 26 September 2016, p. 21.

<sup>94</sup> *Ibid.*

<sup>95</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 92 (<http://www.legal-tools.org/doc/e6a054/>).

<sup>96</sup> Lars Büngener, “Disclosure of Evidence”, in Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 367.

of witnesses. The Chamber determined that all persons who are known to have contacts with the ICC, even if it is a mere act of technical assistance, face a certain degree of risk.<sup>97</sup>

The different protective measures include the option to erase all information which could lead to the identification of the witness through public court documents. Another step could be the presentation of a witness through a pseudonym, according to Rule 87(3)(d) RPE ICC. The advantage of this option is the significant reduction of the risk of an unwanted release of information.

Both options can easily infringe the right of the accused to a fair trial. Thus, the party requesting protective measures has to show that “non-disclosure should still be warranted by the existence of an objectively justifiable risk to the safety of the person concerned”.<sup>98</sup> The request must not be based on the mere wish of the Prosecution to hamper the Defence.<sup>99</sup> The Appeal Chamber noticed that “[t]he use of the word “necessary” emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary”.<sup>100</sup>

Another protective measure is the non-disclosure of information which could lead to the identification of a witness. According to Article 68(5) ICC Statute and Rule 87(3) RPE ICC, the Chamber might conduct an *in-camera* session to determine if a non-disclosure order should be issued. However, the Chamber can suspend its decision and lift the protection of a witness. “There is no exception to the general principle that the Prosecutor

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<sup>97</sup> ICC, *Prosecutor v. Katanga and Chui*, Decision on the Protection of the Neutral and Impartial Status of Information Providers, 5 May 2010, ICC-01/04-01/07-2055-Red, para. 22 (<http://www.legal-tools.org/doc/e3cd8e/>).

<sup>98</sup> ICC, *Prosecutor v. Ongwen*, Decision on Prosecution Request under Paragraph 9 of Decision 1207, 20 April 2018, ICC-02/04-01/15-1234, para. 7 (<http://www.legal-tools.org/doc/d52036/>).

<sup>99</sup> ICC, *Prosecutor v. Al Hassan*, Public redacted version of the “Defence response to the Prosecution’s request for authorisation to withhold the identity of Witness MLI-OTP-P-0608 upon whose evidence the Prosecution will rely at the confirmation of charges hearing”, 11 December 2018, ICC-01/12-01/18-187-Red, para. 14 (<http://www.legal-tools.org/doc/34a0d4/>).

<sup>100</sup> ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 37 (<http://www.legal-tools.org/doc/7813d4/>).

(or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection”.<sup>101</sup> The refusal to comply with the direction of the Court could be punished as misconduct of the Court, according to Article 71 ICC Statute.

### 16.5. Conclusion

The legal framework of the ICC is neither affiliated to the common nor to the civil law traditions and, therefore, could be seen as a composition of elements of both systems. For this reason, dealing with procedural issues can be very challenging for the judges. Common to both systems is only the primacy of testimonial evidence due to the principle of orality.

On several occasions, in particular regarding the presentation and collection of testimonial evidence, the Chamber clarified that the legal framework of the Court could not be compared to the *ad hoc* Tribunals. Moreover, there are significant differences between them, and therefore, the Court is not bound by the decisions taken by the *ad hoc* Tribunals but instead has to develop its own approaches.<sup>102</sup> The conclusion can be drawn that the decisions of the Court are based to a large extent on the principle of orality.

The most challenging task the ICC is faced with in the future regarding testimonial evidence will be to create a uniform jurisdiction. The approaches taken by the different Chambers reflects this problem. A Chamber, which is composed of a majority of judges emanating from common law countries, will adopt more procedural practices coming from the common law tradition and *vice versa*. It is of great importance for the integrity of the Court to find a common path, in particular, to avoid infringements of the rights of the accused as well as other participants of the Court.

Over 20 years after the establishment of the Court, the first decisions on testimonial evidence reveal that the Court will go its own way and will not apply the jurisdiction of the *ad hoc* Tribunals without determining if it fits into the legal framework of the Court. However, there are still some issues regarding witness evidence that must be addressed and discussed as, for example, the handling of communications between the victims, witnesses and the accused with the religious clergy.

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<sup>101</sup> *Lubanga*, 8 October 2010, para. 50, see above note 78.

<sup>102</sup> For example, *Lubanga*, 30 November 2007, paras. 44 ff., see above note 40.

**SECTION D:**  
**DEFENCE ISSUES:**  
**PROCEDURAL AND INSTITUTIONAL PERSPECTIVES**



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## Length of Proceedings at the International Criminal Court: Context, Latest Developments and Proposed Steps to Address the Issue

Benjamin Gumpert and Yulia Nuzban\*

### 17.1. Introduction

Why do proceedings at the International Criminal Court ('ICC') take so long? The reasons are many. The subject matter of ICC investigations and the resulting trials is complex, with alleged crimes often taking place years ago in countries far distant from The Hague. The crimes under ICC jurisdiction will necessarily be part of a broader conflict or attack upon a civilian population. There will often be political sensitivities affecting the co-operation at the national level that is necessary to carry out such investigations.

Once ICC investigators and prosecutors believe they have built a case, it is subject to judicial scrutiny at the arrest warrant stage, and then again at the confirmation stage. Following a suspect's arrest and the appointment of their legal advisers, sufficient time has to be allowed for them to become familiar with a case, which is likely to be extremely voluminous and complex. Most legal arguments are made in writing, with considerable elapse of time between the submissions of parties and participants and the eventual ruling. Such rulings are either appealable as of right, or subject to

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applications for leave to interlocutory appeal.<sup>1</sup> Documents generated by or to be used in the proceedings are likely to have to be translated into languages that can be understood by the accused, Prosecution, Defence and Chambers. At trial, witnesses and victims often have to be brought thousands of miles to testify at the seat of the ICC in The Hague. Proceedings all have to be interpreted, usually between three, sometimes more, languages.<sup>2</sup>

This chapter will explore these and other variables that affect the duration of proceedings at the ICC and will give an overview of the latest internal developments aimed at tackling the problem. Finally, it will suggest additional practical steps to address the issue. But first, it will look into international human rights standards for the completion of criminal proceedings within a reasonable time. In particular, it will examine the four criteria developed in the jurisprudence of the European Court of Human Rights ('ECtHR') for assessing if the length of domestic criminal proceedings is reasonable, and consider their relevance to the ICC proceedings.

While an interesting topic, the length of preliminary examination of situations and reparation proceedings falls outside the scope of this review. Instead, it is limited to criminal proceedings proper, which are understood to cover the period from the initiation of an investigation, either *proprio motu* or following a judicial authorization under Articles 15(4) and 53(1) of the Rome Statute, to the conclusion of trial, sentencing or appeal under Articles 74, 76, 81 and 84.

## **17.2. Criteria for Determining if the Length of Proceedings Is Reasonable**

This section looks into international human rights standards for the completion of criminal proceedings within a reasonable time in light of the fundamental significance of the rights of the accused persons to the criminal process at the ICC.

International human rights law requires that criminal proceedings be conducted in a fair and expeditious manner. This requirement is enshrined in Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Po-

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, Articles 18(4) (admissibility), 19(6) (jurisdiction and admissibility), 56(3)(b) (unique investigative opportunity), 81 (verdict and sentence), 82 (interlocutory decisions) ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>2</sup> Articles 50(1)-(3), 67(1)(a), 67(1)(f) of the Rome Statute.

litical Rights ('ICCPR'). Pursuant to Article 9(3) of the ICCPR, "Anyone arrested or detained on a criminal charge shall be [...] entitled to trial within a reasonable time or to release".<sup>3</sup> Article 14(3)(c) of the ICCPR reads, "In the determination of any criminal charge against him, everyone shall be entitled to [...] be tried without undue delay".<sup>4</sup> Likewise, Article 6(1) of the European Convention on Human Rights ('ECHR') requires that, "In the determination of [...] any criminal charge against him, everyone is entitled to a [...] hearing within a reasonable time".<sup>5</sup> The right to a trial within a reasonable time is also guaranteed in near identical form in other human rights treaties.

The ICC is not party to any international human rights instruments. As an independent international organization outside domestic jurisdictions and external judicial oversight,<sup>6</sup> its activities are regulated by its own unique legal instruments, first and foremost the Rome Statute. Articles 64(2) and 67(1)(c) of the Statute require that trials be conducted in a "fair and expeditious manner" and "without undue delay". Given that Article 21(3) specifically requires that the Statute's provisions be interpreted in light of "internationally recognized human rights", which would encompass the ICCPR and the ECHR, these provisions must be understood as requiring trials at the ICC to take place within a reasonable time.

Perhaps the most instructive jurisprudence in this respect emanates from the ECtHR, which has dealt with the issue of delay, in both civil and criminal proceedings, extensively. The ECtHR has held that the right to a trial within a reasonable time applies to the entirety of the proceedings, including any appeal.<sup>7</sup> The starting point for determining a 'reasonable time'

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<sup>3</sup> International Covenant on Civil and Political Rights, 16 December 1966, Article 9(3) (<http://www.legal-tools.org/doc/2838f3/>).

<sup>4</sup> *Ibid.*, Article 14(3)(c).

<sup>5</sup> European Convention on Human Rights, 4 November 1950, Article 6(1) (<http://www.legal-tools.org/doc/8267cb/>).

<sup>6</sup> Article 4(1) of the Rome Statute. The Assembly of States Parties ('ASP') is the ICC's management oversight and legislative body. It adopted the text of the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence and can make amendments to these instruments under Articles 9, 51, 121–122.

<sup>7</sup> ECtHR, *Delcourt v. Belgium*, Judgment, 17 January 1970, Application no. 2689/65, paras. 25–26 (<http://www.legal-tools.org/doc/5e02c9/>); ECtHR, *König v. Germany*, Judgment, 28 June 1978, Application no. 6232/73, para. 98 (<http://www.legal-tools.org/doc/ac4fc0/>); ECtHR, *V. v. the United Kingdom*, Judgment, 16 December 1999, Application no. 24888/94, para. 109 (<http://www.legal-tools.org/doc/e2c46e/>).

in the context of criminal proceedings may be prior to the case coming before the trial court, for example from the time of arrest, from the time a person is charged, or even from the institution of the preliminary investigation prior to arrest and charge.<sup>8</sup> The reasonableness of the length of proceedings must be assessed in each case taken as a whole according to its particular circumstances, with due regard to a more general principle of a proper administration of justice.<sup>9</sup>

The ECtHR uses four criteria to determine whether the length of criminal proceedings is reasonable: the complexity of the case, the applicant's conduct, the conduct of the administrative and judicial authorities, and the interests of the applicant at stake.<sup>10</sup> Each of these four criteria is discussed below.

Assessments of complexity are based on factors including the number of charges, the number of people involved in the proceedings (such as defendants and witnesses), any international dimensions to the case and the scale of crimes (possibly involving multiple actors and complex transactions).<sup>11</sup> Most cases before the ICC have all of these features.

At the same time, the ECtHR acknowledges that an accused person's conduct, where it results in an extension of the time needed to bring criminal proceedings to a conclusion, will be taken into account when determining whether that time has been reasonable.<sup>12</sup> Accused persons, however,

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<sup>8</sup> ECtHR, *Neumeister v. Austria*, Judgment, 27 June 1968, Application no. 1936/63, para. 18 (<http://www.legal-tools.org/doc/50dc13/>); ECtHR, *Deweert v. Belgium*, Judgment, 27 February 1980, Application no. 6903/75, para. 42 (<http://www.legal-tools.org/doc/8abc83/>); ECtHR, *Ringeisen v. Austria*, Judgment (Merits), 16 July 1971, Application no. 2614/65, para. 110 (<http://www.legal-tools.org/doc/ff864c/>).

<sup>9</sup> ECtHR, *Boddaert v. Belgium*, Judgment, 12 October 1992, Application no. 12919/87, paras. 36, 39 (<http://www.legal-tools.org/doc/kr87rq/>).

<sup>10</sup> ECtHR, *Neumeister v. Austria*, para. 21, see above note 8; ECtHR, *König v. Germany*, para. 99, see above note 7.

<sup>11</sup> ECtHR, *Neumeister v. Austria*, para. 20, see above note 8; ECtHR, *C.P. et autres c. France*, Arrêt, 1 August 2000, Application no. 36009/97, para. 30 (<http://www.legal-tools.org/doc/jyeasr/>).

<sup>12</sup> ECtHR, *Eckle v. Germany*, Judgment, 15 July 1982, Application no. 8130/78, para. 82 (<http://www.legal-tools.org/doc/c79fe4/>); ECtHR, *I.A. v. France*, Judgment, 23 September 1998, Application no. 28213/95, para. 121 (<http://www.legal-tools.org/doc/d6f3c2/>); ECtHR, *Vayıç v. Turkey*, Judgment, 20 June 2006, Application no. 18078/02, para. 44 (<http://www.legal-tools.org/doc/e3caf2/>).

cannot be criticized for merely exercising their rights.<sup>13</sup> Their conduct will only excuse undue delay in the case of manifest bad faith on their part.<sup>14</sup>

The conduct of the authorities is an important factor. The ECtHR requires that domestic judicial systems are designed to meet their obligations in respect of criminal proceedings taking place within a reasonable time. An institutional lack of capacity cannot excuse excessively lengthy proceedings.<sup>15</sup> ECtHR case law requires that domestic courts must be “administering justice without delays which might jeopardize its effectiveness and credibility”.<sup>16</sup>

Where accused persons are being held in custody for the duration of the proceedings, the ECtHR has identified the interest they have in those proceedings taking place within a reasonable time as belonging to a distinct category of priority cases. In such cases, even when they are complex, the ECtHR is less willing to accept any excessive length of proceedings, and the court dealing with the case must show “particular diligence” in administering justice as quickly as possible.<sup>17</sup> Furthermore, while the prosecution of crimes long after they take place on the basis of progressively assembled or freshly discovered evidence is not a matter which itself raises an issue concerning the right to a trial within a reasonable time, it may bring with it a need for heightened diligence in ensuring that there is no delay in the

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<sup>13</sup> ECtHR, *Sopp c. Allemagne*, Arrêt, 8 October 2009, Application no. 47757/06, para. 35 (<http://www.legal-tools.org/doc/pc12ql/>).

<sup>14</sup> For instance, an accused person who had lodged two time-consuming appeals could not be held responsible thereby for excessively lengthy proceedings. The ECtHR found the culpable delay was principally attributable to the inactivity of the first two judges assigned to the case over a period of four years. See ECtHR, *Malet c. France*, Arrêt, 11 February 2010, Application no. 24997/07, paras. 31–32 (<http://www.legal-tools.org/doc/f19vvs/>). See also, ECtHR, *Liga Portuguesa de Futebol Profissional c. Portugal*, Arrêt, 17 May 2016, Application no. 4687/11, paras. 94–95 (<http://www.legal-tools.org/doc/s26ye6/>).

<sup>15</sup> ECtHR, *Abdoella v. the Netherlands*, Judgment, 25 November 1992, Application no. 12728/87, para. 24 (<http://www.legal-tools.org/doc/a3lwia/>); ECtHR, *Dobbertin v. France*, Judgment, 25 February 1993, Application no. 13089/87, para. 44 (<http://www.legal-tools.org/doc/qmdgmd/>).

<sup>16</sup> ECtHR, *H. v. France*, Judgment, 24 October 1989, Application no. 10073/82, para. 58 (<http://www.legal-tools.org/doc/te939y/>); ECtHR, *Katte Klitsche de la Grange v. Italy*, Judgment, 27 October 1994, Application no. 12539/86, para. 61 (<http://www.legal-tools.org/doc/hiqgp4/>); ECtHR, *Scordino v. Italy (No. 1)*, Judgment, 29 March 2006, Application no. 36813/97, para. 224 (<http://www.legal-tools.org/doc/d2ef46/>).

<sup>17</sup> ECtHR, *Şineğu et autres c. Turquie*, Arrêt, 13 October 2009, Application nos. 4020/07, 4021/07, 9961/07 and 11113/07, para. 33 (<http://www.legal-tools.org/doc/5zhazx/>).

conduct of the ensuing proceedings.<sup>18</sup> While there is no presumption that it should be the case, the accused person is typically held in custody for the duration of the ICC proceedings.<sup>19</sup> Equally, the large majority of trials take place long after the commission of the crimes alleged by the Prosecution.<sup>20</sup> All such trials would be defined by the ECtHR as priority cases with a special need for heightened diligence in the speedy conduct of proceedings.

The findings in *Grujović v. Serbia*<sup>21</sup> demonstrate the ECtHR approach to such priority cases. The case was complex. There were three co-accused, the allegations were of aggravated murder and forgery committed in the context of organized crime. The accused was arrested in a foreign State and was convicted of a firearms offence in that country before being transferred to face trial domestically. At the time the case was decided by the ECtHR, criminal proceedings had lasted for eight years and were ongoing, with the accused in custody for all this time. Despite the complexity of the case, the ECtHR found that the reasonable time guarantee had been breached because the domestic authorities had failed to organize the trial efficiently.

In contrast with the ECtHR's settled jurisprudence, there is little ICC jurisprudence on the right to a trial within a reasonable time. In March 2019, Jean-Pierre Bemba made an application for compensation following his acquittal on appeal, alleging that there had been a grave and manifest miscarriage of justice. One of the grounds on which this claim was made was that "[a] decade, to conclude a single accused case, with one form of liability, and events spanning a five-month period, is not reasonable".<sup>22</sup> The Chamber stated that it was "receptive" to Bemba's submissions, but in the same paragraph declared that "a finding of a grave and manifest miscarriage of justice cannot be entered on these grounds alone." The Chamber

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<sup>18</sup> ECtHR, *O'Neill and Lauchlan v. United Kingdom*, Judgment, 28 June 2016, Application no. 41516/10, 75702/13, para. 87 (<http://www.legal-tools.org/doc/4adv9h/>).

<sup>19</sup> Articles 55(1)(d), 58, 81(3)(c)(i) of the Rome Statute. To date, the exceptions are the accused in the cases of *Ruto and Sang* at trial, and the cases of *Muthaura, Kenyatta and Ali; Kosgey, Ruto and Sang; Abu Garda*; and *Banda and Jerbo* at pre-trial.

<sup>20</sup> For an overview of time elapse in individual cases, compare the charged period and the first appearance following arrest or summons in Table 1.

<sup>21</sup> ECtHR, *Grujović v. Serbia*, Judgment, 21 July 2015, Application no. 25318/12 (<http://www.legal-tools.org/doc/vxg14x/>).

<sup>22</sup> ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Second Public Redacted Version of "Mr. Bemba's claim for compensation and damages", 19 March 2019, ICC-01/05-01/08-3673-Red2, paras. 76–78 (<http://www.legal-tools.org/doc/4e04c8/>).

found that the provisions of the Rome Statute made no allowance for such a finding and suggested that the law needed to be changed:

it seems unquestionable that the Bemba case provides a case in point as to the seriousness of the consequences entailed by the absence of statutory limits as to the duration either of the proceedings or, even more critically, of custodial detention. The Chamber finds it urgent for the States Parties to embark on a review of the Statute so as to consider addressing those limitations; until then, it will be the Court's own responsibility to be mindful of the expeditiousness of the proceedings as a fundamental tenet of the right to a fair trial and to streamline its own proceedings accordingly.<sup>23</sup>

It took the Chamber who uttered this injunction fully 14 months to respond to and rule on Bemba's application.

The jurisprudence of other international criminal tribunals could further shed light on the possible interpretation of this right at the ICC. For instance, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') decided in the *Šešelj* case – which occupied thirteen years between arrest and first instance judgment – that no violation of the right to be tried without undue delay had taken place “when one takes into account the complexity of the case, the number of witnesses heard and exhibits tendered before the Chamber, the conduct of the parties and the serious nature of the charges”.<sup>24</sup> These considerations broadly follow the ECtHR test discussed above.<sup>25</sup>

### 17.3. Overview of the Length of the ICC Proceedings

The events giving rise to the charges against Jean-Pierre Bemba occurred in the Central African Republic in 2002–2003. He made his first appearance before the Pre-Trial Chamber in July 2008. His trial began in November 2010 and lasted four years. Two more years passed before the Trial Chamber found him guilty in March 2016. Another two years passed be-

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<sup>23</sup> ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision on Mr Bemba's claim for compensation and damages, 18 May 2020, ICC-01/05-01/08-3694, paras. 65–69 (<http://www.legal-tools.org/doc/50clpw/>).

<sup>24</sup> ICTY, *Prosecutor v. Šešelj*, Trial Chamber, Decision on Motion by Accused to Discontinue Proceedings, 29 September 2011, IT-03-67-T, para. 3 (<http://www.legal-tools.org/doc/61hng5/>).

<sup>25</sup> It must be open to question, however, whether the result would have been the same before the ECtHR.

fore the Appeals Chamber finally acquitted him in June 2018. Other cases at the ICC have taken nearly as long.<sup>26</sup> Thomas Lubanga Dyilo made his first appearance in March 2006. He was convicted six years later in March 2012, and his appeal was determined in December 2014. Germain Katanga made his first appearance in October 2007. Proceedings in his case concluded six and a half years later, in March 2014.

The shortest ICC proceedings to date lasted about a year, because the accused in the *Al Mahdi* case pleaded guilty. He made his first appearance in September 2015, and his verdict and sentence were handed down in September 2016.

The two most significant manifestations of delay are obvious. First, long periods of interstitial time elapse between the various steps in the proceedings, such as first appearance, confirmation of charges decision, start of trial, trial judgment and appeal judgment. Second, courtroom proceedings take place on a small proportion of the days available.

Using the *Bemba* case as an example of interstitial delay, 192 days elapsed between Jean-Pierre Bemba's first appearance on 4 July 2008 and the confirmation of charges hearing, which began on 12 January 2009. Once charges were eventually confirmed on 15 June 2009, a further 525 days passed before the start of the trial on 22 November 2010. But it is worth concentrating on a third period, the 659 days between *Bemba's* conviction on 21 March 2016 and the hearing of his appeal on 9 January 2018. During this period of nearly two years, there were around one hundred interlocutory filings by the parties and rulings by the Appeals Chamber. Bemba had filed his appeal brief in September 2016 and the Prosecution responded in November 2016, but it was not until November 2017 that the Appeals Chamber scheduled the appeal hearing.<sup>27</sup>

The trial proceedings in the *Bemba* case also offer a good illustration of the lack of intensity, with which such proceedings unfold at the ICC. From opening to closing submissions by the parties and participants, the trial spanned just under four years. During that time, the Court only sat on 330 days. That is about a third of the working days available. More recent

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<sup>26</sup> See Table 1 for an overview of individual cases at the ICC.

<sup>27</sup> ICC, *Prosecutor v. Bemba*, 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, ICC-01/05-01/08-3636-Red, paras. 14–28 ('ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red') (<http://www.legal-tools.org/doc/40d35b/>).

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trials have declined even from this performance. The *Ntaganda* trial managed an equivalent proportion of just over a quarter.

The below table gives an overview of the duration of criminal proceedings in individual cases from the first appearance of a suspect before the ICC, either following their arrest or voluntary appearance, to the eventual conclusion of criminal proceedings on appeal, if applicable (see Table 1).

Case	Charged period	First appearance following arrest or summons	Conclusion of proceedings	Elapse of time
Lubanga ('DRC')	2002–2003	20 March 2006	1 December 2014	More than 8.5 years
Katanga ('DRC')	2003	22 October 2007	7 March 2014	Almost 6.5 years
Ngudjolo ('DRC')	2003	11 February 2008	27 February 2015	More than 7 years
Bemba ('CAR-I')	2002–2003	4 July 2008	8 June 2018	More than 10 years
Al Mahdi ('MLI')	2012	30 September 2015	27 September 2016	About 1 year
Ruto and Sang ('KEN')	2007–2008	8 March 2011	5 April 2016	More than 5 years
Kosgey ('KEN')	2007–2008	8 March 2011	23 January 2012	Almost 1 year
Kenyatta ('KEN')	2007–2008	8 March 2011	13 March 2015	About 4 years
Muthaura ('KEN')	2007–2008	8 March 2011	11 March 2013	About 2 years
Ali ('KEN')	2007–2008	8 March 2011	23 January 2012	Almost 1 year
Abu Garda ('DAR')	2007	18 May 2009	23 April 2010	Almost 1 year
Mbarushimana ('DRC')	2009	28 January 2011	30 May 2012	More than 2,5 years
Bemba <i>et al.</i>	2011–	27 November 2013	27 November	About 6

(‘CAR-I’)	2013	5 December 2013 20 March 2014	2019	years
Ntaganda (‘DRC’)	2002– 2003	26 March 2013	30 March 2021	More than 8 years
Gbagbo and Blé Goudé (‘CIV’)	2010– 2011	5 December 2011 27 March 2014	31 March 2021	More than 9,5 and 7 years
Ongwen (‘UGA’)	2002– 2005	26 January 2015	Ongoing	More than 6 years
Al Hassan (‘MLI’)	2012– 2013	4 April 2018	Ongoing	More than 3 years
Yekatom and Ngaïssona (‘CAR-II’)	2013– 2014	23 November 2018 12 December 2018	Ongoing	More than 2,5 years
Abd-Al-Rahman (‘DAR’)	2003– 2004	15 June 2020	Ongoing	More than 1 year
Gicheru (‘KEN’)	2013	6 November 2020	Ongoing	Less than 1 year
Said (‘CAR-II’)	2013	28–29 January 2021	Ongoing	Less than 1 year

**Table 1: Overall length of proceedings per case, excluding suspects at large and deceased suspects, as of 15 July 2021.**

Protracted proceedings are not unique to the ICC. One of the most striking examples of lengthy international criminal proceedings must be the *Nyiramasuhuko et al.* case before the International Criminal Tribunal for Rwanda (‘ICTR’). The case concerned mass atrocities in the Butare prefecture in Rwanda in 1994, with six accused, all arrested between 1995 and 1998. The trial began in June 2001. All six were convicted ten years later, in June 2011. Their appeals were not resolved until December 2015, by which time one of them had been in detention, awaiting the final resolution of proceedings, for 20 years.<sup>28</sup>

The problem of lengthy criminal proceedings plagues domestic judicial systems, too. Indeed, a significant number of applications before the

<sup>28</sup> ICTR, *Prosecutor v. Nyiramasuhuko et al. (Butare)*, Appeals Chamber, Judgment, 14 December 2015, ICTR-98-42-A (<http://www.legal-tools.org/doc/93cee1/>).

ECtHR concern an alleged violation of the right to a fair trial within a reasonable time under Article 6 of the ECHR. The extent of the problem in certain countries has prompted the ECtHR to resort to the so-called pilot judgment procedure.<sup>29</sup>

#### **17.4. Factors that Affect the Length of the ICC Proceedings**

To evaluate the time needed to complete a case at the ICC, it is important to view the matter in its proper context. This section focuses on factors affecting the length of criminal proceedings in individual cases at the ICC, covering the period from the initial appearance of a suspect before a Pre-Trial Chamber to the rendering of a trial judgment and sentencing decision by a Trial Chamber or final appeal by the Appeals Chamber.

In sum, the principal factors affecting the length of the ICC proceedings are the timing, nature, scope and geographic location of crimes; judicial oversight of prosecutorial activities; participation of victims; rights of the accused; transcription, translation and interpretation; disclosure of evidence; witness and staff protection; international co-operation; and background of ICC staff. The impact of these factors on the overall length of proceedings will depend on the individual features of each case.

##### **17.4.1. Timing, Nature, Scope and Geographic Location of Crimes**

Cases before the ICC can be described as ‘cold cases’ on a global scale. The timing, nature and scope of crimes will often result in copious potential suspects and witnesses, multiple charges and voluminous and complex evidence.

The investigation of international crimes faces a number of practical and legal obstacles since these cases are far more complex than most ordinary criminal cases, and frequently raise novel legal questions. The crimes, often committed years prior to proceedings, are likely to have been protracted over a long period of time, occurred over large geographic areas, and involved a large number of victims and extensive perpetrator networks. Linguistic and cultural differences between the investigators and potential

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<sup>29</sup> Many cases coming before the ECtHR result from a common dysfunction at the national level. The pilot judgment procedure identifies structural problems underlying repetitive cases and gives governments clear indications of the type of remedial measures needed to resolve them. See, for example, ECtHR, *Rutkowski and others v. Poland*, Judgment, 7 July 2015, Applications nos. 72287/10, 13927/11 and 46187/11, paras. 4, 9, 188, 203–229 (<http://www.legal-tools.org/doc/ob7k3g/>).

witnesses add another layer of complexity, while witnesses may be difficult to locate and reluctant to provide testimony.

Meanwhile, the lengthy elapse of time between the issuance of an arrest warrant and its execution can have a significant knock-on effect. The *Ongwen* case is a good example. The arrest warrants for Dominic Ongwen and four other Ugandan suspects were issued in July 2005.<sup>30</sup> Significant investigation ceased in 2007, and it seemed for many years that no suspects in the Uganda situation would be brought to justice. Ongwen was eventually arrested in January 2015.<sup>31</sup> In the intervening years, a significant quantity of evidence had become available – mostly in the shape of defectors from the Lord’s Resistance Army, of which *Ongwen* had been a part – which provided grounds to believe that his wrongdoing had been of a more diverse nature, and over a more prolonged period of time, than had been capable of proof back in 2005. To ensure that his trial encompassed more than events taking place in one place on a single day, which had been the basis for his original arrest warrant, the Prosecution were granted a period of a year between his arrest and confirmation hearing to conduct further investigations.<sup>32</sup>

#### 17.4.2. Judicial Oversight of Prosecutorial Activities

Long before a matter comes before trial judges, prosecutorial operations are subject to judicial oversight during three pre-trial sub-stages. First, in the absence of a referral by the UN Security Council or a State Party, when the ICC Prosecutor takes a decision to investigate a situation on the basis of his or her own decision, using so-called *proprio motu* powers, the Rome Statute requires judicial authorization pursuant to its Article 15. Second, once investigations have resulted in a significant body of evidence against a particular suspect, that evidence must be scrutinised by a Pre-Trial Chamber to obtain a warrant of arrest or summons to appear under Article 58. Third, following a suspect’s arrest or voluntary appearance, the Pre-

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<sup>30</sup> ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-57 (<http://www.legal-tools.org/doc/7a2f0f/>).

<sup>31</sup> ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, para. 5 (<http://www.legal-tools.org/doc/74fc6e/>).

<sup>32</sup> ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Public redacted version of “Prosecution’s Application for Postponement of the Confirmation Hearing”, 12 February 2015, ICC-02/04-01/15-196-Red2, paras. 25–33, 41–42 (‘ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-196-Red2’) (<http://www.legal-tools.org/doc/55cfd8/>).

Trial Chamber will assess the sufficiency of the Prosecution's evidence in the course of confirmation proceedings under Article 61.

This level of judicial oversight of prosecutorial activities, particularly at the first and third pre-trial sub-stages mentioned above, was not a feature at the ICTY and ICTR. It was introduced in the Rome Statute as a result of political compromise between its drafters to prevent abuse of prosecutorial powers, and as a balance between legal traditions.<sup>33</sup> As a consequence, it has built additional time into the proceedings while judicial deliberation and the drafting of decisions take place,<sup>34</sup> although it is fair to say that much of the delay can be attributed to the adversarial nature of the confirmation hearing and the resulting need for disclosure. The below table illustrates the time elapse in individual cases between the time of a suspect's first appearance and confirmation or dismissal of charges, just before the start of trial (see Table 2).

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<sup>33</sup> ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, paras. 17–18 (<http://www.legal-tools.org/doc/f0caaf/>). See also Volker Nerlich, "The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, pp. 1339–1356.

<sup>34</sup> It is also fair to say that, in the cases of *Abu Garda*, *Mbarushimana*, *Kosgey* and *Ali*, the confirmation procedure resulted in prosecutions being halted before trial proceedings began, on the grounds of insufficiency of evidence. ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (<http://www.legal-tools.org/doc/cb3614/>); ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red (<http://www.legal-tools.org/doc/63028f/>); ICC, *Prosecutor v. Kosgey, Ruto and Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 4 February 2012, ICC-01/09-01/11-373, para. 293 (<http://www.legal-tools.org/doc/96c3c2/>); ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 29 January 2012, ICC-01/09-02/11-382-Red, para. 430 (<http://www.legal-tools.org/doc/4972c0/>).

Case	First appearance following arrest or summons	Confirmation or dismissal of charges	Time elapse
<u>Democratic Republic of the Congo ('DRC')</u> State referral: April 2004 Investigation opening: June 2004 Time elapse: About 2 months			
Lubanga	20 March 2006	29 January 2007	315 days
Katanga	22 October 2007	26 September 2008	340 days
Ngudjolo	11 February 2008	26 September 2008	228 days
Ntaganda	26 March 2013	9 June 2014	440 days
Mbarushimana	28 January 2011	16 December 2011	322 days
<u>Uganda ('UGA')</u> State referral: July 2004 Investigation opening: July 2004 Time elapse: About 1 month			
Ongwen	26 January 2015	23 March 2016	422 days
<u>Darfur, Sudan ('DAR')</u> UNSC referral: March 2005 Investigation opening: June 2005 Time elapse: About 3 months			
Abu Garda	18 May 2009	8 February 2010	266 days
Banda and Jerbo	17 June 2010	7 March 2011	263 days
Abd-Al-Rahman	15 June 2020	9 July 2021	389 days
<u>Central African Republic I ('CAR-I')</u> State referral: December 2004 Investigation opening: May 2007 Time elapse: About 29 months			
Bemba	4 July 2008	12 January 2009	192 days
Bemba <i>et al.</i>	27 November 2013	11 November 2014	349 days
	5 December 2013		341 days
	20 March 2014		236 days

17. Length of Proceedings at the International Criminal Court:  
Context, Latest Developments and Proposed Steps to Address the Issue

<p><u>Côte d’Ivoire (‘CIV’)</u>  <i>Proprio motu</i> request: 23 June 2011            Investigation authorization: 3 October 2011            Time elapse: About 3,5 months</p>			
Gbagbo	5 December 2011	12 June 2014	920 days
Blé Goudé	27 March 2014	11 December 2014	259 days
<p><u>Kenya (‘KEN’)</u>  <i>Proprio motu</i> request: 26 November 2009            Investigation authorization: 31 March 2010            Time elapse: About 4 months</p>			
Kenyatta and Muthaura	8 March 2011	23 January 2012	321 days
Ali	8 March 2011	23 January 2012	321 days
Ruto and Sang	8 March 2011	23 January 2012	321 days
Kosgey	8 March 2011	23 January 2012	321 days
Gicheru	6 November 2020	15 July 2021	251 days
<p><u>Central African Republic II (‘CAR-II’)</u>            State referral: May 2014            Investigation opening: September 2014            Time elapse: About 4 months</p>			
Yekatom and Ngaïssona	23 November 2018 12 December 2018	11 December 2019	383 days 364 days
Said	28–29 January 2021	Ongoing	Ongoing
<p><u>Mali (‘MLI’)</u>            State referral: July 2012            Investigation opening: January 2013            Time elapse: About 6 months</p>			
Al Mahdi	30 September 2015	24 March 2016	176 days
Al Hassan	4 April 2018	30 September 2019	544 days

**Table 2: Time elapse from suspect’s initial appearance to confirmation of charges decision as of 15 July 2021.**

### 17.4.3. Participation of Victims

Victim participation is one of the hallmarks of the ICC proceedings. Victims are afforded considerable rights of participation during various procedural stages.<sup>35</sup> This contrasts with the arrangements at the ICTY and ICTR, but inspired a similar design for the Special Tribunal for Lebanon ('STL'), the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Kosovo Specialist Chambers.<sup>36</sup>

Inevitably, the nature of international crimes often translates into a large number of participating victims at the ICC. Some of the largest numbers come from the more recent situations and cases, at least in part due to the extent of victimisation under investigation. In the *Ongwen* case, where the accused was charged with 70 counts of crimes against humanity and war crimes, the number of participating victims was 2,026 at the pre-trial stage and 4,107 at trial.<sup>37</sup> In the *Afghanistan* situation, the count of victim representations for the purpose of the confined proceedings pertaining to the request for an authorization to investigate<sup>38</sup> reached 699 on behalf of millions of individuals, while in the *Georgia* situation, it was 6,335.<sup>39</sup> The

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<sup>35</sup> Articles 14(3), 19(3), 68, 75, 82(4) of the Rome Statute; Rules 85–99 of the Rules of Procedure and Evidence.

<sup>36</sup> Article 68(3) of the Rome Statute; Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), 30 May 2007, Article 17 (<http://www.legal-tools.org/doc/da0bbb/>); ECCC, Internal Rules (Rev. 9), 16 January 2015, Rule 23 (<http://www.legal-tools.org/doc/b8838e/>); Kosovo, Law on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015, Article 22 (<http://www.legal-tools.org/doc/8b71c3/>). See also Kinga Tibori-Szabó and Megan Hirst, "Introduction: Victim Participation in International Criminal Justice", in Kinga Tibori-Szabó and Megan Hirst (eds.), *Victim Participation in International Criminal Justice: Practitioners' Guide*, Asser Press, The Hague, 2017, pp. 2–5; Robert Cryer, Darryl Robinson and Sergey Vasiliev, "Victims in the International Criminal Process", in Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp. 446–447.

<sup>37</sup> ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, para. 7 (<http://www.legal-tools.org/doc/74fc6e/>).

<sup>38</sup> This is the broadest form of participation, which differs from participation in court proceedings or obtaining reparations. It is limited to the submission of victim's views, concerns and expectations in relation to the anticipated investigation. Victim participation in the case is linked to the charges subsequently brought by the prosecution and confirmed by the judges, hence the numbers may drop. See Article 14(3) of the Rome Statute.

<sup>39</sup> ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 27 (<http://www.legal-tools.org/doc/2fb1f4/>); ICC, *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor's

consequence of this significant victim participation is felt throughout the proceedings. Legal representatives of victims may be permitted to make oral and written submissions, question witnesses of the calling parties, and call their own witnesses. Important as it is, this does nothing to make the proceedings shorter.

#### 17.4.4. Rights of the Accused

The Rome Statute includes a robust and extensive system of protections of the accused's procedural rights, which are outlined in its Article 67. In addition, Article 21(3) of the Rome Statute requires that its provisions be read in light of internationally recognised human rights standards, further strengthening the statutory protections.

To fully realize the rights thus guaranteed, and in order to ensure that their advocates are able properly to investigate their own case and to test the prosecution case, accused persons often request postponements or extensions of time limits in the proceedings. In the *Ruto and Sang* and *Ongwen* case, for instance, defence lawyers requested several postponements to prepare for the confirmation hearing and trial.<sup>40</sup> Judges thus have to strike a careful balance between the requirement that a trial take place within a reasonable time under Articles 64(2) and 67(1)(c) of the Rome Statute, and the accused's right to have adequate time and resources to prepare for trial under Article 67(1)(b).

#### 17.4.5. Transcription, Translation and Interpretation

Translation of documents, and transcription and interpretation of the spoken word represent a significant share of the ICC's non-judicial work. In

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request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 2 (<http://www.legal-tools.org/doc/a3d07e/>).

<sup>40</sup> ICC, *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the "Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List of Evidence", 12 August 2011, ICC-01/09-01/11-260 (<http://www.legal-tools.org/doc/1d5a28/>); ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762 (<http://www.legal-tools.org/doc/7caa5b/>); ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Confidential Redacted Version of 'Defence Request for a Deadline Extension', 18 April 2018, ICC-02/04-01/15-1232-Conf (<http://www.legal-tools.org/doc/4bfc95/>); ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute, 24 April 2018, ICC-02/04-01/15-1239 (<http://www.legal-tools.org/doc/6182aa/>).

order to ensure that trials are fair and transparent, the important case documents – like the document containing the charges, evidence relied on in support of the charges, and principal judicial decisions – are translated into a “language which the accused fully understands and speaks”.<sup>41</sup> Even when the accused understands one of the ICC’s two working languages, English or French, the evidence against them may require translation from a less common language, like Georgian, Acholi, or Kalenjin. Judges, parties and participants must take this into account during all procedural stages, especially in preparation for the confirmation hearing and trial.<sup>42</sup>

At the investigation stage, where many witness statements must be taken in the form of sound-recorded interviews<sup>43</sup> conducted by means of question and answer, every word must be transcribed, before the work of translation can begin. In the *Banda and Jerbo* case, translation of witness statements into Zaghawa, which is not a written language, presented considerable difficulties for both parties in the preparation for trial, affecting the “overall ability for the accused to be able to advance a meaningful defence”.<sup>44</sup>

Once the average ICC case begins, there will be tens of thousands of pages of documents and courtroom proceedings themselves will last for hundreds of hours, meaning that the time needed for translation, transcription and interpretation work is significant. In the *Ntaganda* trial, the Defence requested and were granted additional time for filing their closing submissions, among other reasons due to delays in receiving the translation of the Prosecution’s 361-pages closing brief.<sup>45</sup>

As artificial intelligence and machine translation improve, this work will increasingly be done by machines, with minimal human oversight. Full automation of transcription and translation could save time and costs and revolutionize international criminal investigations and judicial proceedings.

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<sup>41</sup> Article 67(1)(a) of the Rome Statute; Rule 76(3) of the Rules of Procedure and Evidence.

<sup>42</sup> ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-196-Red2, paras. 34–40, see above note 32.

<sup>43</sup> Article 55 of the Rome Statute; Rule 112 of the Rules of Procedure and Evidence.

<sup>44</sup> ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras. 130–135 (*ICC, Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410’) (<http://www.legal-tools.org/doc/414cc4/>).

<sup>45</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on the Defence request for an extension of time to file its closing brief, 29 May 2018, ICC-01/04-02/06-2291 (<http://www.legal-tools.org/doc/715f99/>).

At the moment, given the need to render the meaning as accurately as possible, it is largely done by a slower and more costly human effort.<sup>46</sup>

#### 17.4.6. Disclosure of Evidence

A significant source of delay between the first appearance of an accused and the commencement of their trial is the time taken to effect disclosure of documentary materials in the possession of the Prosecution to the defence team under Article 67(2) of the Rome Statute and Rules 76 and 77 of the Rules of Procedure and Evidence. Typically, judges require this process to be completed three months before the commencement of trial.

In many cases, particularly those where the suspect has not been arrested until years after the warrant was issued, the Prosecution has thousands of documents in its possession. Each of these documents has to be carefully reviewed for potential relevance and then often redacted to obscure sensitive information. This process can take many months. In the *Ntaganda* case, the volume of disclosure immediately before the three-month deadline was so great that the Trial Chamber felt compelled to grant a three-month delay to the start of the trial at the Defence's request.<sup>47</sup>

There is a concern, and indeed a substantiated concern in some cases, that disclosure to the suspect and his legal team may lead to the unauthorized dissemination of sensitive details, which may affect the security of witnesses and be an inappropriate intrusion into the privacy rights of third parties.<sup>48</sup> This can, at times, lead to a parsimonious disclosure policy, with material being held back from the Defence until the last moment before the deadline fixed by the judges. Litigation, sometimes itself causing delay to

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<sup>46</sup> For time estimates regarding Acholi and English, see ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-196-Red2, paras. 36, 38, 40, see above note 32. It was estimated that “the transcription of an hour of an English/Acholi article 55(2) interview will take five days”. For time estimates regarding Zaghawa, see ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410, para. 130, see above note 44. It was estimated that translating 3700 pages “will take approximately 30 months if three translators were to work on the material on a full-time basis”.

<sup>47</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Urgent request on behalf of Mr Ntaganda seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest, 2 April 2015, ICC-01/04-02/06-541-Red (<http://www.legal-tools.org/doc/08f3cb/>); ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Status Conference, 3 July 2015, ICC-01/04-02/06-T-22-Red-ENG, p. 5 (<http://www.legal-tools.org/doc/1ffcdb/>).

<sup>48</sup> ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court, 8 June 2015, ICC-02/04-01/15-242, para. 2 (<http://www.legal-tools.org/doc/7ef38b/>).

the trial proceedings, concerning alleged failures of disclosure by the Prosecution is common.

The independent experts, who conducted a review of the ICC at the behest of the Assembly of States Parties and reported in September 2020, expressed this view: “[D]isclosure [...] is probably the most significant factor in causing international criminal trials to last so long”.<sup>49</sup> As noted above, disclosure delays have indeed caused delays between arrest and trial. But it played a negligible or non-existent role in the years-long duration of the trial and appeal proceedings, which can be seen at Table 1 above.

#### 17.4.7. Witness and Staff Protection

Investigation and prosecution of international crimes often involve security risks to both staff and witnesses, coupled with a limited capacity to mitigate them. Situation countries often remain dangerous environments years after the events under investigation. Factors like ongoing armed conflict, a political environment hostile to investigators and witnesses seen to represent one or other side of the proceedings, or cultural resistance to investigations and proceedings seen as intrusive may further increase the risk of harm.<sup>50</sup> In the *Al Hassan* case, difficulties resulting from a challenging security situation in Mali prompted the postponement of the confirmation of charges hearing from September 2018 to July 2019.<sup>51</sup>

To date, witnesses and victims in all ICC cases have required some form of protective measures. During an investigation, protective measures may be extensive, depending on the threat and risk of harm.<sup>52</sup> At trial, identities of protected witnesses will be disclosed to the accused in accordance

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<sup>49</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, paras. 476–482 (<http://www.legal-tools.org/doc/cv19d5/>).

<sup>50</sup> See, for example, ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410, paras. 3–4, 7, see above note 44.

<sup>51</sup> ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Decision Instructing Parties to File Observations on a Possible Postponement of the Confirmation of Charges Hearing, 2 July 2018, ICC-01/12-01/18-64-tENG (<http://www.legal-tools.org/doc/19a0ab/>); ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Decision Postponing the Date of the Confirmation Hearing, 18 October 2018, ICC-01/12-01/18-94-Red-tENG (<http://www.legal-tools.org/doc/fcda1c/>); ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Décision fixant une nouvelle date pour le dépôt du document contenant les charges et pour le début de l’audience de confirmation des charges, 18 April 2019, ICC-01/12-01/18-313, paras. 16, 20 (<http://www.legal-tools.org/doc/b90422/>).

<sup>52</sup> Article 68 of the Rome Statute; Rules 81–82 of the Rules of Procedure and Evidence.

with the principle of a fair trial, but their identities are likely to remain protected from the public. In practice, this creates additional workload for the Prosecution, Defence, Registry and Chambers, and requires additional time.

#### 17.4.8. International Co-operation

Investigations into international crimes require extensive co-operation with national and international authorities. As an international organization without its own enforcement component, the ICC heavily relies on international co-operation. Part 9 of the Rome Statute regulates international co-operation and judicial assistance. It places an obligation on States Parties to “cooperate fully” with the ICC in its investigations and prosecutions, including in the arrest and surrender of persons, identification and whereabouts of persons, taking of evidence, service and provision of documents, examination of sites, execution of searches and seizures, victim and witness protection and identification, tracking and freezing of assets.<sup>53</sup> When appropriate, the ICC co-operates with international or regional organizations and NGOs.<sup>54</sup>

Like international judicial co-operation in criminal matters between States, such co-operation takes time, “the timing of which is in the hands of external partners”.<sup>55</sup> Timely and full co-operation has not always been forthcoming.<sup>56</sup>

Co-operation failures may mean that victims and their families have to wait for years or even decades while suspects remain at large because the ICC legal framework does not allow for trials *in absentia*. For example, the failure of States to execute the outstanding arrest warrants in the Libya situation means that the *Gaddafi*, *Al-Tuhamy* and *Al-Werfalli* cases “will

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<sup>53</sup> Articles 86–102 of the Rome Statute. States Parties must also provide assistance in relation to release of persons and enforcement of sentences. See Articles 103–111 of the Rome Statute.

<sup>54</sup> Articles 15(2), 54(3)(c)–(d), 73, 87(1)(b), 87(6), 93(9)(b) of the Rome Statute.

<sup>55</sup> ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-196-Red2, paras. 43–46, see above note 32; ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Decision on Defence Request for Deadline Extension and Cooperation from Uganda, 4 May 2018, ICC-02/04-01/15-1254, para. 6 (<http://www.legal-tools.org/doc/cqxbym/>).

<sup>56</sup> See, for example, ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras. 3–7, 21, 136–143 (<http://www.legal-tools.org/doc/414cc4/>).

remain at an impasse until this essential step is achieved”.<sup>57</sup> Article 61(2) of the Rome Statute does allow for the confirmation of charges proceedings to take place in the absence of the suspect, but the Prosecution to date has not attempted to take advantage of it.

#### 17.4.9. Background of ICC Staff

As of 15 July 2020, there were 123 States Parties to the Rome Statute. ICC staff and elected officials come from all regions of the world, bringing with them their diverse cultures and legal traditions.

Given that the Rome Statute and the Rules do not regulate a significant number of procedural and substantive issues, these lacunae are left for practitioners and judges to interpret. What is allowed in one system can be unheard of or prohibited in another. Examples include the practice of witness preparation or proofing before testimony, evidence admissibility, and plea bargaining.<sup>58</sup> If one were to compare the three active trials running in 2018, witness preparation was allowed in the *Ntaganda* case, but forbidden in the *Ongwen*,<sup>59</sup> and *Gbagbo and Blé Goudé* cases. Indeed, a number of majority rulings in the *Gbagbo and Blé Goudé* case, with strong dissenting opinions, appear to result from the well-rehearsed differences between the common law and civil law systems.<sup>60</sup> Such disagreements cost time to at-

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<sup>57</sup> ICC, Office of the Prosecutor, “Eighteenth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)”, 6 November 2019, para. 34 (<http://www.legal-tools.org/doc/2tnxm3/>).

<sup>58</sup> John Jackson, Yassin Brunger, “Witness Preparation in the ICC: An Opportunity for Principled Pragmatism”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 3, pp. 601–624; Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 335–421; “International Criminal Procedure and Sentencing”, in Cryer, Friman, Robinson and Wilmschurst (eds.), 2019, pp. 435–436 see above note 36.

<sup>59</sup> ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652 (<http://www.legal-tools.org/doc/ad21ce/>); ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504, paras. 4–17 (<http://www.legal-tools.org/doc/311696/>).

<sup>60</sup> ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355 (<http://www.legal-tools.org/doc/aa620a/>); ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Partially dissenting opinion of Judge Henderson on Decision on witness preparation and familiarisation, 3 December 2015, ICC-02/11-01/15-355-Anx1 (<http://www.legal-tools.org/doc/a1555d/>).

tempt to arrive at a common position, and more time to write majority decisions and dissenting opinions where compromise cannot be achieved.<sup>61</sup>

To complicate things further, significant differences may exist within similar legal systems. For example, while lawyers trained in the United States and Canada will consider the pre-testimony preparation of witnesses vital to the interests of justice, those from other common law systems like the United Kingdom or Australia may see some aspects of the practice as impermissible.<sup>62</sup>

Aside from their professional and cultural backgrounds, the mandatory rotation of the ICC judges may have an impact on their cohesion and collegiality. Six new judges are elected every three years, with the six longest in service simultaneously stepping down after a nine-year term. The judges have to leave office just as they become fully familiar and comfortable with their powers and duties at the ICC, taking with them their accumulated institutional knowledge.

### **17.5. The Latest Developments Relating to the Length of the ICC Proceedings**

The ICC is composed of four independent organs with distinct management and mandates, all nested within the same organization.<sup>63</sup> This structural model could contribute to procedural redundancies and delays. To improve the ICC's performance and coherent decision-making, its three principals with administration functions – the President, the Prosecutor, and the Reg-

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<sup>61</sup> See, for example, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, 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, ICC-02/11-01/15-1263 (<http://www.legal-tools.org/doc/440017/>).

<sup>62</sup> ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on witness preparation, Partly Dissenting Opinion of Judge Eboe-Osuji, 2 January 2013, ICC-01/09-01/11-524, paras. 20–36 (<http://www.legal-tools.org/doc/82c717/>); ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, paras. 29, 39–40 (<http://www.legal-tools.org/doc/ac1329/>).

<sup>63</sup> The four organs of the ICC are the Presidency, the Chambers (consisting of Appeals Division, Trial Division and Pre-Trial Division), the Registry and the Office of the Prosecutor, see Article 34 of the Rome Statute.

istrar – consult on issues of common interest, for example management, budget and external relations.<sup>64</sup>

In the end, trial judges are the guardians of fair and expeditious proceedings at the ICC, pursuant to Articles 64(2) and 64(3)(a) of the Rome Statute. While not explicit, this requirement equally applies to pre-trial and appeals judges.<sup>65</sup> Recognizing their joint responsibility in this regard, the ICC judges have taken various steps in 2014–2019 to make things happen more quickly and efficiently, while still having regard to the preservation of the fairness and integrity of the proceedings.

The length of ICC proceedings has been on the radar of its stakeholders for a while. In the past decade, the Assembly of States Parties, Presidency, Chambers, Registry and Office of the Prosecutor have all made efforts to make the ICC proceedings more efficient. This section looks at the results of their efforts.

### 17.5.1. Study and Working Groups

In 2010, the Assembly of States Parties established the Study Group on Governance to expedite the proceedings, and enhance the ICC’s efficiency and effectiveness.<sup>66</sup> In 2012, the ICC created the Working Group on Lessons Learnt to take stock of existing practices and consider measures for improvement.<sup>67</sup> They have, together, successfully galvanized other efforts to tackle the issue. Such efforts include proposing amendments to the Rules of Procedure and Evidence, in particular Rules 132*bis* and 68, later adopted by the Assembly of States Parties.<sup>68</sup>

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<sup>64</sup> ICC, “Presidency 2015–2018: End of Mandate Report by President Silvia Fernández de Gurmendi”, 9 March 2018, p. 2 (“ICC, Presidency Report, 2018”).

<sup>65</sup> In relation to the confirmation of charges proceedings, see Article 61(1), 61(3) and 61(4) of the Rome Statute.

<sup>66</sup> ICC ASP, Establishment of a study group on governance, 10 December 2010, ICC-ASP/9/Res.2 (<http://www.legal-tools.org/doc/a399fa>).

<sup>67</sup> ICC, “Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties”, 23 October 2012, ICC-ASP/11/31/Add.1 (<http://www.legal-tools.org/doc/vl1dey/>).

<sup>68</sup> Silvia Fernández de Gurmendi, “Enhancing the Court’s Efficiency”, in *Journal of International Criminal Justice*, 2018, vol. 16, pp. 346–348. See ICC ASP, Amendment of the Rules of Procedure and Evidence, 21 November 2012, ICC-ASP/11/Res.2 (<http://www.legal-tools.org/doc/d09f58/>); ICC, Amendment of the Rules of Procedure and Evidence, 27 November 2013, ICC-ASP/12/Res.7 (<http://www.legal-tools.org/doc/c50839/>).

More than this, the judges have established several internal working groups to improve judicial practices on evidence disclosure, redactions and other protective measures, victim participation, detention and judgment structure and drafting. Their common objective is to contribute to the development of best practices, harmonisation of working methods, and streamlining of legal research, with a view to ultimately improving the efficiency and quality of judicial work.<sup>69</sup>

### **17.5.2. Reports on the Development of Performance Indicators**

In 2014, the Assembly of States Parties invited the ICC to “intensify its efforts to enhance the efficiency and effectiveness of proceedings including by adopting further changes of practice”. It requested the development of qualitative and quantitative performance indicators.<sup>70</sup>

In response, in November 2015, the ICC published its first report on performance indicators.<sup>71</sup> Two more reports followed in 2016 and 2017.<sup>72</sup> The reports state as their first goal that ICC proceedings are “expeditious, fair and transparent at every stage”.<sup>73</sup>

The 2015 report identified ten non-exhaustive factors as likely to affect the length of proceedings.<sup>74</sup> It suggested that these factors could be used to provide benchmark estimates for the likely duration of cases and that the degree of variance from such benchmarks would be the eventual performance indicator. The 2015 report identified three other areas of con-

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<sup>69</sup> ICC, Presidency Report, 2018, paras. 42, 43, see above note 64.

<sup>70</sup> ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, Annex I, 17 December 2014, ICC-ASP/13/Res.5, paras. 7(a)-(b) (<http://www.legal-tools.org/doc/3e8cf6/>).

<sup>71</sup> ICC, “Report of the Court on the development of performance indicators for the International Criminal Court”, 12 November 2015.

<sup>72</sup> ICC, “Second Court’s report on the development of performance indicators for the International Criminal Court”, 11 November 2016; ICC, “Third Court’s report on the development of performance indicators for the International Criminal Court”, 15 November 2017 (‘Third Court’s report’).

<sup>73</sup> For comparison, the EU Justice Scoreboard 2018 for civil, commercial and administrative cases treats efficiency, quality and independence as the main parameters of an effective justice system. European Commission, “The 2018 EU Justice Scoreboard”, Publications Office of the European Union, 2018, p. 9.

<sup>74</sup> They are the number of accused, their position in society, the number of charges, the number of witnesses, the complexity of facts and law, the novelty of legal or evidential issues, the geographical scope of the case, the scale of victim communities, expected levels of cooperation and security considerations for witnesses and victims.

cern: the interstitial periods between different stages of the proceedings, judicial reaction time in providing decisions on filings, and the fullest possible use of the courtrooms.<sup>75</sup>

### 17.5.3. ICC Presidency 2015–2018

Former ICC President Silvia Fernández de Gurmendi recognised that proper administration is dependent on the efficient conduct of the judicial work. During her mandate, the President made it her top priority to enhance the ICC's efficiency and effectiveness, "with particular emphasis on expediting and improving its criminal proceedings".<sup>76</sup>

In 2015–2018, the President promoted several initiatives aimed at making the proceedings more efficient, for example judicial retreats, collective revision of existing practices, amendments to the legal framework, reforms in legal support structure, working groups, assignment of judges, enhanced co-operation with internal and external actors, development of performance indicators, and the ICC Case Law Database.<sup>77</sup>

### 17.5.4. Chambers Practice Manual

Cognizant of procedural and substantive issues that have arisen at various procedural stages, and in order to contribute to the overall effectiveness and efficiency of ICC proceedings, the judges adopted the Chambers Practice Manual.<sup>78</sup> It initially started as the Pre-Trial Practice Manual, which was adopted in September 2015. The Manual was expanded in February 2016, May 2017 and November 2019 to cover other stages of proceedings, beyond pre-trial. Its 2019 revision includes guidelines for the timing of key judicial decisions at pre-trial, trial and appeal stages, whose stated aim is to make proceedings more efficient and expeditious.

With respect to pre-trial proceedings, the Manual consolidates best judicial practices on issuance of an arrest warrant or summons to appear, first appearance, pre-confirmation proceedings, evidence disclosure, charges, confirmation hearing and decision. With respect to trial, it addresses the first status conference, trial preparation matters, directions on the conduct

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<sup>75</sup> ICC, "Report of the Court on the development of performance indicators for the International Criminal Court", 2015, paras. 15–25, see above note 71.

<sup>76</sup> ICC, Presidency Report, 2018, pp. 2–3, see above note 64.

<sup>77</sup> *Ibid.*, pp. 3–21.

<sup>78</sup> ICC, "Chambers Practice Manual", 12 May 2017, p. 5 (<http://www.legal-tools.org/doc/dh0zyq/>).

of proceedings, and review of detention prior to the commencement of trial. It also includes best practices related to various procedural stages, like admission of victims to participate in proceedings, redaction of information, handling of confidential information and contacts with opposing party's witnesses. What the Manual does not tackle is the interstitial delays which have been highlighted above.

Certain practices endorsed in the Manual have been successfully tested both before and after its first adoption in 2015, in particular during confirmation proceedings in *Gbagbo* (June 2014), *Ntaganda* (June 2014), *Blé Goudé* (December 2014), *Al Mahdi* (March 2016), *Ongwen* (March 2016), *Al Hassan* (September 2019), *Yekatom and Ngaïssona* (December 2019), and *Abd-Al-Rahman* (May 2021).

#### **17.5.5. Amendments to the Regulations of the Court**

Newer changes to the legal framework aimed at streamlining the proceedings have been achieved through amendments to the Regulations of the Court. This is a relatively straightforward process, giving control to the ICC judges within the existing legal framework of the Rome Statute and the Rules of Procedure and Evidence. Taking advantage of this flexible tool, the judges have made four of the six amendments to the Regulations of the Court in 2016–2018.<sup>79</sup> The stated purpose of these amendments is to enhance the overall efficiency of proceedings. They address the composition of benches in Article 70 cases per Regulation 66*bis*; issues concerning page limits, time limits and other procedural matters per Regulations 20(2), 24(5), 33(1)(d), 34, 36, 38 and 44(1); appeals granting or denying interim release per Regulation 64; and final and interlocutory appeals per Regulations 57, 58, 59, 61, 63, 64 and 65.<sup>80</sup>

#### **17.5.6. Strategic Plan 2019–2021**

Strategic Plan 2019–2021 of the Office of the Prosecutor and to a lesser extent, the Court and the Registry, all discuss measures to be taken for improving the speed of ICC proceedings.

Strategic Plan 2019–2021 of the Office of the Prosecutor declares that its goal number two is to increase the speed, efficiency and effective-

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<sup>79</sup> The Regulations of the Court were adopted by the judges on 26 May 2004, and subsequently amended on 14 November 2007, 2 November 2011, 10 February 2016, 6 December 2016, 12 July 2017 and 12 November 2018 (<http://www.legal-tools.org/doc/n0k4lz/>).

<sup>80</sup> ICC, Presidency Report, 2018, paras. 32–35, see above note 64.

ness of preliminary examinations, investigations, and prosecutions. To that end, the Office undertakes to implement the following steps: optimise preliminary examinations; further prioritise amongst investigations and prosecutions; develop a clear completion strategy for situations under investigation; develop narrower cases, where appropriate; prepare and advocate for more expeditious court proceedings; conduct further reviews of its working processes; and optimise co-operation with partners.<sup>81</sup>

### 17.6. Proposed Steps to Address the Issue

Arguably, the ICC's design does not allow for speedier proceedings without the implementation of fundamental reforms to its institutional design and procedural regime, involving changes to the Rome Statute and the Rules of Procedure and Evidence.

One such reform, radical but frequently mooted, could be the elimination of contested confirmation proceedings, which tend to prolong the overall duration of proceedings, and a return to the model of indictment proceedings at the ICTY and ICTR.<sup>82</sup> In the words of the former ICC President, "pre-trial proceedings [at the ICC] have been lengthy and cumbersome and not always helpful to the overall criminal process".<sup>83</sup> The *Bemba* case illustrates the good sense of such a reform. In 2018, the Appeals Chamber determined that charges, which the Pre-Trial Chamber had confirmed were compliant with the requirements of the Rome Statute nine years earlier, were in fact seriously defective.<sup>84</sup> It appears that, in that case at least, the confirmation procedure did not guarantee the protection to the accused which its proponents argued for at the time of the Rome Statute's adoption in 1998.<sup>85</sup>

But less radical measures may also bring fruitful results. Perhaps the logical starting point would be to commission an external audit of the ICC's workflow as a single institution. This would enable a comprehensive

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<sup>81</sup> ICC-OTP, "Strategic Plan 2019–2021", 17 July 2019, p. 15–22 (<http://www.legal-tools.org/doc/7ncqt3/>).

<sup>82</sup> See, for example, Guenaël Mettraux *et al.*, *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, University of Amsterdam, 2014 (<http://www.legal-tools.org/doc/3dae90/>).

<sup>83</sup> Gurmendi, 2018, p. 346, see above note 68.

<sup>84</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, paras. 4, 74–116, 196–197, see above note 27.

<sup>85</sup> The appeal was allowed, despite lack of prejudice to the convicted person. Overall, there have been fewer issues in terms of certainly of the charges than at the ICTY and ICTR.

review, rather than a piecemeal approach taken so far. Such an enterprise would be costly and lengthy. The Independent Expert Review of the ICC and the Rome Statute System has already examined many relevant issues in its Final Report in September 2020.<sup>86</sup> In the meantime, the ICC could look at the more obvious efficiency measures, both great and small, some of which have been tested in domestic jurisdictions. Such measures could include: streamlining judicial proceedings, eliminating inefficiencies and redundancies, and ensuring speedier judicial decision-making.

### **17.6.1. Streamlining Judicial Proceedings**

One of the most straightforward changes would be for Trial Chambers to arrive at verdicts and pass sentence in a single judgment at the conclusion of the trial. This became the settled practice of the ICTY and ICTR.<sup>87</sup> In ICC proceedings to date, a period of months has passed between the announcement of a verdict and a subsequent sentencing hearing. Sentence itself has been passed some weeks later. While the two decisions are the subject of separate articles in the Rome Statute – Article 74 for the verdict and Article 76 for the sentence – there is no statutory requirement that they be delivered on separate occasions. It would be open to the judges to require the parties and participants to ensure that the evidence they called at trial was sufficient to cover any matters which might arise if guilty verdicts were reached and sentence had to be considered by the Trial Chamber. Likewise, closing submissions could include all matters relevant to the possible sentence,<sup>88</sup> or a separate hearing relevant to potential sentencing matters alone could be held, in accordance with Article 76(2).

The making and deciding of interlocutory motions is another area where a streamlined procedure might be envisaged. In the more recent cases, less controversial applications and decisions have been made by email and without the setting of formal periods of time for responses and re-

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<sup>86</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, see above note 49.

<sup>87</sup> “International Criminal Procedure and Sentencing”, in Cryer, Friman, Robinson and Wilms-hurst (eds.), 2019, pp. 475–476 see above note 36.

<sup>88</sup> The combined process at the ICTY and ICTR led to rudimentary submissions on sentence, typically little more than a line in the defence closing brief, and the first real discussion took place on appeal.

plies.<sup>89</sup> Transparency has been ensured by a periodic publication of all such emails. But a more radical and potentially fruitful step would be to explore the possibility of determining interlocutory issues at oral hearings.

A noteworthy example of how such hearings might save time and effort comes from the preparations for the *Bemba* appeal. On 19 September 2016, the Defence made an application to rely upon additional evidence at the hearing of the appeal. In the following five months, the Prosecution submitted six filings on this issue alone. The Defence themselves made a further four filings, and the legal representative of the victims one. The Appeals Chamber issued three interlocutory rulings, none of which resolved the issue at hand.<sup>90</sup> All of the issues raised by the parties and participants could have been heard and determined at a single oral hearing scheduled by the Appeals Chamber shortly after the matter was first raised.

Within trial proceedings, more hands-on management by presiding judges could significantly shorten the giving of evidence. Judges could query the relevance of certain lines of questioning at an early stage and rule out those which are not relevant to central issues in the case. Trial Chambers could refuse to hear witnesses unlikely to cast light on the allegations made by the Prosecution, or at least require that their statements be submitted in writing under Rule 68 of the Rules of Procedure and Evidence. Trial Chambers might also take a rather stricter view of what constitutes ‘expertise’ for the purpose of giving evidence, and clamp down upon testimony from persons who may have a great familiarity with a particular situation, but no identifiable objective expert knowledge relevant to the case.

Even if the party-driven model of litigation is to be followed, this should not prevent Trial Chambers from requiring that all experts on a particular topic, whoever may be calling them to give evidence, exchange their reports in advance, identify areas of disagreement, and then all testify solely on those disputed areas, in each other’s presence, in a trial session devoted to that topic alone. Trial Chambers might, however, make even greater savings of time and other resources by requiring the parties to specify in advance of the trial what matters of expertise they wish to raise, and then nominating non-partisan court-appointed experts to report and be

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<sup>89</sup> See, for example, ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Registry’s Report Filing in the Record of the Case Decisions issued by way of email from June 2019 to January 2020, 4 February 2020, ICC-02/04-01/15-1714 (<http://www.legal-tools.org/doc/zhu4zj/>).

<sup>90</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, paras. 15–2, see above note 27.

questioned by the parties. No additional expert evidence would be permitted on these topics, without a demonstration that it was necessary.

### 17.6.2. Eliminating Inefficiencies and Redundancies

The single greatest apparent inefficiency in the ICC proceedings is the practice of holding trial hearings intermittently.<sup>91</sup> In the *Lubanga* trial, the presentation of evidence began on 28 January 2009 and ended on 20 May 2011, a period of 842 days.<sup>92</sup> Allowing for weekends and public holidays, there were about 580 days, on which hearings could have taken place, of which only 204 days (about a third) were used. The *Katanga* trial was more efficient; the equivalent figures are 490 and 265 days (over half). The figures from the more recent *Bemba* and *Ntaganda* cases (about a third and just over a quarter, respectively) indicate that the proportion of potential sitting days did not increase.<sup>93</sup>

On most days in 2018, all three courtrooms in the new ICC building have been empty, despite the fact that three cases were in trial for most of that year.<sup>94</sup> Courts are not factories, of course. Judges and lawyers have other out-of-court commitments that must be fulfilled. Furthermore, the intensity and duration of proceedings is likely to be such that some periods for analysis, reflection and preparation will be necessary. But the *Katanga* case illustrates that a long and intense case can be held with the ICC using a majority of the sitting days available to it to hear evidence. Efforts must be made to emulate that performance.

As with all metrics, there is great advantage to be gained from transparency. The 2016 and 2017 reports on the performance indicators appear to have retreated from the idea of benchmarking and performance indicators based on such benchmarks. Nor are the ideas of measuring the speed of judicial decision-making or the efficiency of courtroom use taken any further. These reports do include detailed statistical data on cases for each

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<sup>91</sup> However, one cannot disregard the financial limitations that the ICC had experienced in the past, making it difficult for the Registry to enable simultaneous proceedings in all three courtrooms.

<sup>92</sup> ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 11 (<http://www.legal-tools.org/doc/677866/>).

<sup>93</sup> Incomplete (*Ruto and Sang*, ICC-01/09-01/11), guilty plea (*Al Mahdi*, ICC-01/12-01/15), and Article 70 (*Bemba et al*, ICC-01/05-01/13) cases are not considered for the purpose of this comparison.

<sup>94</sup> *Ongwen*, *Gbagbo and Blé Goudé* and *Ntaganda*.

of the seven identified phases,<sup>95</sup> but not in a way which enables useful conclusions to be drawn. For example, the number of days on which trial proceedings took place is contrasted not with the number of days on which courtrooms were available, but with the number of days on which sittings were scheduled to be heard. Although the 2017 report spoke of “next year’s progress report”, none appeared in 2018 or the following years. There has to be some question whether the development of “qualitative and quantitative performance indicators” required by the Assembly of States Parties has been achieved in respect of the stated goal that ICC proceedings are expeditious.

While the 2017 report on the performance indicators sets out data in highly concentrated tabular form for five of the most recent ICC trials,<sup>96</sup> the number of available sitting days is not measured. This data would have enabled the reader to evaluate if the use of courtroom time was efficient. In domestic systems, rather more detailed figures are collected.<sup>97</sup> In any given court centre in the UK, for example, the resident judge and court manager will know the average cost of every minute of court time, and the number of available minutes which are being gainfully used in each of the courtrooms. Where the performance dips significantly beyond what is deemed to be a reasonable level, explanations will be sought from the court officials and judges concerned.

Disclosure of evidence is another area requiring careful attention. Current system of evidence disclosure is time-consuming and labour-intensive, requiring page-by-page review, manual redactions and highly-technical electronic disclosure. However, there would be significant problems with a move to a simpler open book system, whereby, as a rule, all material in the Prosecution’s hands is made available to the defence legal team for inspection as soon as they are appointed. The reasons for not doing it are practical. The Prosecution gathers, as a necessary part of its investigations, a significant quantity of data concerning individuals who may

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<sup>95</sup> The 2016 and 2017 reports identified seven key phases relevant to measuring expeditiousness and fairness, which generate most workload for the judges, parties and participants: confirmation, trial preparation, trial, trial deliberations, sentencing, reparations and final appeals against conviction and sentencing.

<sup>96</sup> *Onghwen, Ntaganda, Gbagbo and Blé Goudé, Al Mahdi and Bemba et al.* See ICC, Third Court’s report, 2017, Annex I, see above note 72.

<sup>97</sup> European Commission, “The 2018 EU Justice Scoreboard”, Publications Office of the European Union, 2018, pp. 10–22.

turn out to have no relevance to the issues in a particular case. It is, and must remain, the Prosecution's task to protect the privacy of such persons and thus withhold information if no disclosure duties arise. Nonetheless, there is scope for a less painstaking approach, for example the adoption of bulk disclosure facilitated by software akin to the electronic disclosure suites used at the ICTY and ICTR. This bulk disclosure might be feasible with large collections of material received from governments or NGOs, or gathered from open sources.

### **17.6.3. Ensuring Speedier Judicial Decision-Making**

As noted above, the monitoring of the time taken for judicial decision-making was proposed in the ICC's 2015 report on the development of performance indicators, but appears to have been dropped in 2016 and 2017 reports. The idea is not new.<sup>98</sup> The Rome Statute and the Rules stipulate time limits for the Prosecution, Defence, legal representatives of victims, Registry, and States to take certain procedural steps. In addition, ICC judges frequently exercise their powers to set additional deadlines, and alter the statutory or regulatory deadlines for parties and participants.

As a first step, monthly data could be assembled and shared, initially only among the judges themselves, on a judge-by-judge basis, for each decision rendered, either individually or as part of a panel, so as to inform judges concerning areas where time may be saved and to enable appropriate targets to be considered.

Thereafter, whether as a matter of practice or by means of binding regulations<sup>99</sup> – thus without any need for an amendment to the Rome Statute or the Rules of Procedure and Evidence – clear deadlines could be set for judicial decisions, in particular decisions on opening an investigation under Article 15, decisions on applications for a warrant of arrest or summons to appear under Article 58, conviction or acquittal decisions under Article 74, sentencing decisions under Article 76, decisions concerning reparations orders under Article 75, and final appeal decisions under Article

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<sup>98</sup> See, for example, Mettraux *et al.*, 2014, paras. 96, 103 and 104, see above note 82; European Commission for the Efficiency of Justice (CEPEJ), Françoise Calvez and Nicolas Regis (eds.), *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, 3rd. ed., 2018, appendix 3b.

<sup>99</sup> Article 52 of the Rome Statute: “The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning”.

81, but also for more routine decisions on interlocutory filings. Standard times could be established for the interstitial periods between the various stages of the proceedings. Such regulations could, of course, allow for a departure from the set deadlines if good reasons to do so are demonstrated.

In November 2019, the ICC judges updated the Chambers Practice Manual to include timeframes for the rendering of key decisions at pre-trial, trial and appeal level. This is, without a doubt, an important step towards speedier judicial decision-making. But it remains to be seen if these timeframes are respected, considering that the document has no binding power on the judges.

### **17.7. Conclusions**

The ICC is an important and ambitious project. In simple terms, it is an agreement that large-scale brutalities that have routinely been tolerated in the past should now be the subject of investigation and prosecution, even if domestic proceedings for such crimes are not viable. The ICC continues to be a beacon of hope for those most affected by armed conflicts and power struggles. Victims and their communities, having faced the turmoil of mass violence, turn to the ICC with expectations of quick and positive results.

But it is paramount that stakeholders understand the ICC's inherent limitations, including the length of time it might take for a case to complete the full procedural cycle. The principal factors affecting the length of the ICC proceedings are the timing, nature, scope and geographic location of crimes; judicial oversight of prosecutorial activities; participation of victims; rights of the accused; transcription, translation and interpretation; disclosure of evidence; witness and staff protection; international co-operation; and background of ICC staff.

In recent years, the Assembly of States Parties, Presidency, Chambers, Registry and Office of the Prosecutor have all made efforts to make the ICC proceedings more efficient. To further improve the length of the ICC proceedings, it would be desirable to consider and implement mechanisms to ensure the making of timely judicial decisions, shorter breaks between procedural stages, more efficient use of available sitting days during trial, and more streamlined procedures for the reception of legal submissions and evidence. Finally, it is imperative for the administration of the ICC to resuscitate the efforts made back in 2015 to develop a set of objective markers that will assist in conducting trials within reasonable time in

consultation with the judges, the Prosecution, legal representatives of the victims and the Defence.



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## Founding an International Criminal Court Bar

Philippe Currat and Brice Van Erps\*

### 18.1. Introduction

Drawing on the authors' own experience and hands-on involvement in the proceedings and negotiations leading up to the creation of the International Criminal Court Bar Association ('ICCBA'), this chapter recounts its creation. The authors highlight the importance and the need for a long overdue bar association that is in line with international standards. It recalls the role played by the important mobilization and self-organization of the profession to obtain, in collaboration with the Registrar of the Court, a bar association that is independent of the Registry of the Court and that can fulfil its mission to uphold professional standards and ethics, as well as protect its members from persecution and improper restrictions and infringements and more largely co-operate with the organs of the Court and other entities who gravitate around the International Criminal Court ('ICC') in furthering the ends of justice and public interest.

Firstly, this chapter gives an overview of the situation before the creation of the ICCBA and sets forth the challenges and solutions encountered up to the creation of the ICCBA. Secondly, the authors depict the situation as it is with the implementation of the ICCBA and lastly, this chapter postulates what can be expected of the future of the ICC provided with a bar association.

### 18.2. The Past of the ICC: No Bar Expected

#### 18.2.1. The Tools Available *Ab Initio*

According to the first two paragraphs of the Preamble of the Basic Principles on the Role of Lawyers, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Ha-

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vana, Cuba, on 27 August to 7 September 1990 ('Basic Principles on the Role of Lawyers'), the role of lawyers is closely linked to the promotion of human rights and fundamental freedoms, without distinction as to race, sex, language or religion, in the establishment of the conditions under which justice can be maintained. Furthermore, the last paragraph of said Preamble states that

professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operating with governmental and other institutions in furthering the ends of justice and public interest.<sup>1</sup>

Nevertheless, less than three years thereafter, the Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), adopted on 25 May 1993<sup>2</sup> made no mention of the Defence in the organization of the Tribunal; the same is to be said for the International Criminal Tribunal for Rwanda ('ICTR').<sup>3</sup> When discussing the creation of a permanent international criminal court, the States only briefly mentioned, during the preparatory works, in 1995, the idea of a bar for the ICC, without pursuing any step forward in that direction.<sup>4</sup> Once again, only the rights of the accused or of the Defence are mentioned in the Rome Statute, in Articles 56 or 67 to 69, but the Defence as an institution remains absent from the organization of the Court. Finally, it is part of the functions of the Registry to organize the Defence, according to Rule 13 of the Rules of Procedure and Evidence of the ICC ('RPE'), that provides that the Registrar shall put in place regulations to govern the operation of the Registry: "The regulations shall provide for defense Counsel to have access to appropriate and reasonable administrative assistance from the Registry".<sup>5</sup> But there is no institution he

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<sup>1</sup> "Basic Principles on the Role of Lawyers", 27 August to 7 September 1990, Preamble, p. 1, para. 2 ('Basic Principles on the Role of Lawyers').

<sup>2</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (<http://www.legal-tools.org/doc/b4f63b/>).

<sup>3</sup> Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (<http://www.legal-tools.org/doc/8732d6/>).

<sup>4</sup> William Schabas and Yvonne McDermott, "Article 67", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck, Hart and Nomos, 2016, p. 1653, para. 4.

<sup>5</sup> ICC RPE, Rules of Procedure and Evidence, 9 September 2002, Rule 13, Part II. A ('ICC RPE') (<http://www.legaltools.org/doc/8bcf6f/>).

may consult with, on any matters which may affect the operation of the Defence.

It follows from Rule 20 RPE, that the Registrar (and not the Registry) assumes certain responsibilities relating to the rights of the Defence. In particular and based on a direct reference to Article 43(1) of the Rome Statute, it is stated that “the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the Defence, consistent with the principle of fair trial as defined in the Statute”.<sup>6</sup> It is particularly interesting to note that Article 43(1) of the Rome Statute reads as follows: “The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court”. Is this really to say that the organization of the Defence counts among those “non-judicial aspects of the administration and servicing of the Court”? Following the latest commentators in English of that article,

It is apparently intended to ensure that the Registry does not interfere with judicial prerogatives. However, it is suggested that this limitation should be read narrowly only to cover any administrative aspect of the Court’s judicial decision-making process such as the Judges’ deliberations or consultations amongst the Judges themselves. It is not intended to affect Registry’s duties to provide for the management of the Court’s judicial activities, including scheduling and support services.<sup>7</sup>

Clearly, the Defence is not properly taken into consideration.

Nevertheless, the Registrar, in organizing the staff and the financial administration of the Registry in a manner that promotes the rights of the Defence, shall provide support, assistance, and information to all Defence Counsel appearing before the Court in the way described in Rule 20 RPE, including in ensuring the professional independence of Defence Counsel. The Registrar occupies accordingly a central position regarding not only the promotion of the rights of the Defence, but also the organization of the Defence. By entrusting the Registrar with the responsibility of advising the Prosecutor and the Chambers on relevant defence-related issues, the RPE disregard some of the Basic Principles on the Role of Lawyers. It is true that the Registrar may also co-operate with national defence and bar associations or any other independent representative body of counsel and legal

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<sup>6</sup> *Ibid.*, Rule 20(1).

<sup>7</sup> Magda Karagiannakis, “Article 43(1)”, in Triffterer and Ambos (eds.), 2016, p. 1281 para. 7, see above note 4.

associations to promote the specialization and training of lawyers in the ICC law and regulation, but two observations seem necessary here. Firstly, that this is left to the Registrar's own appreciation to consider when such a co-operation may be appropriate and, secondly, that we can doubt the ability of almost all national or regional bar associations in training their members in a specialization that is, by nature, always exercised outside of their jurisdiction.

Rule 20(3) ICC RPE provides that:

for purposes such as the management of legal assistance in accordance with Rule 21 and the development of a Code of Professional Conduct in accordance with Rule 8, the Registrar shall consult, as appropriate, with any independent representative body of Counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

Three points are of paramount importance here.

The first interesting point mentioned in Rule 20(3) ICC RPE is legal assistance. This means, pursuant to Articles 55(2)(c) and 67(1)(d) of the Rome Statute, the right to conduct the Defence through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it. Based on Rule 21 ICC RPE, the Registrar shall propose the establishment of criteria and procedures for assignment of legal assistance in the Regulations, "following consultations with any independent representative body of Counsel or legal associations".<sup>8</sup> The Registrar shall create and maintain a list of counsel, who meet the criteria set forth in Rule 22 and the Regulations of the Court,<sup>9</sup> from which a person shall freely choose his or her counsel. According to Rule 22(3) ICC RPE, "In the performance of their duties, Counsel for the defense shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties".<sup>10</sup>

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<sup>8</sup> ICC RPE, Rule 21(1), see above note 5.

<sup>9</sup> *Ibid.*, Rule 21(2), and ICC, Regulations of the Court, 26 May 2004 (<http://www.legal-tools.org/doc/2988d1/>).

<sup>10</sup> ICC RPE, Rule 22(3), see above note 5.

Here lays the second point, in the determination of the professional conduct a counsel must adopt before the Court. It is particularly interesting to observe that, in the absence of a bar, Rule 8 ICC RPE states that it is the Presidency that shall draw up a draft Code of Professional Conduct for Counsel, based on a proposal made by the Registrar, after consultation with the Prosecutor, which is to be transmitted to the Assembly of States Parties ('ASP'), for adoption. This is the sole text in the ICC system, to be adopted by the States Parties after the participation of all the judicial organs of the Court, and this is certainly a mark of its importance.

In the Resolution by which the Code of Professional Conduct for Counsel is adopted, the States Parties formally recognize "the general principles governing the practice and ethics of the legal profession".<sup>11</sup> Here we learn of the existence of such general principles that allegedly govern the practice and ethics of the legal profession in international law without however being told which they are. Surely, it is hard to consider that all the Articles of the Code would be the expression of general principles recognized worldwide, especially regarding the very particular construction of the disciplinary regime, which is based on a form of complementarity with the national authorities and which refers to the bar association of which a counsel is a member or any other organ competent to regulate and control his or her professional activity. Looking back and again to the last paragraph of the Preamble of the Basic Principles on the Role of Lawyers, the following statement is of a particular interest:

professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest.<sup>12</sup>

The ICC definitely needed a bar and, this is the third point, in drafting and adopting the RPE, the States Parties reserved to themselves the role of facilitators in the establishment of an independent representative body of counsel.

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<sup>11</sup> ICC ASP, Code of Professional Conduct for Counsels, ICC-ASP/4/Res.1, 2 December 2005, Preamble, p. 1, para. 4 ('Resolution ICC-ASP/4/Res.1') (<http://www.legal-tools.org/doc/f9ed33/>).

<sup>12</sup> Basic Principles on the Role of Lawyers, last paragraph of the Preamble, see above note 1.

During the Geneva Symposium of 2012, organized by the authors to celebrate the tenth anniversary of the ICC on the theme “Assembling the Defense”, Elise Groulx, a founding member of both the International Criminal Defence Attorneys Association and the International Criminal Bar (‘ICB’), made a statement, recalling:

The Defence was the cause that nobody wanted to endorse or support. [...] I cannot tell you how unpopular the issue was at first in that forum and this lasted for quite a while. [...] Our argument was that getting fair trial procedure and the right to Counsel down on paper was only Step 1. The rights are only guaranteed in reality when we take a Step 2: ensuring institutions are in place to enforce them.<sup>13</sup>

Before the ICTY, it was the same kind of self-organization movements that permitted the creation of an Association of Defence Counsel, but it was also the same difficulties that complicated its official recognition.<sup>14</sup> At the ICC, the situation is quite different. The Court is not an *ad hoc* tribunal created by United Nations Security Council resolution, but a permanent institution based on an international multilateral treaty. The question of a formal recognition of a bar association is thus not left in the sole hands of the judges through a modification of the RPE but requires a decision of the States Parties and can therefore, depending on the forms envisaged, require an amendment to the Rome Statute. Such a solution was definitely impractical and another form of creation of a bar had to be conceived, one that did not imply any amendment to the Rome Statute and, as far as possible, the less possible amendments to any other texts adopted by the States Parties.

### **18.2.2. The Attempt of the International Criminal Bar**

The International Criminal Bar was born in Montreal on 15 June 2002,<sup>15</sup> just two weeks before the entry into force of the Rome Statute. Some 400 prominent lawyers coming from more than 50 countries around the world, particularly worried by the fact that there was no institutional representation of the Defence before the ICC,<sup>16</sup> decided to meet in Montreal. After

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<sup>13</sup> Statement by Elise Groulx, “Rassembleur la défense”, ICB Conference of Geneva, 29–31 March 2012 (unpublished, the manuscript of the presentation is on file with the authors).

<sup>14</sup> See Association of Defence Counsel, “About Us” (available on its web site).

<sup>15</sup> See International Criminal Bar, “History” (available on its web site).

<sup>16</sup> See *ibid.*

that, they held the ICB first general assembly in Berlin, on 21 and 22 March 2003.<sup>17</sup> Since its creation, the force of the ICB was the diversity and the drive of individual lawyers, personally involved and interested in international criminal law, but also of many local or national bars. Among them, we can mention the Bar of Paris and the French Conseil national des barreaux, the German Deutscher Anwaltverein, the Bar of England and Wales, the American Bar Association, the Bars of Lebanon or Morocco, of Hong Kong, the Bar of Québec, the national Bars of Canada, Costa Rica, the Democratic Republic of Congo, Malaysia, Mali, Japan, South Africa, South Korea or the Swiss Federation of Lawyers, and many others, as well as international associations of lawyers, for instance the Inter-American Bar Association, the Canadian Council of Criminal Defence Lawyers, the European Bars Federation (‘FBE’), the Union Internationale des Avocats (‘UIA’), or the International Criminal Defense Attorneys Association that all worked together. It was particularly important to involve in the process local and national bars and international organizations of lawyers. Historically, at least in Europe and North America, the bar associations have largely come from the self-organizing movements of the legal profession, around the idea of guaranteeing the quality of training of lawyers and protecting their independence in the exercise of their profession, in order to guarantee the interests of justice.<sup>18</sup> The local and national bars also have extensive experience in defining and enforcing ethical and professional rules for the profession; they have long been recognized as key interlocutors by the States with regard to the exercise of the legal profession. It is therefore interesting to recall, for instance, the European Bars Federation Resolution of June 2002, which reads:

FBE, [...]

Reaffirms that the International Criminal Court, in order to ensure the legitimacy of its functioning, must recognise the right of Counsel as the “third pillar” of the International Criminal Court.

Declares the following to be essential principles: [...]

4. The preservation of the prerogatives of Bars and Law Societies to govern the qualification of Counsel as well as dis-

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<sup>17</sup> See *ibid.*

<sup>18</sup> See Arman Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, International Courts and Tribunals Series, 2013, p. 10–16.

ciplinary sanctions and procedures under the national codes of ethics.

5. The need for assistance and advice on ethical issues for Counsel appearing before the International Criminal Court, to be provided by a body representing Counsel and recognised by the International Criminal Court.

Resolves that in order to ensure that these principles continue to be respected before the International Criminal Court:

1. There should be an institution representing Counsel before the International Criminal Court open to all bars and Law Societies;

2. Such an institution should be fully supported by the Bars and Law Societies and recognised by the Assembly of States Parties in the International Criminal Court; and

3. The FBE welcomes the institution founded in Montreal on June 15 2002.<sup>19</sup>

In 2002, the States Parties and the organs of the Court were not ready for the creation of an ICC bar. It was impossible to obtain the formal recognition the ICB wanted and the Court started its existence without a bar or any other form of an association of Defence counsels.

After failing to obtain recognition as the Court's bar in the first years after its founding, the ICB was partly marginalized by the organization of the Defence adopted by the Registry of the Court. In particular, the establishment of the list of counsel, the content of which was, at first, confidential, has not allowed to unify the Defence. The lawyers who came to be registered on the list of counsel all over the world were not all aware of the existence of the ICB, which, being unable to know the names of the lawyers on the list, was not able to make itself known. Various difficulties followed, with the ICB speaking on behalf of the Defence, seeking to promote the general interests of the profession before the Court, while the lawyers on the list of counsels, who were not members of the ICB, did not recognize themselves in its positions. This created a gap that widened as the number of lawyers on the list of counsel increased and whose voices, multiplying without consultation, became too many to be audible. This situation has forged the perception that the Registry was seeking to divide the Defence so as not to lose the powers conferred to it by the relevant texts.

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<sup>19</sup> European Bars Federation, "Resolution about international justice court", June 2002.

### 18.2.3. A Solution Emerges

Despite the tools available and the attempt of the ICB, no bar at the ICC had been established after more than ten years. The lobbying undertaken, especially by the ICB, had however, in the authors' opinion, contributed to some progress in the direction of a bar in the general opinion.

At the ICB General Assembly of December 2012, the authors could observe that the terms of the equation began to change. On the initiative of the author of this chapter, the ICB considered that the time of its recognition had passed and that it was necessary to work for the creation of a bar association specific to the Court, on new foundations. In particular, it was necessary to identify what could be understood as a bar in the very particular context of the ICC. Indeed, each of the bars represented in the organs of the ICB, from all continents, had its history, its legal basis, its field of competence and its experience. It did not make much more sense to duplicate for the Court the institutional scheme of the Paris Bar than that of the Bar of Costa Rica, Canada, Mali, Malaysia or any other. Moreover, it was clear that missions, which, in some countries but not everywhere, fall within the competence of the bar, in particular disciplinary control and legal aid, were already subject to regulations before the ICC. Neither was it possible to copy the solution chosen by the Extraordinary Chambers in the Courts of Cambodia ('ECCC') as their solution was that the lawyers intervening before those chambers were submitted to the Cambodian law.<sup>20</sup> The Office of the Principal Defender at the Special Court for Sierra Leone was not a satisfying source of inspiration either, given that. Firstly, it is similar to the system of the Office of Public Counsel for the Defence ('OPCD'). Secondly it has encountered sustained critics, amongst which one by an author that described it as a naked defence office due to the fact that it had been given an unclear mandate, was poorly staffed, and was neglected by the Registry.<sup>21</sup> It was therefore necessary to find a formula that could serve the interests of the profession and the proper functioning of justice, while respecting the existing legal and regulatory framework. The most inspiring example came of course with the solution found at the Special Tribunal for Leb-

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<sup>20</sup> United Nations General Assembly, Khmer Rouge trials, UN Doc. A/RES/57/228 B, 22 May 2003 (<http://www.legal-tools.org/doc/533d2a>).

<sup>21</sup> Ashraph, Sareta, "The Naked Defense Office: How an Unclear Mandate, Poor Staffing, and Registry Disinterest Stripped the Office of the Principal Defender", in Charles Jalloh (ed.), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, 2013, pp. 550–571.

anon, whose Defence Office was, however, a fully-fledged organ of the Court, implemented from the outset.<sup>22</sup> This solution did thus not appear viable for the ICC given the cumbersome nature of the procedure to modify the Rome Statute and insufficient willingness on the part of the States Parties to implement a defence organ on par with the other organs.

It was time to understand that the absence of a bar was not only due to a lack of will of the Court Registry, but perhaps more so to the inability of the Defence to come together to speak with one voice, in the common interest. The ICB has therefore embarked on a rallying of the Defence, making the effort to contact each lawyer, one by one, in order to determine together the fundamental principles that could allow the creation of a bar. This might remind one of the fundamentals of the self-organization of the legal profession which led to the emergence of bars in Europe.<sup>23</sup> It was during the March 2012 symposium organized in Geneva to mark the tenth anniversary of the Court, with the participation of ICB organs, lawyers on the List of Counsels and in the presence of the Head of all the Court's organs, as well as the President of the ASP, then Ambassador Tina Intelman from Estonia, that it was made possible to change the settings in relation to the creation of an ICC bar association.

At the next session of the ASP, the Committee on Budget and Finance submitted a report to the Assembly on the organizational structure of the Court, in which it started with the recommendation that:

the Court undertake a thorough evaluation/review of its organizational structure with a view to streamlining functions, processes and corresponding structures, reducing spans of control where necessary, identifying responsibilities that could be delegated and rationalizing lines of reporting. Furthermore, the Committee recommended that the Court present a report on the complete structure of the Court, and not at the position level, for its eighteenth session, with a view to identifying clear managerial and reporting lines, as well as any needs, current or future, to modify the Court's structure and post requirements.<sup>24</sup>

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<sup>22</sup> See Resolution 1757 (2007), UN Doc. S/RES/1757 (2007), 30 May 2007, Article 2, p. 7 (<http://www.legal-tools.org/doc/c8fb1a>).

<sup>23</sup> Philippe Currat and Brice Van Erps, *La défense devant les juridictions pénales internationales*, Editions Probare, 2019, p. 295–307.

<sup>24</sup> See ICC ASP, “Report of the Court on its organizational structure”, 4 May 2012, ICC-ASP/11/6, p. 1, para. 2.

With the election of Herman von Hebel as Registrar of the Court, on 8 March 2013,<sup>25</sup> a wider movement of reorganization of the Registry was proposed and implemented, albeit in a controversial manner.<sup>26</sup> In October 2014, the Registrar presented to the ASP a draft proposal for the establishment of a Defence Office and a Victims' Office ('Draft Basic Outline of Proposals to Establish Defence and Victims Offices').<sup>27</sup> This document provided an overview of the vision, reasons and ideas behind these proposals and was intended to serve as a basis for discussions with relevant stakeholders. In the months following the presentation of this document, the Registrar's proposals received wide attention from lawyers, experts, representatives of NGOs or States.

During the December 2014 ASP, in New York, the Registrar proposed the authors to attend the next ICB General Assembly, to be held in Barcelona in January 2015, and to take that opportunity to have an in-depth discussion with the legal profession on the place and the role of the existing bodies, namely the OPCD and the Office of Public Counsel for Victims ('OPCV'), or the Counsel Support Section ('CSS') and on the creation of a bar or other form of association of lawyers. The Barcelona discussions were intense and the Registrar was certainly not on conquered ground. They were necessary and opened up unprecedented perspectives in the history of the Court. At the end of its General Assembly, on 30 January 2015, the ICB adopted a resolution giving a mandate to its Executive Committee, to work on the creation of an independent bar for the ICC.<sup>28</sup> This resolution

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<sup>25</sup> ICC, "ICC's new Registrar Herman von Hebel takes oath", 18 April 2012, ICC-CPI-20120418-PR899.

<sup>26</sup> Various organisations have published critical analyses, notably on the legal representation of victims, see, for example, the FIDH, "Newsletter", 18 November 2014". See also H el ene Calame and Jo el Hubrecht, "Projet de r evision du Greffe de la CPI: une r eforme controvers ee", Institut des Hautes  tudes sur la Justice, March 2015. This reorganisation of the Registry has been the subject of various reports, including to the Assembly of States Parties, see ICC ASP, "Audit report of the ReVision project of the International Criminal Court's Registry", 9 November 2016, ICC-ASP/15/27 ('Audit Report of the ReVision Project') (<http://www.legal-tools.org/doc/80a7a5/>); see also ICC ASP, "ReVision Report: Secretariat of the Assembly of States Parties", 13 December 2017, ICC-ASP/16/INF.3 (<http://www.legal-tools.org/doc/372360/>).

<sup>27</sup> ICC Registry, "Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court", 31 August 2016, pp. 131–132, para. 411 ('Comprehensive Report on the Reorganisation of the Registry') (<http://www.legal-tools.org/doc/cbc6cc/>).

<sup>28</sup> ICB General Assembly, "R esolution sur la proposition de cr eation d'un Barreau des avocats admis   repr esenter devant la CPI", 30 January 2015 (unpublished document, the text of the resolution is on file with the authors).

specifically stated that the bar should ensure the independence and the representation of the legal profession and of all counsel before the ICC, be in charge of enforcing ethical rules applicable to counsel and of the discipline of counsel, that counsel practising before the ICC have to be members of the bar, which was to be created for the ICC only. The draft document creating the bar was designed to be submitted for adoption to the fourteenth Session of the ASP.

If there was clearly no debate on the first point regarding the necessity of ensuring the independence of the legal profession, the question to determine if an ICC bar association must be for all counsel or only for those who are intervening in the defence of an accused, at the exclusion of the legal representatives of victims, has always been a matter of discussion. Such was already the case at the creation of the ICB and was, once again, the case during the Founding Congress of the ICCBA. The answer has always been the same, to consider that all counsel being subjected to the same Code of Professional Conduct for Counsel in the exercise of the same profession before the Court, a bar should be for all of them. The second point, regarding the enforcement of ethical rules applicable to counsel and of the discipline of counsel, was to recall the importance of these questions and the role a bar could play in improving the professional conduct of counsel. The third point was not so much discussed during the 2015 ICB General Assembly although it is of paramount importance. By stating so clearly that counsel practising before the ICC have to be members of the Bar, it was meant that it would be mandatory for a list counsel to join the Bar, to be authorized to practice before the ICC. In stating that the Bar is created for the ICC, the ICB considered essential to have a bar specifically dedicated to that Court and not one for all the international or internationalized courts or tribunals. The specificity of the ICC, as a permanent and potentially universal Court, entails the specificity of the missions of that Bar. The last point, providing that the draft document creating the Bar was to be submitted for adoption to the ASP, underlines the specificity of the ICC regarding the fundamental role of the States in the functioning of the Court. It must be recalled that not only the Rome Statute and the RPE but also the Code of Professional Conduct for Counsel have been adopted by the ASP. The adoption of the text by the States Parties was seen as necessary not only to guarantee the independence of the bar association, but also to ensure the level of formal recognition appropriate to allow it to act as an in-

terlocutor with both States Parties and other judicial organs of the Court in the fulfilment of its mission.

Most importantly, a conference of experts – amongst which the author, in his capacity as General Secretary of the ICB, was convened by the Registry at the seat of the Court in March 2015. It was then important to prepare this meeting by assembling all the major figures of the Defence before the ICC and to present a unique and common voice during the discussion with the Registry. Among many others, those who had also been working on a project of creating a bar or an association of counsel for the ICC, namely Raymond Brown, Jens Dieckmann, Michael Karnavas and Geoff Roberts, took part. The two Co-Presidents of the ICB, Roxane Helme QC and David Levy, one of the Vice-Presidents, Kenneth Gallant, and Philippe Currat, ICB General Secretary, spent the weeks before the meeting calling the other lawyers one by one. If it was certainly not easy to convince all of them to meet the day before the opening of the expert meeting, a Sunday night, it has finally been possible to achieve something that appears, looking back to that date, historical. It was the first time that the main actors of the Defence before the ICC took the opportunity to discuss together the best way to create, finally, a bar. It was particularly important that such discussions may have been conducted at a moment that allowed the Defence to take part in the discussion opened by the Registrar around his ReVision project.<sup>29</sup> In the weeks leading up to the expert meeting, intense discussions took place on issues such as whether a bar should only be open to defence lawyers or also to representatives of the victims, should be limited to counselling or open to members of their teams, should be limited to counsel pleading before the ICC or open to all practitioners before all international criminal jurisdictions, if affiliation to this bar was to be on a compulsory or voluntary basis, if the members were to pay dues and if that bar was to be registered, as to its legal form, under Dutch law, because of the seat of the Court in the Netherlands.

All the participants to that preparatory work, amongst them Philippe Currat, agreed on the following fundamental principles: (i) the organization set up will be a bar and not an association of counsel; (ii) the Bar will be for all counsel at the Court, both defence and victims; (iii) membership is open to all counsel, co-counsel, legal assistants, case managers, who are

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<sup>29</sup> Comprehensive Report on the Reorganisation of the Registry, Foreword by the Registrar, pp. ix-x, see above note 27. The authors of these pages were among the experts.

members of their national bars; (iv) membership is mandatory for list counsel; (v) it is first of all an ICC Bar, and is open to members from the United Nations criminal courts and tribunals; (vi) it will have at least a Defence and a Victims section; (vii) the Bar must be represented in every Committee or Working Group dealing with amendments to legal texts, rules and regulations and making of new sets of rules and regulations; (viii) it provides services to members (for example, support in day to day dealing with issues on the Court; legal advice if needed by counsel), perhaps maintaining a list of counsel; and (ix) the Bar will finance itself first of all with member fees/dues but may accept outside funding (such as from the ASP) so long as its principles are not compromised.

During that experts meeting, the common position expressed by the Defence was strongly perceived not only by the Registry, but also by all the other experts and NGO representatives who attended the meeting. It is fair to say that such a common position was not expected and provoked an important change in the way the ReVision project was to be completed. When, at the end of the meeting, it was decided to create a drafting committee for preparing the Statute of an ICC bar association, the composition of it was decided by consensus. Only the involvement of the OPCD and OPCV Principal Counsel has raised some controversy as to their independence while they belong to the staff of the Court and their offices are administratively attached to the Registry. It was considered that their expertise in the functioning of the Court was of particular importance for the committee and thus justified their participation.

The drafting committee was comprised of 11 persons, namely Geoff Roberts (counsel, IBA member), Raymond Brown (counsel), Ken Gallant and David Levy (representing ICB), Michael Karnavas (counsel), Jens Dieckmann (counsel), Emmanuel Altit (Defence counsel), Luc Walleyn (victims counsel), Ghislain Mabanga (witness counsel), Xavier-Jean Keïta (OPCD), and Paolina Massidda (OPCV). This committee decided to work speedily and to be done with its mission by May 2015. It was also decided that the committee shall circulate among its members the three to four drafts that were on the table, will send its common draft for review and comments to ICC list counsel and to international associations of lawyers, will reconvene in order to take into account the comments, and will draft a final document that will be sent to the Registrar and circulated to the legal profession.

In its report of August 2016, the Registry notes:

This consultation process led to the holding in March 2015 of the two days of an expert conference bringing together about 70 experts with extensive experience in the functioning of the Court in the areas of defence and victims' participation in the proceedings. Many Defence Counsels and victims' representatives in cases heard by the Court attended, as did a large number of representatives of NGOs and individual experts. This consultation allowed the Registrar to reconsider some of the original ideas and, as a consequence, led to the initial proposals being reviewed and developed further.<sup>30</sup>

In a November 2016 Report, the Registrar explained in particular in relation to the Defence:

The project team strived to merge the two sections in charge of defence (the Office of Public Counsel for Defence, OPCD, and the Counsel Support Section, CSS). A similar project provided for the merger of two sections in charge of assistance for victims (the Office of Public Counsel for Victims, and the Victims Participation and Reparations Section). The project led to significant preparatory work and the drawing up of recommendations as numerous as in the case of other sections but was ultimately not adopted as it would have implied a change to the Regulations of the Court. Judges had some general discussions on this potential merger in 2014 and 2015, which demonstrated that there was a division among Judges on the matter. As a consequence, the matter was not developed further, no concrete proposed amendments to the Regulations were ever submitted and this aspect of ReVision was abandoned.<sup>31</sup>

Even if it was not said clearly by the Registry, it is possible to consider the abandonment of that part of the ReVision project also as a consequence of the March 2015 experts meeting and of the unity shown by the legal profession. The common front offered by the Defence had thus had a real and positive influence on the course of the reorganization process of the Registry.

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<sup>30</sup> *Ibid.*, p. 132, para. 413.

<sup>31</sup> Audit Report of the ReVision Project, p. 11, paras. 69–70, see above note 26.

### 18.3. The Present of the ICC: A Bar Achieved

The work of the drafting committee was a strong starting point but was not enough in itself. It was necessary, in parallel to its work, to build as broad support as possible around the concretization of a bar, on the part of States, organs of the Court and local or national bar associations as international associations of lawyers.

With regard to States Parties, David Levy and Philippe Currat conducted extensive diplomatic consultations to convey to the various delegations the importance of establishing a bar association to build and strengthen the credibility of the Court. It is important to say that the position of the States, globally, had profoundly evolved since the opening of the *Bemba et al.* case<sup>32</sup> for offences against the administration of justice in connection with the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. The arrest, on 20 November 2013, of Aimé Kilolo Masemba, principal Defence Counsel of Jean-Pierre Bemba Gombo, and Jean-Jacques Magenda Kabongo, his Defence case manager, together with one of the Defence witnesses and a member of Parliament in the Democratic Republic of the Congo and their subsequent transfer to the ICC Detention Centre, provoked an unprecedented judicial seism. If it was possible and admissible for the Prosecutor to monitor the Defence Counsel, members of his defence team and the accused person during the trial phase against him, to request and obtain the arrest of a Defence Counsel in the middle of the presentation of the defence case to the Trial Chamber, it was certainly necessary to have a bar to discuss with in order to ensure the protection of the rights of the Defence and, in particular, the protection of the confidentiality and the professional secrecy, during the investigative phase on alleged offenses against the administration of justice. The consequences on the Court's image, its integrity, on the image of the legal profession and its integrity as well as its ability to present an effective defence in accordance with the applicable professional rules, were devastating. It was certainly a turning point for the States Parties as well as for the organs of the Court and also for the Defence Counsel. The Court had no interlocutor with whom to discuss, lawyers had no institution to turn to for advice and protection and the States Parties had been taken by surprise.

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<sup>32</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Pre-Trial Chamber II, Warrant of arrest for Jean-Pierre Bemba Gobo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 20 November 2013, ICC-01/05-01/13-1-tENG (<http://www.legal-tools.org/doc/4b1297/>).

The election of the then Minister of Justice of Senegal Sidiki Kaba as President of the ASP, in December 2014, was of particular importance. His career as well as his extended experience as Defence counsel made him the perfect interlocutor to understand the necessity of the creation of an ICC bar association. It was particularly with his Vice-President, Ambassador Álvaro Moerzinger (Uruguay), who was based in The Hague, that we discussed the considerations that could lead the ASP to agree to support the process of establishing a bar and then to recognize it formally.

These diplomatic consultations with States Parties would not have been enough without parallel discussions with the organs of the Court. The judges, and in particular the Presidency, have shown continued support for the idea of finally establishing a bar association for the ICC. The then President of the Court, Judge Silvia Fernández de Gurmendi, spared no effort to ensure that this second opportunity to create a bar for the Court does not fail as did the first attempt in 2002. The Prosecutor Fatou Bensouda, although perhaps less directly concerned with the creation of a bar, has always shown support for the founding process. The then Registrar, Herman von Hebel, was much more directly involved. During all the preparatory work, we regularly heard informal reports from lawyers based on personal interaction that the Registrar could have a hidden agenda and that his main purpose was to get his ReVision project through, not the creation of a bar. Some did not hesitate to say that the Registrar was instrumental in the discussions in order to pass the suppression of the two OPCD and OPCV and that, ultimately, we would be the dupes of an announced disaster. We were obviously aware that the institutionalization of defense through the establishment of a bar was only one part of a much broader reorganization of the Registry. In fact, we had to be careful not to interfere with the parts of the ReVision project that did not concern the defense. But we also had to be vigilant, especially at certain particularly tense moments of the controversy provoked by the Registrar's actual or supposed intentions in his reorganization desires, not to tie the fate of the Bar to that of the ReVision project. It was actually in an exercise of great acrobatics of multilateral diplomacy that we indulged ourselves. It was done so with all the conviction that we generally put in the exercise of our profession, in the same terms as those of the Basic Principles on the Role of Lawyers.

Last, but not least, we had to deal with the expectations of the representatives of our own profession, among them some particularly powerful bars, like the one of Paris, or some international associations of lawyers. In

fact, we were particularly aware of the difficulties that may exist in trying to work with lawyers. As lawyers ourselves, we knew that the only chance for success lay in always placing the debates on the general principles of the practice of our profession. Some lawyers wanted to reserve the possibility of being a member of the bar of the Court to only the very few of us who were actually pleading in a defense team. They would have formed a very small cartel to defend the interests of its members to ensure them the monopoly of representation before the ICC. The ICB has always responded by highlighting the collective nature of the work in progress and its efforts in ensuring the success of the collective project, beyond the questions of the people involved. At no other time since their adoption in 1990 have the Basic Principles on the Role of Lawyers been as influential as during this period.

It was on this basis that it was finally possible to gather at the seat of the Court, on 30 June 2016, the founding congress of the ICCBA, which adopted its statutes. In the few days before, it was still necessary to face the last jolts of dissatisfied colleagues. Some have tried to suggest that the current process lacked independence from the Registrar and that it was therefore not possible for lawyers to play that game. Oddly enough, they appealed to the President of the Court to intervene, but apparently did not perceive that it could not be more legitimate to place themselves under the control of the Presidency of the Court than that of the Registry. History ran its course and could not be stopped. The common front offered by the Defence, which had been so long and difficult to build, fortunately held against the last assaults which were delivered to it.

During the founding congress of the ICCBA, some amendments were proposed to the draft Statutes submitted to the attendees. The proposed rule of requiring a qualified majority of two-thirds of the votes for any amendment to the Statute was not discussed or proposed itself for amendment. The question of the possibilities for Court staff to be members of the Bar was particularly discussed. It was, for some of us, a question of principle closely linked to the independence of the Bar. For the others, the lawyers working in the OPCD and OPCV were counsel like the others, their names appearing on the list of counsels allowed to plead before the Court and being subjected, like all others, to the same code of professional conduct in the exercise of their profession. After a very intense debate, the result of the vote was one of those that does not allow to definitively settle the controversy. The proposal to deny Court staff membership to the Bar

was accepted by just under 60 percent of the votes. This is a strong majority, but below the required two-thirds majority for amendments to the Statute.

Another point that was discussed at length was the funding of the Bar. In any bar, lawyers pay fees or dues that can sometimes be high. However, it was obvious to everyone that out of the 600 or so names on the list of counsels, only a tiny minority would actually be called to take part in a defence team. Was it therefore legitimate to ask those who will never work in the Court to pay dues to this bar? Should there be different amounts for members who are active in a defence or victim representation team and for those who are not? A proposal was made to deduct a percentage of the legal aid received by lawyers as a financial contribution to the Bar, but this was not supported. Of course, with these financial elements, it is the independence of the Bar that is at stake. It was inconceivable for counsel that the Bar's funding should come from the budget of the Registry or any other judicial body of the Court, as this would have been incompatible with the principle of its independence. It was not the same with funding granted by the States Parties, on a budget line independent of the ones of the other organs but it would have been necessary to count at the political level with the reluctance of the States Parties to increase their financial contributions to the functioning of the Court and it would have been necessary to find a way to compensate this new accounting line by the reduction of another one. Finally, the question was left open and the determination of the amount of the individual contributions of the members was referred to subsequent decisions of the bodies to be issued.

The first ICCBA General Assembly was held at the seat of the ICC, on 1 July 2016.<sup>33</sup> During this first assembly, the organs were elected and the membership system was established. Three forms of membership were provided for in the Constitution of the ICCBA: full membership of the ICCBA, which is open to all lawyers admitted to the ICC List of Counsel or those who are eligible to practice before the ICC as independent defence or victims counsel; associate membership, which is open to individuals who are admitted to the ICC List of Assistants or those assigned as support staff to a case at the ICC and have at least five years of relevant experience in

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<sup>33</sup> See Association du Barreau Près la Cour Pénale Internationale, “À propos” (available on its web site).

international criminal law; and affiliate membership, which is open to individuals with demonstrable experience of international criminal law.<sup>34</sup>

To complete the process, the ASP welcomed the establishment of the Court's bar association and acknowledged its existence at the 2016 session.<sup>35</sup> At the following session, on 1 November 2017, the ASP adopted a first Report on the Statutes and Activities of the ICCBA, the summary of which shows the progress made and the quality of the objective finally achieved, from the first sentence:

The quality of justice before the ICC depends on the ability of Counsel for Victims and the Defence to perform their respective roles effectively and independently. The overriding goal of the ICCBA is to strengthen the capacity of independent Counsel to perform this role and ensure that the views and concerns of Victims' and Defence Counsel and Support Staff are represented to the Court. In the first 18 months of its existence, the ICCBA has developed into a fully functioning organization that has engaged with the Court, ASP and third parties to address issues of concern to the ICCBA membership and promote the ICCBA's broader goals in accordance with its mandate. The ICCBA has opened a dialogue with the Registrar and relevant Registry officials to discuss the views and concerns of Victims and Defence Counsel and Support Staff and seek improvements in their general conditions of work before the Court. It also contributed to the ongoing review of the Court's Legal Aid system through an in-depth commentary and by making cost-neutral proposals for significant improvements of the current situation pending the finalization of a complete review of the Legal Aid Scheme. The ICCBA is additionally conducting an assessment of potential policy gaps at the Court, which have a direct impact on the work of Counsel and Support Staff and the security of their clients – Victims, Defendants and Witnesses – to bring these matters to the Court's attention. The ICCBA has directly, and through partners, organized a variety of substantive and skills-based trainings for Counsel and Support Staff, and is in the process of launching online training facilities, through its web site, to

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<sup>34</sup> See ICCBA, Constitution, "Membership", Part II, Article 3.

<sup>35</sup> ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/15/Res.5, 24 November 2016, p. 44, para. 62 ('Resolution ICC-ASP/15/Res.5') (<http://www.legal-tools.org/doc/991a13/>).

provide easier access to expert training to its globally-based membership. Externally, the ICCBA is building a solid and worldwide network of Counsel interested in the ICC, reaching out beyond the limits of current membership to the Rome Statute, raising awareness of the ICC system in non-States Parties and supporting the Court's goal of reaching universality. Important components of this initiative include the appointment of Regional and National Focal Points who can explain the role and work of the ICC and the ICCBA and reaching cooperation agreements with national and regional bar associations and other relevant entities. By doing so, the ICCBA strives to become an indispensable and reliable partner of the Court and the Assembly in achieving a model of modern and transparent criminal justice by enhancing the quality of representation of Victims, Defendants and other persons.<sup>36</sup>

The ICCBA is governed by its General Assembly who elects the President, as well as fourteen members of an Executive Council.<sup>37</sup> Amongst those members of the Executive Council, an Executive Committee conducts the daily operations of the association. Standing Committees have also been set up to consider issues and propose activities and actions relevant to their particular area of focus, such as a Defence Committee, a Victims Committee and a Training Committee.<sup>38</sup> Furthermore, there are Regional and National Focal Points to conduct certain outreach activities on behalf of the ICCBA in the Focal Point's geographic area of responsibility.<sup>39</sup>

However, it is regrettable to note that, to this day, few academic papers are dedicated to the defense and the organization of the defense before the ICC. Even fewer publications and reflections can be found on the deontological and ethical principles that prevail, or should prevail, for counsel intervening at the ICC. It thus appears that in the absence of academic research, ICCBA committees will be at the forefront of useful reflections on the subject.

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<sup>36</sup> ICC ASP, "Report on the Constitution and Activities of the International Criminal Court Bar Association ("ICCBA")", 13 November 2017, ICC-ASP/16/30, p. 2 (<http://www.legal-tools.org/doc/ed3dbb/>).

<sup>37</sup> See ICCBA, Constitution, "General Assembly", Part IV, Article 8, no. 12a, see above note 34.

<sup>38</sup> See ICCBA, Constitution, "General Assembly", Part IV, Article 8, no. 12(d), (e) and (i), see above note 34.

<sup>39</sup> See ICCBA, "Governance" (available on its web site).

#### **18.4. The Future of the ICC: A Bar Improving the Legitimacy of the Court**

In its Resolution of 2017, entitled ‘Strengthening the International Criminal Court and the Assembly of States Parties’, the ASP invited the ICCBA to report on its constitution and activities, demonstrating the importance of this Bar for the consolidation of the Court and the ASP.<sup>40</sup> The Report on the Activities of the ICCBA aimed at providing the Assembly with information in response to this invitation.<sup>41</sup>

Each year since the founding of the ICCBA, the ASP has noted the importance of the work carried out by independent representative bodies of counsel or legal associations.<sup>42</sup> In 2018, the Assembly recognizes the ICCBA as an independent representative body of counsel which may be consulted by the Registrar, if appropriate, pursuant to Rule 20(3) of the RPE.<sup>43</sup> According to that rule, the ICCBA is therefore called upon to take on new responsibilities in essential areas of the Court’s activities that affect the defense and in particular regarding the functioning of the legal aid system.<sup>44</sup> Above all, it will also participate in any evolution of the Code of Professional Conduct for Counsel, adopted by the States Parties on 2 December 2005,<sup>45</sup> when there was no institutional structure bringing them together. As is the case with the bar associations in many national jurisdictions, ICCBA will thus be able to reappropriate the rules governing the practice of the profession before the ICC.

When the ASP, in 2019, requested ICCBA to report in advance to its Bureau on its constitution and activities,<sup>46</sup> it creates the conditions to establish, year by year, high-level institutional relationships that allow counsel to have direct access to States Parties and to become their privileged inter-

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<sup>40</sup> ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/16/Res.6, 14 December 2017, p. 45, para. 73 (<http://www.legal-tools.org/doc/36d60d/>).

<sup>41</sup> ICC ASP, “Report on the Constitution and Activities of the International Criminal Court Bar Association (“ICCBA”)”, 28 October 2020, ICC-ASP/17/380.

<sup>42</sup> Resolution ICC-ASP/15/Res.5, p. 11, para. 82, see above note 35, or, ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/18/Res.6, 6 December 2019, p. 11, para. 78 (‘Resolution ICC-ASP/18/Res.6’) (<http://www.legal-tools.org/doc/lvkj72/>).

<sup>43</sup> Resolution ICC-ASP/18/Res.6, p. 11, para. 80, see above note 42.

<sup>44</sup> ICC RPE, Rule 20(3), see above note 5.

<sup>45</sup> ICC ASP, Resolution ICC-ASP/4/Res.1, see above note 11.

<sup>46</sup> ICC ASP, Resolution ICC-ASP/15/Res.5, p. 11, para. 83, see above note 35.

locutors with respect to their activities. This is a significant step forward compared to the situation that prevailed until 2016. At that time, it was in fact the Registrar of the Court who discussed with the States Parties all issues relating to the defense and legal representation of victims. Such a situation did not allow States Parties to have first-hand information about the work of counsel, nor to give due consideration to the importance of their role in ensuring fair trials before the Court.

By recognizing the importance of the ICCBA, the ASP is finally fully implementing the recommendations adopted by the UN in the Basic Principles on the Role of Lawyers. For instance, Principle 4 states that governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms.<sup>47</sup> In the future of the ICC, the activities developed by the ICCBA in co-operation with the ASP will ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of lawyers and of human rights and fundamental freedoms recognized by national and international law.<sup>48</sup> In countries where groups, communities or regions exist whose needs for legal services are not met, which is notably the case for almost all the situation States before the ICC, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, it will now be possible for the Court to take, develop and enforce special measures to provide opportunities for candidates from these groups to enter the legal profession and ensure that they receive training appropriate to the needs of their groups.<sup>49</sup>

The recognition of the ICCBA by the States Parties also provides, in the future, an effective means of implementing the Agreement on the Privileges and Immunities of the Court, Article 18 of which aims to enable counsel to carry out their duties in complete security.<sup>50</sup> This is also an enforcement of Basic Principle 16 on the Role of Lawyers, which states that governments shall also ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or im-

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<sup>47</sup> Basic Principles on the Role of Lawyers, Principle 4, see above note 1.

<sup>48</sup> *Ibid.*, Principle 9.

<sup>49</sup> *Ibid.*, Principle 11.

<sup>50</sup> ICC, “Agreement on the Privileges and Immunities of the International Criminal Court”, 9 September 2002, ICC-ASP/1/3 (<http://www.legal-tools.org/doc/6eefbc/>). For a full analysis of the issue, see Currat and Van Erps, 2019, p. 217–293, see above note 23.

proper interference, that they are able to travel and to consult with their clients freely both within their own country and abroad, and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.<sup>51</sup> Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.<sup>52</sup>

The ICC can now count on the co-operation of a professional association of lawyers to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.<sup>53</sup>

### **18.5. Conclusion**

Thus, it has to be noted that despite the duration and importance of the preparatory work, States Parties have never shown any particular interest in institutionalizing the defense before the ICC. It was only when the Rome Statute came into force that the counsel mobilized to organize themselves. The worldwide legal profession took fourteen years to structure itself in a system that made it possible to provide the ICC with the last pillar it needed to reach the standards set forth by the Basic Principles on the Role of Lawyers. The ICCBA, by professionalizing and organizing the activity of counsel, by ensuring their independence, and justifying the privileges and immunities set forth in the ICC system through the respect of strict professional rules is therefore equipped to fulfil its role to support the Court's mission to render an international justice on the most serious crime allegations.

The way the ICCBA was finally created reminds one of the historical foundations of the creation of the bars in Europe, which was based on the self-organization of lawyers. Only the discipline lawyers impose to their peers and the support they provide each other within an independent professional association can give the legal profession the credibility it needs to fulfil its mission.

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<sup>51</sup> Basic Principles on the Role of Lawyers, Principle 16, see above note 1.

<sup>52</sup> *Ibid.*, Principle 17.

<sup>53</sup> *Ibid.*, Principle 25.

Today, and for the greatest benefit of the ICC, we can see the ICCBA as one of these professional associations of lawyers that have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, as it is stated in the last paragraph of the Preamble of the Basic Principles on the Role of Lawyers.



**SECTION E:**  
**LEGITIMACY AND INDEPENDENCE**



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## Cultivating the Court’s Legitimacy and the Use of Constructivism to Prepare for Head of State Aggression Prosecutions

Cara Cunningham Warren\*

[W]hile the ICC could not have been established without the support of States, it is a creation of global civil society.

As such, it needs to work much harder than national courts to gain legitimacy. In each of its early cases, it will be not just the suspect but also the Court itself which is on trial.<sup>1</sup>

### 19.1. Introduction

There is cause to celebrate activation of the International Criminal Court’s (‘ICC’ or ‘Court’) power to prosecute the crime of aggression.<sup>2</sup> Now, for the first time ever, a permanent international tribunal has jurisdiction over the “supreme international crime [that] contains within itself the accumulated evil of the whole”.<sup>3</sup> This achievement marks the culmination of a century-long journey from the position that States were the “sovereign judges

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<sup>1</sup> Marlies Glasius, “What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court’s First Investigations”, in *Human Rights Quarterly*, 2009, vol. 31, no. 2, pp. 496–497.

<sup>2</sup> ICC Assembly of States Parties (‘ASP’), Activation of the jurisdiction of the Court over the crime of aggression, ICC-ASP/16/Res.5, 14 December 2017 (‘ASP Aggression Activation Resolution’) (<http://www.legal-tools.org/doc/6206b2/>).

<sup>3</sup> “Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences”, in *American Journal of International Law*, 1947, vol. 41, no. 1, p. 186.

of their own actions with regard to the *casus belli* or *foederis* act of aggression”<sup>4</sup> to the imposition of individual criminal responsibility for such activity.<sup>5</sup> “Although there [were] numerous stumbling blocks in the quest, [...] they [were] overcome, one by one, along the way from Rome, where the Rome Statute was adopted in 1998, to Princeton, to Kampala, and, finally, to New York”<sup>6</sup> where the Activation Resolution was adopted in December 2017. This is indeed a remarkable achievement.

At the same time, much work remains.<sup>7</sup> Normative development and capacity building are necessary next steps to avoid further opening Pandora’s Box regarding one of the Court’s most difficult chapters: Head of State or Head of Government (‘HOS’) prosecutions. Prosecuting the leadership crime of aggression is fraught, as reflected in the long journey that brings us to this point. One challenge relates to the inescapable tension between sovereigns. No doubt what one State will characterize as a grave breach of the United Nations (‘UN’) Charter will be to another State the necessary

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<sup>4</sup> Thomas Bruha, “The General Assembly’s Definition of the Act of Aggression”, in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, pp. 143–44.

<sup>5</sup> For a detailed account of this history, see Claus Kreß, “On the Activation of ICC Jurisdiction over the Crime of Aggression”, in Pavel Šturma (ed.), *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives*, Brill Nijhoff, 2019, pp. 45–59; Permanent Mission of the Principality of Liechtenstein to the United Nations *et al.*, “Handbook: Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC”, 2019, pp. 1–3 (‘Handbook’); Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, 2002, pp. 21–45.

<sup>6</sup> Dapo Akande and Antonios Tzanakopoulos, “Treaty Law and ICC Jurisdiction over the Crime of Aggression”, in *European Journal of International Law*, 2018, vol. 29, no. 3, p. 940.

<sup>7</sup> While these ‘stumbling blocks’ were overcome, one also must note the perceived stops and starts along the way. Acknowledging the pattern can generate hope, in uncertain times, that the Court’s goals can and will be realized. Acknowledgement also will hopefully spur the relentless pursuit of a methodology that might change the pattern and hasten the development of this critical body of law. In terms of the existing pattern, Robertson notes the “deceptively false start” at Nuremberg and the “tentative definition” of aggression endorsed by the UN General Assembly in 1974. Then, in 1998, the crime of aggression was included in the Rome Statute only to be suspended until a definition could be agreed upon. This occurred in 2010 at Kampala, but it would take another eight years for activation to be achieved. See Geoffrey Robertson, “Foreword”, in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, 2018.

and appropriate exercise of inalienable sovereign rights.<sup>8</sup> Only working within a well-developed legal framework can bring these aggression situations and cases to their rightful conclusion, which is defined in this context as reaching the correct legal outcome in a manner that upholds rather than diminishes the Court's standing.

With an eye toward achieving this result, this chapter evaluates the Court's next steps through the lens of constitutive legitimacy. In general, legitimacy is the bedrock principle upon which successful courts are built.<sup>9</sup> And in the context of the Court's application of aggression jurisdiction, constitutive legitimacy is especially relevant. It has two features: the manner in which an adjudicative body is created (input and consent)<sup>10</sup> and the community's ultimate acceptance of and participation in the entity's processes (its efficacy).<sup>11</sup>

There are three legitimacy challenges that will undermine HOS aggression prosecutions if left unresolved. Section 19.2. focuses on questions of input and consent related to the Court's limited aggression jurisdiction and undeveloped complementarity rules in the HOS aggression context. Section 19.3. raises questions of efficacy regarding the Court's inability to pursue successfully a case against a sitting Head of State ('HOS') (for example, former Sudanese President Al-Bashir).

In turn, Section 19.4. suggests that the Office of the Prosecutor ('OTP') develop a prosecutorial framework for HOS aggression situations in order to diffuse these legitimacy challenges. In terms of substance, the framework would expand the existing preliminary examination analysis to address complementarity questions unique to aggression situations that involve a sitting HOS.<sup>12</sup> It also would interpret the existing 'not in the interests of justice' analysis to include an evaluation of whether pursuing the

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<sup>8</sup> Douglas Guilefoyle, *International Criminal Law*, Oxford University Press, 2016, p. 301 (noting the challenge that States and their leaders will rely on "grey areas" to escape responsibility).

<sup>9</sup> See Yvonne McDermott and Wedad Elmaalul, "Legitimacy", in William A. Schabas and Shannonbrooke Murphy (eds.), *Research Handbook on International Courts and Tribunals*, Edward Elgar Publishing, 2017, pp. 229–245.

<sup>10</sup> *Ibid.*, p. 229, citing Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy*, Palgrave Macmillan, 2007, p. 15.

<sup>11</sup> McDermott and Elmaalul, 2017, p. 229, see above note 9.

<sup>12</sup> A preliminary examination of a situation does not involve a specific accused. Nevertheless, the HOS's potential involvement in an aggression situation would be more apparent and should be part of the calculus.

situation would negatively impact the Court's legitimacy. If so, the OTP should engage international, regional, and other relevant actors to explore "other justice mechanisms" or "peace processes" as articulated in the OTP's Interests of Justice Policy Paper.<sup>13</sup>

As a matter of process, Section 19.4. urges the OTP to adopt a constructivist mindset when it develops the complementarity norms and engages with other actors to identify "other justice mechanisms". There are a wide range of constructivist perspectives;<sup>14</sup> however, a first principle is that it turns away from power-based International Relations theories. Instead, Constructivism focuses on the constitutive effect norms have on a State actor's identity, and, in turn, how shared identities inform normative development and co-operation.<sup>15</sup> Rather than power, Constructivism is rooted in interaction and consensus-building.<sup>16</sup>

The successes achieved in Rome in 1998 can be explained by Constructivism, and a return to this approach has the potential to overcome the legitimacy pitfalls noted above. The chapter turns now to discuss these pitfalls in more detail.

## 19.2. Input Legitimacy Challenges

Input Legitimacy refers to the process by which a tribunal is created – specifically, whether constituents have the opportunity to express input and consent, such that the tribunal's actions reflect the "authentic preferences" of those subject to its power.<sup>17</sup> At the international level, one would ask whether States participated in the creation of the entity; whether they were

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<sup>13</sup> ICC-OTP, "Policy Paper on the Interests of Justice", 9 September 2007, pp. 7–8 ('Interests of Justice Policy Paper') (<http://www.legal-tools.org/doc/bb02e5/>).

<sup>14</sup> Constructivism has been called an ontology rather than an official theory: Anne-Marie Slaughter, "International Relations, Principal Theories", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2011, para. 19. Others describe it as a theory or approach with multiple strains: Anthony Clark Arend, *Legal Rules and International Society*, Oxford University Press, 1999, p. 126; Caroline Fehl, "Evaluating the International Criminal Court: A 'Practice Test' for Realist and Constructivist Approaches", in *European Journal of International Relations*, 2004, vol. 10, no. 3, p. 359. Like Arend and Fehl, this chapter does not delve into the intricacies between various schools of thought but, instead, seeks to capture the essence of the approach.

<sup>15</sup> Arend, 1999, p. 125, see above note 14, citing Alexander Wendt, "Constructing International Politics", in *International Security*, 1995, vol. 20, no. 1, p. 71.

<sup>16</sup> *Ibid.*

<sup>17</sup> McDermott and Elmaalul, 2017, p. 229, see above note 9, citing Fritz Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, 1996, p. 6.

in a position to offer their input, as equal sovereigns; and whether they ultimately consented to the creation of the entity.<sup>18</sup> Although the ICC was created in 1998, activation of the crime of aggression is a new chapter in the institution's history that involves significant normative development. Input is critical.

In this context, there are two legitimacy challenges the Court should anticipate and address: lack of ratifications of the Kampala Amendments, which limits the Court's jurisdiction under Article 15*bis*, and undeveloped norms regarding complementarity, which is a bedrock principle of the Court that does not fit easily into the HOS aggression context.

### **19.2.1. Input and Consent Challenge: Ratification and Acceptance Stalemate Regarding the Kampala Amendments**

The Article 15 legitimacy challenge is centred on the number of States that have ratified or accepted the Kampala Amendments. As explained below, relatively few States have taken this action. If the current ratification trend persists, the authority conferred upon States Parties and the Prosecutor pursuant to Article 15*bis* could become meaningless. This is intolerable from an input and consent perspective.

As we know, Article 15*bis* outlines a very narrow jurisdictional basis in instances of State Party referrals and *proprio motu* prosecutions. In these instances, the Court only has jurisdiction over the States that have ratified or accepted the Kampala Amendments,<sup>19</sup> and this number can be reduced if a State that has ratified or accepted the Kampala Amendments files a declaration notifying the Registrar of its intent to withdraw its consent to the Court's jurisdiction.<sup>20</sup> This approach is more restrictive than the jurisdic-

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<sup>18</sup> McDermott and Elmaalul, 2017, p. 230, see above note 9, citing Lee A. Casey and David B. Rivkin, Jr., "The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties", in *Virginia Journal of International Law*, 2003–2004, vol. 44, pp. 63, 66. But see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundation for International Law*, Oxford University Press, 2004, pp. 303–304 (arguing that State consent is not a sufficient or necessary ground by which to confer international legitimacy, particularly in light of bargaining inequities and power asymmetries).

<sup>19</sup> Rome Statute of the International Court of Justice, 17 July 1998, Article 15*bis* (5) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>): "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory".

<sup>20</sup> *Ibid.*, Article 15*bis* (4).

tional rule applied to genocide, war crimes, and crimes against humanity.<sup>21</sup> With respect to these crimes, the Court can exercise jurisdiction if the national of a non-State Party commits the crime in the territory of a State Party.<sup>22</sup>

It must be noted that this section does not seek to renew the Article 15 debate. The effort to identify its scope was hard fought,<sup>23</sup> and while it did not go as far as some asserted it should, there is a sense that the States Parties reached the best outcome that was available at the time.<sup>24</sup>

In fact, the more restrictive approach of Article 15*bis* could promote legitimacy, as it is rooted in consent (recall that its proponents were labelled ‘Camp Consent’ during the difficult jurisdictional debates).<sup>25</sup> With that said, realizing the legitimacy potential of this approach is only feasible if States ratify or accept the Kampala Amendments. Unfortunately, this process has essentially stopped progressing. This is at the heart of the input legitimacy challenge.

As of the publication of this chapter, only 40 of the 123 ICC Member States have ratified or accepted the Kampala Amendments.<sup>26</sup> Moreover, there is a negative trend in this regard. Ratification and acceptance rates reached their peak in 2013, declined for several years, plateaued in 2018

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<sup>21</sup> Kreß, 2019, p. 51, see above note 5; Jennifer Trahan, “Revisiting the Role of the Security Council Concerning the International Criminal Court’s Crime of Aggression”, in *Journal of International Criminal Justice*, 2019, vol. 17, no. 3, p. 473.

<sup>22</sup> ICC Statute, Article 12(2)(a), see above note 19; Trahan, 2019, p. 473, fn. 8, see above note 21.

<sup>23</sup> Akande and Tzanakopoulos, 2018, p. 942, see above note 6. There was extensive debate whether to adopt a broad or narrow view of jurisdiction in cases of State referral or *proprio motu* investigations. See Assembly of States Parties, *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, 27 November 2017, ICC-ASP/16/24, paras. 13–22. Annex II A articulates the narrow view. Annexes II B and C articulate the positions of States that espoused the broad view. The narrow view prevailed. ASP Aggression Activation Resolution, para. 2, see above note 2; Akande and Tzanakopoulos, 2018, pp. 939, 942, see above note 6. At the same time, at the instance of the States in favour of the broad view, paragraph 3 of the Activation Resolution also affirms the independence of the Court in determining its jurisdiction, ASP Aggression Activation Resolution, para. 3, see above note 2.

<sup>24</sup> Trahan, 2019, p. 474, see above note 21.

<sup>25</sup> Akande and Tzanakopoulos, 2018, p. 942, see above note 6.

<sup>26</sup> United Nations Treaty Collection, Depository, Status of Treaties, “10.b. Amendments on the crime of aggression to the Rome Statute of the International Criminal Court: Kampala, 11 June 2010” (‘UNTC, Kampala Participants’) (available on its web site).

and 2019, and then dropped to one ratification in 2020.<sup>27</sup> In this way, the Court lacks the jurisdictional power that was deemed instrumental 20 years ago with respect to ICC prosecutions generally.<sup>28</sup>

It is critical that an attempt be made to break the stalemate to avoid the historical pattern of stops and starts that has bedevilled development of the ICC's power to prosecute aggression.<sup>29</sup> One source of the stalemate could be undeveloped legal norms. For instance, Kreß suggests that "quite a few States involved in military activities in grey legal area scenarios, instead of ratifying the Kampala Amendments, appear to have adopted a position of 'wait and see' how the Court will interpret the substantive definition of [aggression]".<sup>30</sup> Unfortunately, there may not be much to "see" in the foreseeable future that would prompt additional ratifications.

It has been suggested, and this author agrees, that the first aggression situations will likely be rooted in Article 15*ter* jurisdiction (United Nations Security Council ('Security Council') referral).<sup>31</sup> But it is unclear whether the Security Council will actually refer an aggression situation to the Court. In addition to the highly complex and political nature of the situations involved,<sup>32</sup> there also is the issue of the Security Council's history with re-

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<sup>27</sup> Deposits of ratification or acceptance instruments reached their peak in 2013 and have declined each subsequent year, with only one ratification in 2020, and zero thus far in 2021. The number of deposits per year are 2010 (0); 2011 (0); 2012 (3); 2013 (10); 2014 (7); 2015 (6); 2016 (6); 2017 (3); 2018 (2); 2019 (2); 2020 (1); 2021 (0), see *ibid.*

<sup>28</sup> Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, 2004, p. 83 (noting how "the basic jurisdictional features of the Rome Statute [such as territorial *or* nationality jurisdiction, automatic jurisdiction upon ratification, and prohibiting reservations] have a direct effect on the ability of the Court to promote effective, regular accountability").

<sup>29</sup> Robertson, 2018, see above note 7 (referring to the "deceptively false start" at Nuremberg, *et cetera*).

<sup>30</sup> Kreß, 2019, p. 62, fn. 54, see above note 5. Kreß describes "the fact that the undisputed core of the prohibition of the use of force is surrounded by certain grey areas which are characterized by both sophisticated legal debate and deep legal policy divide. These areas, which unfortunately are of significant practical relevance, remain outside the scope of the definition of the crime of aggression", see *ibid.*, p. 51.

<sup>31</sup> Trahan, 2019, p. 482, see above note 21. Trahan notes that "with the jurisdictional limitations that appear to exist, it will be difficult for a crime of aggression case to be initiated under Article 15*bis*; thus, whether crime of aggression cases can be pursued before the ICC for the foreseeable future may depend largely on whether the Security Council is willing to make referrals", see *ibid.*

<sup>32</sup> *Ibid.*, p. 474 (noting the "unanswered question [...] depends, first, on what situations of aggression will arise in the future, and, second, on the political context of the situation").

spect to the concept of aggression. The General Assembly's 1974 definition of aggression was a recommendation intended to assist the Security Council,<sup>33</sup> and this definition is linked to the Rome Statute's aggression definition.<sup>34</sup> With that said, the "Security Council has not once referred to the 1974 Definition of Aggression, although after its adoption by the General Assembly, the Security Council passed thirty-two Resolutions in which acts of aggression were determined".<sup>35</sup> Moreover, the Security Council has not determined an act of aggression since 1990.<sup>36</sup> It appears to start assiduously avoiding the term after 1990, which is the same decade that the International Criminal Tribunal for the former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda and ICC were coming to life. Instead, the Security Council began to articulate its decisions in the UN Charter's "peace and security" phraseology.<sup>37</sup>

The case of non-referral by the Security Council could perpetuate the 'wait and see' stalemate. If these States are taking this approach to ascertain how the definition of aggression will be interpreted, non-referrals in the current Security Council-centric universe mean there will be nothing to 'see' that might spur action. This is a lost opportunity in general, but these States also should be of particular interest if they are using force in the 'grey areas' as Kreß describes. Moving even just a few members of this group into the aggression regime could spur more rapid development of the definition as well as international customary law. It also has the potential to reduce the use of force.

Focusing on the States that are subject to the Court's Article 15*bis* jurisdiction also is unlikely to break the 'wait and see' stalemate. Simply put, there is a jurisdictional mismatch. The States over which the Court is empowered to assert jurisdiction pursuant to Article 15*bis* are not the States most likely to commit aggression.<sup>38</sup> These States, as early participants in

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<sup>33</sup> Nicolaos Strapatsas, "The Practice of the Security Council Regarding the Concept of Aggression", in Kreß and Barriga (eds.), 2017, p. 179, see above note 4.

<sup>34</sup> Bruha, 2017, p. 143, see above note 4.

<sup>35</sup> *Ibid.*, p. 168. See also Strapatsas, 2017, p. 180, see above note 33.

<sup>36</sup> Strapatsas, 2017, p. 180, see above note 33.

<sup>37</sup> *Ibid.*

<sup>38</sup> With this said, there is some debate about whether humanitarian intervention could be one basis for asserting aggression jurisdiction over a State that has ratified or accepted the Kampala Amendments. See David J. Scheffer and Angela Walker, "Twenty First Century Paradigms on Military Force for Humane Purposes", in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, 2019, pp. 493–525.

the Kampala regime, are affirmatively developing the international norms that will constrain aggression.<sup>39</sup> These 40 States have answered what Kreß describes as the call to the “conscience of mankind [...] aimed towards the preservation of world peace”.<sup>40</sup>

Finally, even if the Security Council does refer a situation that could spur some of those ‘wait and see’ States to action, that does not address the underlying input and consent challenge. On the one hand, a Security Council referral is a legitimate jurisdictional basis articulated in Article 15*ter*. And a strong referral system makes sense if one considers aggression investigations and prosecutions as a final piece of a “comprehensive anti-aggression regime”<sup>41</sup> that includes the UN Charter Article 2(4)’s prohibition against the threat of or use of force and the Security Council’s powers to address threats to peace and security. In this way, the criminalization of aggression “closes the impunity gap”<sup>42</sup> and harkens back to the two-pronged approach taken in 1945 when the UN Charter was signed, and the Charter of the International Military Tribunal was adopted in the summer of 1945.<sup>43</sup>

With that said, Article 15 has two bases for jurisdiction. More than ten years after Kampala, the already low and steadily declining ratification rates reflect that one of those two bases is being rendered irrelevant. Sixty-

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But see Jennifer Trahan, “The Crime of Aggression and the International Criminal Court”, in *ibid.*, pp. 303–336 (arguing that these States likely would not be subject to ICC jurisdiction as humanitarian intervention does not constitute a manifest violation of the UN Charter).

<sup>39</sup> This also is consistent with ICC membership generally, where States in the most conflict-prone regions are not members, Firew Kebede Tiba, “Regional International Criminal Courts: An Idea Whose Time Has Come?”, in *Cardozo Journal of Conflict Resolution*, 2016, vol. 17, no. 2, pp. 521, 523.

<sup>40</sup> Kreß, 2019, p. 45, see above note 5; Handbook, 2019, pp. 3–5, see above note 5 (praising these early ratifiers and noting the role they play in the development of legal norms that restrict aggression). At the same time, enthusiasm should be tempered by the fact that most of these States have not yet incorporated the aggression regime into their domestic spheres. Pål Wrangé, “The Crime of Aggression, Domestic Prosecutions and Complementarity”, in Kreß and Barriga (eds.), 2017, p. 706 see above note 4; Parliamentarians for Global Action, “Implementing Legislation on the Rome Statute” (available on its web site).

<sup>41</sup> Bruha, 2017, p. 142, see above note 4.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, pp. 145–46 (noting the simultaneous pursuit of “an international peace order based on security and justice and an international criminal regime enabling prosecution and punishment of war crimes”).

seven percent of ICC Member States are withholding their input and consent in this regard.

These circumstances should give us pause, especially when viewed through a legitimacy lens. What does it say about an institution's capacity to reflect the "authentic preferences" of those subject to its power if the source of the Court's jurisdiction is rooted in the decisions of an external body rather than the Court's Member States?

The response to this question might differ depending on how one approached the initial Article 15 debate. Some may even reject the premise that the "authentic preferences" of State actors accused of aggression are relevant. But it cannot be denied that the Court is at a turning point and is looking to strengthen its hand.<sup>44</sup> A non-referral when aggression appears to have occurred or the application of the aggression regime against a non-State Party *via* Security Council referral are both very unlikely paths to spur ratification. If anything, they would likely stoke more recalcitrance and stalemate.

It will be a challenge to increase the number of ratifying States, but the suggestions in this chapter offer a new approach. While a Security Council referral might provide a short-term boon for those who lament the Court's limited jurisdiction, the Security Council is no substitute for State Party engagement. The Court should consider a turn toward consensus-building and normative development with a constructivist mindset, as described further in this chapter.

### **19.2.2. Input and Consent Challenge: Developing Complementarity Norms**

The second legitimacy concern looks at the Court's power from a different perspective. While the previous section urged the Court to empower itself *vis-à-vis* the Security Council, this section urges the Court to develop a normative framework that resolves complementarity and balance-of-power questions between the Court and Member States. The aim is to encourage States to express input and consent, such that the Court's actions in future

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<sup>44</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020 ('Independent Review 2020 Final Report') (<http://www.legal-tools.org/doc/cv19d5/>); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/18 Res. 6, 6 December 2019 ('ASP Strengthening Resolution') (<http://www.legal-tools.org/doc/lvkj72/>); ICC-OTP, "Strategic Plan 2019–21", 17 July 2019 (<http://www.legal-tools.org/doc/7ncqt3/>).

aggression situations can better reflect the “authentic preferences” of those subject to its power.<sup>45</sup>

### 19.2.2.1. Complementarity as a First Principle

Unlike the *ad hoc* tribunals, which enjoyed primacy,<sup>46</sup> the ICC's jurisdiction is purposefully limited. Domestic courts retain primary jurisdiction over the prosecution of international crimes, with the Court supplementing or complementing national systems rather than displacing them.<sup>47</sup> In this way, the ICC is considered a court of last resort.<sup>48</sup>

This concept of complementarity is the bedrock upon which the Court was built. Although the topic was political and sensitive, complementarity was the first issue discussed on the first day of the Preparatory Committee's first session,<sup>49</sup> and “it would not be an over-statement to affirm that the early agreement on a complementarity regime was what made the Court possible”.<sup>50</sup> Indeed, complementarity was intended to “appease those concerned with a permanent court and an independent court, [and] outreach campaigns focused strategically on the complementarity principle to assuage concerns”.<sup>51</sup> The approach succeeded by convincing “States that

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<sup>45</sup> McDermott and Elmaalul, 2017, p. 229, see above note 9.

<sup>46</sup> See ICTY, *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 58, 97 (<http://www.legal-tools.org/doc/866e17/>).

<sup>47</sup> ICC Statute, Article 17, see above note 19; Elinor Fry, *The Contours of International Prosecutions: As Defined by Facts, Charges, and Jurisdiction*, Eleven International Publishing, The Hague, 2016, p. 137.

<sup>48</sup> ICC Statute, Article 17, see above note 19. But see Carsten Stahn, “Taking Complementarity Seriously: On the Sense and Sensibility of Classical ‘Positive’ and ‘Negative’ Complementarity”, in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, vol. 1, Cambridge University Press, 2011, pp. 233, 237, 239 (noting that the Court possesses more power under the complementarity regime than was first appreciated and that implicit in the Rome Statute is an idea of shared responsibility which makes the ICC a “guardian of accountability”).

<sup>49</sup> Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court's Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference”, in *Global Governance*, 1999, vol. 5, no. 1, p. 5.

<sup>50</sup> Silvia A. Fernandez De Gurmendi, “Foreword”, in Stahn and El Zeidy (eds.), 2011, p. xviii, see above note 48.

<sup>51</sup> Carsten Stahn, “Complementarity: A Tale of Two Notions”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 94, 96. It should be noted that not all agreed that this was the right approach. Fernandez De Gurmendi, 2011, p. xix, see above note 50:

they would remain master over their own judicial proceedings, without allowing perpetrators of serious crimes to go unpunished”.<sup>52</sup>

Complementarity served as this balm because it is, at its heart, a concurrent jurisdiction framework that empowers States *vis-à-vis* the Court.<sup>53</sup> It applies only when *both* the Court and at least one State are competent to adjudicate the matter,<sup>54</sup> and it “eases [the] jurisdictional qualms of domestic courts”<sup>55</sup> by transforming a discretionary admissibility principle into an institutional framework that allocates competencies and settles disputes over the exercise of jurisdiction.<sup>56</sup>

### 19.2.2.2. Complementarity’s Uneasy Fit in the Head of State Aggression Context

Despite the fundamental nature of the principle, the conceptual dimensions of complementarity have been described as “underdeveloped in their articulation and meaning”<sup>57</sup> and suffering from a “large degree of normative ambiguity and uncertainty”.<sup>58</sup> There is no shortage of entities presently engaged with the topic,<sup>59</sup> but the need for normative development persists.

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“[M]any left Rome with the feeling that the complementarity provisions, which failed to recognize primacy to the international jurisdiction, were a necessary but regrettable concession to national sovereignty that could weaken the future institution to some extent.”

<sup>52</sup> Adrian Bos, “Assembly of State Parties”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. xvii.

<sup>53</sup> Roger S. Clark, “Complementarity and the Crime of Aggression”, in Stahn and El Zeidy (eds.), 2011, pp. 721–722, see above note 48.

<sup>54</sup> *Ibid.*, p. 723.

<sup>55</sup> Stahn, 2008, p. 90, see above note 51.

<sup>56</sup> *Ibid.*, p. 91.

<sup>57</sup> Stahn, 2011, p. 233, see above note 48.

<sup>58</sup> *Ibid.*, p. 235. See also Kristina Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation*, DJØF Publishing, Copenhagen, 2000, p. 45 (describing the term being used in its earliest days as an “empty box in which one could put whatever one liked without having to reveal the intentions behind it”); Megan A. Fairlie and Joseph Powderly, “Complementarity and Burden Allocation”, in Stahn and El Zeidy (eds.), 2011, p. 644, see above note 48 (arguing that Article 17 fails to address a number of key issues regarding its operation and interpretation and that the Court still has to determine its precise functioning).

<sup>59</sup> In addition to the Bureau, the ASP identifies 24 academic, State, international and/or regional organisations, and non-governmental organisations. ICC ASP, “List of Actors working in the field of Complementarity” (available on the ICC’s web site).

This is particularly true with respect to aggression.<sup>60</sup> The Special Working Group on the Crime of Aggression is criticized for giving the topic short shrift,<sup>61</sup> and there does not appear to be movement on this front.<sup>62</sup>

This need for normative development is particularly significant because the basic tenets of the complementarity principle do not fit easily in the HOS aggression context. As we know, Article 17 involves a two-step analysis:

[T]he initial questions to ask are (1) whether there are ongoing investigations or prosecutions or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability [...]. *It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute [gravity inquiry].*<sup>63</sup>

There is little guidance regarding the application of this principle when a sitting HOS has participated in the situation under examination.

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<sup>60</sup> See Pål Wrangé, “The Crime of Aggression, Domestic Prosecutions and Complementarity”, in Kreß and Barriga (eds.), 2017, pp. 732–40 see above note 4 (identifying the need for normative development, in the aggression context, of the complementarity terms “has jurisdiction”, “same conduct”, and “genuine investigation or prosecution”).

<sup>61</sup> Clark, 2011, pp. 721–722, see above note 53.

<sup>62</sup> The ASP adopted Resolutions in December 2019 in 22 subject areas. Complementarity is the seventeenth of these 22 subject areas, which suggests the topic is a lower priority. Moreover, all the Resolutions in this category focused on developing the capacity of national courts: ASP Strengthening Resolution, paras. 126–136, see above note 44. This does not reflect a drive for normative development of substantive legal rules. In addition, while there are many good reasons to pursue an aggression prosecution in a domestic court (cheaper, faster, closer to site of the crime), others argue that aggression cases, especially those involving a HOS, present particular challenges that an international tribunal may be better equipped to manage: Wrangé, 2017, p. 742, see above note 60. More dialogue and subsequent development are needed on this front.

<sup>63</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 78 (emphasis added) (‘Katanga’) (<http://www.legal-tools.org/doc/ba82b5/>).

Instead, there is a range of options, and each favours a finding that the situation is admissible (that is, that the Court can proceed rather than an individual State).<sup>64</sup> The automaticity of this result is troubling given the importance of the complementarity principle,<sup>65</sup> and, as discussed in the next section, the Court's paradoxical power structure and inability to bring a sitting HOS into custody. It also is inconsistent with the ASPs' almost exclusive focus on empowering and building the capacity of national courts.<sup>66</sup>

The first potential scenario is that the target State would not initiate an investigation or prosecution against her sitting HOS for the crime of aggression. This is a likely situation, not only given the political dimensions involved with decisions to use force, but also because most States have not incorporated the crime of aggression into the domestic sphere.<sup>67</sup> As the Court noted in *Katanga*, the lack of action removes the complementarity question entirely.<sup>68</sup> Again, complementarity resolves concurrent jurisdiction questions; it lies dormant, and thus does not check the Court's jurisdiction, in the absence of State action. At the same time, however, the Court's assertion of power against a sitting HOS sets up the difficult or unwanted consequences noted above.

A second option is that the use of force would open internal schisms within the aggressor State, and it would become difficult to ascertain who is competent to make domestic decisions to investigate or prosecute. It is unclear how the Court should proceed in light of such conflict. At best, the informal expert panel urged court officials to be mindful of conflict between internal institutions. It noted that "unwillingness in one branch of government may create 'inability' in another branch attempting sincerely to

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<sup>64</sup> As noted above, there is debate about whether domestic or international forums are better equipped to handle an aggression prosecution: Wrangé, 2017, p. 742, see above note 60. The matter should be fleshed out.

<sup>65</sup> Indeed, both the Rome Statute and the 2010 Review Conference stress the status of States as the primary actors and those with the primary duty to investigate and prosecute. See Stahn, 2011, p. 238, see above note 48.

<sup>66</sup> In December 2019, the ASP adopted Resolution 6, which contains eleven specific statements regarding complementarity. Ten refer expressly to developing national court capacity. The other refers to another document that refers to national capacity building. ASP Strengthening Resolution, paras. 126–136, see above note 44.

<sup>67</sup> Wrangé, 2017, p. 706, see above note 60.

<sup>68</sup> *Katanga*, para. 78, see above note 63.

investigate or prosecute”.<sup>69</sup> Likewise, the expert panel mentioned inability in a way that could cover HOS aggression when it advised that “obstruction by uncontrolled elements” would render a system unavailable.<sup>70</sup> Thus each of these statements suggests that in the face of uncertainty the case would be deemed admissible, and this Court of last resort would assume control. While asserting jurisdiction may be technically correct, the net result would likely place the Court in a tenuous situation that could strain its legitimacy.

A similar difficulty could occur if the victim State attempted to investigate or prosecute a sitting HOS for aggression or a third State did so on universal jurisdiction grounds. In this instance, the Court would not be pursuing the case as a primary actor, but it could be called upon to assist in a positive complementarity role. Given the complex and fraught circumstances under which these situations arise, this would be a prime instance where the Court's support would be warranted. Nevertheless, taking such action in a time of armed conflict could be a dangerous enterprise – literally and, in terms of the Court's legitimacy, figuratively. The Court would be seen as working with domestic or external forces against a sitting HOS. And if the Court, regional actors, or minority groups within the aggressor State were seen to remove a sitting HOS from office, it has the appearance of a Court-sanctioned change in government. This certainly shifts the Court into the political realm in a way that it has sought to avoid and in a way that detracts from its legitimacy.

The negative repercussions of the Court's long-standing conflict regarding HOS immunity, as reflected by the issues surrounding the Al-Bashir arrest warrants serve as an important warning of what challenges are presented by proceeding in the presence of conflicting legal interpretations. Steps should be taken to resolve this normative gap. States Parties entered into the Rome Statute with the understanding that they were the primary actors. Nonetheless, the current reading of complementarity in the HOS aggression context suggests that the Court is more than one of last resort or, at least, could be seen as having the ability to tip the scales in these extremely sensitive situations involving the use of force. Developing a normative framework to govern these complementarity questions would give

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<sup>69</sup> ICC, “Informal Expert Paper: The Principle of Complementarity in Practice”, 15 March 2010, ICC-01/05-01/08-721-Anx9, para. 45 (‘Informal Expert Paper on Complementarity’) (<http://www.legal-tools.org/doc/ff5cf5/>).

<sup>70</sup> *Ibid.*, paras. 48–49.

States Parties the opportunity to provide input and consent to the processes that will be employed. This approach would achieve the Court's goal of being principled, consistent and fair, which in turn enables it to fulfill its mandate and build and maintain its legitimacy.<sup>71</sup>

### 19.3. Legitimacy Challenges Related to Efficacy and Compliance

The challenges concerning the number of States that have ratified or accepted the Kampala Amendments and the need for normative development regarding complementarity relate to the first aspect of constitutive legitimacy – consent and input. The second facet relates to effectiveness, which involves the community's ultimate acceptance of and participation in the Court's processes.<sup>72</sup> In this case, the concern rests in the Court's paradoxical power structure, which is severely challenged in the HOS aggression context.

Some gauge efficacy by how well a court achieves its goals, with the suggestion that courts can improve the perception of their effectiveness if they set a limited number of goals; articulate goals that are capable of being assessed (for example, operational goals); and avoid articulating goals that depend on the co-operation or participation of entities that are not under the court's control.<sup>73</sup>

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<sup>71</sup> *Ibid.*, p. 4, noting that the expert group was guided by three:

considerations in developing or recommending interpretations, policies, and practices. These considerations might also be considered by the OTP. An overarching consideration was to identify the approaches best supported by objective interpretations of the Statute and international law. Another consideration was to minimize unnecessary obstacles for the OTP and to facilitate its work. Another was to seek credible, reasonable approaches that would maintain the support of the international community. All three considerations ultimately lead to increasing the Court's effectiveness.

The Kampala Declaration takes a similar approach. Paragraph 1 reaffirms the participants commitment to the Rome Statute and its "full implementation, as well as to its universality and integrity". Paragraph 5 notes a similar commitment to effective domestic implementation of the Statute and taking action in accordance with internationally recognized standards. ICC ASP, Kampala Declaration, RC/Decl. 1, 1 June 2010, paras. 1, 5 (<http://www.legal-tools.org/doc/146df9-1/>).

<sup>72</sup> McDermott and Elmaalul, 2017, p. 229, see above note 9.

<sup>73</sup> McDermott and Elmaalul, 2017, p. 233, see above note 9. See also Address by Judge Sang-Hyun Song, in ICC ASP, "Seminar on International Criminal Justice: The Role of the International Criminal Court", 19 May 2009, p. 7 ('Judge Song Address, 2009').

Other scholars consider the power of a court to compel participation in court proceedings and adherence to its judgments.<sup>74</sup> This power impacts a court's ability to resolve particular disputes before it, which promotes respect and future compliance. Likewise, compliance determines a court's "significance as a political actor. To the extent that it can exercise this power against other government institutions, it can change the dimension and scope of the political bargaining space".<sup>75</sup> Moreover,

the power of a court to compel litigants to appear before it and to comply with the resulting judgment stems in part from its ability to harness the coercive power of the [institution]. Supplementing and surrounding this core of potential coercion, however, is the power of legitimacy: a court's ability 'to command acceptance and support from the community so as to render force unnecessary'.<sup>76</sup>

Although these scholars use different metrics to gauge effectiveness, they are interrelated. Compliance enables a court to achieve its aims, which, in turn, makes it effective.<sup>77</sup> With respect to the ICC, the legitimacy gap relates to the Court's paradoxical power structure, which is significantly exposed in the HOS aggression context.

At the most basic level, the Court is tasked with the same responsibility as domestic courts in terms of adjudicating crimes, but international crimes are especially complex and difficult,<sup>78</sup> and unlike domestic courts, the ICC must proceed without primary jurisdiction or an enforcement system. What is more, the Court aspires to the loftiest of goals, including ending impunity, giving voice and reparations to victims of mass atrocities, creating an historical record of these complex cases, and promoting security and human rights.<sup>79</sup> Thus, paradoxically, a Court with limited power

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<sup>74</sup> McDermott and Elmaalul, 2017, p. 234, see above note 9, citing Laurence R. Helfer and Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication", in *Yale Law Journal*, 1997, vol. 107, no. 2, p. 283; Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, Palgrave Macmillan, 2008, p. 133.

<sup>75</sup> Laurence R. Helfer and Anne-Marie Slaughter, 1997, p. 284, see above note 74.

<sup>76</sup> *Ibid.*

<sup>77</sup> McDermott and Elmaalul, 2017, p. 234, see above note 9.

<sup>78</sup> Kevin Jon Heller, "A Sentence-Based Theory of Complementarity", in *Harvard International Law Journal*, 2012, vol. 53, no. 1, p. 102.

<sup>79</sup> See ICC Statute, Preamble, see above note 19; Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*, Routledge, 2016, p. 2.

“aspire[s] to achieve objectives whose attainment would be a serious challenge to even the most powerful domestic counterparts”.<sup>80</sup>

In terms of effectiveness, one can see that this power structure conflicts with the suggestions noted above. The Court has set many wide-ranging and aspirational goals. Likewise, they are of a nature that is difficult to measure and quantify. Even so, this author would not suggest they be altered.<sup>81</sup> They are fundamental to our shared values and identity. They serve a cohesive function. With an eye toward bolstering the Court’s effectiveness, however, it should protect itself from the ramifications of HOS aggression examinations where the power dynamics are exacerbated.

Examining a situation that involves a sitting HOS increases exponentially the challenges of a ‘standard’ international criminal investigation given the power wielded by the executive – over people, documents, domestic juridical functions and systems, police powers, and so forth. These examinations also trigger the fierce sovereignty questions that stymied the development of the Court in the first place. At the same time, HOS prosecutions are rare;<sup>82</sup> therefore, in the normative sense, there is not a significant body of experience to guide behaviour.

As a consequence, it is perhaps not surprising that HOS prosecutions have presented such a serious challenge to the Court’s legitimacy. In fact, there has been only one successful ICC HOS prosecution involving the former President of Côte d’Ivoire, Laurent Gbagbo, who was charged after

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<sup>80</sup> Fry, 2016, p. 137, see above note 47. See also Mirjan Damaška, “The International Criminal Court between Aspiration and Achievement”, in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, no. 1, pp. 19, 21–27.

<sup>81</sup> The recommendations of the Independent Expert Review Final Report suggest that the Court identify specific goals that can be measured and quantified. This approach would not diminish the Court’s lofty aims but would supplement them in a productive way, Independent Review 2020 Final Report, pp. 114–118, see above note 44.

<sup>82</sup> Firew Tiba, “The Prosecution of Sitting Heads of States by the International Criminal Court”, in *Willamette Journal of International Law and Dispute Resolution*, 2013, vol. 21, no. 2, p. 134; Charles Chernor Jalloh, “The Law and Politics of The Charles Taylor Case”, in *Denver Journal of International Law and Policy*, 2015, vol. 43, no. 3, p. 229. And even though there has been an increase in the number of cases since 1990, they almost always involve a former HOS, not sitting leaders. Mary Robinson, “Foreword”, in Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State*, Cambridge University Press, 2009, p. xvi; *ibid.*, Introduction, p. 12.

he had been removed from power. He was surrendered to ICC custody, and his trial began in 2016. He was acquitted in 2019.<sup>83</sup>

In contrast, the Court has been unable to bring into custody three HOSs when they were in office: Omar Al-Bashir of Sudan, Muammar Gaddafi of Libya, and Uhuru Kenyatta of Kenya. Efforts to bring Al-Bashir into custody sparked a decades-long conflict between the ICC and many Member States that refused to comply with the Court's co-operation orders and requests.<sup>84</sup> Gaddafi was never brought into custody. His case was closed after he was killed by opposition forces;<sup>85</sup> however, the Court's inability to obtain custody over Saif Gaddafi, Libya's former second-in-command and Muammar's son,<sup>86</sup> suggests what may have been the result of Muammar Gaddafi's prosecution. Finally, the case against Kenyatta has been closed because there is insufficient evidence to proceed,<sup>87</sup> and some of those charged with offences against the administration of justice related to witness interference remain at large.<sup>88</sup>

Thus, in terms of efficacy, the Court has been unable to achieve its prosecutorial aims against current executives. If this were not enough, the situations have devolved to the point that the Court is accused of reinforcing or amplifying political divides.<sup>89</sup> Addressing or avoiding the dynamic that produced these results will be an important step in building the Court's capacity so it is in a position to pursue its first HOS aggression case.

This is an admittedly political and international relations-based approach, but it could change the dynamic in a useful way. It also is consistent with the Final Report of the Independent Expert Review that encouraged the Court to continue to develop the relationship between the ju-

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<sup>83</sup> ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/15 (acquitted on 15 January 2019, confirmed by the Appeals Chamber on 31 March 2021).

<sup>84</sup> ICC, *Prosecutor v. Omar Hassan Al-Bashir*, ICC-02/05-01/09 (ongoing case).

<sup>85</sup> ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11 (ongoing case).

<sup>86</sup> *Ibid.*

<sup>87</sup> ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 (charges withdrawn on 23 January 2012).

<sup>88</sup> See ICC, *Prosecutor v. Water Barasa*, ICC-01/09-01/13 (ongoing case). One exception is Mr. Gicheru, who has surrendered to the Court's jurisdiction: ICC, *Prosecutor v. Paul Gicheru*, ICC-01/09-01/15 (ongoing case).

<sup>89</sup> Chazal, 2016, p. 27, see above note 79.

dicial functions of the Court and other political and institutional actors like the ASP and the UN.<sup>90</sup>

#### **19.4. A Prosecutorial Framework and Constructivist Methodology to Address Legitimacy Gaps**

Three legitimacy pitfalls have been identified: questions of input and consent related to the number of Kampala Amendment ratifications; questions of consent related to undeveloped complementarity rules for HOS aggression situations; and questions of efficacy related to the Court’s paradoxical power structure. This next section explores how the OTP could develop a prosecutorial framework to diffuse these legitimacy traps.

In terms of substance, the OTP can create an expanded preliminary examination framework to be applied to aggression situations that potentially involve a sitting HOS. As explained below, the framework would address the complementarity and efficacy gaps that have been identified. Moreover, the OTP can use an approach rooted in constructivism to build consensus. This mindset has the capacity not only to yield positive normative results, but there also is the potential to change the Court’s trajectory with respect to ratifications and acceptances of the Kampala Amendments.

##### **19.4.1. Substance: A Normative Framework Focused on Admissibility and the Interests of Justice**

The proposed Prosecutorial Framework would articulate norms to be applied to future preliminary examinations related to HOS aggression. During the preliminary examination, the OTP assesses jurisdiction, admissibility, and the interests of justice in four stages to determine whether there is a reasonable basis to proceed with an investigation.<sup>91</sup> The proposed Prosecutorial Framework is linked to phases three and four (see Table 1).

<b>Preliminary Examination Phases<sup>92</sup></b>	<b>Action Taken</b>
1.	Initial assessment of information received pursuant to Article 15; OTP will evaluate the seriousness of the information and deter-

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<sup>90</sup> See generally, Independent Review 2020 Final Report, see above note 44.

<sup>91</sup> ICC Statute, Article 53(1)(a)-(c), see above note 19.

<sup>92</sup> ICC-OTP, “Policy Paper on Preliminary Examinations”, November 2013, pp. 18–19 (“Preliminary Examination Paper, 2013”) (<http://www.legal-tools.org/doc/acb906/>).

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	mine whether the situation is manifestly outside the Court’s jurisdiction.
2.	Formal commencement of a preliminary examination; OTP will evaluate “whether the preconditions to the exercise of jurisdiction under Article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court”. <sup>93</sup>
3.	Evaluate admissibility pursuant to Article 17: “[I]n line with its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes”. <sup>94</sup>
4.	Evaluate the countervailing consideration of the interests of justice. <sup>95</sup>

**Table 1: Preliminary examination phases.**

#### 19.4.1.1. Developing Complementarity Norms

To address the input and consent challenges regarding complementarity, the Prosecutorial Framework would specify at Phase Three how the future complementarity analysis should be conducted in the context of HOS aggression situations. For example, the framework could address the following questions: Who is competent to speak on behalf of the aggressor State with regard to domestic investigation and prosecution decisions involving a sitting HOS? How should the complementarity analysis proceed when there are varying degrees of willingness and ability within the aggressor State? How far does positive complementarity extend when a victim State seeks to investigate or prosecute? And, finally, what impact does a third party’s assertion of universal jurisdiction have on the Court’s complementarity analysis?

The OTP likely will continue to identify these and other complementarity questions to be resolved.<sup>96</sup> Section 19.4.2. will discuss the specific constructivist methodology to use; however, the point here is to encourage the OTP to collaborate with interested parties now to develop the Prosecutorial Framework. The area of law is fraught, norms are needed to support

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<sup>93</sup> *Ibid.*, p. 19.

<sup>94</sup> *Ibid.*, p. 10.

<sup>95</sup> Interests of Justice Policy Paper, 2007, p. 9, see above note 13.

<sup>96</sup> See Wrangé, 2017, see above note 60.

future Court action, and agreement will be difficult to achieve. With that said, these future situations will be volatile and high profile, thus it is beneficial to develop meaningful and workable norms before rather than in the midst of such a proceeding.

This approach fills a troublesome gap and will further the OTP's goal of being principled, consistent and fair, which in turn enables it to build and maintain its legitimacy.<sup>97</sup> Achieving this result through a transparent and deliberative process also promotes international law in terms of treaty interpretation and the development of custom. Finally, it could assuage the concerns of States that have not yet ratified the Kampala Amendments, in the same way initial decisions regarding complementarity eased concerns and paved the way for the Rome Statute in the 1990s.

#### **19.4.1.2. Resolving Efficacy Concerns**

To address efficacy concerns related to previously attempted HOS prosecutions, the framework would interpret the phase four 'not in the interests of justice' element to include an analysis of the potential damage proceeding with the case could do to the Court's legitimacy. As noted, 'not in the interests of justice' is a countervailing consideration. If the jurisdiction and admissibility evaluations favour further Court action, the OTP may still decline to pursue the matter if it is not in the interests of justice to do so. As articulated by the Prosecutor, this inquiry involves the gravity and blatancy of the crime; the interests of victims (both in seeing justice done and their security); the special circumstances of the accused (age, infirmity, and role and degree of involvement in the alleged crime); and the availability of other justice mechanisms (reparations, institutional reform, truth seeking, and peace processes).<sup>98</sup>

The proposed framework would expand the interpretation of this last factor regarding the availability of other justice mechanisms. If the evaluation suggests that the Court would risk long-term damage to itself as an institution if it were to proceed beyond the preliminary examination phase, at that point in time, the OTP should pursue other 'justice mechanisms' instead. This decision would be taken as a last resort, and not merely because a particular case would be challenging. This proposed interpretation of the last factor would focus on serious obstacles that would undermine the

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<sup>97</sup> Informal Expert Paper on Complementarity, p. 4, see above note 69.

<sup>98</sup> Interests of Justice Policy Paper, 2007, pp. 4–9, see above note 13.

Court's legitimacy. The ten-year saga of trying to bring into custody the former Sudanese President is a prime example. It was more than an inability to execute a search warrant. The dispute pitted States Parties against the Court and prompted the threatened withdrawal of the Court's long-standing and strongest supporters.

To be clear, this is not a separate feasibility analysis, which has been rejected by the OTP<sup>99</sup> and the expert panel charged to review the ICC and the Rome Statute system.<sup>100</sup> First, the proposed approach does not add a new criterion to the existing preliminary examination framework. Considering the impact on the Court's legitimacy and the availability of other mechanisms is a reasonable interpretation of the "other justice mechanisms" and "peace processes", which are articulated in the OTP's policy paper.<sup>101</sup>

Moreover, the proposed inquiry goes beyond 'feasibility'. Feasibility refers typically to ease or convenience. The term was described recently by the Court in the Pre-Trial Chamber ('PTC')<sup>102</sup> and Appeals Chamber<sup>103</sup> decisions regarding the situation in Afghanistan. The Appeals Chamber impugned the PTC's decision to decline the Prosecutor's request to authorize an investigation into the situation in Afghanistan because the PTC exceeded its authority.<sup>104</sup> The PTC went beyond the Prosecutor's general statement that proceeding would not be contrary to the interests of justice and analysed whether it was feasible to proceed. Although the PTC did refer to the credibility of the organization and its financial sustainability,<sup>105</sup> the PTC focused its analysis on whether the Court could effectively investigate and prosecute the case within a reasonable time frame.<sup>106</sup> The Independent

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<sup>99</sup> Preliminary Examination Paper, 2013, para. 70, see above note 92.

<sup>100</sup> Independent Review 2020 Final Report, p. 213, Recommendation 228, see above note 44.

<sup>101</sup> Interests of Justice Policy Paper, 2007, paras. 6a-b, see above note 13.

<sup>102</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 ('PTC-Afghanistan') (<http://www.legal-tools.org/doc/2fb1f4/>).

<sup>103</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 ('Appeals Chamber-Afghanistan') (<http://www.legal-tools.org/doc/x7kl12/>).

<sup>104</sup> *Ibid.*, para. 46.

<sup>105</sup> PTC-Afghanistan, para. 88, see above note 102.

<sup>106</sup> *Ibid.*, para. 89.

Expert Review picked up the criticism of this approach by focusing on an inability to arrest someone.<sup>107</sup>

While these might be relevant considerations, the proposed framework would look at the question from a different, deeper perspective. The proposed standard would question whether proceeding to the investigation stage would be destructive to the Court. If other justice mechanisms or peace processes can address the situation, there is no cause to jeopardize the Court. Preserving the Court's legitimacy is preserving its capacity to address future grave situations and cases and to protect future victims. Again, the ten-year saga involving the Court's inability to bring the former Sudanese President into custody is a prime example. The analysis is not about the difficulties with the arrest warrant. It is how the case brought the ICC to the brink. It brought the Court in direct conflict with its Member States, and the impunity with which the former President travelled freely to other countries left its mark on the Court.

Requiring this high threshold also addresses the OTP's concern that considering feasibility would encourage obstructionist behaviour.<sup>108</sup> The calculus is not related to individual behaviour but to a much broader political, social, cultural, and economic calculus based on pre-existing and long-standing relationships (or lack thereof). The Prosecutorial Framework could be devised as outlined below, with these key characteristics. In particular, when risk to the Court is low, the framework's interests of justice inquiry should favour Court action. If Court capacity is high *vis-à-vis* the low risks, success and dialogue will have a normative impact. And even if the Court's capacity also is low, this would be a prime opportunity for dialogue and additional norm building given the lack of opposition.

Conversely, the framework would suggest that the Court proceed with caution when the risks to the Court, as well as the Court's capacity, are high. Finally, when risk is high and Court capacity is low, the framework would suggest that the Court focus on generating international community dialogue regarding a holistic resolution of the situation, that is, other justice mechanisms (see Table 2).

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<sup>107</sup> Independent Review 2020 Final Report, p. 211, paras. 651–652, see above note 44.

<sup>108</sup> Preliminary Examination Paper, 2013, para. 70, see above note 92.

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	<b>High Court Capacity</b>	<b>Low Court Capacity</b>
<b>Low Risk</b>	OTP proceeds.	OTP proceeds.
<b>High Risk</b>	<p>OTP proceeds with caution.</p> <p>Use constructivist approach to weigh options available to the international criminal law network.</p> <p>If consensus does not emerge regarding which avenue to pursue, OTP proceed only if</p> <p>(i) the gravity of harm warrants action, <i>and</i> the Court believes proceeding will achieve some significant goal, such that potential damage to the Court’s legitimacy is a worthy risk,</p> <p>or</p> <p>(ii) there is a great risk that evidence destruction will preclude future prosecution, <i>and</i> proceeding is the only way to obtain and preserve evidence.</p>	<p>OTP avoids investigation until risk to the Court is reduced to an acceptable level.</p> <p>In the meantime, use constructivist approach to identify alternative means to:</p> <p>(i) achieve and maintain security;</p> <p>(ii) encourage Security Council or regional actors to become involved in the situation; and</p> <p>(iii) preserve evidence.</p>

**Table 2: Proposed interests of justice framework.**

One of the most basic underpinnings of the ‘interests of justice’ principle is that there be a Court empowered to achieve justice. Thus, considering whether it is in the Court’s long-term legitimacy interests to pursue a situation today should be a driving force in this analysis of whether other justice mechanisms are available.

#### **19.4.2. Methodology: A Shift Toward Constructivism**

The final legitimacy concern to be addressed is the limited number of States that have ratified or accepted the Kampala Amendments. International Relations theories contextualize the Court’s current position. In particular, the Court was created in an era of constructivism (that is, collective norm development), whereas the current HOS prosecution stalemates reflect a return to the power-based dynamic of rationalism (that is, a State will cede power to an international organization when it is to the State’s

advantage to do so, and only to the extent of the advantage).<sup>109</sup> Given the Court's paradoxical power structure, it is clear who the winners and losers will be if rationalism continues to hold sway as the Court moves into HOS aggression cases.

The OTP can attempt to change the dynamic by using the constructivist approach when addressing HOS aggression claims. The theory explains how the Like-Minded States were able to bring the Rome Statute to completion despite the objections of several powerful States, and it should be employed again today to develop the Prosecutorial Framework in advance of the Court's first aggression case. Constructivism also can be used to galvanize other actors when the OTP assesses interests of justice in a specific future situation and concludes that judicial resolution may be untenable. Before shifting to these specific uses, however, let us first consider the approach and its impact on the Court.

#### 19.4.2.1. Constructivism

The adoption of the Rome Statute in 1998 was a surprise to the extent that it achieved what had previously eluded the international community: a permanent international criminal court.<sup>110</sup> Some attribute this monumental occasion to the rise of the international relations approach of constructivism and a spirit of co-operation and optimism.<sup>111</sup> Constructivists focus on the "inherent normativity of law"<sup>112</sup> rather than power. Actors and structures are considered mutually constitutive.<sup>113</sup> Social interaction builds

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<sup>109</sup> Caroline Fehl, "Evaluating the International Criminal Court: A 'Practice Test' for Realist and Constructivist Approaches", in *European Journal of International Relations*, 2004, vol. 10, pp. 357, 364.

<sup>110</sup> Antonio Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", in Cassese, Gaeta and Jones (eds.), 2002, see above note 52.

<sup>111</sup> Nicole Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case", in *International Organization*, 2009, vol. 63, no. 1, p. 33. See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, 2014, p. 39; Philippe Kirsch and Darryl Robinson, "Reaching Agreement at the Rome Conference"; William R. Pace and Jennifer Schense, "The Role of Non-Governmental Organizations", in Cassese, Gaeta and Jones (eds.), 2002, see above note 52; Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague et al., 1999 (<http://www.legal-tools.org/doc/d71078/>).

<sup>112</sup> Deitelhoff, 2009, p. 43, see above note 111.

<sup>113</sup> "Rationalism and Reflectivism in IR Theory", in *UK Essays*, December 2016, available on its web site.

shared identities, which inform structure. In turn, structures influence identities, and so the circle of norm and institution-building continues.<sup>114</sup>

Constructivists also embrace social variables and their influence on behaviour. Dialogue, discourse, and opportunities for persuasion (rather than coercion) are critical.<sup>115</sup> When no relevant norm exists to guide behaviour, the answer is not to coerce but to open discourse that begins with reasonable, agreed-upon principles, identifies 'turning points' in beliefs and progress, and ultimately sets norms. Actors in the broadest sense of the term (that is, States, international organizations, non-governmental organizations, and individuals and experts) engage to create a shared identity and consensus.<sup>116</sup>

#### **19.4.2.2. The Court's Creation Through a Constructivism Lens**

Scholars who attended the Preparatory Committee ('PrepCom') and the Rome diplomatic conference provide many examples of behaviour that reflects a constructivist mindset. They continually note the shared sense of purpose and common enterprise that created momentum toward adoption and overrode the objections of more powerful countries.<sup>117</sup> For example, the work of the PrepCom has been described as a "high act of international creativity",<sup>118</sup> in which people increasingly felt compelled to participate in the common endeavour that held the "promise of partly redeeming the worst in the history of their times".<sup>119</sup> And although the PrepCom participants were afraid that they had not done enough because the text sent to Rome was a "bulky draft about which there had been much disagreement",<sup>120</sup> this spirit of common purpose carried over into the Rome diplomatic conference.

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<sup>114</sup> See Kyle M. Danish, "International Relations Theory", in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, pp. 207, 216.

<sup>115</sup> Deitelhoff, 2009, p. 44, see above note 111.

<sup>116</sup> *Ibid.*

<sup>117</sup> Leila Nadya Sadat and Richard Carden, "The New International Criminal Court: An Uneasy Revolution", in *Georgetown Law Journal*, 2000, vol. 88, p. 387; Deitelhoff, 2009, p. 35, see above note 111.

<sup>118</sup> Benedetti and Washburn, 1999, pp. 1–2, see above note 49; see also Deitelhoff, 2009, see above note 111.

<sup>119</sup> Benedetti and Washburn, 1999, p. 1, see above note 49.

<sup>120</sup> *Ibid.*, p. 2.

Old patterns of agreement, outworn groupings, fears of the powerful, and inhibitions on leadership were weakened or cut down there. For the multilateral making of new global institutions in a new century, there are now new ways to negotiate and to reach agreement. They were tested in Rome in the summer of 1998, and they worked.<sup>121</sup>

Constructivism can explain how the increasingly ascendant group of Like-Minded States gained momentum and built a coalition that propelled the treaty text forward, and the more powerful permanent members of the UN Security Council<sup>122</sup> were not able to impose their will on the group. One explanation is that the new dynamic of constructivism rather than power-based rationalism took and held the field in Rome.<sup>123</sup>

### **19.4.2.3. Current Deadlock Through the Lens of Other International Relations Theories**

Rationalism or neo-liberal institutionalism could explain declining participation trends and the current deadlock between the Court and those who have opposed attempts to prosecute a sitting HOS, for example, former President Al-Bashir.

Rationalists explain the creation of international institutions as rational State actors with fixed preferences working within an anarchic system to solve co-operation problems that impact their interests. Neo-liberal institutionalism adheres to this idea, but there is a more modern focus on co-operation and institutional design.<sup>124</sup> For example, the theory suggests that States will centralize monitoring or decision making in an international institution, but their willingness is tempered by sovereignty costs. The greater the cost to a State's traditional sovereignty interests, that is, power over its citizens or territory, the less likely it is to accept centralization.<sup>125</sup> This may mean that the State will not participate in the international insti-

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<sup>121</sup> *Ibid.*, p. 34.

<sup>122</sup> *Ibid.*, p. 27.

<sup>123</sup> Sadat and Carden, 2000, pp. 387–388, see above note 117:

The negotiation and adoption of the Rome Treaty worked a quiet, albeit uneasy, revolution of sorts: a surreptitious segue into the new millennium, a millennium likely to be characterized both by a new multipolar balance of power in which the United States does not exercise an unchallenged hegemony over world affairs, and by new modalities of international governance. Indeed, many aspects of the Rome Statute challenge fundamental tenets of the structure of international law existing heretofore.

<sup>124</sup> Fehl, 2004, pp. 363–364, see above note 14.

<sup>125</sup> *Ibid.*, p. 364.

tution, particularly in the context of security questions,<sup>126</sup> or the State might condition its participation upon retaining control over the institution's decision-making through voting rules or veto power.<sup>127</sup>

#### **19.4.2.4. A Return to Constructivism**

As noted above, the OTP can consider returning to constructivism at two different stages with respect to the Prosecutorial Framework.

##### **19.4.2.4.1. Development of the Normative Framework**

First, the OTP can use constructivist methods to develop the Prosecutorial Framework in a transparent, deliberative process. While the OTP maintains confidentiality as necessary,<sup>128</sup> it also has named transparency as a major policy objective.<sup>129</sup> The Court's first Prosecutor warned that the Rome Statute's legitimacy could be undermined if the Court is not perceived to respect the law: "To avoid this possibility and build a solid institutional basis from the beginning, we make public our policies and regularly explain our legal decisions".<sup>130</sup> In keeping with this principle of transparency, the OTP publishes policy papers that outline its processes<sup>131</sup> and publicizes its decisions regarding preliminary examinations<sup>132</sup> and other matters.<sup>133</sup>

##### **19.4.2.4.2. Use of a Deliberative Process to Develop Interests of Justice Alternatives**

The OTP also can use a consensus-building approach when it begins to pursue a specific HOS aggression situation and its countervailing interests of justice evaluation suggests that the Court should pursue other justice

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<sup>126</sup> Deitelhoff, 2009, see above note 111.

<sup>127</sup> Fehl, 2004, p. 364, see above note 14.

<sup>128</sup> See Preliminary Examination Paper, 2013, p. 20, see above note 92; ICC-OTP, "Policy Paper on Case Selection and Prioritisation", 15 September 2016, pp. 5–6, 15 ('Case Selection Paper') (<http://www.legal-tools.org/doc/182205/>).

<sup>129</sup> Preliminary Examination Paper, 2013, p. 22, see above note 92.

<sup>130</sup> Luis Moreno-Ocampo, "The Prosecutor's Use of Legal Policies", in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, 2015, p. 12.

<sup>131</sup> See Preliminary Examination Paper, 2013, see above note 92; Case Selection Paper, see above note 128; Informal Expert Paper on Complementarity, see above note 44.

<sup>132</sup> See ICC-OTP, "Report on Preliminary Examination Activities 2017", 4 December 2017 (<http://www.legal-tools.org/doc/e50459/>); ICC-OTP, "Report on Preliminary Examination Activities 2016", 14 November 2016 (<http://www.legal-tools.org/doc/f30a53/>).

<sup>133</sup> See Case Selection Paper, see above note 128 (noting that decisions will be publicized).

mechanisms. Such dialogue would not direct or limit the Court's ultimate decisions. Rather, when judicial action appears destructive to the Court, the Court should bring others to the table to discuss alternatives. As the first Prosecutor predicted:

To end impunity for the most serious crimes, the entire network has to perform. For this reason, an excessive focus on courtroom activities will conceal other activities needed to stop and punish mass atrocities. To achieve such goals, the international community has to agree on additional actions, including political, humanitarian, military, and judicial measures.<sup>134</sup>

This sentiment also is in keeping with the UN Secretary General's encouragement: "Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof".<sup>135</sup>

In this way, judicial action is one tool in the toolkit of transitional justice, but when its exercise is destructive to the Court, other options should be pursued. Perhaps the threat of judicial action, in combination with investigative actions taken by non-governmental organizations and political pressure asserted by regional actors or the UN may be sufficient to achieve desired results.

One can see how dialogue and collaboration amongst this network of international criminal law actors might shift the power dynamic. When it is only the OTP and the Court against a target State, the paradox of the ICC's power structure tips the balance of power in favour of the target State. Whereas, when the dynamic involves the OTP, in consultation with this engaged group, the power balance shifts, potentially to incentivize cooperation with the Court.

## 19.5. Conclusion

Former President of the ASP, O-Gon Kwon, has reminded us that "international criminal justice [is] a living and growing organism, a work in progress, a project still in its infancy, and as such, we have an obligation to

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<sup>134</sup> Moreno-Ocampo, 2015, p. 9, see above note 130.

<sup>135</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, p. 26 (<http://www.legal-tools.org/doc/77bebf>).

future generations to care for its development".<sup>136</sup> In this way, we cannot abide the status quo but must seek to push ahead in proactive and creative ways.

Activation of the crime of aggression triggers the need for normative development. The OTP should use a constructivist approach to develop Phases Three and Four of the preliminary examination evaluation. The complementarity rules are not an easy fit in the HOS aggression context, and the countervailing interests of justice analysis should evaluate other justice mechanisms to protect the Court's legitimacy. Action on these fronts may, in turn, spur additional ratifications or acceptances of the Kampala Amendments. This chapter encourages action to build the Court's legitimacy and capacity so that it will be the institution its framers envisioned – one to stand as a final check on aggression.

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<sup>136</sup> "Statement by H.E. O-Gon Kwon, New President of the Assembly of States Parties (upon election)", 4 December 2017, p. 2.



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## Defining Situations at the International Criminal Court

Nicolai von Maltitz and Thomas Körner\*

### 20.1. Introduction

Since the creation of the International Criminal Court ('ICC', 'the Court'), the geopolitical world climate has changed considerably. While the last decade of the twentieth century had been characterized by States' increasing political will for international co-operation and multilateralism, the past 20 years have reinvoked State sovereignty concerns and claims for a nationalistic and protectionist system of governance. This general development has also affected the ICC, as the Court is highly dependent on the co-operation of States Parties as well as non-member States. Without the support of States, the potential for the ICC to fulfil its legal mandate is decisively diminished. It is all the more worrying that the ICC has been facing repeated criticism, having been denoted inefficient or characterized as a mere tool of politicization, used in order to implement a neo-colonial strategy by the Western world. Although these claims may not be well-founded, they point towards an important observation. Particularly in times of unsteady political support, the perception of the ICC as an independent and impartial arbiter of international criminal justice is more than a question of legitimacy. It is an axiom for the Court's effective functioning: Only if the ICC is perceived as such, it may ensure the necessary State co-operation and dismantle unfounded accusations of politicization as critique merely

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motivated by a State's general political opposition towards the Court as a multilateral institution.

In order to be perceived as independent and impartial, the ICC needs to be particularly cautious not to arbitrarily limit investigations to one side of a political conflict. In this regard, the determination of the individual scope of a 'situation' appears of fundamental importance as 'situations' form the general framework of prosecutorial investigations and thus pre-determine the range of potential cases to be selected for prosecution. Therefore, it appears rather surprising that, more than 20 years after the adoption of the Rome Statute of the ICC ('Rome Statute'), the term has not gained a lot of attention in the ICC's legal practice nor in international legal scholarship. This chapter aims to provide for a coherent way to interpret the term 'situation' with the clear intention that an intensified discussion on this matter will ultimately strengthen the Court.

## **20.2. Defining the Term 'Situation' in the Rome Statute**

### **20.2.1. The Jurisdictional Regime of the ICC**

In order to develop a distinct understanding of what the term 'situation' describes within the legal framework of the Rome Statute, it is important to provide a short overview of the ICC's multi-layered jurisdictional framework.

#### **20.2.1.1. General Parameters of Jurisdiction**

During the drafting process of the Rome Statute, the jurisdictional reach of the ICC was a key issue for intense political debate.<sup>1</sup> The discussion was shaped by two fundamentally different concepts of the position the future international criminal court should have in the evolving international legal order. On the one hand, there were those States that favoured the Court to respect and foster the sovereignty of the nation States and the competences of the United Nations Security Council ('UNSC'). Most prominently, the United States' delegation supported a jurisdictional model that required either a positive decision of the UNSC, or both the consent of the State of the accused's nationality as well as the State on whose territory the accused

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<sup>1</sup> On the drafting history, see for example Philippe Kirsch and John Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process", in *American Journal of International Law*, 1999, vol. 93, no. 1, pp. 8–11; Hans-Peter Kaul, "Special Note: The Struggle for the International Criminal Court's Jurisdiction", in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, vol. 6, no. 4, pp. 364–376.

allegedly committed the crime as a basis for the ICC's exercise of jurisdiction over a specific case.<sup>2</sup> On the other hand, there were those States that intended the ICC to become a truly universal criminal court whose jurisdictional system should be independent of the consent of States and the UNSC. For instance, the German delegation proposed a jurisdictional regime that was based on the principle of universality.<sup>3</sup> Although the majority of States favoured a wider-reaching jurisdictional reach of the Court,<sup>4</sup> a compromise was found in Rome that combines elements of both positions. In general terms, the contracting States agreed to limit the ICC's jurisdiction to individual conduct that constitutes an international core crime of genocide, crimes against humanity, war crimes, and the crime of aggression<sup>5</sup> (Article 5 of the Rome Statute), committed by a person at or above the age of eighteen (Article 26 of the Rome Statute). Temporally, the Court's jurisdiction covers crimes committed after the entry into force of the Rome Statute on 1 July 2002 (Article 11(1) of the Rome Statute).

#### **20.2.1.2. Preconditions to the Exercise of Jurisdiction**

In addition to these general parameters of jurisdiction, the so-called 'preconditions to the exercise of jurisdiction' pursuant to Article 12 of the Rome Statute need to be fulfilled. These preconditions are met if a State has either generally accepted the jurisdiction of the Court by becoming a State Party to the Rome Statute (para. 1) or by filing an *ad hoc* declaration in that regard (para. 3). Thereby, the State consents to the Court exercising jurisdiction over its nationals (para. 2(b)) or over any individual that commits an international crime on its territory (para. 2(a)). Pursuant to Article 11(2) of the Rome Statute, in the case of a State acceding to the Rome Statute after its entry into force, the exercise of the Court's temporal jurisdiction is limited by the State's individual date of accession. The State may additionally accept the Court's jurisdiction for a period dating back as far

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<sup>2</sup> Proposal Submitted by the United States of America: Article 7, UN Doc. A/CONF.183/C.1/L.70, 14 July 1998 (<http://www.legal-tools.org/doc/df3ddb/>).

<sup>3</sup> The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by Germany, UN Doc. A/AC.249/1998/DP.2, 23 March 1998 (<http://www.legal-tools.org/doc/5e6109/>).

<sup>4</sup> Kaul, 1998, pp. 370–371, see above note 1.

<sup>5</sup> At the Kampala Review Conference, the ICC States Parties agreed upon a separate jurisdictional regime for the Court's exercise of its jurisdiction over the crime of aggression (see Article 15 *bis* and *ter* of the Rome Statute). Due to the limited scope of this paper, the following submissions do not engage in a detailed analysis thereof.

as the entry into force of the Rome Statute (see the limitations of Article 24(1)) by filing a complementary *ad hoc* declaration under Article 12(3) of the Rome Statute. In generally relying on States' consent as a precondition to the exercise of jurisdiction, implementing the well-known principles of territoriality and active personality, further reaching proposals of granting the Court general universal jurisdictional reach were dismissed.

### 20.2.1.3. Exercise of Jurisdiction

If the preconditions to the exercise of jurisdiction are met, the 'exercise of jurisdiction' must still be triggered, according to Article 13 of the Rome Statute. There are three separate mechanisms that serve this function: the referral of a 'situation' to the Prosecutor by a State Party (Article 13(a), 14 Rome Statute), or the UNSC (Article 13(b) Rome Statute), or *proprio motu* investigations by the ICC Prosecutor (Article 13(c), 15 Rome Statute). As Article 12(2) of the Rome Statute does not refer to UNSC referrals, the UNSC may trigger the ICC's exercise of jurisdiction also for nationals of non-member States acting on non-member State territory,<sup>6</sup> dating as far back as the entry into force of the Rome Statute.<sup>7</sup> In theory, UNSC referrals may thus guarantee the Court's universal reach within its general parameters of jurisdiction. Whereas the procedures guiding UNSC and State referrals vary only in minor details, the initiation of investigations by the Prosecutor is substantially different. In order to start formal investigations *proprio motu*, the Prosecutor needs to submit a request for authorization of an investigation to the responsible Pre-Trial Chamber, according to Article 15(3) of the Rome Statute. Subsequently, the Pre-Trial Chamber determines whether there is a "reasonable basis to proceed" and whether the "case appears to fall in the jurisdiction of the Court"<sup>8</sup> (Article 15(4) of the Rome

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<sup>6</sup> See only ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecutor's Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 16 ('ICC, *Prosecutor v. Harun and Kushayb*, ICC-02/05-01/07-1-Corr') (<http://www.legal-tools.org/doc/e2469d/>); ICC, *Prosecutor v. Al-Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 40 (<http://www.legal-tools.org/doc/e26cf4/>).

<sup>7</sup> See for example ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Prosecutor's Application under Article 58, 7 May 2009, ICC-02/05-02/09-1, para. 2 (<http://www.legal-tools.org/doc/126792/>).

<sup>8</sup> For a further discussion on the meaning of the rather misplaced term 'case' in Article 15(4) Rome Statute, see ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the

Statute). The authorization procedure was agreed upon in order to counter fears that the Prosecutor could become an inherently political body,<sup>9</sup> constituting an oversight mechanism to ensure prosecutorial independence and impartiality.<sup>10</sup>

### 20.2.2. The Term ‘Situation’ as a Gatekeeper of ICC Investigations

The wording of Articles 13(a), 14, and 13(b) of the Rome Statute determines that States Parties and the UNSC may trigger the exercise of jurisdiction for a ‘situation’. Moreover, despite the misleading wording of Article 15(4) of the Rome Statute, which uses the term ‘case’, it is clear from reading the provision in conjunction with Article 15(5), (6) of the Rome Statute and taking into account its drafting history that *proprio motu* investigations shall also be undertaken into a ‘situation’.<sup>11</sup> The investigation of a ‘situation’ is a particularity of the ICC’s legal regime that is neither to be found in domestic legal orders nor in the legal frameworks of the *ad hoc* Tribunals.<sup>12</sup> The term is not further defined within the Court’s legal framework; however, it is of crucial importance as it serves as a gatekeeper for ICC investigations. In this regard, the Rome Statute implies that the existence of a ‘situation’ precedes the Court’s exercise of jurisdiction. Moreover, the ‘situation’ determines the possible scope of the Court’s investigations and thus the range of potential cases that may be selected for prosecution.<sup>13</sup>

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Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, paras. 64–69 (ICC, *Situation in Kenya*, ICC-01/09-19-Corr) (<http://www.legal-tools.org/doc/f0caaf/>).

- <sup>9</sup> For the individual delegation’s position, see William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 396–397.
- <sup>10</sup> Lovisa Bådagård and Mark Klamberg, “The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court”, in *Georgetown Journal of International Law*, 2017, vol. 48, no. 5, p. 663.
- <sup>11</sup> See Héctor Olásolo, “The Prosecutor of the ICC before the Initiation of Investigations: A Quasi Judicial or Political Body?”, in *International Criminal Law Review*, 2003, vol. 3, no. 2, p. 100, fn. 44.
- <sup>12</sup> Philippe Kirsch and Darryl Robinson, “Referral by States Parties”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 619.
- <sup>13</sup> Cf. ICC, Office of the Prosecutor (‘OTP’), Policy Paper on Preliminary Examinations, November 2013, para. 41 (<http://www.legal-tools.org/doc/acb906/>); see also Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, pp. 446–447; Mohammad Zakerhossein, “A Concept Without Consensus: Conceptualisation of the ‘Situa-

It is rather surprising that more than 20 years after the adoption of the Rome Statute, there seems to be no established understanding of what the term ‘situation’ actually implies in legal practice.

### 20.2.2.1. Reasons for Including a ‘Situation Phase’

The first draft of a Statute for the future International Criminal Court proposed by the International Law Commission in 1994<sup>14</sup> did not recognize a distinction between ‘situations’ and ‘cases’. Pursuant to Article 25(2), the Draft Statute empowered States Parties to “lodge a complaint with the Prosecutor alleging that [...] a crime appears to have been committed”, whereas the UNSC could refer a “matter” to the Court under Article 23(1) of the Draft Statute. Within the subsequent drafting process, the possibility to trigger the Court’s exercise of jurisdiction for an individual crime was replaced by the requirement to open investigations into a ‘situation’ or a ‘matter’.<sup>15</sup> By the time of the Rome Conference, the ‘situation-based’ approach had gained decisive support with the result that the adoption of the respective provisions was rather uncontroversial.<sup>16</sup> The reason for rejecting the initial case-based approach may be found in the delegations’ concern that the possibility of lodging a complaint with regard to particular individuals or crimes could politicize the complaint procedure.<sup>17</sup> Even the term ‘matter’ was considered to be too specific in that regard.<sup>18</sup> Introducing the ‘situation phase’ was intended to prevent the referring entities from limiting prosecutorial investigations “to a particular conduct, suspect or party”,<sup>19</sup> thus (mis-)using the Court’s activities to pursue an own political agenda.<sup>20</sup>

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tion’ Notion in the Rome Statute”, in *International Criminal Law Review*, 2018, vol. 18, no. 4, p. 688.

<sup>14</sup> “Draft Statute for an International Criminal Court with commentaries”, in Yearbook of the International Law Commission, vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994 (<http://www.legal-tools.org/doc/390052/>).

<sup>15</sup> Lionel Yee, “The International Criminal Court and the Security Council: Article 13(b) and 16”, in Roy S. Lee (ed.), *The International Criminal Court: Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 148.

<sup>16</sup> Kirsch and Robinson, 2002, p. 621, see above note 12.

<sup>17</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1996, vol. I, UN. Doc. A/51/22, para. 146 (<http://www.legal-tools.org/doc/e75432>).

<sup>18</sup> Yee, 1999, p. 148, see above note 15.

<sup>19</sup> Rod Rastan, “Situations and Cases: Defining the Parameters”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, p. 422.

<sup>20</sup> Cf. Kirsch and Robinson, 2002, p. 623, see above note 12.

However, the ‘situation phase’ shall not only shield the ICC from political instrumentalization in view of UNSC and State referrals, it also creates an important safeguard with regard to *proprio motu* investigations. Making ‘situations’ the subject of prosecutorial investigations, also following the authorization of the competent Pre-Trial Chamber, shall enable the Prosecutor to use his or her discretionary power to select individual cases for prosecution in an impartial and independent manner.<sup>21</sup> The Prosecutor is mandated to investigate all sides of a conflict rather than to immediately select an individual case for criminal prosecution.<sup>22</sup> Thus, the ‘situation phase’ is designed to serve a neutrality function, preventing arbitrarily narrow investigations and one-sided prosecutions that could stimulate claims of partiality and arbitrariness.

### **20.2.2.2. Pre-Determination and Politicization of ‘Situations’ in Legal Practice**

Despite these unequivocal intentions for including a ‘situation phase’, the effectiveness of the concept’s neutrality function depends on the interpretation of the term ‘situation’ itself. In the following section, it will be analysed how certain interpretations of the term ‘situation’ undermine such neutrality function, leading to arbitrary pre-determinations of prosecutorial investigations and the danger of the Court’s politicization.

#### **20.2.2.2.1. State Referrals**

Most ‘situations’ currently investigated by the Prosecutor were triggered by States Parties.<sup>23</sup> However, contrary to the dominant concept of State referrals envisaged at the Rome Conference, States Parties very reluctantly refer ‘situations’ occurring on the territory of another State Party, but rather such that occur on their own territories (so-called ‘self-referrals’). The legality of self-referrals has been eagerly disputed among legal scholars,<sup>24</sup> however, it was finally confirmed by the Court’s legal practice.<sup>25</sup>

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<sup>21</sup> See also Mohammad Zakerhossein, *Situation Selection Regime at the International Criminal Court: Law, Policy, Practice*, Intersentia, Cambridge, 2017, p. 32.

<sup>22</sup> In this regard Article 54(1)(a) of the Rome Statute imposes on the Prosecutor an obligation “to establish the truth”, which is also applicable to the Prosecutor’s case selection policy; see ICC, OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, para. 22 (<http://www.legal-tools.org/doc/182205/>).

<sup>23</sup> ICC, “Situations under investigation” (available on its web site).

<sup>24</sup> For a critical view, see William Schabas, *An Introduction to the International Criminal Court*, 5th. ed., Cambridge University Press, 2017, p. 148; in support of self-referrals, see

One of the main reasons why self-referrals may raise legitimate concerns are the foreseeable motives of a State Party to issue such a referral and their further implications for the proceedings at the ICC. Self-referrals are most likely to be undertaken in “convoluted situations in which State-sponsored groups and non-State actors contend for power and resources”.<sup>26</sup> With the referring State Party being part of the conflict, it seems very plausible that the State may desire to use the ICC’s involvement as a means against its internal opponents.<sup>27</sup> As the Prosecutor is frequently dependent on the referring State’s co-operation, for example in order to access the site of crime and collect relevant evidence, he or she may appear particularly vulnerable to tolerating any such attempt of politicization.<sup>28</sup>

In that regard, the ICC’s first self-referral issued by Ugandan President Yoweri Museveni may serve as an example for a State Party’s attempt of circumventing the neutrality function of the ‘situation phase’ in pre-determining the parameters of the referred ‘situation’. On 16 December 2003, Museveni referred the “situation concerning the Lord’s Resistance Army” (‘LRA’) to the Prosecutor of the ICC.<sup>29</sup> The wording of the referral reveals the government’s clear intention to initiate investigations solely for crimes committed by the LRA rather than for all actors involved in the conflict (which includes the government-aligned Ugandan People’s Defence Forces).<sup>30</sup> However, despite the intended limitation expressed in the refer-

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Darryl Robinson, “The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 2, pp. 355–384.

<sup>25</sup> See for example ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 85 (<http://www.legal-tools.org/doc/ba82b5/>).

<sup>26</sup> Harmen van der Wilt, “Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 211.

<sup>27</sup> Paola Gaeta, “Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 4, pp. 951–952; see also Mahnoush Arsanjani and Michael Reisman, “The Law-In-Action of the International Criminal Court”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 392.

<sup>28</sup> Cf. Gaeta, 2004, pp. 950–951, see above note 27; see also William Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts”, in *Criminal Law Forum*, 2008, vol. 5, no. 1, p. 19.

<sup>29</sup> ICC, “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC”, 29 January 2004, ICC-20040129-44.

<sup>30</sup> Van der Wilt, 2015, p. 213, see above note 26.

ral's wording, the Prosecutor announced that "the scope of the referral encompass[e]d all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA".<sup>31</sup> It was argued that the Prosecutor could assume Uganda's consent for the broader terming of the referred 'situation'<sup>32</sup> and could therefore base his decision on a 'symmetric interpretation' of the referral rather than having to use his *proprio motu* powers in order to open investigations into an unlimited 'situation'.<sup>33</sup> However, until today, the Prosecutor did not pursue any prosecutions of members of the Ugandan authorities or military<sup>34</sup> and the Ugandan government allegedly threatened the Court to withdraw its co-operation if any such investigative steps are taken.<sup>35</sup>

#### 20.2.2.2.2. Security Council Referrals

States Parties may not be the only ones that may try to use their power to trigger investigations in order to pre-determine the individual scope of the 'situations' thus referred. The UNSC's referral of the Situation in Darfur,

<sup>31</sup> See ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05, para. 5 (<http://www.legal-tools.org/doc/ab8b5f/>); the Presidency of the ICC went even further in assigning the "[S]ituation in Uganda" to Pre-Trial Chamber II, see ICC, Presidency, *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1 (<http://www.legal-tools.org/doc/b904bb>).

<sup>32</sup> Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 411; see also Mathew Happolt, "Darfur, the Security Council, and the International Criminal Court", in *International and Comparative Law Quarterly*, 2006, vol. 55, no. 1, p. 231, fn. 29; see also the Prosecutor's letter to the ICC's Presidency annexed to ICC, *Situation in Uganda*, ICC-02/04-1, see above note 31.

<sup>33</sup> See also Claus Kreß, "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 4, pp. 946–947.

<sup>34</sup> The issuance of arrest warrants only against members of the LRA was sharply criticized by renowned NGOs, see, for example, Amnesty International, "Uganda: First Ever Arrest Warrant by International Criminal Court – A Step Towards Addressing Impunity", 14 October 2005, AI Index: AFR 59/008/2005.

<sup>35</sup> Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention", in *Ethics & International Affairs*, 2007, vol. 21, no. 2, p. 188; Alana Tiemessen, "The International Criminal Court and the Politics of Prosecutions", in *The International Journal of Human Rights*, 2014, vol. 18, nos. 4–5, p. 451.

Sudan,<sup>36</sup> as well as its referral of the Situation in Libya, contain provisions that point towards a similar practice. It has been noted that during the first years following the creation of the ICC, a referral of a ‘situation’ by the UNSC seemed to be rather unlikely due to the hostile position towards the Court shared by those permanent members of the UNSC that are not States Parties to the Rome Statute, which are, China, Russia, and the United States.<sup>37</sup> The UNSC’s first referral of the Situation in Darfur, Sudan in 2005<sup>38</sup> was, therefore, considered a major breakthrough in its relations to the Court.<sup>39</sup> However, with two of the five permanent member States abstaining (China and the United States), the referral has been considered to signal “tolerance” rather than “political commitment” to the Court’s activities.<sup>40</sup> It is of note for the purpose of this contribution that Resolution 1593 foresaw a regulation that limited the exercise of jurisdiction for nationals of non-member States. It prescribed that “nationals, current or former officials or personnel from a contributing State outside Sudan which [was] not a party to the Rome Statute of the International Criminal Court [should] be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction ha[d] been expressly waived by that contributing State”.<sup>41</sup>

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<sup>36</sup> With regard to the geographical scope of the ‘situation’ referred to the Prosecutor by the UNSC, Pre-Trial Chamber II determined that limiting the ‘situation’ to the geographical area of ‘Darfur’ did not render the referral invalid. According to the Pre-Trial Chamber the territorial scope of a ‘situation’ could be envisaged “both extending beyond, and restricted to a specific area located within, the territory of one State”, ICC, *Prosecutor v. Abd-Al-Rahman (‘Ali Kushayb’)*, Pre-Trial Chamber II, Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302), 17 May 2021, ICC-02/05-01/20-391, para. 26 (‘ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-391’).

<sup>37</sup> See also Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, *Leiden Journal of International Law*, 2006, vol. 19, no. 1, pp. 203–204.

<sup>38</sup> Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005 (<http://www.legal-tools.org/doc/4b208f/>).

<sup>39</sup> See only Antonio Cassese, “Is the ICC still Having Teething Problems?”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, p. 436.

<sup>40</sup> Rosa Aloisi, “A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court”, in *International Criminal Law Review*, 2013, vol. 13, no. 1, p. 160.

<sup>41</sup> Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005, OP 6 (<http://www.legal-tools.org/doc/4b208f/>).

A similar clause was included in Resolution 1970 unanimously adopted by the UNSC in 2011 that referred the Situation in Libya to the ICC.<sup>42</sup> The nature and effect of these exempting clauses have been widely discussed among international legal scholars.<sup>43</sup> In view of the wording and intent of the UNSC, it seems most reasonable to assume that the clauses are intended to limit the exercise of jurisdiction of the Court by shaping the personal scope of the ‘situations’ to be investigated. The UNSC simply did not intend to trigger the ICC’s exercise of jurisdiction for individuals falling under the exemption clauses. It has been suggested that the UNSC’s attempt to pre-determine the scope of the investigations to be triggered is particularly troublesome in the Libya Situation<sup>44</sup> as a report of the International Commission of Inquiry fuelled claims of crimes having been committed by NATO forces that had been involved in the fight against the former Libyan regime under Muammar Gaddafi.<sup>45</sup> Although the Prosecutor seems to have considered all-sided investigations, assuming the legal competence “to investigate all allegations of crimes by all actors”,<sup>46</sup> such announcement did not result so far in any prosecution of individual members of the exempted group.<sup>47</sup>

### **20.2.2.2.3. *Proprio Motu* Investigations**

In general, the initiation of investigations by the Prosecutor seems to be less vulnerable to attempts of politicization, as the Prosecutor as well as the authorizing Pre-Trial Chambers are equally bound by the principles of independence and impartiality. However, a thorough analysis of the authori-

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<sup>42</sup> Resolution 1970 (2011), UN Doc. S/RES/1970, 26 February 2011, OP 6 (<http://www.legal-tools.org/doc/00a45e/>).

<sup>43</sup> For a synopsis of the different ways to interpret the exemption clauses, see Cryer, 2006, pp. 209–214, see above note 37; for critical remarks on the provisions, see also Happolt, 2006, pp. 231–234, see above note 32; Schabas, 2017, pp. 152–157, see above note 24.

<sup>44</sup> Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 331.

<sup>45</sup> Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44, 1 June 2011, paras. 228–235 (<http://www.legal-tools.org/doc/em92ne/>).

<sup>46</sup> ICC, OTP, “Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)”, 16 May 2012, para. 54.

<sup>47</sup> It was thus suggested that the Prosecutor’s announcements were merely an appeasing reaction to the report of the Commission of Inquiry, Stahn, 2012, pp. 331–332, see above note 44.

zation decisions reveals very different approaches implemented by the various Pre-Trial Chambers with regard to the pre-determination of the scope of prosecutorial investigations that may have different repercussions on the effectiveness of the neutrality function of the ‘situation phase’.

In the Authorization Decision for investigations into the Situation in Kenya, Pre-Trial Chamber II considered the timeframe of the Prosecutor’s requested investigations (“post-election violence of 2007–2008”)<sup>48</sup> as “too broad” and concluded that “as such, it [was] the responsibility of the Chamber to define the temporal scope of the authorization for investigations with respect to the situation under consideration”.<sup>49</sup> Subsequently, the Chamber authorized investigations relating to events on the territory of Kenya between the date of the Rome Statute’s entry into force for Kenya (1 June 2005) and the date of the Prosecutor’s request for authorization of an investigation (26 November 2009).<sup>50</sup> The Pre-Trial Chamber’s holding is noteworthy. After remarking that the request was “too broad” regarding its temporal scope, it authorized a timeframe considerably broader than the one requested. Moreover, it held that Article 15(4) and 53(1)(a) of the Rome Statute generally precluded the authorization of investigations into prospective events, installing the date of the Prosecutor’s request as temporal limit to the investigations.<sup>51</sup>

In the Authorization Decision concerning the Situation in Côte d’Ivoire, Pre-Trial Chamber III generally followed the example of the Kenya Authorization Decision. There are, however, two important differences. Firstly, the Pre-Trial Chamber also considered broadening the original timeframe requested by the Prosecutor (“since 28 November 2010”)<sup>52</sup> in order to cover all crimes committed in Côte d’Ivoire between the acceptance of the Court’s jurisdiction (19 September 2002) and the date of the Prosecutor’s request (23 June 2011).<sup>53</sup> It generally acknowledged that

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<sup>48</sup> ICC, OTP, *Situation in Kenya*, Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3, para. 114 (<http://www.legal-tools.org/doc/c63dcc/>).

<sup>49</sup> ICC, *Situation in Kenya*, ICC-01/09-19-Corr, para. 203, see above note 8.

<sup>50</sup> *Ibid.*, paras. 207, 211.

<sup>51</sup> *Ibid.*, para. 206.

<sup>52</sup> ICC, OTP, *Situation in Côte d’Ivoire*, Request for Authorisation of an Investigation Pursuant to Article 15, 23 June 2011, ICC-02/11-3, para. 181 (<http://www.legal-tools.org/doc/1b1939/>).

<sup>53</sup> ICC, *Situation in Côte d’Ivoire*, Pre-Trial Chamber III, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation

“[w]hile the context of violence [had] reached a critical point in late 2010, it appear[ed] that this [had been] a continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d’Ivoire”.<sup>54</sup> However, the majority of the Chamber rejected the expansion of the timeframe as it found that “[t]he Prosecutor’s Request [did] not refer to specific incidents that may have occurred prior to 28 November 2010”<sup>55</sup> and ordered the Prosecutor “to revert to the Chamber with additional information [...] on potentially relevant crimes committed between 2002 and 2010”.<sup>56</sup> In the meantime, however, the majority of the Chamber still authorized investigations into the Situation in Côte d’Ivoire, limiting the exercise of the Court’s jurisdiction to crimes committed since 28 November 2010.<sup>57</sup> Following the Prosecutor’s provision of the requested information, the Pre-Trial Chamber then “expand[ed] its authorisation for the investigation in Côte d’Ivoire”, determining that the events since 19 September 2002 and those for which it had already authorized investigations “were to be treated as a *single situation*”.<sup>58</sup> Secondly, Pre-Trial Chamber III slightly modified the approach implemented in the Kenya Authorization Decision with regard to the end date of the investigations. Although it generally recognized the date of the Prosecutor’s request to mark their temporal limit, it created an exception for continuing crimes of the “ongoing situation”.<sup>59</sup> In such cases, the Pre-Trial Chamber authorized investigations of crimes after the date of the Prosecutor’s request if the contextual elements of the continuing crimes were the same for those committed prior to that date.<sup>60</sup> Judge Silvia Fernández de Gurmendi added a separate and partially dissenting opinion to the majority decision. She argued that even without reverting to the Prosecutor, “the Chamber could have authorised an investigation of the *entire situation* on the basis of the incidents already presented,

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in the Republic of Côte d’Ivoire”, 15 November 2011, ICC-02/11-14-Corr, para. 183 (‘ICC, *Situation in Côte d’Ivoire*, ICC-02/11-14-Corr’) (<http://www.legal-tools.org/doc/e0c0eb/>).

<sup>54</sup> *Ibid.*, para. 181.

<sup>55</sup> *Ibid.*, paras. 183–184.

<sup>56</sup> *Ibid.*, para. 185.

<sup>57</sup> *Ibid.*, para. 212.

<sup>58</sup> ICC, *Situation in Côte d’Ivoire*, Decision on the “Prosecution’s Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010”, 22 February 2012, ICC-02/11-36, paras. 36–37 (emphasis added) (<http://www.legal-tools.org/doc/de6177/>).

<sup>59</sup> ICC, *Situation in Côte d’Ivoire*, ICC-02/11-14-Corr, para. 179, see above note 53.

<sup>60</sup> *Ibid.*, para. 179.

since [...] they serve[d] only as samples of the gravest types of criminality in this situation”.<sup>61</sup> Moreover, concerning the authorization of investigations post-dating the Prosecutor’s application, Judge de Gurmendi argued that “there should be no requirement for a crime to be a ‘continuing crime’ in order to fall within the authorised investigation”.<sup>62</sup> Instead, she referred to the jurisprudence of Pre-Trial Chamber I in the *Mbarushimana* case, arguing that an authorization of an investigation may exceed the date of the Prosecutor’s request “insofar the crimes [were] sufficiently linked to the situation of crisis”.<sup>63</sup>

Pre-Trial Chamber I adopted a similarly broad understanding in the Authorization Decision for the Situation in Georgia. The Chamber generally accepted the Prosecutor’s suggested temporal and geographical scope of the investigations (crimes committed between 1 July 2008 and 10 October 2008 in and around South Ossetia).<sup>64</sup> It, however, held that events that had occurred outside these parameters would also fall under the authorized ‘situation’ if “they [were] sufficiently linked thereto and, obviously [fell] within the Court’s jurisdiction”.<sup>65</sup>

In the Authorization Decision for the Situation in Burundi, Pre-Trial Chamber III followed this approach in general. It did however not implement a ‘sufficient link’ requirement for the Prosecutor to extend the suggested temporal and geographical scope (crimes committed in Burundi between 26 April 2015 and 26 October 2017),<sup>66</sup> but requested “the legal re-

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<sup>61</sup> ICC, *Situation in Côte d’Ivoire*, Pre-Trial Chamber III, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the 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”, 5 October 2011, ICC-02/11-15-Corr, para. 58 (emphasis added) (‘ICC, *Situation in Côte d’Ivoire*, ICC-02/11-15-Corr’) (<http://www.legal-tools.org/doc/eb8724/>).

<sup>62</sup> *Ibid.*, para. 70.

<sup>63</sup> *Ibid.*, paras. 71, 73, referring to ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the “Defence Challenge to the Jurisdiction of the Court”, 26 October 2011, ICC-01/04-01/10-451, para. 16 (‘ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451’) (<http://www.legal-tools.org/doc/864f9b/>).

<sup>64</sup> ICC, OTP, *Situation in Georgia*, Request for Authorisation of an Investigation Pursuant to Article 15, 13 October 2015, ICC-01/15-4, paras. 1, 349 (<http://www.legal-tools.org/doc/460e78/>).

<sup>65</sup> ICC, *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s Request for Authorization of an Investigation, 27 January 2016, ICC-01/15-12, para. 64 (‘ICC, *Situation in Georgia*, ICC-01/15-12’) (<http://www.legal-tools.org/doc/a3d07e/>).

<sup>66</sup> The confidential request is cited after ICC, *Situation in Burundi*, Pre-Trial Chamber III, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Au-

quirements of the contextual elements [to be] fulfilled” in that regard.<sup>67</sup> Although the Chamber’s wording remains rather opaque, it seems reasonable to assume that the Chamber referred to the requirement implemented in the Côte d’Ivoire Authorization Decision with regard to continuing crimes. Hence, those crimes that fall outside the requested parameters must share the same contextual elements as those which fall within. This seems all the more plausible as the Chamber subsequently addressed crimes of a continuing nature that were also considered to be covered by the authorized investigations, even if they continued after the Prosecutor’s request and – most remarkably – even after the date of Burundi’s withdrawal from the Rome Statute taking effect.<sup>68</sup>

In contrast to the more recent decisions of Pre-Trial Chambers I and III, granting the Prosecutor some considerable power to expand the investigations after the authorization decision, Pre-Trial Chamber II, in its decision rejecting the opening of an investigation into the Situation in Afghanistan, strictly opposed such policy in *obiter dictum*. The Prosecutor had requested to open investigations “in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003 [the date of Afghanistan’s accession to the Rome Statute], as well as other alleged crimes that ha[d] a nexus to the armed conflict in Afghanistan and [were] sufficiently linked to the situation and [had been] committed on the territory of other States Parties in the period since 1 July 2002”.<sup>69</sup>

The Prosecutor particularly demanded such flexibility in view of the complexity of the ongoing Situation in Afghanistan, “in which crimes allegedly continue[d] to be committed on a near daily basis.”<sup>70</sup>

While the Prosecutor, in essence, requested “to be permitted to expand or modify its investigation [...] so long as the cases brought forward for prosecution [were] sufficiently linked to the authorised situation”,<sup>71</sup>

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thorization of an Investigation into the Situation in the Republic of Burundi”, 25 October/9 November 2017, ICC-01/17-9-Red, para. 191 (‘ICC, *Situation in Burundi*, ICC-01/17-9-Red’) (<http://www.legal-tools.org/doc/8f2373/>).

<sup>67</sup> *Ibid.*, para. 192.

<sup>68</sup> *Ibid.*

<sup>69</sup> ICC, OTP, *Situation in Afghanistan*, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, 20 November 2017, ICC-02/17-7-Red, para. 376 (<http://www.legal-tools.org/doc/db23eb/>).

<sup>70</sup> *Ibid.*, para. 38.

<sup>71</sup> *Ibid.*

Pre-Trial Chamber II tried to limit the effect of the Authorization Decision, holding that the power to expand the scope of the Prosecutor's investigations required a "close link [...] with one or more of the incidents specifically authorised".<sup>72</sup> The Chamber explicitly highlighted that a Pre-Trial Chamber's "authorisation [did] not cover the situation as a whole, but rather only those events or categories of events that [had] been identified by the Prosecution".<sup>73</sup> Upon appeal, the Appeals Chamber overturned the Pre-Trial Chamber's refusal to authorize investigations into the Situation in Afghanistan.<sup>74</sup> Noticeably, it also pronounced itself on the *orbiter dictum* of Pre-Trial Chamber II that had limited the effect of the authorization decision.<sup>75</sup> After stating that such approach would be "unworkable in practice",<sup>76</sup> it rejected the Pre-Trial Chamber's restrictive approach, authorizing the commencement of an investigation following the Prosecutor's original request.<sup>77</sup>

#### 20.2.2.2.4. Conclusions on Pre-Determinations and Politicization of 'Situations' in Legal Practice

Both UNSC referrals, as well as the Uganda referral, seem to convey a similar understanding of the way a 'situation' may be referred to the ICC. They rely on the assumption that the referring entity has the competence to determine the scope of the prosecutorial investigations by introducing material parameters within the triggering documents at the time of the referral.<sup>78</sup>

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<sup>72</sup> ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 41 ('ICC, *Situation in Afghanistan*, ICC-02/17-33') (<http://www.legal-tools.org/doc/2fb1f4/>).

<sup>73</sup> *Ibid.*, para. 42.

<sup>74</sup> ICC, *Situation in Afghanistan*, Appeals Chamber, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 05 March 2020, ICC-02/17-138 ('ICC, *Situation in Afghanistan*, ICC-02/17-138') (<http://www.legal-tools.org/doc/x7k112/>).

<sup>75</sup> *Ibid.*, paras. 55–64.

<sup>76</sup> *Ibid.*, para. 63.

<sup>77</sup> *Ibid.*, paras. 64, 79.

<sup>78</sup> It is unclear whether Pre-Trial Chamber II (in the same composition that had rendered the overturned Afghanistan Decision) supported such understanding in view of the UNSC's referral of the Situation in Darfur, Sudan. Since the UNSC had related its referral to the geographical region of 'Darfur', rather than Sudan as a whole, the Defence argued that it mandated an "unwarranted preselection of the crimes and cases that [might] fall within the Court's jurisdiction in connection with that situation". The Pre-Trial Chamber rejected the Defence's request to determine the illegality of the UNSC referral on the basis of such ar-

Although the initiation of *proprio motu* investigations by the ICC Prosecutor differs substantively from the other trigger mechanisms, the Authorization Decisions in the Situations in Kenya and Côte d’Ivoire convey a comparable understanding, as the respective Pre-Trial Chambers considered themselves competent and responsible to pre-determine the scope of the ‘situations’ before the commencement of formal investigations.<sup>79</sup>

In essence, such an understanding reveals a specific interpretation of the term ‘situation’ that seems to stand at odds with its neutrality function. The Pre-Trial Chambers’ Authorization Decisions in the Situations in Kenya and Côte d’Ivoire as well as the overturned Afghanistan Decision seem to suggest that every set of events that such decisions cover necessarily constitutes a ‘situation’ in terms of the Rome Statute. This becomes particularly obvious in view of the two-step authorization procedure undertaken in the Situation in Côte d’Ivoire. Although Pre-Trial Chamber III was well aware that its initial authorization of investigations did not cover certain events that it assumed to form part of the “ongoing political crisis”, it still granted investigations into a ‘situation’. Subsequently, the Chamber labelled both sets of authorized events as forming part of a “single situation”. Since the material scope of the authorized investigations is thus determined by random formal circumstances such as the sufficiency of information provided by the Prosecutor or the date of the Prosecutor’s authorization request, the Pre-Trial Chambers seem to reject the view that a ‘situation’ is characterized by a distinct *material content*. This position had also been shared by Pre-Trial Chamber II in the overturned Afghanistan Authorization Decision stating – in *obiter dictum* – that the Pre-Trial Chamber would not have authorized investigations with regard to a ‘situation as a whole’ but only concerning individual events or categories of events previously identified by the Prosecutor.<sup>80</sup> Such understanding of the term ‘situation’ coincides with that pursued by the UNSC and Uganda: They seem to

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gument, holding that “a situation [was] defined by the scope of the criminal action allegedly committed within it, rather than by pre-determined boundaries established for other purposes”. However, the Pre-Trial Chamber’s reasoning did not provide for a final conclusion whether limiting (geographical) parameters introduced by the SC could indeed legally pre-determine the ICC’s scope of investigations. See ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-391, paras. 11, 25–27, see above note 36.

<sup>79</sup> As demonstrated above, material parameters pre-determining the scope of the Prosecutor’s investigations may, *inter alia*, relate to the specification of certain groups of potential defendants, time-periods and territories as well as groups of criminal offences.

<sup>80</sup> ICC, *Situation in Afghanistan*, ICC-02/17-33, para. 42, see above note 72.

assume that all sets of events referred to the Court constitute a ‘situation’ in terms of the Rome Statute irrespective of any limitation introduced by the referring entities.

However, such a merely formal understanding of the term ‘situation’ clearly contradicts the drafters’ intention to include the ‘situation phase’ into the Court’s legal regime. By granting the referring entities the competence to shape and frame the prosecutorial investigations, the investigation phase can be easily politicized, limiting investigations and thus also the selection of individual cases, to one side of a conflict. This would be particularly worrying in cases of UNSC referrals that relate to ‘situations’ covering alleged individual criminal conduct that was not committed on the territory or by a national of a State Party as there would be no other way to trigger the exercise of the Court’s jurisdiction. In view of *proprio motu* proceedings, it would be incorrect to speak of a danger of politicization with regard to pre-determining the prosecutorial investigations. The case law does not reveal that the respective Pre-Trial Chambers have in any way aimed at implementing an own political agenda, independent of the pursuit of justice. However, a merely formal understanding of the term ‘situation’ with regard to *proprio motu* investigations may have a similarly endangering effect for the acceptance of the Court’s work. If the ‘situation’ to be investigated is not characterized by a distinct *material content*, but by more or less arbitrary formal circumstances, investigations that are – coincidentally – limited to one side of a conflict cannot be prevented.

Consequently, the ‘situation phase’ may only serve a neutrality function in order to guarantee the Prosecutor’s independence and impartiality if the term ‘situation’ designates some distinct *material content*. Only if the object of UNSC referrals, State referrals and authorization decisions relates to what could be described in general terms as all relevant events of a conflict, the Prosecutor may indeed investigate crimes committed by all sides of a conflict. The Prosecutor’s reactions to limited UNSC and State referrals, the Pre-Trial Chambers’ jurisprudence in the Situations in Georgia and Burundi, Judge de Gurmendi’s partially dissenting opinion in the Côte d’Ivoire Authorization Decision as well as the Appeals Chamber’s Authorization Judgment in the Situation in Afghanistan point towards such *substantive understanding* of the term ‘situation’ that will be discussed in the following sections.

### 20.2.3. Defining the Term ‘Situation’ – Merging Procedure and Substance

Any definition of the term ‘situation’ needs to be based on an interpretation of the ICC’s legal framework. In this context, it is noteworthy that the ICC itself possesses the so called *compétence de la compétence*, that is, the power to determine the extent of its own jurisdiction.<sup>81</sup> As any case selected for prosecution needs to be sufficiently linked to a ‘situation’ that has either been referred to the Court or authorized for investigations by the competent Pre-Trial Chamber,<sup>82</sup> the scope of an individual ‘situation’ may be subject to a ruling on jurisdiction under Article 19 of the Rome Statute.<sup>83</sup>

The first Chamber to define the term ‘situation’ was Pre-Trial Chamber I in the Situation in the Democratic Republic of the Congo. It held that “situations [were] generally defined in terms of temporal, territorial and in some cases personal parameters”.<sup>84</sup> The Chamber distinguished ‘situations’ from ‘cases’, which “comprise[d] specific incidents during which one or more crimes within the jurisdiction of the Court seem[ed] to have been committed by one or more identified suspects”.<sup>85</sup> The approach to define the term ‘situation’ in distinction to the term ‘case’ has frequently been cited and has also found some resonance in legal scholarship.<sup>86</sup> Although the distinction proves useful as a starting point to explain the intentions behind

<sup>81</sup> See only ICC, *Request under Regulation 46(3) of the Regulations of the Court*, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18-37, paras. 30–33 (<http://www.legal-tools.org/doc/73aeb4/>).

<sup>82</sup> Cf. ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision Requesting the Clarification on the Prosecutor’s Application under Article 58, 6 September 2010, ICC-01/04-575-US, para. 12 (<http://www.legal-tools.org/doc/b63d59/>).

<sup>83</sup> See for example ICC, *Prosecutor v. Harun and Kushayb*, ICC-02/05-01/07-1-Corr, paras. 12, 14, see above note 6.

<sup>84</sup> ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65 (<http://www.legal-tools.org/doc/2fe2fc/>).

<sup>85</sup> *Ibid.*, para. 65.

<sup>86</sup> See, for example, Susana SáCouto and Katherine A. Cleary, “The Gravity Threshold of the International Criminal Court”, in *American University Washington College of Law*, 2008, vol. 23, no. 5, p. 809, fn. 1; Helmut Satzger, *International and European Criminal Law*, 2nd ed., C.H.Beck, Hart and Nomos, Munich and Oxford, 2017, p. 238; Schabas, 2017, pp. 142–143, see above note 24.

including the ‘situation phase’, its value to define the term ‘situation’ appears rather limited. All it reveals is, as already stated above, that ‘cases’ arise out of the investigation of a ‘situation’. A ‘situation’ must thus be broader than a ‘case’ and the latter must be sufficiently linked to the former in order for the ICC to exercise its jurisdiction.<sup>87</sup> Moreover, the Pre-Trial Chamber’s holding does not seem to aim at offering a concise definition of the term ‘situation’. Although all mentioned parameters may indeed serve as indicators for the *material content* of a ‘situation’, they cannot constitute decisive criteria to define the term. In fact, such a definition might even be used to arbitrarily limit investigations to parts of a ‘situation’ as shown above. Pre-Trial Chamber I seems to be aware of the deficiency of its description, highlighting that ‘situations’ may only “in some cases” be defined in personal parameters, without offering a concept that would enable us to conclude when these ‘cases’ actually occur. All the Pre-Trial Chamber seems to provide is a way to factually describe the *material content* of a ‘situation’ rather than offering a definition of the term itself. However, the latter must necessarily precede the former as a ‘situation’ may not be described without its *material content* being previously determined on the basis of a *substantive understanding* of the term.

### 20.2.3.1. The Elusiveness of the *Material Content* of a ‘Situation’

In contrast to the merely formal understanding of the term ‘situation’ described above, a *substantive understanding* assumes that every ‘situation’ is characterized by some distinct *material content*. The *material content* of a ‘situation’ is inherently factual. M. Cherif Bassiouni thus argued that a “situation [was] the overall factual context in which it [was] believed that a crime within the jurisdiction of the Court ha[d] been committed”.<sup>88</sup> In legal scholarship, the *material content* of a ‘situation’ was further described as the “conflict scenario”<sup>89</sup> or the “contextual element of a situation”.<sup>90</sup>

For the realization of the neutrality function of the term ‘situation’ and, more generally, for the unambiguous determination of the ICC’s juris-

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<sup>87</sup> Zakerhossein, 2017, pp. 30–31, see above note 21.

<sup>88</sup> Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law*, 2nd. ed., Brill Martinus Nijhoff Publishers, Leiden, 2013, p. 680.

<sup>89</sup> Antonio Marchesi and Eleni Chaitidou, “Article 14”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H.Beck, Hart and Nomos, Munich and Oxford, 2016, para. 25.

<sup>90</sup> Zakerhossein, 2017, p. 49, see above note 21.

diction over a specific case, it would be best if the *material content* of a ‘situation’ was clearly definable. However, “[m]odern conflicts are seldom well-defined events. They stop and re-start, have precursors and encounter periods of low intensity and resurgence, as armed groups remobilize, undergo new configurations, or link up with other movements. Combatants, small arms and extremist rhetoric migrate from one territory to another, precipitating new, inter-related violence”.<sup>91</sup>

Rod Rastan makes an important observation that may prove vital in the context of developing a *substantive understanding* of the term ‘situation’. Any attempt to define the *material content* of a ‘situation’ is confronted with the limitations that the narration (and our perception) of the past entail. As far as the human mind may infer, history does not pursue any inherent logic, nor is the past naturally divided into any kind of independent subsections. Factual accounts are commonly narrated in terms of causes and events, however, the qualification of any circumstance as one or the other depends on the narrator’s own perception and thus, constitutes an inherently subjective value judgment. Although such preambular remarks must not be casually ignored, they do not weigh against a *substantive understanding* of the term ‘situation’. Recognizing that the definition of the *material content* of a specific ‘situation’ might never be ultimately justifiable does not necessarily contradict the neutrality function that striving for such definition may realize in legal practice. To put it differently, even if every definition of the scope of prosecutorial investigations may be challenged from an epistemological point of view, it does not mean that the conscious choice of such a definition may not have the desired effect to reduce the occurrence of one-sided investigations. Thus, it is not the ultimate justifiability but rather the *quest for plausibility* of the individual scope of the prosecutorial investigations in view of the ICC’s independence and impartiality that should determine a *substantive understanding* of the term ‘situation’. In order to assure such plausibility, an interpretation of the term ‘situation’ may take into account certain material criteria to approximate the *material content* of a ‘situation’ as well as a determination of the process of how to define the individual scope of a ‘situation’.

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<sup>91</sup> Rod Rastan, “The Jurisdictional Scope of Situations Before the International Criminal Court”, in *Criminal Law Forum*, 2012, vol. 23, no. 1, p. 1.

### 20.2.3.2. The ‘Situation of Crisis’

In the *Mbarushimana* case, Pre-Trial Chamber I introduced the term “situation of crisis”,<sup>92</sup> which seems to be intended to implement a *substantive understanding* of the term ‘situation’. The term was also used by Judge de Gurmendi in her partially dissenting opinion.<sup>93</sup> Although the term ‘situation of crisis’ is neither legally defined nor to be found in the drafting documents of the Rome Statute,<sup>94</sup> its introduction was welcomed by some legal scholars as a “threshold qualifier to the exercise of jurisdiction”.<sup>95</sup> With reference to the jurisprudence of the European Court of Human Rights in the case of *Lawless v. Ireland*,<sup>96</sup> proponents of such a view draw a parallel between a ‘situation of crisis’ and a state of ‘public emergency’ in terms of Article 15(1) of the European Convention on Human Rights, claiming that the Court’s exercise of jurisdiction shall only cover “exceptional circumstances – not structural ones which constitute a departure of the status quo”.<sup>97</sup> It is doubtful whether Pre-Trial Chamber I intended the term ‘situation of crisis’ to imply such a restriction of the ICC’s exercise of jurisdiction. In the *Mbarushimana* case, the Pre-Trial Chamber needed to address the Defence’s claim that the ICC was not permitted to exercise jurisdiction over the case as it did not fall under the self-referred Situation in the Democratic Republic of the Congo.<sup>98</sup> The Chamber rejected the Defence motion, holding that the ‘situation of crisis’ did not only cover events in the region of Ituri, but also such that had occurred after the time of the referral in the

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<sup>92</sup> See only ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, paras. 21–27, see above note 63.

<sup>93</sup> ICC, *Situation in Côte d’Ivoire*, ICC-02/11-15-Corr, paras. 71, 73, see above note 61.

<sup>94</sup> Rastan, 2012, pp. 9–10, see above note 91.

<sup>95</sup> Zakerhossein, 2017, p. 40, see above note 21; see also Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, Brill Martinus Nijhoff Publishers, Leiden, 2005, p. 43; for an opposing view that had originally introduced the term ‘threshold qualifier’ see Rastan, 2012, p. 10, see above note 91.

<sup>96</sup> European Court of Human Rights, *Lawless v. Ireland (No. 3)*, Judgment, 1 July 1961, Application No. 332/57, para. 28 (<http://www.legal-tools.org/doc/d803eb/>).

<sup>97</sup> Olásolo, 2005, see above note 95; see also Zakerhossein, 2017, pp. 39–40, see above note 21.

<sup>98</sup> ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Defence Challenge to the Jurisdiction of the Court, 19 July 2011, ICC-01/04-01/10-290, para. 12 (<http://www.legal-tools.org/doc/a3e1da/>).

Kivus region.<sup>99</sup> Thus, the Chamber found a “link between the events which led to [the] referral and the charges brought against Mr. Mbarushimana”.<sup>100</sup>

It seems reasonable to argue that the Pre-Trial Chamber introduced the term ‘situation of crisis’ not as a threshold qualifier to the Court’s jurisdiction, but rather in order to plausibly explain why the ‘situation’ covers a wide range of events that are territorially and temporally remote from each other.<sup>101</sup> Moreover, the Rome Statute already provides a threshold requirement at a different level. Pursuant to Articles 17(1)(d) and 53(1)(c) of the Rome Statute, a case is not admissible if it lacks sufficient gravity. Introducing another threshold prerequisite at the ‘situation’ level seems therefore rather counterintuitive. The Pre-Trial Chamber’s ruling thus underlines the need for a *substantive understanding* of the term ‘situation’, however, it does not necessarily add any new substance to it.<sup>102</sup> It was suggested in legal scholarship that the ‘crisis’ notion might further define the *material content* of a ‘situation’, arguing that “[s]ituations are distinct from each other because their constituent crisis (events and their causes) are different”.<sup>103</sup> It may indeed appear plausible to value ‘exceptional circumstances’ for determining the scope of individual ‘situations’. However, neither the wording nor the drafting history of the Rome Statute suggest that such notion is always required for the Court’s exercise of jurisdiction.<sup>104</sup> On the contrary, the nature of some of the worst crimes in the jurisdiction of the Court is inherently structural.<sup>105</sup> Although the notion of ‘crisis’ may thus sometimes be helpful to plausibly determine the scope of certain ‘situations’, such may simply not be the case with others.

### 20.2.3.3. Contextual Elements of International Crimes

Further approximation to the *material content* of a ‘situation’ could be found in the contextual elements of international crimes.<sup>106</sup> The Rome

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<sup>99</sup> ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, paras. 20–39, see above note 63.

<sup>100</sup> *Ibid.*, para. 5.

<sup>101</sup> Cf. Rastan, 2012, p. 13, see above note 91.

<sup>102</sup> *Ibid.*

<sup>103</sup> Zakerhossein, 2017, p. 40, see above note 21.

<sup>104</sup> Rastan, 2012, p. 12, see above note 91.

<sup>105</sup> *Ibid.*

<sup>106</sup> For further clarification of the term ‘contextual element’, see Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd. ed., Oxford University Press, 2014, paras. 102, 443.

Statute regulates that crimes against humanity require a “widespread or systematic attack against the civilian population” (Article 7), war crimes appear in the context of an armed conflict (Article 8), whereas genocide gains a collective dimension by requiring the “intent to destroy, in whole or in part”, one of the protected groups (Article 6). As applying contextual elements in legal practice assumes the determination of a distinct factual background, it seems reasonable to conclude that they may have a role in determining the *material content* of a ‘situation’.<sup>107</sup> Thus, the majority of Pre-Trial Chamber III held in the Côte d’Ivoire Authorization Decision that continuing crimes that post-dated the Prosecutor’s authorization request would form part of the authorized investigations if their contextual elements were the same for those committed prior to the date of the request.<sup>108</sup> The Burundi Authorization Decision may be read in a similar way.<sup>109</sup> Thus, a ‘situation’ could for example be defined by all events that occurred within the framework of an armed conflict. At first sight, it appears rather appealing to refer to contextual elements in order to determine the scope of an individual ‘situation’.

The jurisprudence of international criminal courts and tribunals could thus create a point of reference in determining the scope of the investigations, which would possibly increase the degree of legal certainty of the outcome, fostering the plausibility of the decision. However, as reasonable as such an approach might appear in some cases, it may prove obstructive in others. The contextual elements of international crimes do not describe distinct historical circumstances. For example, a widespread attack against the civilian population may be carried out as a policy pursued in an armed conflict.<sup>110</sup> In such cases, it would seem artificial, in view of the *material content* of a ‘situation’, to pull such closely linked events apart in subsuming them under two different ‘situations’. Moreover, armed conflicts in particular may last for decades, covering periods of decreased intensity as well as such of erupting violence. Referring to an armed conflict in order to define the scope of a ‘situation’ may thus be particularly questionable in view of the Court’s complementary nature. As Article 17 of the Rome Statute

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<sup>107</sup> Zakerhossein, 2017, p. 40, see above note 21.

<sup>108</sup> ICC, *Situation in Côte d’Ivoire*, ICC-02/11-14-Corr, para. 179, see above note 53.

<sup>109</sup> ICC, *Situation in Burundi*, ICC-01/17-9-Red, para. 192, see above note 66.

<sup>110</sup> See for example the history of the Ugandan conflict, ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, paras. 60–64 (<http://www.legal-tools.org/doc/74fc6e/>).

clearly expresses, the primary responsibility to prosecute international crimes remains with States. Thus, Pre-Trial Chamber I held in the *Mbarushimana* case, in view of self-referred ‘situations’, that “the Statute [could not] be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration”.<sup>111</sup> Any interpretation of the term ‘situation’ must hence comply with the complementary nature of the ICC, which may not be guaranteed if the contextual elements of international crimes always became determinative for the individual scope of a ‘situation’.

#### **20.2.3.4. Procedural Approach to a Substantive Understanding**

In acknowledging the elusiveness of the *material content* of a ‘situation’, it is apparent that an approach merely based on material elements to define the scope of the investigations will be limited in its potential to guarantee the Court’s independence and impartiality. The structural weakness of material elements leads to the conclusion that a *quest for plausibility* with regard to the scope of prosecutorial investigations needs to focus on the implementation of a standardized process in order to determine the individual scope of a ‘situation’. Such a procedural approach to determine a *substantive understanding* of the term ‘situation’ has not, so far, caught any broader attention in the jurisprudence of the ICC and international legal scholarship. This seems particularly surprising as the Court’s legal practice clearly reveals the endangering potential that the use of procedural elements can have on the plausibility of the scope of an individual ‘situation’. As shown above, granting States, the UNSC and the authorizing Pre-Trial Chambers the formal competence to pre-determine the scope of prosecutorial investigations creates the potential for investigations to be intentionally or coincidentally limited to parts of a conflict. Such pre-determinations do not appear plausible in view of the independence and impartiality of the ICC as they do not strive for the approximation of the *material content* of the ‘situation’.

Hence, developing a procedural approach to a *substantive understanding* of the term ‘situation’ addresses the question which entity may, at which point in time, determine the individual scope of an investigation. In this regard, every determination introducing limitations to the prosecutorial

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<sup>111</sup> ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, para. 21, see above note 63.

investigations will carry more plausibility if it is based on a conscious and well-reasoned decision made with the visible intention to approximate the *material content* of the ‘situation’. In this regard, it is of note that for the exemption of non-member State personnel included in the UNSC’s past referrals no plausible reasoning was provided. Moreover, Pre-Trial Chamber I in the Georgia Situation as well as the Appeals Chamber in the Situation in Afghanistan rightly observed that any authorization decision is necessarily based on the limited amount of information that the Prosecutor gathered during the preliminary examination phase that offers only limited investigative powers.<sup>112</sup> Even, if the Pre-Trial Chamber intends to determine the scope of the authorized investigations in view of the approximation of the *material content* of a ‘situation’, its decision may not take into account the results of the formal investigations yet to be authorized.<sup>113</sup>

Therefore, in order to guarantee a well-reasoned decision with regard to the individual scope of the investigations that may satisfy the *quest for plausibility*, the Prosecutor should be granted the competence to progressively determine the scope of the individual ‘situation’ in the course of the investigations.<sup>114</sup> Such a procedural approach guarantees – and this as far as possible – that prosecutorial investigations will not be intentionally or coincidentally limited in an implausible manner and thus complies with the drafters’ intention for creating the ‘situation phase’. Hence, the term ‘situation’ would refer to an open concept that allows the Prosecutor to investigate a broad historical context covering all sides of a conflict. Although such understanding of the term ‘situation’ grants the Prosecutor a great degree of discretion with regard to the scope of the individual investigations, it will still underlie judicial control under Article 19 of the Rome Statute. The competent Chambers will still have to determine whether an individual case falls within the scope of a ‘situation’. In compliance with the proce-

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<sup>112</sup> ICC, *Situation in Georgia*, ICC-01/15-12, para. 63, see above note 65; ICC, *Situation in Afghanistan*, ICC-02/17-138, para. 59, see above note 74.

<sup>113</sup> Pre-Trial Chamber I, thus, concludes that it would be ‘illogical’ to bind the Prosecutor to the crimes mentioned in the Authorization Decision, see ICC, *Situation in Georgia*, ICC-01/15-12, para. 63, see above note 65.

<sup>114</sup> In substance, the Appeals Chamber seems to support such procedural approach to a *substantive understanding* of the term ‘situation’ at least regarding *proprio motu* investigations. Highlighting the Prosecutor’s duty to establish the truth under Article 54(1) of the Rome Statute in its Afghanistan Authorisation Judgment, it mandated the Prosecutor to “carry out an investigation into the situation as a whole”, ICC, *Situation in Afghanistan*, ICC-02/17-138, para. 60, see above note 74.

dural approach to a *substantive understanding* of the term ‘situation’, the Chambers would not, however, have to positively determine any distinct material parameters for the Court’s exercise of jurisdiction, but would rather have to review the plausibility of the Prosecutor’s reasoning in view of the *material content* of the respective ‘situation’. In essence, the legal practice of all authorization decisions as well as most self-referrals reveals some urge to implement such a procedural approach to delineate the term ‘situation’. The Kenya and Côte d’Ivoire Authorization Decisions recognized the individual date of entry into force of the Rome Statute, or of the acceptance of jurisdiction as the starting date of the timeframe for the authorized investigations, granting the Prosecutor at least some substantial degree of discretion with regard to determining the individual scope of the investigations. In the Georgia and Burundi Authorization Decisions, the Prosecutor was granted an even broader degree of discretion, being authorized to extend the investigations to events that did not fall under the initially considered parameters in temporal, geographical as well as personal terms. Moreover, the Afghanistan Authorization Appeals Chamber Judgment granted the Prosecutor an expansive degree of flexibility with regard to the scope of investigations, confirming the initial authorization request. Furthermore, many self-referrals also grant the Prosecutor such further reaching discretionary powers.<sup>115</sup>

However, as the Authorization Decisions in the Situations in Kenya and Côte d’Ivoire show very clearly in view of the possibility to determine the temporal limit of the Prosecutor’s investigations, the Prosecutor’s discretion is not considered an essential element of the term ‘situation’ that applies to all trigger mechanism equally. A differentiation between UNSC and State referrals on the one hand and *proprio motu* investigations on the other hand is, however, not warranted as long as the authorizing Pre-Trial Chambers may exercise their oversight function with regard to *proprio motu* proceedings. As Judge de Gurmendi rightly argued in her partially dissenting opinion, this function is sufficiently satisfied if the Prosecutor provided for “samples of the gravest types of criminality in [a] situation” that prove that the initiation of investigations is not “frivolous, or politically motivated”.<sup>116</sup> This sufficiently addresses the fears of a politicized Prosecu-

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<sup>115</sup> See, for example, the referrals lodged by the Democratic Republic of the Congo and the State of Palestine.

<sup>116</sup> ICC, *Situation in Côte d’Ivoire*, ICC-02/11-15-Corr, paras. 17, 58, see above note 61. The Appeals Chamber substantially confirmed this position in ICC, *Situation in Afghanistan*,

tor, which were at the origins of the installation of the Article 15 authorization procedure.

#### **20.2.4. Consequences of the Procedural Approach to the Term ‘Situation’**

With regard to State and UNSC referrals, the procedural approach to a *substantive understanding* of the term ‘situation’ implies that their function is not to pre-determine the exact scope of the prosecutorial investigations, but rather to draw the Prosecutor’s attention to certain historical events that allegedly included the commission of international crimes and to initiate prosecutorial investigations in this regard.<sup>117</sup> Applying such interpretation of the term ‘situation’ in legal practice provides for an adequate solution with regard to the consequence of State or UNSC referrals that try to limit the prosecutorial investigations. In view of the Uganda as well as the UNSC referrals, the Prosecutor seems to assume the competence to simply disregard any limitations introduced by the referring entities that would restrict the investigations to one side of a conflict. In the *Mbarushimana* case, Pre-Trial Chamber I expressed a similar view, holding that “a referral [could] not limit the Prosecutor to investigate only certain crimes, for example crimes committed by certain persons or crimes committed before or after a given date; as long as crimes [were] committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions [could] be initiated”.<sup>118</sup> In support of its opinion, the Chamber referred to the Prosecutor’s position in the Uganda Situation as well as a holding of a differently composed Pre-Trial Chamber I in the *Bashir* case,<sup>119</sup> suggesting that even in the case of a UNSC referral, any limitation to the exercise of jurisdiction introduced by the referring entity

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ICC-02/17-138, para. 61, see above note 74. However, it provided for an inconsistent reasoning in that regard, highlighting that the Prosecutor’s investigations remain somehow limited by “the contours of the situation”. This appears rather circular: if the Prosecution factually defines its investigatory scope by being mandated to investigate the “situation as a whole” as the Appeals Chamber convincingly recognized, the “contours of the situation” do not provide for any material limitation. The expression may however effectively describe the Chambers’ limited standard of judicial review with regard to the Prosecutor’s definition of an individual ‘situation’ in proceedings under Article 19 of the Rome Statute.

<sup>117</sup> For a similar understanding of the nature of UNSC and State referrals see Zakerhossein, 2017, p. 58, see above note 21.

<sup>118</sup> ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, para. 27, fn. 41, see above note 63.

<sup>119</sup> ICC, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09-3, para. 45, see above note 6.

could simply be disregarded.<sup>120</sup> Such an approach seems to be incompatible with the interpretation of the term ‘situation’ developed above. In order to trigger the Court’s exercise of jurisdiction by referring a ‘situation’ to the Prosecutor, States Parties and the UNSC would need to accept the procedural approach to a *substantive understanding* of the term. Establishing whether the respective entities have indeed referred a ‘situation’ to the Court requires an interpretation of the referring documents in order to ascertain that the UNSC or the State Party accepted the Prosecutor’s competence to determine the individual scope of the investigations in the course of the subsequent proceedings. If the documents reveal that the referring entity did not accept such far-reaching competence of the Prosecutor, the referral did not comply with the procedural approach to the interpretation of the term ‘situation’. Thus, a ‘situation’ was not referred to the Court so that the latter’s exercise of jurisdiction was simply not triggered.<sup>121</sup> The analysis of the Court’s legal practice shows that the Prosecutor as well as the Chambers might be tempted, particularly in cases of UNSC referrals, to accept referrals that contradict such understanding of the term ‘situation’. Rather than denying itself jurisdiction over an entire ‘situation’, the Court would still be able to adjudicate at least part of the crimes allegedly committed within that ‘situation’ and thus be able to broaden its jurisdictional reach. However, it is exactly such an approach that makes the Court vulnerable to legitimate criticisms of politicization and instrumentalization. We accept that the rejection of a referral would be a bold move. However, it would be an equally strong message in favour of the independence and impartiality of the ICC.

### 20.3. Conclusions

Facing the current geopolitical world climate, multilateral organizations such as the ICC need to be very cautious not to become politicized institutions, being dragged into the power struggle of unilateral State interests. More than 20 years after the adoption of the Rome Statute, the Court needs to be particularly wary in order to not only protect its nature as an inde-

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<sup>120</sup> ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, fn. 41, see above note 63.

<sup>121</sup> For a similar opinion on the consequence of politicized UNSC referrals, see Sarah Nouwen, *Complementarity in the Line of Fire*, Cambridge University Press, 2013, p. 256; Zakerhossein, 2018, p. 691, see above note 13; see also Kirsten Bowman, “The International Criminal Court and the Security Council: The Power of Politics and the Undermining of Justice”, in Joanna Nicholson (ed.), *Strengthening the Validity of International Criminal Tribunals*, Brill Martinus Nijhoff Publishers, Leiden, 2018, pp. 89–90.

pendent and impartial arbiter of international criminal justice, but also to be perceived as such by the international community. Only such perception may guarantee the co-operation and support of States and domestic communities that is vital for the Court's effective functioning. This chapter proposed an interpretation of the term 'situation' that prevents the Court's exercise of jurisdiction to be intentionally or coincidentally limited to parts of a political conflict. Such neutrality function may only be realized by assuming that every 'situation' describes a distinct *material content* that may best be approximated by granting the Prosecutor the power to determine the scope of the individual 'situation' in the course of the investigations. As the term 'situation' provides a general framework for prosecutorial investigations, it applies equally to all trigger mechanisms. Thus, the proposed interpretation of the term 'situation' would limit not only the oversight function of the Pre-Trial Chambers' authorization decision with regard to *proprio motu* investigations, but also the competence of the UNSC and States to pre-determine the scope of the investigations triggered by referring a 'situation' to the Court. The implementation of such an approach to determine the scope of a 'situation' might inevitably be met with resistance by some of the actors, who would stand to lose influence in the shaping of the scope of the individual investigations. However, the costs of overcoming such opposition would be outweighed by the result: Implementing a process that is resilient in protecting the Court in order to perform its legal mandate and thereby fulfilling its *raison d'être* – helping to guarantee lasting respect for and the enforcement of international justice.

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## Politics and the Institutional Integrity of the International Criminal Court

Shannon Fyfe\*

### 21.1. Introduction

The Rome Statute of the International Criminal Court (‘Rome Statute’ and ‘ICC’) emerged following years of interest from various governments in establishing a permanent court to prosecute perpetrators of international crimes. The treaty that eventually established the ICC was the result of inter-governmental negotiations, which were ultimately successful in large part due to the ‘tribunal fatigue’<sup>1</sup> of governments concerned by “the financial and political costs of creating *ad hoc* United Nations (‘UN’) criminal tribunals for the atrocities that burdened so many regions of the world”.<sup>2</sup> A permanent court would “provide greater efficiencies in addressing the investigation and prosecution of atrocity crimes”,<sup>3</sup> but drafting the parameters of the Rome Statute required several years of work by legal experts and diplomats from a majority of the world’s governments.<sup>4</sup>

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<sup>1</sup> David Scheffer coined this term to refer to the Security Council’s lack of enthusiasm about the prospect of financing a new judicial mechanism “every time an outrage against humanity merits judicial intervention”, David Scheffer, “International Judicial Intervention”, in *Foreign Policy*, 1996, vol. 22, no. 102, p. 34.

<sup>2</sup> David Scheffer, “The International Criminal Court”, in William Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, 2010, pp. 67–83, 68.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

Politics not only played a crucial role in the drafting of the Rome Statute, but it is also enshrined in its structure. The individuals who work for the Court, while charged with performing their duties with integrity and without bias, all hail from somewhere, and it is impossible to ensure that prosecutors and judges make decisions while remaining completely neutral. Members of the UN Security Council are even more likely to allow political relationships to influence their decisions about whether or not to refer situations to the ICC. And much of the Court's ability to obtain accused individuals and evidence of crimes relies on the co-operation of States.

Some of the political influences that affected the drafting of the Rome Statute and subsequent jurisprudence of the ICC appear to be an inevitable and perhaps even necessary feature of the Court's existence. Yet, in other ways, politics appears to undermine the institution at its very core, as the role the UN Security Council and individual States can play in ICC processes threatens to compromise the promise of the ICC as a source of justice. As we look ahead to the future of the ICC, these latter concerns about power and politics remain, and there is no indication that they will subside in the future. Recent decisions by the Appeals Chamber, the Office of the Prosecutor ('OTP') and the Pre-Trial Chamber suggest that the ICC may be moving toward intractable political entanglements. Accordingly, in this chapter I will consider the future of the institutional integrity of the ICC and its various organs, in light of three recent decisions. I begin by attempting to construct a normative framework for understanding the role of integrity in institutional obligations, and the relationship between politics and institutional integrity. I then use three illustrative decisions to draw out concerns about the ability of the ICC to maintain its integrity in light of political forces.

## 21.2. Integrity

Although my focus is on the institutional integrity of the ICC, we must first consider what it means for an individual to 'act with integrity'<sup>5</sup> before we can explore questions about what it means for a group or an organization to do so. This normative framework can help us assess various actors carefully, individuals and institutions alike, instead of merely relying on natural

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<sup>5</sup> A more comprehensive analysis can be found in Shannon Fyfe, "Ethics, Integrity, and the Bemba Acquittal", in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (<http://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

language appeals to ‘character’ and ‘integrity’ and ‘justice’. Understanding the conceptual underpinnings of the term gives us better tools for identifying whether or not an individual or institution can claim to possess integrity.

### 21.2.1. Individual Integrity

In Section 21.2.1., I argue that integrity should involve two necessary features: a structural sense of integrity and a substantive sense of integrity. Within these two aspects of the normative framework, I explore several prominent possibilities for understanding integrity. Each of these ways of understanding integrity introduces important considerations to an individual actor’s decision-making process.

#### 21.2.1.1. Structural Conceptions of Integrity

One way to understand integrity is as a formal relation an entity has to itself, between parts of itself, or with other entities. Views that focus on these relations consider integrity to be a formal, structural concept. Bernard Williams defends such a view, based on ‘identity-conferring commitments’.<sup>6</sup> An identity-conferring commitment is “the condition of my existence, in the sense that unless I am propelled forward by the conatus of desire, project and interest, it is unclear why I should go on at all”.<sup>7</sup> According to Williams, if an individual abandons such a commitment, then the individual begins to lose what gives their life its moral identity. An individual is “identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about”<sup>8</sup> – and when he makes any choice that alienates him from these projects and attitudes, he fails to act with integrity.<sup>9</sup>

Relatedly, we can think about integrity in terms of wholeness and integration. Gabriele Taylor defines a person with integrity as “the person who ‘keeps his inmost self intact’, whose life is ‘of a piece’, whose self is whole and integrated”.<sup>10</sup> A person of integrity “lacks corrupt in the sense

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<sup>6</sup> See Bernard Williams, “Integrity”, in J.J.C. Smart and Bernard Williams (eds.), *Utilitarianism: For and Against*, Cambridge University Press, 1973, pp. 108–117; see also Bernard Williams, *Moral Luck: Philosophical Papers 1973–1980*, Cambridge University Press, 1981.

<sup>7</sup> Bernard Williams, “Persons, Character and Morality”, in Smart and Williams (eds.), 1973, pp. 1–19, 12, see above note 6.

<sup>8</sup> Williams, 1973, p. 116, see above note 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> Gabriele Taylor, “Integrity”, in *Proceedings of the Aristotelian Society, Supplementary Volumes*, 1981, vol. 55, pp. 143–159, 143.

that his self is disintegrated”.<sup>11</sup> Taylor claims that a person of integrity will usually possess substantive moral qualities like honesty and loyalty, but “we ascribe integrity to him who behaves in socially acceptable ways, or to him who sticks to his principles however adverse the circumstances”.<sup>12</sup> A person of integrity must also act rationally, based on reasons that are sufficient for action.<sup>13</sup>

A third structural understanding of integrity comes from David Luban, who offers a view based on the concept of wholeness, which to him means avoiding cognitive dissonance. He sees integrity as “wholeness or unity of a person, an inner consistency between deed and principle”.<sup>14</sup> In Luban’s account, cognitive dissonance, or the clashing of our conduct and our principles, threatens our intuitions about integrity.<sup>15</sup> He claims that because we are “highly resistant to the thought of our own wrongdoing”,<sup>16</sup> it is likely that “we will bend our moral beliefs and even our perceptions to fight off the harsh judgment of our own behavior”.<sup>17</sup> Yet Luban distinguishes this so-called integrity from genuine integrity, and identifies the former as mere ‘dissonance reduction’.<sup>18</sup> Genuine integrity “consists of taking the high road, the road of conforming our behavior to our principles”,<sup>19</sup> and requires that an individual keep her principles intact.<sup>20</sup>

Finally, Cheshire Calhoun understands integrity to refer to relationships with others rather than oneself. She claims that “the notion of ‘standing for something’ is central to the meaning of integrity”.<sup>21</sup> Calhoun distinguishes ‘standing by’ one’s principles (which one can do alone) from ‘standing for’ one’s principles, which captures what happens when one is a

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<sup>11</sup> *Ibid.*, p. 144.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 148.

<sup>14</sup> David Luban, “Integrity: Its Causes and Cures”, in *Fordham Law Review*, 2003, vol. 72, no. 2, p. 279.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 281.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 298.

<sup>20</sup> *Ibid.*

<sup>21</sup> Cheshire Calhoun, “Standing for Something”, in *The Journal of Philosophy*, 1995, vol. 92, no. 5, p. 253.

member of a community where there may be conflicting views.<sup>22</sup> The ‘standing by’ one’s principles is “intimately, tied to protecting the boundaries of the self – to protecting it against disintegration, against loss of self-identity, and against pollution by evil”.<sup>23</sup> Calhoun argues that integrity should instead be “tightly connected to viewing oneself as a member of an evaluating community and to caring about what that community endorses”.<sup>24</sup> This particular account of integrity allows us to see “why we care that persons have the courage of their convictions” when engaged in deliberation (or collective decision-making) with other members of a community.<sup>25</sup>

These structural conceptions of integrity are arguably insufficient because they would permit immoral individuals, either acting alone or collectively in immoral communities, to meet the formal requirements for integrity in spite of morally reprehensible behaviour. In the sub-section that follows, I provide a necessary complement to these structural views of integrity.

### **21.2.1.2. Substantive Conceptions of Integrity**

We may also have the intuition that a complete understanding of integrity should include substance, since it is possible to act with complete structural integrity, and still act in ways that most would find to be objectively immoral. In my view,<sup>26</sup> it is necessary to include substantive constraints on what it means to act with integrity. In what follows, I explore two ways of understanding substantive constraints on integrity.

#### **21.2.1.2.1. Virtue**

We tend to think of integrity as “an admirable trait of character and genuine excellence of persons in its own right”.<sup>27</sup> Virtue might be seen as a disposition which itself yields motivations, or as “necessary for that relation to

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<sup>22</sup> *Ibid.*, pp. 253–54.

<sup>23</sup> *Ibid.*, p. 254.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, p. 259.

<sup>26</sup> While they do not use the same terminology I use, other views that require two discrete aspects of integrity include those espoused by Lynne McFall, “Integrity”, in *Ethics*, 1987, vol. 98, no. 1, pp. 5–20; and Deborah L. Rhode, “If Integrity Is the Answer, What Is the Question?”, in *Fordham Law Review*, 2003, vol. 72, no. 2, pp. 335–336.

<sup>27</sup> Greg Scherkoske, “Could Integrity Be An Epistemic Virtue?”, in *International Journal of Philosophical Studies*, 2012, vol. 20, no. 2, p. 185.

oneself and the world which enables one to act from desirable motives in desirable ways”.<sup>28</sup> Or we might understand integrity as a ‘cluster concept’, signifying:

a cluster of morally praiseworthy attributes including such things as the sincerity and steadfastness with which [an individual’s] moral beliefs are held, the struggle [an individual] ha[s] undergone to achieve them, [an individual’s] willingness and capacity to question them.<sup>29</sup>

Damian Cox, Marguerite LaCaze and Michael Levine defend such a ‘cluster concept’ view,<sup>30</sup> arguing that an individual who exemplifies the virtue of integrity finds an Aristotelian mean between excesses. An example of an excess of virtue might be steadfastness where integrity demands change, and an example of a vice might be hypocrisy, where it undermines integrity.<sup>31</sup> Understanding integrity as a virtue, as either an intrinsically valuable feature or as a cluster of admirable attributes, is compatible with the structural constraints I examined in the previous sub-section, and provides additional moral constraints.

#### **21.2.1.2.2. Moral Purpose**

An alternative way to undergird the moral elements of integrity is to adopt a view about the specific sorts of commitments that may be acceptably defended on a structural account of integrity. Mark Halfon understands an individual of integrity as one who embraces “a moral point of view that urges them to be conceptually clear, logically consistent, apprised of relevant empirical evidence and careful about acknowledging as well as weighing relevant moral considerations”.<sup>32</sup> He identifies these constraints as those which guarantee that an individual attempts to do ‘what is best’ instead of just whatever can be plausibly defended.<sup>33</sup> Elizabeth Ashford defends a similar account of ‘objective integrity’, in which an attribution of

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<sup>28</sup> Bernard Williams, “Utilitarianism and Self-Indulgence”, in Smart and Williams (eds.), 1973, pp. 40–53, 49, see above note 6.

<sup>29</sup> Damian Cox, Marguerite LaCaze and Michael P. Levine, “Should We Strive for Integrity?”, in *Journal of Value Inquiry*, 1999, vol. 33, no. 4, p. 521.

<sup>30</sup> *Ibid.*, pp. 521, 523.

<sup>31</sup> Damian Cox, Marguerite LaCaze and Michael P. Levine, *Integrity and the Fragile Self*, Ashgate Publishing, Aldershot, 2003, p. 49.

<sup>32</sup> Mark Halfon, *Integrity: A Philosophical Inquiry*, Temple University Press, 1989, p. 37.

<sup>33</sup> *Ibid.*

integrity requires that an individual's own understanding of her moral decency "must be grounded in her leading a genuinely morally decent life".<sup>34</sup>

The individuals who make up the ICC and its discrete organs are expected to possess both 'integrity' and 'high moral character', and it makes sense that the terms should have distinct definitions. Demanding that an individual act 'virtuously' or 'with objectively good reasons' does not give us *deontic verdicts*, which are verdicts about which actions are optional, forbidden, or required. Accordingly, we need both structural and substantive conceptions of integrity to help shape what an individual should do to act with integrity.

### 21.2.2. Institutional Integrity

We can think of an institution's integrity as an aggregation of the integrity of the individuals which make up the organization. On this view, we can reduce the concept of a board of directors, for instance, to those individuals who make up the board, with no remainder. This is an individualist account of an organization, on which individuals "are not, when brought together, converted into another kind of substance", but instead they remain individuals.<sup>35</sup> A reference to the integrity of the board of directors merely refers to the aggregation of the individual integrity of each director, according to this account.

Yet, we do not think of most organizations in such a limited manner. A group or institution usually engages in collective decision-making, and the outputs of that group or institution are *collective* decisions, at least to some extent. One individual may represent the organization and possess final decision-making power, or there may be a collective decision-making procedure that results in a 'judgment' or decision on behalf of the organization. Either way, the individual integrity of the members of an organization is at most necessary, but not sufficient, to establish institutional integrity.

Institutional integrity can also be distinguished from individual integrity on the basis of the legitimacy of the entity. There are some accounts of individual integrity that claim individuals who do not act with integrity do

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<sup>34</sup> Elizabeth Ashford, "Utilitarianism, Integrity and Partiality", in *Journal of Philosophy*, 2000, vol. 97, p. 4.

<sup>35</sup> John Stuart Mill, "On the Logic of the Moral Sciences (Book VI)", in John Stuart Mill, *A System of Logic, Ratiocinative and Inductive, Part II*, University of Toronto Press, 1981, p. 879.

not act as agents at all.<sup>36</sup> I would argue that it makes more sense to understand individuals who fail to act with integrity as existing, but perhaps not be trusted or taken seriously. Institutions, however, may collapse without integrity. An institution may become illegitimate because it lacks integrity, especially if integrity is a crucial feature of the institution's mandate or identity, and it could cease to function altogether. It may also be the case that the perception of the institution as illegitimate causes the institution to collapse, especially due to lost support from external actors. The loss of integrity can be fatal to an institution, even where it would not be fatal for an individual.

#### **21.2.2.1. Substantive Integrity of Institutional Actors**

As with individual integrity, it is intuitive to think that institutional integrity must be at least somewhat tied to moral substance. However, it is possible for an institution to act with complete structural integrity while acting in ways that are intuitively immoral. On my two-pronged account of integrity, it cannot be the case that an institution aimed at something intuitively immoral can act with integrity, so there must be substantive constraints on what it means for an institution to act with integrity.

The individual integrity of the members of an organization is likely to constitute a necessary feature of institutional integrity, as noted above. An individual actor within an institution must operate with a commitment to moral principles, whether explicitly required by the organization or coincidentally maintained by the individual in her own capacity. It seems possible, then, that the moral content underpinning the structural integrity of an organization could come about by accident, but not structural integrity itself. Organizations almost always require explicit statements regarding the aims, purposes and general structure of the organization. So an institution with structural integrity (in terms of cohesion or integration) will still fail to achieve institutional integrity if it operates pursuant to a clearly repugnant moral commitment (such as the promotion of ethnic cleansing). The substantive integrity requirement for an institutional actor could be met by encouraging individuals who make up the organization to act virtuously (in a broad sense), or by explicitly outlining the particular virtues that are crucial to the aims of the institution, or by outlining procedures that

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<sup>36</sup> See Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity*, Oxford University Press, 2009.

safeguard institutional decision-making as being based on ‘objectively good reasons’ or an ‘objective moral purpose’.

### 21.2.2.2. Structural Integrity of Institutional Actors

The structural integrity of institutional actors can be understood as a formal relation an institution has to itself, between parts of itself (either sub-institutions or individuals), or with other institutions. Recalling Williams’ view, integrity is based on ‘identity-conferring commitments’, or “the condition[s] of my existence, in the sense that unless I am propelled forward by the conatus of desire, project and interest, it is unclear why I should go on at all”.<sup>37</sup> From an institutional perspective, organizations come into existence for reasons, in order to achieve a discrete purpose or further a particular project. An institution that abandons an identity-conferring commitment is very likely to lose what gives the institution its identity, causing the institution to collapse altogether, or at least lose legitimacy. An institution may be able to reorganize itself under different ‘conditions of existence’, but an institution like the ICC is unlikely to survive such a fundamental change.

Taylor identifies an individual with integrity as one who ‘keeps his self intact’, meaning he “will not ignore relevant evidence, he will be consistent in his behaviour, he will not act on reasons which, given the circumstances, are insufficient reasons for action”.<sup>38</sup> Institutions like the ICC have been created with a sense of what they are meant to do, so they can act rationally to maintain a sense of institutional self, and they can discourage conflict or disintegration between the sub-institutions and/or individuals making up the institution. Luban’s view of genuine integrity can also map onto institutions, as an institution can be thought of as having structural integrity if it is “untouched, unsullied”<sup>39</sup> and keeps its principles intact.<sup>40</sup>

Calhoun’s understanding of integrity as ‘standing for something’ helps flesh out institutional integrity in two ways. First, the virtue of integrity can refer to an institution’s commitment to standing up for its own principles in the face of conflicting views from external institutions or individuals. Second, Calhoun’s view can be used to understand how individ-

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<sup>37</sup> Williams, 1981, p. 12, see above note 7.

<sup>38</sup> Taylor, 1981, p. 148, see above note 10.

<sup>39</sup> See Luban, 2003, p. 298, see above note 14.

<sup>40</sup> *Ibid.*

uals within the institution engage in collective decision-making. If the institution has a common objective or project, individuals should be “acting on one’s own best judgment” while negotiating with other individuals within the institution.<sup>41</sup> Her account of integrity speaks to “why we care that persons have the courage of their convictions” when deliberating with other members of a community.<sup>42</sup>

### 21.2.2.3. Structural Integrity of Institutional Judicial Actors

Although in what follows, I also consider the integrity of prosecutorial organs, it is worth specifically addressing the structural integrity of judicial organs, due to their individual and collective power within a criminal legal system. The output of a judicial body should reflect, according to most scholars, a particular kind of structural integrity. I briefly consider one such argument from Ronald Dworkin.

In *Law’s Empire*, Dworkin provides a model of adjudication known as ‘law as integrity’.<sup>43</sup> This view sees that rights and responsibilities of individuals “flow from past decisions” and thus “count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification”.<sup>44</sup> Individuals are entitled to a coherent extension of past decisions, “even when judges profoundly disagree about what this means”.<sup>45</sup> Judges must “identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness”.<sup>46</sup>

Using the analogy of a chain novel, Dworkin creates a scenario in which a group of individuals seek to write a novel together.<sup>47</sup> Each author is tasked with interpreting the chapters that have been written previously,<sup>48</sup> and each author “has the job of writing his chapter so as to make the novel

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<sup>41</sup> Calhoun, 1995, p. 256, see above note 21.

<sup>42</sup> *Ibid.*, p. 259.

<sup>43</sup> See Ronald Dworkin, *Law’s Empire*, Harvard University Press, 1986, pp. 176–275.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, p. 134.

<sup>46</sup> *Ibid.*, p. 225.

<sup>47</sup> *Ibid.*, p. 229.

<sup>48</sup> *Ibid.*

being constructed the best it can be”.<sup>49</sup> The novelists, according to Dworkin, “aim jointly to create, so far as they can, a single unified novel that is the best it can be”,<sup>50</sup> just as a judge must try to create a single, unified story about the law. In order to do so, “the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment”.<sup>51</sup> A judge who fails to do so “cannot claim in good faith to be interpreting his legal practice at all”.<sup>52</sup>

The adjudicative model of law as integrity and its inherent relationship with both permissible and impermissible political influences lead us directly to the next section, in which I consider the normative foundations of the relationship between politics and law, especially within a criminal law institution.

### 21.3. Politics as a Threat to Integrity<sup>53</sup>

Of the various threats to substantive and structural integrity, particularly of legal institutions, certain political influences are one of the most concerning. Law in general, and criminal law in particular, is promulgated by political institutions. There are two main camps of views about the relationship between the political and the legal in terms of international criminal justice. One camp argues that the legal and political realms must remain completely separate, and the other camp recognizes that all law is political, but the important task is to distinguish between inevitable or permissible political influences, and those which threaten institutional integrity.

In the first camp, “law and politics must be kept apart as much as possible in theory no less than in practice”.<sup>54</sup> Carl Schmitt is able to separate the two by definition when he identifies politics with having the power to defeat an enemy.<sup>55</sup> According to Judith Shklar’s critique, for those who

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, p. 255.

<sup>52</sup> *Ibid.*

<sup>53</sup> A more complete account of the arguments in this section can be found in Shannon Fyfe, “The Office of the Prosecutor: Seeking Justice or Serving Global Imperialism?”, in *International Criminal Law Review*, 2018, vol. 18, no. 6, pp. 988–1014.

<sup>54</sup> Judith Shklar, *Legalism*, Harvard University Press, Cambridge, 1964, p. 111.

<sup>55</sup> Carl Schmitt, *The Concept of the Political: Expanded Edition*, University of Chicago Press, Chicago, 2007, p. 36. I provide this reference to Schmitt’s articulation of the relationship between law and politics due to its influence, but given his role in laying the basis for the legality of the Nazi regime, I immediately move to other sources engaged with the first camp.

believe in the autonomy of politics, “[l]aw aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies”.<sup>56</sup> Politics is the realm “in which power and its norms, the rules of prudence and expediency, operate”,<sup>57</sup> and this realm must be overcome through the superior nature of the law. Carving out an independent rule of law seems to be a worthy endeavour. But on this first understanding of international criminal law, courts and their organs are either purely political actors, or they must be held out as immune to political pressures and interests. These views are too limiting, as becomes clear when we turn to the second type of view.

In the second camp, law and politics do not inhabit two separate spheres. Law is “not an answer to politics, neither is it isolated from political purposes and struggles”.<sup>58</sup> On this view, even a limited conception of the political cannot be completely excluded from the legal domain. Hans Morgenthau developed an understanding of international law and politics that recognized the difficulty of separating the political and the legal.<sup>59</sup> Morgenthau claimed that “[a]nything might be, and nothing was necessarily political, including any question over which a court might possess jurisdiction”, and thus the relationship between the political and the legal could not be symmetrical.<sup>60</sup> Legislatures make decisions about how courts should function, even overruling court decisions. That the ICC is largely untethered from a legislature should not make us think that politics can be completely kept out of prosecutorial and judicial decision-making.<sup>61</sup>

Some would claim that international criminal law came about as a codification of “customary and treaty-based international law, the applicable general principles of law and internationally recognized human rights”,

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<sup>56</sup> Shklar, 1964, p. 111, see above note 54.

<sup>57</sup> *Ibid.*, p. 126.

<sup>58</sup> *Ibid.*, p. 143.

<sup>59</sup> *Ibid.*

<sup>60</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, 2001, p. 441, citing Hans Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, Noske, Leipzig, 1929, pp. 62–72.

<sup>61</sup> The Assembly of States Parties is the management oversight and legislative body of the ICC, but it does not hold the same power that most legislative bodies hold over the law in a domestic context. Since the body is made up of State Parties, it does not avoid politics simply by holding itself out as legislative.

reflecting a cosmopolitan commitment to universal human rights.<sup>62</sup> Others would argue that the international criminal legal system only came about as a result of political consensus among States. Modern international criminal law emerged in response to the atrocities committed during and after World War II, and the ICC came into existence through a large multilateral treaty. The international criminal legal system has grown in large part due to “its promise to make the world a better place”,<sup>63</sup> but the growth has occurred through the promulgation of political agreements.

Sarah Nouwen and Wouter Werner argue that the ICC acts politically because it makes distinctions between friend and enemy.<sup>64</sup> They claim that the ICC “adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical “political will” for the enforcement of its decisions”.<sup>65</sup> Frédéric Mégret has argued that while international criminal justice tries to distance itself from any “blatantly political decision”, the aims of international criminal law “cannot come about without some political power”.<sup>66</sup> The concern, however, is that even narrow political considerations could have too much influence on prosecutorial and judicial decisions. Once we acknowledge that politics and law always intersect, the hard question is whether a given political influence on a court is inappropriate, threatening the integrity of the relevant organ or the entire institution.

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<sup>62</sup> See, for example, Alexander Heinze, “The Statute of the International Criminal Court as a Kantian Constitution”, in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018, p. 356 (<http://www.toacp.org/ps-pdf/34-bergsmo-buis>); see also Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Edward Elgar Publishing, 2010, pp. 15, 21–22; Yvonne McDermott, “The Influence of International Human Rights Law on International Criminal Procedure”, in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, 2018, p. 282.

<sup>63</sup> See John H. Barton and Barry E. Carter, “International Law and Institutions for a New Age”, in *Georgetown Law Journal*, 1992–93, vol. 81, no. 3, pp. 535–562, 535, 536; see also Laurence Juma, “Unclogging the Wheels: How the Shift from Politics to Law Affects Africa’s Relationship with the International System”, in *Transnational Law and Contemporary Problems*, 2014, vol. 23, pp. 305–365, 309.

<sup>64</sup> See Sarah M. H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2010, vol. 21, no. 4, pp. 941–965, 942.

<sup>65</sup> *Ibid.*, p. 943.

<sup>66</sup> Frédéric Mégret, “The Anxieties of International Criminal Justice”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, pp. 197–221, 201.

Given the foundations and function of international criminal law,<sup>67</sup> we ought to view international criminal courts and tribunals as both political and legal entities, at least to some extent. Law and politics cannot be disconnected from each other. Given that laws are generally promulgated by political institutions, and international law necessarily involves the continued participation of political entities, the influence of politics on law is inevitable. So, by my lights, a ‘political influence’, or the participation of a political entity in a legal process, is not necessarily nefarious. Keeping politics from impermissibly intruding into the domain of law so as to maintain the integrity of legal institutions can be interpreted as preventing prosecutorial and judicial decisions from being made by political leaders who are not judicial officers. The Prosecutor of the ICC, for example, can actually be seen as a “counterweight to state power”.<sup>68</sup> Political leaders are not expected to make decisions without bias for the interests of their own people (or themselves). Yet, we expect officers of a court to render *fair* decisions.

Accordingly, the distinction I draw to identify what constitutes an impermissible political influence, threatening the integrity of the ICC, relies on the concept of fairness. The goal of international criminal law is to ‘bring the guilty to justice’, and the commitment to giving a fair trial to each accused party is “merely a means, albeit conceivably a cardinal and central one”.<sup>69</sup> Fairness is not sufficient for ensuring the integrity of international criminal justice institutions like the ICC, but I argue that it is necessary for both structural and substantive components of integrity. Accordingly, political influence is impermissible when it introduces certain kinds of unfairness into decision-making. Mégret contends that we cannot easily determine if the concept of fairness in international criminal law is meant to be procedural, substantive, or distributive.<sup>70</sup> I argue that we should care about all three types of fairness, despite the fact that they will sometimes

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<sup>67</sup> International criminal law has come about through the co-operation of States seeking to prevent future mass atrocities. In the preamble of the Rome Statute, the treaty parties resolve to “guarantee lasting respect for and the enforcement of international justice”, Rome Statute of the International Criminal Court, 17 July 1998, Preamble (‘Rome Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>68</sup> Allison M. Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 510–552, 518.

<sup>69</sup> Mégret, 2016, p. 209, see above note 66.

<sup>70</sup> *Ibid.*, p. 210.

be at odds with one another, but that procedural fairness is particularly crucial for maintaining institutional integrity.

Procedural fairness is assessed on the basis of a system's rules.<sup>71</sup> Rights that are guaranteed by procedures "allow for a system of law to emerge out of a set of substantive rules and [...] minimize arbitrariness".<sup>72</sup> A system can be said to be procedurally fair, regardless of outcomes, if the same rules are applied to all parties without bias. Correspondingly, an institution that is not procedurally fair can be seen as lacking structural integrity. The requirements for structural integrity cannot be met by a system that does not function with internal and external consistency, with at least a nominal commitment to seeking its own stated goals.

Substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liberty from confinement, and a trial that does not result in a mistaken conviction.<sup>73</sup> This type of fairness ensures that trials do not result in absurd or intuitively immoral outcomes,<sup>74</sup> or in which there are not violations of the vague demands that officers of the Court act with "high moral character".<sup>75</sup> An institution that consistently reaches bad outcomes, even when following procedures, to the letter, might be said to lack substantive fairness. Again, even when an institution maintains structural integrity, the content of the integrity should be morally good as well, reflecting substantive integrity.

Distributive fairness in a criminal justice system involves who is actually tried for crimes, out of the group of all potential defendants.<sup>76</sup> A criminal justice system might be seen as fair with respect to distribution if

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<sup>71</sup> See, for example, *ibid.*; Yvonne McDermott, *Fairness in International Trials*, Oxford University Press, 2016.

<sup>72</sup> Larry May, *Global Justice and Due Process*, Cambridge University Press, 2011, p. 52.

<sup>73</sup> See, for example, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?", in *Law and Philosophy*, 1998, vol. 17, no. 1, pp. 19–42, 19.

<sup>74</sup> See Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford University Press, New York, 1995; see also Lon L. Fuller, *The Morality of Law*, Yale University Press, 1964.

<sup>75</sup> I merely note the sources of prosecutorial and judicial ethical obligations here. For a comprehensive analysis of prosecutorial ethics at the ICC, see Alexander Heinze and Shannon Fyfe, "Prosecutorial Ethics and Preliminary Examinations at the ICC", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (<http://www.toaep.org/ps-pdf/33-bergsmo-stahn>).

<sup>76</sup> Mégret, 2016, p. 211, see above note 66.

it is willing and able to try all parties who deserve to be tried. While distributive fairness can be distinguished from substantive fairness, it can be captured by the concept of substantive integrity. While we might think that there is nothing procedurally<sup>77</sup> or substantively<sup>78</sup> wrong with the fact that nearly all of the investigations and cases at the ICC have been directed at the Global South, this distributive unfairness does not meet the requirements of substantive integrity. Both in fact and in terms of perception, this generates moral concern.

Again, we should care about all three types of fairness, and both structural and substantive features of integrity, but here I will argue that clear violations of procedure or structure are what constitute an impermissible political influence on the ICC. Like most criminal justice institutions, the ICC cannot be structured to completely avoid substantive<sup>79</sup> and distributive injustice. There may be *permissible* political influences that should nonetheless be avoided in order to maintain the perception and existence of substantive and distributive justice, and the corresponding perception and existence of the substantive integrity of the ICC. I will consider some of these influences in the next section.

#### **21.4. Integrity of the ICC and its Organs**

In this final section, I turn to some recent examples of actions taken by three organs (or sub-organs) of the ICC, each of which appears to threaten the integrity of the Court in one way or another, especially due to political influence. I begin with a discussion of some of the normative, substantive constraints on the individual judges and prosecutors who make up the organs and sub-organs of the Court. I consider the tension between political influence and integrity with respect to the actions taken by each organ. The two examples I use are cases that have received a great deal of discussion and criticism, inside and outside of the Court due to what the various decisions suggested about the direction of and prospects for the Court.

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<sup>77</sup> Insofar as the situations and cases have been handled in accordance with the procedures outlined in the Rome Statute.

<sup>78</sup> Insofar as the outcomes of the cases have been accurate and morally defensible.

<sup>79</sup> The ICC cannot guarantee perfectly accurate results, but it can ensure that the dignity of each accused individual is respected.

### 21.4.1. Integrity at the Court

Prosecutors and judges at the Court maintain individual ethical obligations toward their roles in the criminal justice system. They must “be concerned with the way choices are made, defendants’ rights are respected, and trials are conducted, independent of the end-states the trials produce”.<sup>80</sup> Luban, for instance, claims that a lawyer’s objective should always be to protect the human dignity of the client.<sup>81</sup> This means judges and prosecutors are obligated to aim at treating individuals as subjects of their experience and their testimony, and as individuals, rather than as entities that can be “entirely subsumed into larger communities” if doing so serves some desirable end-state.<sup>82</sup> In order to uphold this standard of human dignity, prosecutors and judges must never humiliate victims or defendants, or treat these individuals as mere resources to be used in furtherance of a particular outcome.<sup>83</sup>

Individual integrity for prosecutors and judges requires reflection on substantive moral values, but they must also think strategically about achieving substantive results. In order to maintain integrity, these individuals must keep their own guiding principles intact, as well as those of the OTP and the judiciary, and Court as an institution. The institutional integrity of the ICC is fragile, as the failure of any individual or organ of the Court could threaten the integrity of the ICC as a whole. One of the considerations that prosecutors and judges must take into account, in their own capacity and as representatives of organs of the Court, is whether or not an individual or collective decision is likely to threaten the continued existence of the institution of the ICC. This, in turn, would threaten the greater institution of international criminal law.

I return to the accounts we have from Taylor and Luban of integrity as wholeness, which are particularly relevant when applied to both individual prosecutors and judges, as well as the Court, in terms of demanding decisions that are unlikely to threaten the continued existence of the institution. If the ICC is to continue to exist, it must remain focused on identity-conferring commitments (as explained by Williams). These can be found in

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<sup>80</sup> Heinze and Fyfe, 2018, p. 10, see above note 75.

<sup>81</sup> See David Luban, *Legal Ethics and Human Dignity*, Cambridge University Press, 2007, pp. 65–95.

<sup>82</sup> *Ibid.*, p. 88.

<sup>83</sup> *Ibid.*

the Preamble to the Rome Statute, including the idea that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,<sup>84</sup> the determination to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”,<sup>85</sup> and the resolution to “guarantee lasting respect for and the enforcement of international justice.”<sup>86</sup> If the Court ceases to pursue the ends for which it was constructed, then it is likely to fail to meet the requirements for substantive and structural integrity, and may eventually fall apart altogether.

Accordingly, I argue that ICC prosecutors and judges are obligated to at least consider the end states that are reasonably expected be produced by their decisions, in order to maintain the stability and coherence of the Court. This will suggest the permissibility of certain political influences, and discourage others. I now turn to examples of situations in which the demands of integrity at the ICC have been influenced by politics.

#### **21.4.2. The Judiciary**

As Dworkin suggests, the judiciary is a critical site of integrity for a legal system, especially in a common law system or a hybrid system like the system at the ICC. On the Dworkinian view of law as integrity, judges are tasked with interpreting the law and making decisions as part of the long story of the ICC. Here we look at the coherence of three different judicial actions.

##### **21.4.2.1. Case Study: The *Bemba* Appeal<sup>87</sup>**

In June 2018, the Appeals Chamber of the ICC acquitted Jean-Pierre Bemba Gombo (‘Bemba’) of the charges of war crimes and crimes against humanity, overturning the decision of Trial Chamber III to convict the defendant.<sup>88</sup> Three judges joined in the Judgment issued by the majority,

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<sup>84</sup> Rome Statute, Preamble, see above note 67.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> A similar analysis can be found in Fyfe, 2020, see above note 5.

<sup>88</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article

while two judges dissented.<sup>89</sup> The Judgment overturning the conviction focused on two grounds of appeal: that the conviction exceeded the charges, and that Bemba was not liable as a superior.<sup>90</sup>

#### **21.4.2.1.1. Second Ground of Appeal – Conviction Exceeding Charges**

On one ground of appeal, the majority of the Appeals Chamber found that the Prosecutor offered a ‘non-exhaustive’ list of alleged criminal acts, including murder, rape and pillaging, which was broadly confirmed by the Pre-Trial Chamber.<sup>91</sup> The Prosecutor went on to provide information on individual criminal acts which were not stated explicitly in the initial charging document,<sup>92</sup> and the Trial Chamber convicted Bemba of a number of these acts.<sup>93</sup> Bemba alleged on appeal that “[n]early two thirds of the underlying acts for which [he] was convicted were not included or improperly included in the Amended Document Containing the Charges and fall outside the scope of the charges”.<sup>94</sup>

Despite the Appeals Chamber’s acknowledgement of amended documents containing more specific factual allegations against Bemba, the majority of the Appeals Chamber found that his convictions were for specific acts that were not substantiated in the Trial Chamber’s conviction document,<sup>95</sup> and that the Trial Chamber erred when it convicted Bemba of acts which did not fall within the “facts and circumstances described in the charges.”<sup>96</sup> The dissenting judges argued, conversely, that the Trial Chamber could consider any criminal acts that fell within the broad geographical, temporal, and other substantive parameters outlined by the Prosecutor.<sup>97</sup>

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74 of the Statute”, 8 June 2018, ICC-01/05-01/08A (*‘Bemba Judgment’*) (<http://www.legal-tools.org/doc/40d35b/>).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, para. 32.

<sup>91</sup> *Ibid.*, para. 75.

<sup>92</sup> *Ibid.*, para. 76.

<sup>93</sup> *Ibid.*, para. 83.

<sup>94</sup> *Ibid.*, paras. 77–78.

<sup>95</sup> *Ibid.*, paras. 116–118.

<sup>96</sup> *Ibid.*

<sup>97</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański to the 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, ICC-01/05-01/08-3636, paras. 32, 36 (*‘Dissenting Opinion’*) (<http://www.legal-tools.org/doc/dc2518/>).

They claimed that Bemba's conviction did not exceed the facts and circumstances described in the charges.<sup>98</sup>

#### **21.4.2.1.2. Third Ground of Appeal – Command Responsibility**

On another ground of appeal, the majority of the Appeals Chamber concluded that the Trial Chamber erred in concluding that Bemba failed to take all necessary and reasonable measures to prevent or repress the crimes committed by Mouvement de Libération du Congo ('MLC') forces in the Central African Republic ('CAR'), that his case was materially affected by these errors, and that Bemba cannot be held criminally liable for crimes committed by MLC troops during the CAR operation.<sup>99</sup> The majority of the Appeals Chamber found that the Trial Chamber ignored significant evidence relevant to Bemba's liability for the crimes committed by MLC forces.<sup>100</sup> The dissenting judges disagreed, finding that the Trial Chamber's conclusion with respect to Bemba's liability for the crimes committed by MLC forces in the CAR was in fact supported by the evidence.<sup>101</sup>

#### **21.4.2.1.3. Integrity of the *Bemba* Appeals Chamber**

It may be the case that some of the judges in the Appeals Chamber failed to meet the requirements for institutional integrity. The arguments proffered by the dissenting judges in the *Bemba* Appeal suggest that the requirements for charging individuals with crimes and the requirements for establishing liability under a theory of command responsibility each depart significantly from prior jurisprudence.<sup>102</sup> If this is the case, the ICC Judiciary is no longer telling a consistent, unified story, unless it is able to give a coherent explanation for these significant departures. As written, the Appeals Chamber's majority decision reflects a failure to express a "coherent conception of justice and fairness"<sup>103</sup> and a failure to take into account the actual political history of its community and institution.<sup>104</sup> The dissenting judges also suggest that the majority view creates a challenge for the international rule

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<sup>98</sup> *Ibid.*, para. 32.

<sup>99</sup> *Bemba* Judgment, paras. 137, 194, see above note 88.

<sup>100</sup> *Ibid.*, paras. 166–194.

<sup>101</sup> Dissenting Opinion, paras. 185–191, see above note 97.

<sup>102</sup> I do not have space to go into detail about the jurisprudence here, but instead I rely on the argument of the dissenting judges.

<sup>103</sup> Dworkin, 1986, p. 225, see above note 43.

<sup>104</sup> *Ibid.*

of law. Bemba was detained for many years, and his supporters claimed that his prosecution was politically-motivated.<sup>105</sup> Yet, the lack of accountability suggests that the ICC cannot be a source of justice for victims of human rights violations.

Importantly, the ICC was set up to prosecute the leaders and organizers of mass atrocity crimes, accused of planning and co-ordinating heinous crimes. It is plausible that the majority of the Appeals Chamber may not have been acting in good faith in their interpretation, due to their failure to consider the previous decisions and the political history of the Court, or the impact of the decision on international rule of law. Here there may be a failure to consider the permissible political influence of history, and it is not known whether this the result of a good faith adjudicative effort, the personal preferences of the judges, or impermissible political influence of outside forces. It may be that this decision reflects a breach of the requirements for institutional integrity, insofar as the majority opinion in the *Bemba* case does not tell a coherent story (whether or not there is one for the judges to tell).

#### **21.4.2.2. Case Study: The Afghanistan Situation**

In April 2019, the Pre-Trial Chamber of the ICC unanimously rejected the Office of the Prosecutor's request to proceed with an investigation for alleged crimes against humanity and war crimes in Afghanistan.<sup>106</sup> The request from the OTP concerned potential crimes committed by the Taliban and their affiliated Haqqani Network, Afghan National Security Forces, US armed forces and the Central Intelligence Agency of the US.<sup>107</sup> The judges declined to accept the request on the basis that "an investigation into the situation in Afghanistan at this stage would not serve the interests of justice".<sup>108</sup> In March 2020, the Appeals Chamber of the ICC overturned the

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<sup>105</sup> For instance, the former United States Under-Secretary for African Affairs, Herman Cohen, wrote to the ICC and requested Bemba's release prior to the 2018 presidential elections in the Democratic Republic of the Congo. The letter is available on *La Libre Afrique's* web site.

<sup>106</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 ('Decision Pursuant to Article 15') (<http://www.legal-tools.org/doc/2fb1f4/>).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, p. 32.

Pre-Trial Chamber's rejection, paving the way for the Prosecutor's investigation into the situation in Afghanistan.<sup>109</sup>

#### **21.4.2.2.1. Pre-Trial Chamber Decision**

Because the situation was brought to the Court by the OTP, the Pre-Trial Chamber was tasked with providing prior authorization for the OTP to proceed with the investigation, which is “a specific, fundamental and decisive filtering role”.<sup>110</sup> Under the Rome Statute, the OTP must provide the relevant evidence to suggest that there is a “reasonable basis to proceed”<sup>111</sup> with an investigation, and the Pre-Trial Chamber is asked to examine the request and the supporting material, and approve or reject the request to proceed with an investigation.<sup>112</sup> In determining whether or not such a reasonable basis exists, the OTP and the Pre-Trial Chamber must consider three separate factors. The first question is whether there is enough evidence “to believe that a crime within the jurisdiction of the Court has been or is being committed”.<sup>113</sup> The second question is whether the case is admissible under Article 17 of the Rome Statute.<sup>114</sup> Finally, the third question is whether, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.<sup>115</sup>

In deciding not to authorize an investigation into the situation in Afghanistan, the Pre-Trial Chamber found that the OTP's request established a reasonable basis to proceed in terms of jurisdiction, as well as gravity and complementarity (that is, admissibility under Article 17).<sup>116</sup> However, the Pre-Trial Chamber determined that an investigation would not serve the interests of justice.<sup>117</sup> In so doing, it relied on the understanding that “an investigation would only be in the interests of justice if prospectively it ap-

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<sup>109</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 (‘Judgment on the Appeal’) (<http://www.legal-tools.org/doc/x7kl12/>).

<sup>110</sup> *Ibid.*, para. 30.

<sup>111</sup> Rome Statute, Article 15, see above note 67.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, Article 53(1)(a).

<sup>114</sup> *Ibid.*, Article 53(1)(b).

<sup>115</sup> *Ibid.*, Article 53(1)(c).

<sup>116</sup> See Decision Pursuant to Article 15, see above note 106.

<sup>117</sup> *Ibid.*

pears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.”<sup>118</sup> With respect to the situation in Afghanistan, the Pre-Trial Chamber determined that the interests of justice could not be served due to:

- the significant time elapsed between the alleged crimes and the Request;
- the scarce co-operation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence;
- the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution’s investigative efforts and activities at this stage.<sup>119</sup>

Accordingly, the Pre-Trial Chamber rejected the OTP’s request due to the fact that “the current circumstances of the situation in Afghanistan [were] such as to make the prospects for a successful investigation and prosecution extremely limited.”<sup>120</sup>

#### **21.4.2.2.2. The Integrity of the Pre-Trial Chamber**

Based on the above summary, it may be the case that the judges in the Pre-Trial Chamber failed to meet the requirements for institutional integrity, and on two separate bases. First, like the judges in the majority from the Appeals Chamber in the *Bemba* case, it appears to be the case that the judges are not telling a consistent story.<sup>121</sup> While the Pre-Trial Chamber is not required to act consistently with previous authorization decisions, it

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<sup>118</sup> *Ibid.*, para. 89.

<sup>119</sup> *Ibid.*, para. 91.

<sup>120</sup> *Ibid.*, para. 96.

<sup>121</sup> The OTP has consistently made decisions without regard to feasibility of investigations (see, for example, ICC-OTP, “Report on Preliminary Examination Activities 2013”, 25 November 2013, para. 70 (<http://www.legal-tools.org/doc/dbf75e/>)). Additionally, there is no jurisprudential support for the Pre-Trial Chamber’s decision to reject the authorization altogether, when there is only evidence that investigating certain of the crimes for which the OTP has provided information will prove challenging. ICC, *Situation in the Islamic Republic of Afghanistan*, Office of the Prosecutor, Request for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, 7 June 2019, ICC-02/17-34, para. 1 (‘Request to Appeal’) (<http://www.legal-tools.org/doc/039451/>).

should, at least on Dworkin's model of law as integrity, offer an explanation for the clear departure from previous decisions.

Additionally, it is likely that the Pre-Trial Chamber was influenced by impermissible political forces, threatening the integrity of the Pre-Trial Chamber and the Court. The decision concludes with what appears to be a permissible concern for the continued existence of the Court, as the Pre-Trial Chamber's decision notes that "pursuing an investigation would [not] result in meeting the objectives listed by the victims favoring the investigation, or otherwise positively contributing to it",<sup>122</sup> which, "far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve".<sup>123</sup> On its face, these statements appear to reflect a concern for maintaining the perception and existence of the Court as a valuable tool for seeking international criminal justice.

And yet, other evidence suggests that this may not be the real reason for rejecting the OTP's request. The OTP has asked the Pre-Trial Chamber to authorize their investigation into Afghanistan because it thinks that it has the resources, in terms of evidence and prospects for co-operation, to effectively pursue the investigation. The Pre-Trial Chamber's rejection of their claims suggests that open hostility the US has exhibited toward the Court broadly, and toward this situation in particular, is a sufficient justification for denying the authorization for the investigation. If a State's disinterest in co-operation (under a particular administration or under any administration) is sufficient to end an investigation, then it seems the institution of the ICC is likely to crumble. The Court exists, in part, because of States' being unwilling or unable to pursue justice for international crimes in their own criminal justice systems. The role of the ICC is to pursue justice *in spite of* this unwillingness, and the OTP has the discretion to decide to pursue cases despite state refusals to co-operate. If the position of the Trump Administration with respect to the ICC played a role in the Pre-Trial Chamber's decision, then this constitutes a serious political threat to the integrity of the Pre-Trial Chamber and the Court as a whole.

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<sup>122</sup> Decision Pursuant to Article 15, para. 96, see above note 106.

<sup>123</sup> *Ibid.*

### 21.4.2.2.3. The Appeals Chamber Judgment

The OTP sought and was granted leave to appeal a “decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” under Article 82(1)(d) of the Rome Statute.<sup>124</sup> In this sub-section and the next, I outline and analyse the Appeals Chamber’s response, although I consider the OTP’s appeal in a later section.

The Appeals Chamber unanimously agreed to amend the Pre-Trial Chamber’s 2019 decision on the basis of two conclusions. First, the Appeals Chamber found that the Pre-Trial Chamber erred in reviewing the OTP’s analysis of the factors under Article 53(1)(a) to (c) of the Rome Statute, which require that a situation involves (a) a reasonable basis to believe that a crime within the Court’s jurisdiction has been committed or is being committed, (b) admissibility, and (c) the absence of substantial reasons to believe that an investigation would not serve the interests of justice.<sup>125</sup> Second, the Appeals Chamber found that the Pre-Trial Chamber’s decision to authorize an investigation “should not be restricted to the incidents specifically mentioned in the Prosecutor’s request under Article 15(3) of the [Rome] Statute and incidents that are ‘closely linked’ to those incidents”.<sup>126</sup> In the interest of space and in light of the analysis above, I focus on the first of these conclusions.

With respect to the first conclusion, the Appeals Chamber considered that in the five decisions that had been previously issued by pre-trial chambers in authorizing investigations under Article 15(4) of the Rome Statute, they “considered all the factors set out in Article 53(1) of the Statute, including, to a certain extent, the Prosecutor’s interests of justice assessment under Article 53(1)(c) of the Statute.”<sup>127</sup> The Appeals Chamber found that Article 53(1) “reflects an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor not to proceed in the limited circumstances set out in Article 53(1)(a) to (c) of the Statute.”<sup>128</sup> But this was the first appellate test of how Article 53(1) should be

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<sup>124</sup> Rome Statute, Article 82(1)(d), see above note 67.

<sup>125</sup> Judgment on the Appeal, para. 1, see above note 109; Rome Statute, Article 53(1), see above note 67.

<sup>126</sup> Judgment on the Appeal, para. 2, see above note 109; Rome Statute, Article 15(3), see above note 67.

<sup>127</sup> Judgment on the Appeal, para. 24, see above note 109.

<sup>128</sup> *Ibid.*, para. 29.

applied in a case that is initiated *proprio motu*, by the Prosecutor.<sup>129</sup> Article 15 details that it is within the discretionary power of the Prosecutor to determine whether or not there is a reasonable basis to proceed with such an investigation, and if the Prosecutor finds such a reasonable basis, the Pre-Trial Chamber's authorization is required.<sup>130</sup>

The Appeals Chamber found that Article 15 of the Rome Statute "governs the initiation of a *proprio motu* investigation, while Article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council".<sup>131</sup> Article 15, the Appeals Chamber notes, does not refer to Article 53 of the Rome Statute, nor does it refer to the interests of justice.<sup>132</sup> Rather, Article 15 only tasks the Pre-Trial Chamber with considering if "there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court".<sup>133</sup> The Appeals Chamber found that while the Prosecutor is required to consider all the factors under Article 53(1), these factors "are *not* relevant for the purposes of the pre-trial chamber's decision".<sup>134</sup> Accordingly, the Pre-Trial Chamber erred in considering the 'interests of justice' factor from Article 53(1)(c) of the Rome Statute.<sup>135</sup> The Pre-Trial Chamber instead "should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction".<sup>136</sup>

Since the 'interests of justice' factor was the Pre-Trial Chamber's sole consideration in declining to authorize the initiation of the investigation into the situation in Afghanistan, the Appeals Chamber found that "if the matter were remanded to the Pre-Trial Chamber, it would have no other recourse but to authorise the investigation".<sup>137</sup> Given this inevitable out-

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<sup>129</sup> *Ibid.*, para. 25.

<sup>130</sup> *Ibid.*, paras. 30, 32; Rome Statute, Article 15, see above note 67.

<sup>131</sup> Judgment on the Appeal, para. 33, see above note 109.

<sup>132</sup> *Ibid.*, para. 34; Rome Statute, Article 15, see above note 67.

<sup>133</sup> Rome Statute, Article 15(4), see above note 67; Judgment on the Appeal, para. 34, see above note 109.

<sup>134</sup> Judgment on the Appeal, para. 35, see above note 117.

<sup>135</sup> *Ibid.*, para. 37.

<sup>136</sup> *Ibid.*, para. 46.

<sup>137</sup> *Ibid.*, para. 54.

come, the circumstances, and “in the interests of judicial economy”,<sup>138</sup> the Appeals Chamber decided to amend the Decision Pursuant to Article 15 and authorize the Prosecutor’s investigation into the situation in Afghanistan.<sup>139</sup>

#### **21.4.2.2.4. The Integrity of the Appeals Chamber**

Here, the Appeals Chamber relies on judicial precedent (and the lack thereof), statutory interpretation, and the history of the drafting of the Rome Statute, in order to construct a coherent narrative and to provide clear guidance for the ICC and its organs going forward. As a result, the Appeals Chamber makes a better case than the Pre-Trial Chamber for maintaining (or restoring) the structural integrity of the institution.

First, the Appeals Chamber deals directly with cases that conflict or appear to conflict with their conclusions, not ignoring relevant evidence and maintaining consistency in behaviour, and thereby contributing to the integrity of the ICC and the judiciary.<sup>140</sup> As stated above, the Appeals Chamber addresses the five previous decisions from Pre-Trial Chambers authorizing investigations under Article 15(4) of the Rome Statute, all of which involved consideration of the Prosecutor’s Article 53(1)(c) ‘interests of justice’ assessment, at least somewhat.<sup>141</sup> The Appeals Chamber is not obligated, however, to follow the precedent set by the Pre-Trial Chambers, so the Appeals Chamber provides a comprehensive analysis of why it chooses to read the Rome Statute differently, and set a new standard going forward. In so doing, the Appeals Chamber clarifies the relationship between the Prosecutor and the Pre-Trial Chamber where the Prosecutor has initiated an investigation *proprio motu*, which strengthens the structural integrity of the institution as a whole.

Second, the Appeals Chamber conducts a thorough analysis of the text of the Rome Statute, in light of the plain meaning of the text, the statutory history of the document, and the function of Articles 15 and 53 of the Rome Statute. The Appeals Chamber refers to the drafting process of the Rome Statute in noting the careful balance sought in giving the Prosecutor

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> See Taylor, 1981, p. 148, see above note 10.

<sup>141</sup> Judgment on the Appeal, para. 24, see above note 109.

discretion to initiate investigations.<sup>142</sup> The discretion afforded by Article 15 is distinguished from the parameters of Article 53(1), which reflect “an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor *not* to proceed in limited circumstances set out in Article 53(1)(a) to (c) of the [Rome] Statute”.<sup>143</sup> The Appeals Chamber contrasts this with Article 15, noting that it would be “contrary to the very concept [of discretion] to suggest that a duty to investigate could be imposed by the Pre-Trial Chamber in the absence of a request for authorization of an investigation by the Prosecutor”.<sup>144</sup> This reflects a difference in the appropriate role of judicial review with respect to referred and Prosecutor-initiated investigations.

The Appeals Chamber’s analysis of the content and placement of Articles 15 and 53(1) shows that the two Articles are meant to address a Prosecutor’s investigation in “two distinct contexts”.<sup>145</sup> Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while Article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council. On a plain reading, Article 15 does not refer to Article 53, nor does it refer to the ‘interests of justice’, but it does state what that the Pre-Trial Chamber *is* supposed to consider.<sup>146</sup> Article 15(3) can be considered alongside Article 53(1), since both address the subject-matter of the Prosecutor’s decision, but Article 15(4), which addresses the Pre-Trial Chamber’s assessment, cannot similarly be read in light of Article 53(1).<sup>147</sup> The Appeals Chamber “concludes that a plain reading of the relevant legal provisions in their context suggests that the Pre-Trial Chamber under Article 15(4) of the [Rome] Statute is only required to assess the information contained in the Prosecutor’s request to determine whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court’s ju-

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<sup>142</sup> *Ibid.*, para. 26; see also Morten Bergsmo, Jelena Pejić, and Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck, Hart and Nomos, München, Oxford and Baden-Baden, 2016, pp. 726–729; Morten Bergsmo, Pieter Kruger, and Olympia Bekou, “Article 53”, in *ibid.*, pp. 1366–1368.

<sup>143</sup> Judgment on the Appeal, para. 29, see above note 109.

<sup>144</sup> *Ibid.*, para. 31.

<sup>145</sup> *Ibid.*, para. 33.

<sup>146</sup> *Ibid.*, para. 31; Rome Statute, Article 15, see above note 67.

<sup>147</sup> Judgment on the Appeal, para. 36, see above note 109.

risdiction”.<sup>148</sup> Again, the Appeals Chamber is providing clarity on roles and standards here, rather than trying to thread the needle to justify a nonsensical or incoherent distinction.

Finally, in direct contrast to the Pre-Trial Chamber, the Appeals Chamber’s judgment is not undermined by concerns about political influence or interference. The Appeals Chamber notes that failing to acknowledge the appropriate scope of the Prosecutor’s discretion cannot be justified as a way to ensure “that the Prosecutor does not embark on a frivolous or politically motivated investigation”, since it would instead serve to “inhibit the Prosecutor’s truth-seeking function”.<sup>149</sup> The Appeals Chamber distinguishes the broad scope of the investigation from jurisdiction in particular cases, claiming that it is “premature and unnecessary to resolve specific and detailed jurisdictional issues on an incident-by-incident basis for the purposes of authorising the investigation into the situation in Afghanistan”.<sup>150</sup> This preference for maintaining broad scope in the early stages of the legal process can be distinguished from the Pre-Trial Chamber’s concerns that “the prospects for a successful investigation and prosecution [were] extremely limited”,<sup>151</sup> which avoids even the appearance of political influence from particular parties, either directly or due to concerns that the parties will be uncooperative. This contributes to both the substantive and structural integrity of the ICC, avoiding unfair procedures and ensuring that the moral purpose of the ICC is not thwarted.

### **21.4.3. The Office of the Prosecutor**

While Dworkin’s concept of judicial integrity does not directly apply to the OTP, the presence of discretion provides an opportunity for a parallel, insofar as the OTP is also invested in telling a coherent story and ensuring the survival of the institution, albeit without the specific expectation that the OTP adhere to precedent. But the OTP must retain its reputation as a fair organ, not subject to impermissible influences that would challenge its identity as a source of justice.

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<sup>148</sup> *Ibid.*, para. 45.

<sup>149</sup> *Ibid.*, para. 61, see above note 109.

<sup>150</sup> *Ibid.*, para. 78, see above note 109.

<sup>151</sup> Decision Pursuant to Article 15, para. 96, see above note 106.

#### **21.4.3.1. Case Study: Response to the *Bemba* Verdict and Integrity of the Office of the Prosecutor<sup>152</sup>**

Several days after the Appeals Chamber rendered its verdict in the *Bemba* case, the ICC Prosecutor, Fatou Bensouda, released a statement<sup>153</sup> expressing concern with the Appeals Chamber decision. Notably, she explicitly claimed that she “must uphold the integrity of the Court’s processes and accept the outcome”.<sup>154</sup> Yet she also indicated her worries that the Appeals Chamber’s judgment reflected radical interpretations of jurisprudence and precedent.<sup>155</sup> Prosecutor Bensouda ended her statement with an acknowledgment of the victims of violence in the Central African Republic and proclaimed the solidarity of the OTP with these victims.<sup>156</sup>

It is not clear that the OTP acted with institutional integrity from the standpoint of wholeness or integration, although this does not reflect anything about the Prosecutor’s individual integrity or her commitment to keeping the substantive principles of the institution intact. The OTP’s decisions must reflect reasoned deliberation, not just loyalty or a commitment to achieving outcomes that are desired by victims. Accordingly, I conclude that while the OTP should use its outreach capacity to assure victims of violence that the Court is not a futile source of international criminal justice, the OTP failed to exhibit institutional integrity when the Prosecutor used the OTP’s official platform to suggest the opposite, with respect to individual cases or the Court’s practices as a whole, thereby undermining the integrity of the Court and the OTP.

#### **21.4.3.2. Case Study: Response to the Afghanistan Decision and Integrity of the OTP**

Several days after the Pre-Trial Chamber rejected the OTP’s request for authorization to pursue an investigation into crimes committed in Afghanistan, Prosecutor Bensouda released a statement acknowledging the decision.<sup>157</sup> In the short statement, she notes that the only concern of the Pre-

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<sup>152</sup> A similar analysis can be found in Fyfe, 2020, see above note 5.

<sup>153</sup> ICC, “Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo”, 13 June 2018.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> ICC, “Statement of the Office of the Prosecutor following the decision of Pre-Trial Chamber II concerning the Situation in Afghanistan”, 12 April 2019.

Trial Chamber is their assessment of the interests of justice, and states that the OTP “will further analyse the decision and its implication, and consider all available legal remedies”.<sup>158</sup> In June 2019, the OTP requested permission to appeal the Pre-Trial Chamber’s decision to reject the request for authorization to pursue an investigation into crimes committed in Afghanistan.<sup>159</sup> In the filing, the OTP sought to appeal the decision based on:

- the Pre-Trial Chamber’s interpretation of Articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice;
- the exercise of the Pre-Trial Chamber’s discretion under those provisions; and
- the Pre-Trial Chamber’s understanding of the scope of any investigation it may authorise, in light of Article 15 and other material provisions of the Statute.<sup>160</sup>

According to the OTP, these issues, affect “the fair and expeditious conduct of the proceedings”, and “[t]hey also affect not only the outcome of any trial but also the very possibility of a trial occurring”.<sup>161</sup> The OTP also claims that “the Pre-Trial Chamber’s reasoning is likely to affect all situations which the Prosecutor may consider bringing before the Court *proprio motu*”.<sup>162</sup>

It is in the second case study that we can see a clear rejection of impermissible political influences on the OTP, as an organ of the Court, and a clear concern for the political history and the continued existence of the Court. In short, the OTP’s filing reflects the individual integrity of those who drafted the request for appeal, and the institutional integrity of the organ of the OTP. The OTP’s request may be, in part, an attempt to reassure the specific victims of violence in Afghanistan, and the global community as a whole, and it is grounded in the identity-conferring commitments of the ICC as an institution, and the OTP as an organ of that institution.

With respect to structural institutional integrity, the filing of the request follows the stated procedures for disagreeing with a decision of the

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

<sup>159</sup> Request to Appeal, see above note 121.

<sup>160</sup> *Ibid.*, para. 3.

<sup>161</sup> *Ibid.*, para. 4.

<sup>162</sup> *Ibid.*, para. 5.

Pre-Trial Chamber, and it contains both substantive and structural concerns about the continued functioning of the OTP, the Pre-Trial Chamber, and the Court. The OTP's response seeks to clarify the OTP's ability to pursue their statutory tasks in the future, which will be necessary for the perceived and actual functioning of the Court within the relevant political climate. The OTP's request reflects reasoned deliberation and a focus on both substantive and structural integrity, and as we saw in a previous sub-section, the Appeals Chamber agreed with the OTP on these fronts.

### **21.5. Conclusion: The Future of the Integrity of the Court**

The case studies above suggest that both the Judiciary and OTP are at risk for allowing impermissible political influences to threaten the integrity of the organs, and the ICC itself. If the majority of the Appeals Chamber and the Pre-Trial Chamber in fact failed to act with institutional integrity, which seems likely, this is concerning for the sub-organs, for the future of jurisprudence at the ICC, and for the Court itself. The potential casualties of these decisions speak directly to Prosecutor Bensouda's urge to defend the institution of the ICC, and challenge the decisions of both the Appeals Chamber and Pre-Trial Chamber. The Prosecutor cannot be responsible for maintaining the integrity of the entire institution if a separate branch fails in its own sub-institutional integrity requirements. Therefore, Prosecutor Bensouda individually, and the OTP as an organ, must remain committed to both substantive and structural integrity requirements if the Court is to remain coherent and continue to exist.

Bemba's 2018 acquittal by the Appeals Chamber and the Pre-Trial Chamber's 2019 rejection of the OTP's request to pursue an investigation in Afghanistan have been public lightning rods for those concerned with defending and challenging the legitimacy of the ICC and the enterprise of international criminal law. These decisions, among others, bring to light concerns about impermissible political influences on the Court, and the negative impact of these influences on the Court's integrity. Looking toward the future, it will be crucial for the OTP and the Judiciary in particular to think about the integrity of the Court and its organs in broader terms, considering the requirements of both substantive and structural integrity before making public decisions that could threaten the future of the primary seat of international criminal justice.

**PART III:**  
**ACHIEVEMENTS AND LEGACY:**  
**REFLECTIONS ON THE TWENTIETH ANNIVERSARY**  
**OF THE ROME STATUTE**



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## ***Quo vadis, International Criminal Court?* The European Union's Role and Responsibility to Support the Court in Good Times and in Bad Times**

**Barbara Lochbihler\***

### **22.1. Introduction**

One year after the Rome Statute of the International Criminal Court ('Rome Statute') had been adopted in 1998, I became Secretary General of Amnesty International in Germany. In this function, I watched and politically accompanied the International Criminal Court's ('ICC') birth and early childhood. As a Member of the European Parliament ('EP') from 2009 until 2019, and especially as a board member of the Parliamentarians for Global Action ('PGA') and Convenor of PGA's International Law and Human Rights Programme, I have been observing the ICC's adolescence until today, gathering and directing European Union ('EU') support whenever necessary. Although I am not sure whether the ICC is an adult yet, I have strong hopes for the Court's future. The ongoing support of the EU and its Member States will be essential, but it will not come by itself in times of troubled waters for human rights, international justice, and multilateral cooperation.

The EU in general, and the European Parliament in particular, has been a staunch supporter of the ICC from the very beginning. The basic premise of this support is the awareness that the performance and the future of the Court very much depend on its wider family, namely, the States, as the ICC can only be as perfect as the States Parties allow for. This includes

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the need for the family to be as large as possible, meaning that more ratifications are definitely needed for the ICC to become a truly global actor. Also, as for any multilateral international organization, co-operation from States Parties is crucial. Since the ICC does not have its own police force, it relies wholly on States Parties to arrest suspects and it needs their co-operation to conduct investigations. Another, albeit less pronounced focus of the EU's policy on the ICC is to strengthen it as a Court for the victims, bringing justice to the victims, which has to be visible and tangible for individuals as well as in public debates.

With these overall principles set out, in the following, I will elaborate from a practitioner's perspective and by means of examples of how the EU's support specifically looks like in political, institutional, and financial terms, to be introduced in the next section. A particular focus in Section 22.3. will be on how the European Parliament has been providing much of the political impetus behind the EU's policy on the ICC. Section 22.4. presents key aspects and objectives of the EU's engagement and, finally, the considerable external and internal challenges ahead for the ICC and its supporters will be discussed.

## **22.2. The European Union's Instruments for Political, Institutional and Financial Support**

A 2011 Council Decision<sup>1</sup> and a related Action Plan that operationalizes the Decision constitute the basis of the EU policy with regard to the ICC, committing both the EU and its Member States. According to the Council Decision, the objective of the EU's policy is:

to advance universal support for the Rome Statute of the International Criminal Court ('Rome Statute') by promoting the widest possible participation in it, to preserve the integrity of the Rome Statute, to support the independence of the ICC and its effective and efficient functioning, to support cooperation with the ICC, and to support the implementation of the principle of complementarity.

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<sup>1</sup> European Union, Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CSFP, 21 March 2011, 2011/168/CFSP, p. 57 ('Council Decision 2011/168/CFSP') (<http://www.legal-tools.org/doc/88ff3f/>). Before this, EU, Council Common Position of 11 June 2001 on the International Criminal Court, 12 June 2001, 2001/443/CFSP, amended in 2002 and 2003 and accompanied by action plans, established the framework for the EU policy on the ICC (<http://www.legal-tools.org/doc/o0ffoj/>).

As laid out in the Action Plan, means to achieve these objectives are mainstreaming the ICC in external and internal relations, political dialogues, bilateral demarches, letters from the High Representative, statements, including at the UN and other multilateral bodies, and support for the dissemination of the ICC's principles and rules. Furthermore, the EU has included an ICC ratification and implementation clause in several of its co-operation agreements with partner countries, for example, the association agreements with Eastern Partnership countries and the Partnership Agreement between the EU and the African, Caribbean and Pacific States, known as 'Cotonou Agreement'.<sup>2</sup> The 2018 EU Annual Report on Human Rights and Democracy in the World points out the EU's "unwavering support for the ICC and its commitment to renew efforts to promote the universality and preserve the integrity of the Rome Statute",<sup>3</sup> in particular in view of the twentieth anniversary of its adoption. The EU has continued to make every effort to further this process with third countries, "in particular in its human rights dialogues, through *démarche* campaigns worldwide, the systematic inclusion of a clause in agreements with third countries encouraging the ratification of, or accession to, the Rome Statute, through offering implementation assistance, or through financial support to civil society organizations advocating the universality of the Rome Statute".<sup>4</sup>

Countries that encounter difficulties in ratifying, accessing, and implementing the Rome Statute have been provided with assistance, including expert assistance, financial support or access to relevant information. According to the 2011 Council Decision:

Member States shall contribute, when requested, with technical and, where appropriate, financial assistance to the legislative work needed for the participation in and implementation of the Rome Statute by third States. The Union may, when requested, also contribute with such assistance.<sup>5</sup>

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<sup>2</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (Cotonou Agreement), 23 June 2000, 2000/483/EC (<http://www.legal-tools.org/doc/x4dwu3/>), Article 11(7): "The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instrument".

<sup>3</sup> EU, "Annual Report on Human Rights and Democracy in the World 2018", 13 May 2019, 9024/19, p. 82 ('EU Annual Report 2018').

<sup>4</sup> *Ibid.*

<sup>5</sup> Council Decision 2011/168/CFSP, p. 57, see above note 1.

Means of this technical assistance to third States might be the organization of technical consultations at expert level, the secondment or any other form of deployment of EU Member States' experts to the relevant administrations of the requesting State, or, *vice versa*, the detachment of third States' experts to Member States' relevant administrations. According to the 2017 EU Annual Report:

[i]n particular, regional or local seminars and training for legal professionals have proved extremely relevant, covering the Defence or representation of victims, while also promoting dialogue among participants at the regional level. Moreover, training for legal professionals increased participants' legal expertise in international criminal and humanitarian law and developed their knowledge of the Rome Statute system.<sup>6</sup>

Civil society projects funded by the EU and its Member States are another instrument of assistance in legislative processes towards ratification or implementation of the Rome Statute, but also of linking the fight against impunity to reconciliation processes after the conflict, as by efforts to strengthen judicial capacity and independence in post-war Western Balkan, and supporting civil society organizations engaged in this work.

This illustrates that in addition to political and institutional support, funding is the third pillar of the EU policy on the ICC. The EU and its Member States taken together are the biggest contributors to the Court's budget. Besides these direct contributions, the funding of non-governmental and civil society organizations' activities aimed at promoting and strengthening the Rome Statute system for international criminal justice at a grassroots level as well as internationally via the European Instrument for Democracy and Human Rights ('EIDHR') cannot be overestimated. Capacity building, outreach and communication programmes with local civil society involved are extremely relevant for bringing the ICC's mission and work to the ground, especially to the victims in affected communities.

### **22.3. Instruments of Parliamentary Support**

The Parliament is a key actor in this European picture. With numerous resolutions it has not only provided much of the political impetus behind the EU's policy on the ICC but also publicly and continuously expressed its support for the ICC and the principles of the Rome Statute. Strong public

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<sup>6</sup> EU, "Annual Report on Human Rights and Democracy in the World 2017", 28 May 2018, 9122/18, p. 64.

commitments to uphold international criminal justice and to fight against impunity from the only directly elected EU institution<sup>7</sup> are powerful political signals towards the other EU institutions as well as the outside world.

The parliamentary groundwork on the ICC and international justice takes place in the parliamentary committees which in this case are mainly the Committee on Foreign Affairs and the Subcommittee on Human Rights. Initiatives for resolutions, the commissioning of studies or reports, hearings, or delegation visits are mainly connected to these parliamentary bodies.

### 22.3.1. Parliament Resolutions

The European Parliament resolution of 17 November 2011 on 'EU support for the ICC: facing challenges and overcoming difficulties' is but one of the many examples of these activities. Initiated by a report of the Committee on Foreign Affairs, it reiterated its "full support for the ICC, the Rome Statute and the international criminal justice system, whose primary objective is the fight against impunity for genocide, war crimes and crimes against humanity"<sup>8</sup> and underlined "the importance of the principle of universality".<sup>9</sup> Among further aspects, it called:

for the establishment of effective policies and enhancing mechanisms to ensure that victims' participation at the ICC has substantive impact, including more accessible psychological, medical and legal counselling and easy access to witness protection programmes; highlights the importance of promoting awareness of sexual violence in conflict zones by means of law programmes, the documentation of gender-based crimes in armed conflicts, and the training of lawyers, Judges and activists on the Rome Statute and on international jurisprudence in relation to gender-based crimes against women and children.<sup>10</sup>

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<sup>7</sup> The 751 members of the European Parliament are elected every five years by more than 400 million people eligible to vote in the EU Member States. Seats are allocated according to the size of the population of each country, but based on the principle of degressive proportionality. The Council of the European Union is only indirectly legitimated through national elections. The European Commission is the executive branch of the EU, with Commissioners chosen by the Council of the European Union and affirmed by the European Parliament.

<sup>8</sup> European Parliament, "Report on EU Support for the ICC: Facing Challenges and Overcoming Difficulties", 17 November 2011, P7 TA(2011)0507, para. 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

The adoption of the Kampala Amendments to the Rome Statute,<sup>11</sup> including on the crime of aggression, had been welcomed in the 2011 resolution already and Member States were encouraged to ratify them. The EP resolution of 17 July 2014 explicitly called “for the EU to adopt a common position on the crime of aggression and the Kampala Amendments”<sup>12</sup> and, underlining the principle of universality of the Rome Statute, urged “the EU to be at the forefront in pushing for the Kampala Amendment on the crime of aggression to enter into force and to support the efforts under way to achieve this goal”.<sup>13</sup> Besides these specific resolutions, every year a strong paragraph on the ICC is included in the EP’s resolution on the EU Annual Report on Human Rights and Democracy in the World, calling on the EU to continue its unfettered support to the Court in political and financial terms.

### **22.3.2. Activities at the Committee Level**

The ICC and international criminal justice are regular issues on the agenda of the Committee on Foreign Affairs as well as the Subcommittee on Human Rights, hearing high-level guests like the ICC chief Prosecutor as well as human rights activists from the field working with victims, witnesses and affected communities. A joint workshop of the Subcommittee on Human Rights and the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs on 28 June 2018 on the topic of ‘Universal jurisdiction and international crimes: Constraints and best practices’ is an example of this kind of parliamentary work. Academics and highly experienced practitioners discussed international trends as regards the concept of universal jurisdiction and the EU’s approach to promoting universal jurisdiction through its external relations, as well as practical ex-

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<sup>11</sup> For the first review of the Rome Statute, State Parties gathered in Kampala from 31 May until 11 June 2010. Two resolutions that amended the crimes under the jurisdiction of the ICC were adopted by the Review Conference, one amending the article on war crimes and one providing a definition and a procedure for jurisdiction of the ICC over the crime of aggression. Both amendments had to be adopted by at least 30 State Parties before the Assembly of State Parties could decide on the activation of the ICC’s jurisdiction on aggression in December 2017.

<sup>12</sup> European Parliament (‘EP’), Crime of aggression, 17 July 2014, 2014/2724(RSP) (<http://www.legal-tools.org/doc/li434c/>).

<sup>13</sup> *Ibid.*

perience in applying universal jurisdiction in the fight against impunity in Europe.<sup>14</sup>

The commissioning of studies is another instrument of parliamentary work, as mentioned above. One important example is the 2014 study requested by the Subcommittee on Human Rights on “Mainstreaming Support for the ICC in the EU’s Policies”.<sup>15</sup> With regard to recent and future challenges for the ICC, it was designed to critically assess the EU’s performance in mainstreaming support for the ICC and to analyse how the EU and Member States could focus its policies and activities of supporting the ICC’s cause.

### **22.3.3. Commitment by Members of Parliament**

The driving forces behind all these political activities usually are individual Members of Parliament (‘MEPs’). When I joined the European Parliament, I got to know some colleagues enthusiastically committed to the ICC’s cause. This encouraged me to establish the group of ‘Friends of the ICC’ in the EP. Additionally, the same and other MEPs have been members of the Parliamentarians for Global Action, a non-profit, non-partisan international network of parliamentarians in all regions of the world committed to advocating for human rights and the rule of law, international justice and accountability.<sup>16</sup> Its current membership of approximately 1,300 legislators in 142 elected parliaments around the globe includes high-level politicians, including past and present Prime Ministers, Cabinet Ministers and Committee Chairs. These members can play an influential role when it comes to gaining and fostering the political will for ratification and implementation of the Rome Statute in a given country. Due to the overlaps in issues, the two groups of Friends of the ICC and PGA members within the EP merged some years ago. The PGA European Parliament Group aims to make sure that the support of the ICC is taken into account in the different fields of work of the EP.

To illustrate how PGA, the European Parliament and representatives of organs of the ICC can constructively collaborate to further the ICC’s

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<sup>14</sup> See the documentation of the workshop, EP, “Universal jurisdiction and international crimes: Constraints and best practices”, 10 January 2019 (available on the EU’s website).

<sup>15</sup> Olympia Bekou, “Mainstreaming support for the ICC in the EU’s policies”, European Parliament, Directorate-General for External Policies, March 2014, EXPO/B/DROI/2013/28.

<sup>16</sup> See the Parliamentarians for Global Action’s (‘PGA’) website.

cause, the Strategic Meeting on Support of Victims of Mass Atrocities<sup>17</sup> that took place in September 2017 is a good example. PGA and its European Parliament Group initiated this event with the objective to contribute to the effective implementation of the mandate of the Trust Fund for Victims at the ICC by supporting its fundraising goals and, eventually, secure its financial sustainability. The event was strategically timed to coincide with renewed attention on corporate social responsibility within the European Parliament. Participants included MEPs as well as executives and legal representatives of major companies and conglomerates and officers in charge of corporate social responsibility initiatives. Thus, awareness raising and fundraising were equal purposes of the meeting, as the capacity of the Trust Fund for Victims to ensure that survivors of the gravest human rights violations are enabled to live a life of hope, dignity, and respect and to fully guarantee effective reparations to victims strongly depends on its ability to raise sustainable financial resources.

Finally, the ICC is an issue committed MEPs regularly raise on missions abroad and in political meetings with EU representatives as well as with government representatives from EU third countries in Brussels. An example is the Foreign Minister from Malaysia, whom I met in Brussels in October 2018. After the May 2018 elections and change of government in Malaysia, there was a chance that the country might ratify the Rome Statute and the EU would need to support this development by all means. The 2018 PGA Annual Forum was very encouraging in this regard as a leading parliamentarian and Minister from Malaysia announced the imminent accession of the country to the Rome Statute. However, in April 2019, Malaysia withdrew from the accession already underway due to domestic political pressure.<sup>18</sup>

## **22.4. Key Aspects of the European Union’s Policy on the ICC and International Criminal Justice**

### **22.4.1. Widest Possible Ratification**

As stated in the 2011 Council Decision, worldwide accession to the Rome Statute is one of the main objectives of the EU’s policy on the ICC:

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<sup>17</sup> See PGA, “Strategic Meeting on Support for Victims of Mass Atrocities”, 28 September 2017.

<sup>18</sup> See Coalition for the International Criminal Court, “Malaysia backtracks on accession to the Rome Statute”, 12 April 2019 (available on its website).

In order to contribute to the objective of the widest possible participation in the Rome Statute, the Union and its Member States shall make every effort to further this process by raising the issue of the widest possible ratification, acceptance, approval or accession to the Rome Statute and the implementation of the Rome Statute in negotiations, including negotiations of agreements, or political dialogues with third States, groups of States or relevant regional organisations, whenever appropriate.<sup>19</sup>

Measures undertaken by the EU to promote the widest possible ratification of the Rome Statute – for which EU terminology commonly uses the broader term ‘universality’ or ‘universal ratification’ – have been particularly successful and a distinctive sign of the EU’s commitment to support the ICC and its system of international justice. Tools to operationalize this commitment have been described above, especially with regard to technical and legal assistance.

A major challenge arose after the arrest warrant against Sudan’s then President Bashir, and, later on, the indictment of the Kenyan President Kenyatta had prompted several African States to think about or even announce their withdrawal from the Court, and the African Union from 2008 onwards to adopt several resolutions that called upon its members to no longer co-operate with the ICC and eventually to withdraw. For all EU actors, there is no doubt that the possible or actual withdrawal of States is detrimental to the Court’s strength and credibility. Thus, the prevention of this harmful development has caused intensive diplomatic activities since then. South Africa is one of the States still on an uneven path of withdrawal, caused by its government’s refusal to arrest the Sudanese President and a subsequent confrontation with the High Court. In an answer from the High Representative-Vice-President Mogherini, on behalf of the Commission, to a written question from the EP, it was not only elaborated how the EU’s diplomats had tried to convince their South African counterparts of the importance to execute the arrest warrant. It also stated that the:

EU is open to listening to concerns by some Africans governments about the Court yet insists that these concerns need to be presented within the framework provided by the Rome Statute. The EU will continue to actively promote the universality of the Rome Statute in its contacts with African partners

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<sup>19</sup> Council Decision 2011/168/CFSP, p. 57, see above note 1.

and within the AU and actively encourage State Parties to remain committed to an effective and comprehensive cooperation with the Court. The EU will also carry on providing technical and financial assistance to third countries worldwide for ratifying and implementing the Rome Statute and in support of global ratification campaigns undertaken by civil society organisations.<sup>20</sup>

On the Parliament's behalf, among other initiatives, a delegation of the Subcommittee on Human Rights paid an extra visit to the African Union in 2013, at times when the organization fiercely attacked the ICC. As a means to build trust and to intensify understanding and co-operation, the delegation lobbied for the possibility to open an office of the ICC within the African Union itself. Further parliamentary activities to counter withdrawals went hand in hand with PGA's work. With regard to South Africa, the organization prepared a Submission to the Justice Committee of the South African Parliament in which the reasons were highlighted as to why it was legally and politically unsound to repeal the ICC Act 2002 and to proceed with the withdrawal from the Rome Statute.<sup>21</sup> Earlier on, PGA had mobilized its members from the parliamentary opposition, while, in spring 2017, they did a strong recruitment campaign of members from the African National Congress.<sup>22</sup> As a result, not only PGA members in the South African Parliament strongly and quietly advocated against withdrawal from the Rome Statute, but they even formed a new PGA South African National Group. At the Pan-African Parliament (the African Union's Parliamentary Assembly), a former PGA board member blocked the 'calendarization' of a resolution supporting the mass withdrawal by African States from the Rome Statute. Most regrettably, in 2017, Burundi became the first country to leave the ICC and the Philippines followed in 2019. However, I consider it as a success story that the mass withdrawal could be prevented so far. This was not least because of constant efforts of the EU and also of PGA.

Constructive co-operation of PGA, its European Parliament Group and EU institutions has, of course, always been directed towards raising the number of ratifications, too. In November 2018, the tenth Consultative As-

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<sup>20</sup> EP, "Answer given by the High Representative/Vice-President Mogherini on behalf of the Commission", 28 September 2015, E-010694/2015(ASW).

<sup>21</sup> PGA, "Submission of PGA on the RSA Bill to Repeal the Implementation of the Rome Statute of the International Criminal Court Act 2002", 8 March 2017.

<sup>22</sup> The African National Congress ('ANC') has been the Republic of South Africa's governing political party since the election of Nelson Mandela 1994.

sembly of Parliamentarians for the International Criminal Court and the Rule of Law ('CAP-ICC') and fortieth Annual Forum of PGA was held in the Parliament of Ukraine in Kyiv. PGA has actively engaged with Ukrainian lawmakers since 2003, supporting domestic reforms to strengthen justice, protect human rights and enhance international co-operation and peace. Considering that the ratification of the Rome Statute is included in the EU-Ukraine Association Agreement and that it may become achievable after the entry into effect of a relevant constitutional reform in the second half of 2019, organizing the tenth CAP-ICC session at the end of 2018 created a significant momentum to advance ratification and implementation of the Rome Statute by Ukraine. The European Commission shared this assessment and co-funded the Consultative Assembly under the EIDHR.

#### **22.4.2. Complementarity, Accountability and Its Limits**

A key principle of the Rome Statute and, therefore, of EU policy on international criminal justice is that of complementarity. According to Article 17 of the Rome Statute, the ICC is competent to conduct investigations only when States are unable or unwilling to prosecute the crimes under its jurisdiction themselves. The more States are able and willing to prosecute perpetrators of gravest crimes within their own justice system, the less the ICC is needed and challenged. In a constructive manner, this is the reasoning behind the EU's efforts in technical and legal support for third States to strengthen their national legal systems, adopt the necessary international criminal codes, and qualify more judges and lawyers on these issues.<sup>23</sup>

Tragically, in the most cruel and violent conflicts of these times, neither the ICC nor the respective States are able or willing to prosecute the perpetrators of crimes against humanity and war crimes and to bring about justice for the hundreds of thousands of victims. Looking at Syria, Yemen, Iraq, Myanmar – in all these cases, complementarity is stuck between States, which have neither ratified the Rome Statute (and no perspective for this to change) nor are willing to prosecute their own military or security personnel, and permanent members of the UN Security Council blocking a necessary referral to the ICC. Twenty years following the adoption of the Rome Statute, we still continue witnessing atrocities being committed, with the international community shying away from adequately addressing them.

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<sup>23</sup> See EU Annual Report 2018, p. 97, see above note 3.

The EU as a major global actor has significant responsibility to help overcome this political and legal deadlock by using all diplomatic means available. The EP emphasized this in various resolutions and called for concrete measures to be taken. With regard to Myanmar, the EP called once more in its resolution of 14 June 2018:

on the EEAS [European External Action Service] and the Member States to seek accountability in multilateral fora for those responsible for committing crimes in Myanmar; takes note of the ICC Chief Prosecutor's request to the Court's Judges to confirm the ICC's jurisdiction over the crime of deportation of Rohingya from Myanmar to Bangladesh; urges that the EU and the EU Member States take the lead in the UN Security Council and table a dedicated resolution referring the entire situation in Myanmar/Rakhine State to the ICC; urges that the EU Member States take the lead in the UN General Assembly and the UN Human Rights Council and ensure the urgent establishment of an international, impartial and independent mechanism to support investigations into alleged atrocity crimes.<sup>24</sup>

Not least because of parliamentary pressure, but not as outspoken as I had wished for, the Council of the European Union adopted conclusions on the situation in Myanmar on 10 December 2018, referring to its former conclusions of 26 February 2018. It expressed deep concern over the findings of the independent international Fact-Finding Mission that gross human rights violations committed in Myanmar amount to the gravest crimes under international law. This Fact Finding Mission had been established by the UN Human Rights Council in 2017 with the support of the EU as a means to fill the accountability gap as long as no other solution, as for example a Security Council referral, is in sight. The Council Conclusion pointed out that the EU has consistently called for accountability of those responsible for such crimes and does support “in particular the establishment of an ‘independent mechanism’ to further investigate and prepare for fair and independent criminal proceedings in accordance with international law standards in order to address the important issue of accountability” which “should be created in full recognition of the jurisdiction of the Inter-

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<sup>24</sup> EP, “Resolution the situation of Rohingya refugees, in particular the plight of children”, 14 June 2018, 2018/2756(RSP).

national Criminal Court”.<sup>25</sup> Also, additional targeted restrictive measures against perpetrators of serious and systematic human rights violations were announced. Not mentioned in the Conclusion, however, is the ICC Pre-Trial Chamber decision of September 2018<sup>26</sup> that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under Article 7 of the Rome Statute, followed in July 2019 by the ICC chief Prosecutor's request for authorization of an investigation pursuant to Article 15 into the situation at hand.<sup>27</sup> I consider these important developments in the efforts to eventually bring justice to the victims of the atrocities committed in Myanmar.

In the case of Syria, the EP has equally called for the EU to live up to its global responsibility and increase diplomatic efforts to ensure accountability. The EP resolution of 15 March 2018 contains the strongest and most detailed language so far from the EP on accountability. It not only explicitly mentions the responsibility of Syria, Russia and Iran “for the heinous crimes they continue to commit in Syria and that those perpetrating such crimes, be they states or individuals, will be held to account”. The EP also stresses its conviction that:

there can be no effective conflict resolution or sustainable peace in Syria without accountability for the crimes committed and calls for the adoption of an EU accountability strategy towards the atrocity crimes committed in Syria; reiterates its support for the principle of universal jurisdiction in tackling impunity and welcomes steps taken by a number of EU member states to this effect; additionally welcomes initiatives by member states to make grave violations of international law an offensive under their national laws; reiterates its call on the EU and its Member States to explore, in close coordination

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<sup>25</sup> Council of the European Union, “Council Conclusions on Myanmar/Burma”, 10 December 2018, 15033/18 (<http://www.legal-tools.org/doc/31tg81/>).

<sup>26</sup> ICC, Pre-Trial Chamber I, Decision on the “Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, ICC-RoC46(3)-01/18 (<http://www.legal-tools.org/doc/73aeb4/>).

<sup>27</sup> ICC, Office of the Prosecutor, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Request for authorisation of an investigation pursuant to Article 15, 4 July 2019, ICC-01/19-7 (<http://www.legal-tools.org/doc/8a47a5/>).

with like-minded countries, the creation of a Syrian war crimes tribunal, pending a successful referral to the ICC.<sup>28</sup>

Subsequently, the Council Conclusions on Syria of 16 April 2018 made the following declaration stating the absence of avenues for international justice and reflecting the Syrian accountability dilemma quite well:

The Council underlines the need for accountability and the EU will remain at the forefront of the accountability efforts and relentlessly pursue accountability for the atrocities committed in the Syrian conflict. All those responsible for breaches of international law, in particular of international humanitarian law and human rights law, some of which may constitute war crimes or crimes against humanity, must be held accountable, including those committing crimes against religious, ethnic and other groups and minorities. Impunity for such crimes is unacceptable and thus the EU will continue to support the documentation of human rights violations and efforts to gather evidence in view of future legal action. [...] The EU reiterates its call to have the situation in Syria referred to the International Criminal Court. In the absence of avenues for international justice, the Prosecution of war crimes under national jurisdiction where possible represent an important contribution towards securing justice.<sup>29</sup>

It is worth to mention that the EP resolution also criticized a case of blatant violation of the EU policy on international justice by one of its Member States. Following media reports that the Italian Interior Minister and the Director of the Agency for Information and External Security in Rome had received the head of the Syrian National Security Bureau Ali Mamlouk,<sup>30</sup> who is included in the EU sanctions list, the EP rightly called this a flagrant violation of the Council Decision 2011/273/CFSP concerning restrictive measures against Syria.

This example relates to the impression that, when it comes to the unconditional co-operation with the ICC and the cause of international criminal justice, not all Member States are as determined as I would hope for. Some incidents with regard to the arrest warrant against President Al-Bashir reinforced this assessment.

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<sup>28</sup> EP, Situation in Syria, 15 March 2018, 2018/2626(RSP).

<sup>29</sup> Council of the European Union, “Council Conclusions on Syria”, 16 April 2018, 7956/18.

<sup>30</sup> See, for example, Stephanie Kirchgaessner, “Italian officials allegedly met with Syria’s top military adviser”, in *The Guardian*, 29 June 2018.

## 22.5. Challenges Ahead

More than 20 years after the Rome Statute was adopted, the ICC and the international community in support of the Court face considerable challenges.<sup>31</sup>

### 22.5.1. Internal Challenges: The ICC's Performance

Some of them are related to the Court's management and performance itself. It is no secret that the qualification of the ICC staff, including its judges, has been a cause of concern for several years. The acquittal of Jean-Pierre Bemba in June 2018<sup>32</sup> shed a spotlight on the critical aspects of legal assessments, length of proceedings, outreach, and communication for victims. The Pre-Trial Chamber decision in April 2019 to reject the Prosecutor's request for an investigation of alleged war crimes and crimes against humanity in Afghanistan because it would not be in the "interest of justice"<sup>33</sup> is another seriously worrying example. The ICC cannot afford a major lack of confidence in its effectiveness. Therefore, the EU must revive, *inter alia*, one of the measures outlined in its 2011 Action Plan:

Member States should continue to encourage the establishment of transparent selection, nomination and election procedures for ICC Judges and Prosecutors. They should also make every possible effort to ensure that highly qualified candidates are nominated for positions to be filled through elections and that the overall composition of the ICC with regard to competences, geographic origin, legal systems and gender remains in conformity with the criteria stipulated in the Rome Statute. To that end, they will take into account relevant provisions of the Rome Statute and the resolutions of the Assembly of States Parties. To ensure the highest standards of credibility and effi-

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<sup>31</sup> See, as just one example of the many seriously concerned voices, the call of four former Presidents of the Assembly of States Parties for an independent assessment of the ICC's functioning: Zeid Raad Al Hussein *et al.*, "The International Criminal Court needs fixing", in *Atlantic Council*, 24 April 2019.

<sup>32</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, 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', 08 June 2018, ICC-01/05-01/08-3636-Red (<http://www.legal-tools.org/doc/40d35b/>).

<sup>33</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 (<http://www.legal-tools.org/doc/2fb1f4/>).

ciency of the ICC, the selection, nomination and election procedures should be kept under regular review.<sup>34</sup>

Without a doubt, political support for the Court must remain high on the EU's agenda. However, as the ICC's everyday judicial performance has legitimately come under increased scrutiny, technical and legal assistance should receive more and particular attention in the near future. With regard to the limited productivity of the ICC in terms of the caseload, the maximization of human resources that could be deployed by the organization itself, and possible changes of the procedure of domestic nomination and international election of the judges, the respective reforms of the European Court of Human Rights' system which led to a significantly enhanced judicial productivity in the last decade ought to be a source of inspiration for the States Parties of the ICC, to serve the best interests of the fight against impunity.

The EU's financial contribution to the ICC is an issue which the European Parliament will have to strongly defend in the next few years. With a decreased budget due to Brexit and upcoming negotiations on the next Multiannual Financial Framework, there will be resource allocation battles ahead. In the coming EIDHR, the allocation between different thematic areas such as the ICC support will be established later on; but we must call on the EU and Member States to maintain at least a similar allocation, in real terms, as the current one. We must also address the pressure the Court faces from Canada, France, Germany, Italy, Japan, and the UK to influence the level of its annual budget requests,<sup>35</sup> and we should demand the resources the Court needs to function effectively for future years.

### **22.5.2. External Challenges: Human Rights and International Justice Under Fire**

The most severe challenge, however, lies in the international backlash and a backsliding within the EU sphere in terms of commitment to human rights, democracy and international justice, which includes the danger of less enthusiasm over supporting the ICC. Hardly anything could make this clearer than the US administration's attack on the Court which was expressed by National Security Adviser John Bolton in his speech of 10 Sep-

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<sup>34</sup> Council of the European Union, "Action Plan to follow-up on the Decision on the International Criminal Court", 12 July 2011, 12080/11, para. 2(a).

<sup>35</sup> See ICC Assembly of State Parties, "The United Kingdom of Great Britain and Northern Ireland: General Debate Statement", 5 December 2018.

tember 2018.<sup>36</sup> Caused by the ICC possibly launching an investigation of American servicemen over alleged abuses against prisoners in Afghanistan, Bolton called the ICC illegitimate and threatened that the US would ban ICC judges and prosecutors from entering the US, impose sanctions on any funds they had in the States and prosecute them in the American court system.<sup>37</sup> Amnesty International, only one of the many critical voices on Bolton's tirade, called this "an attack on millions of victims and survivors who have experienced the most serious crimes under international law and undermines decades of ground-breaking work by the international community to advance justice".<sup>38</sup> I could not agree more.

The EU's reaction to these fierce threats was voiced by the High Representative and Vice President Federica Mogherini three days later at a plenary session of the European Parliament:

[...] today the existence of the International Criminal Court is being questioned and I think it is important to say in this hemisphere formally and clearly that it is not questioned by the European Union and that we will continue to strongly and fully support the ICC and its work. [...] we all know that the International Criminal Court has brought that change. It has strengthened universal justice, beyond power politics and beyond geopolitical interests. It has made clear that justice is not an enemy of reconciliation, but rather the contrary: It is the basis for reconciliation. It's when the victims feel powerless, when crimes are met with impunity that reconciliation is much harder to achieve. And that accountability is essential to build the foundation for peace. The court may not be perfect. But the best way forward is not to dismantle our global institutions.

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<sup>36</sup> The speech is available in Matthew Kahn, "National Security Adviser John Bolton Remarks to Federalist Society", in *The LawFare Blog*, September 10, 2018 (available on its website).

<sup>37</sup> In March 2019, this was followed by Secretary of State Pompeo's announcement that the US government would deny or revoke visas for ICC personnel, see, "US to deny visas for ICC members investigating alleged war crimes", in *The Guardian*, 15 March 2019 (available on its website).

<sup>38</sup> Amnesty International, "Amnesty International USA Calls on the US to Support ICC Victims of Most Serious Crimes", 10 September 2018 (available on its website). See also Human Rights Watch, "US Takes Aim at the International Criminal Court", 11 September 2018 (available on its website).

The way forward for us is to make them stronger, and build a stronger and more effective multilateral system.<sup>39</sup>

In light of the increasing pressure that the international rules-based order is facing, 34 Members of Parliament, including myself, in a letter dated 29 June 2018, reiterated a call that had been made by the EP already in its 2011 resolution on support for the ICC. The signatories demanded the establishment of an EU Special Representative for International Humanitarian Law and International Justice and argued that such a dedicated high-level expert would provide the EU with significantly enhanced capacity to play its much-needed leadership role:

Now, at a time when the EU and its Member States represent one of the world's few pillars left supporting an international rules-based order, we need the EU's principled leadership more than ever, and this leadership would clearly be advanced through a Special Representative dedicated to International Humanitarian Law and International Justice.<sup>40</sup>

This call was taken up again by the EP as a whole in its Resolution of 12 December 2018 on the Annual Report on Human Rights and Democracy in the World.<sup>41</sup> The establishment of this dedicated EU Special Representative for International Humanitarian Law and International Justice is a necessary but not sufficient step for the EU to advance and inspire its supportive policy on the ICC and international criminal justice in times of increasing challenges for just this.

It is time to have a close look at the 2011 Action Plan to evaluate those aspects successfully implemented, those that need a stronger impetus and those that are missing with regard to current and future challenges. Also, the EU must strengthen the support for the ICC system of international criminal justice in the ongoing preparations for the next EU Action Plan on Human Rights and Democracy and other relevant policy documents, including their implementation.

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<sup>39</sup> European External Action Service, "Speech by HR/VP Mogherini on cases of breaches of human rights, democracy and the rule of law – the situation in Uganda", 13 September 2018.

<sup>40</sup> EP, "Letter of 34 Members of the European Parliament to High Representative/Vice-President Federica Mogherini", 29 June 2018.

<sup>41</sup> EP, "Annual report on human rights and democracy in the world 2017 and the European Union's policy on the matter", 12 December 2018, 2018/2098(INI).

## **22.6. Conclusion**

Although there has been repeated and legitimate criticism of the EU for inconsistencies and incoherence in its diplomatic efforts, the EU's political, diplomatic, and financial support for the ICC has been almost undisputed from the very beginning. However, there is no guarantee that the EU and its Member States will remain the Court's most enthusiastic advocates forever as governments, politics and political discourse in Europe change. Success in increasing the number of accessions to the Rome Statute, in preventing withdrawals, in reinforcing national capacities for dealing with crimes under the Rome Statute – as the EU can rightly claim for itself – will not come by itself. There are severe challenges ahead with the ICC's internal management and performance problems, rough waters for human rights and international justice, and incidents in the recent past implying that not all EU Member States are as determined as necessary when it comes to the unconditional co-operation with the ICC and the cause of international criminal justice. Twenty years after the adoption of the Rome Statute, the EU has to be more committed than ever to support a not yet perfect Court.



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## Russia and the International Criminal Court: From Uncertain Engagement to Positive Disengagement

Bakhtiyar Tuzmukhamedov\*

### 23.1. Introduction

At the outset, credit should be given to the International Nuremberg Principles Academy for dedicating a separate Nuremberg Forum 2018 panel to discuss approaches of those major States, which chose either not to engage the International Criminal Court ('ICC') or to disengage from the Court and its founding document. The moderator of the panel on 'State Engagement and Disengagement' at the Nuremberg Forum 2018, Carsten Stahn, edited a multi-author volume on the ICC law and practice which appeared in 2015.<sup>1</sup> As someone who had to deal with a group of co-authors numbering nineteen,<sup>2</sup> this author can hardly imagine how one can lead a legion of fifty-eight experts each with his or her own view of the world. However, in a review of that collective effort assembled by Professor Stahn,<sup>3</sup> this author pointed out, as a single most obvious and substantive deficiency, the absence of contributions from and about 'disengaging' States, except maybe

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<sup>1</sup> Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements*, Oxford University Press, 2015.

<sup>2</sup> Bakhtiyar Tuzmukhamedov (ed.), *Mezhdunarodnoye pravo* (International Law), 4th. ed., 2015, reprinted in 2018. An earlier edition, co-edited with Valeriy Kuznetsov, was translated into English by William E. Butler and appeared as Bakhtiyar Tuzmukhamedov and Valriy Kuznetsov (eds.), *International Law - A Russian Introduction*, Eleven International Publishing, 2009.

<sup>3</sup> Bakhtiyar Tuzmukhamedov, "Book Review", in *Moscow Journal of International Law*, 2015, vol. 99, no. 3, p. 267.

South Africa, which at the time of publication of that book review was only on its way to a temporary disengagement from the ICC.<sup>4</sup> Of course, there were contributors whose native or educational backgrounds could be traced to major non-State Parties, but they focused on issues other than attitudes of those States towards the Rome Statute and the ICC.

The Russian delegation had been party to the drafting process of the Rome Statute of the ICC. The delegation voted for the text, stating that 17 July 1998 “marks the end of an important effort to reconcile different legal systems. It was a reason for satisfaction that a compromise package has been crafted that the Russian Federation has been able to support”.<sup>5</sup> The treaty was signed by Russia on 13 September 2000,<sup>6</sup> as ordered by the President. The Presidential Executive Order<sup>7</sup> was initiated by the Ministry of Foreign Affairs in co-ordination with the principal stakeholders – the Prosecutor General, the Supreme Court, the Ministries of Internal Affairs, of Defense, of Justice, the Federal Security Service, and the Foreign Intelligence Service. It referred to the Rome Statute as “worked out with participation of the Russian Federation”. Sixteen years and two months later, the President promulgated another Executive Order of immediate relevance to

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<sup>4</sup> On 19 October 2016, South Africa notified the depositary of its withdrawal from the Rome Statute (see UN Doc. C.N.786.2016.TREATIES-XVIII.10), only to “revoke the Instrument of Withdrawal” (see Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, UN Doc. C.N.121.2017.TREATIES-XVIII.10, 7 March 2017 (<http://www.legal-tools.org/doc/9b2054/>)). The grounds for, and circumstances of those actions, while offering rich material for constitutional, international and comparative law analysis, fall outside the scope of this paper. It should be noted, though, that in 2017 the Minister of Justice and Correctional Services of South Africa introduced to the National Assembly the International Crimes Bill, B 37-2017, which, if enacted into law, will make effective the withdrawal of that State from the Rome Statute.

<sup>5</sup> “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court”, Press Release L/2889, 20 July 1998 (<http://www.legal-tools.org/doc/458bd1/>).

<sup>6</sup> United Nations Treaty Collection, “Status of Treaties, Chapter XVIII Penal Matters, 10. Rome Statute of the International Criminal Court” (available on its web site).

<sup>7</sup> Rasporyazheniye Prezidenta Rossiyskoy Federatsii No. 394-rp: “O podpisanii Rimskogo Statuta Mezhdunarodnogo Ugolovnogo Suda” (Executive Order of the President of the Russian Federation No. 394-rp: “On the Signing of the Rome Statute of the International Criminal Court”), 8 September 2000, in *Sobraniye Zakonodatel'stva Rossiyskoy Federatsii* (Collection of Legislation of the Russian Federation, ‘SZ RF’), 11 September 2000, No. 37, Item 3710 (<http://www.legal-tools.org/doc/jo14ua/>). Executive Order (*Rasporyazheniye*) is a second-tier administrative act issued within the President’s authority, with Decree (*Ukaz*) above, and Instruction of the President (*Porucheniye Prezidenta*) below it.

the Rome Statute, although this time it instructed the Ministry of Foreign Affairs to notify the depositary of Russia's intention not to become a party to the Statute.<sup>8</sup> For whatever reason, unlike the Executive Order to sign the Statute, this one was initiated by the Ministry of Justice, in co-ordination with the Foreign Ministry and other unspecified departments of the executive branch, as well as with the Supreme Court, the Prosecutor General's Office, and the Investigative Committee.

This chapter will offer the author's perception of the evolution of the official Russian attitude towards the Rome Statute and the Court it had established, based on available government acts and statements, and relevant, though few, judicial sources. It will demonstrate that, official 'disengagement' from the ICC notwithstanding, there is a continued interest in the Russian academic community in international criminal law in general, and matters related to the ICC in particular.

### 23.2. Expectations of Engagement

Following Russia's vote for the adoption of the Rome Statute and the signing of the treaty, in early 2003 the President instructed the Ministry of Justice to set up an inter-agency working group tasked with drafting a law on the ratification of the Rome Statute.<sup>9</sup> The working group went further than drafting a law that would merely establish Russia's consent to be bound by the Statute. It also drafted multiple amendments to the Criminal Code and

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<sup>8</sup> Rasporyazheniye Prezidenta Rossiyskoy Federatsii No.361-rp: "O namerenii Rossiyskoy Federatsii ne stat' uchastnikov Rimskogo Statuta Vezhdunarodnogo Ugolovnogogo Suda" (Executive Order of the President of the Russian Federation No. 361-rp: "On the Intention of the Russian Federation not to become a Party to the Rome Statute of the International Criminal Court"), SZ RF, 21 November 2016, No. 47, Item 6630 (<http://www.legal-tools.org/doc/02c22f-1/>).

<sup>9</sup> A respective Instruction of the President (*Porucheniye Prezidenta*), to the Ministry of Justice, was not available to this author, however experts privy to activities of the inter-agency group cite its designation as Instruction No. Pr-48 of 10 January 2003, and refer to the composition of the inter-agency group as comprising representatives of the Main Legal Directorate of the Administration of the President, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Internal Affairs, Federal Security Service, Prosecutor General's Office, Institute of Legislation and Comparative Law (an adjunct of the Government), Institute of State and Law of the Russian Academy of Sciences, *et al.*: Elena Trikoz, "Rimskiy Statut Mezhdunarodnogo Ugolovnogogo Suda v Rossiyskoy Federatsii: Ramochnaya Model Implementatsii" (The Rome Statute of International Criminal Court: A Framework Model of Implementation), in Gleb Bogush and Elena Trikoz (eds.), *Mezhdunarodniy Ugolovniy Sud: Problemy, Discussii, Poisk Resheniy* (International Criminal Court: Problems, Discussions, Search for Solutions), Institute of Law and Public Policy, Moscow, 2008, p. 148.

the Criminal Procedural Code that would bring national legislation in harmony with the Statute. In particular, the working group was of the view that the whole division of the Criminal Code addressing crimes against peace and security of mankind needed to be thoroughly reviewed and amended in order to harmonize it with respective definitions and elements of crimes as envisaged in the Rome Statute. The group suggested to develop and to expand existing provisions of the Criminal Code into a separate chapter on war crimes. Another proposal dealt with amendments of chapter on “Crimes against Justice (the Judiciary)” to include crimes against the ICC, as well as offenses committed by ICC officials.<sup>10</sup>

The inter-agency working group submitted legislative drafts to the President’s Administration in late 2005, thus completing its mandate.<sup>11</sup> However, the product was deemed as requiring revision and further work and had been put aside indefinitely.<sup>12</sup>

As to the government’s declarations, to the best of this author’s knowledge, the last official comment coming from the Foreign Ministry, that positively discussed the feasibility of Russia becoming a party to the Rome Statute, goes back to July 2009. At a press briefing, the Spokesperson of the Ministry read out prepared remarks and indicated that:

in the long term Russia is interested in becoming a full party to the Rome Statute. What needs to be determined are the optimum terms and timing of our accession to that international treaty. As per instructions from the President of Russia, proposals on harmonizing Russian legislation with provisions of

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<sup>10</sup> Elena Trikoz, “*Implementatsiya Obyazatel'stv, Vytekayushchikh iz Rimskogo Statuta: Ramochnaya Model Dlya Rossiyskoy Federatsii*” (Implementation of Obligations under the Rome Statute: A Framework Model for the Russian Federation), in Gleb Bogush and Elena Trikoz (eds.), *Mezhdunarodnoye Ugolovnoye Pravosudiye - Sovremenniy Problemy* (International Criminal Justice - Current Problems), Institute of Law and Public Policy, Moscow, 2009, pp. 592–596.

<sup>11</sup> The draft is reproduced as annex to Bogush and Trikoz, 2008, pp. 717–727, see above note 9. Subsequently, a team of legal academics picked up from where the working group left the draft, and developed it even further, though recognizing that “it has become another futile attempt to modify the Russian criminal legislation”: Gleb Bogush, Gennady Esakov and Vera Rusinova, *Mezhdunarodniye Prestupleniya. Model' Implementatsii v Rossiyskoye Ugolovnoye Zakonodatel'stvo* (International Crimes. A Model of Implementation into the Russian Criminal Legislation), Institute of Law and Public Policy, Moscow, 2017. The book includes an upgraded draft and detailed, well-documented commentary thereto. For further reading see: Gennady Esakov, “International Criminal Law in Russia: Missed Crimes Waiting for a Revival”, in *Journal of International Criminal Justice*, 2017, no. 15, pp. 371–392.

<sup>12</sup> Trikoz, 2008, p. 149, see above note 9.

the Statute are being reviewed. It is already apparent that we would need to introduce certain amendments to our national legislation to prevent its coming into conflict with requirements of the Rome Statute.

The Foreign Ministry Spokesperson implicitly referred to the inter-agency working group, which was to draft “balanced and compound decisions that would ensure subsequent efficient participation of our country in the system of international criminal justice”. However, there was an apparent caveat: the Foreign Ministry official made it clear that a final decision had yet to be taken based on ascertaining that the ICC had proven itself as a “genuinely universal judicial mechanism, free from political bias and impartiality”.<sup>13</sup>

Statements made by Russian delegates at the Review Conference in Kampala in 2010 were generally positive towards the Rome Statute and the ICC, but they did not specifically address prospects of ratification. Metaphorically comparing the ICC to “a kind of a sword of Damocles for those who admit a possibility of achieving political goals by committing mass murders, extermination and violating international law”, the Head of the Russian Delegation went on to state that:

already today at the initial stage of the ICC existence we can affirm that the Court has fulfilled itself and found its own place in the world. In the course of the Rome Conference Russia voted for the Statute and further signed it. Our country has not ratified the Statute. Currently Russia, being a non-Party to the Statute, fruitfully cooperates with the ICC.<sup>14</sup>

Not being part of, or privy to the diplomatic process that culminated in the adoption of the Rome Statute, or other events, whether at the Assembly of States Parties or the Review Conference, this author, nonetheless, has fair reasons to believe that diplomats who led Russian delegations at Rome and Kampala conferences negotiated in good faith. However, it

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<sup>13</sup> Press Briefing by the Official Representative of the MFA of Russia A.A. Nesterenko on 21 July 2009 (translated by the author) (<http://www.legal-tools.org/doc/7ww5yc/>).

<sup>14</sup> Statement by H.E. Kirill G. Gevorgyan, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, Head of the Delegation of the Russian Federation to the Review Conference of the Rome Statute of the ICC, 1 June 2010 (<http://www.legal-tools.org/doc/bxrkr3/>). See also “Statement by the Russian Federation”, in ICC ASP, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010, Official Records, 2010, Annex IX, p. 126 (<http://www.legal-tools.org/doc/146df9-1/>).

seems in retrospect that chances of ratification by the time of the Review Conference have slimmed down, as compared to the period immediately following the Rome Conference. It would be fair to describe the Russian position as evolving from positive to uncertain engagement, and then onwards from uncertain to positive disengagement.

### **23.3. From Expectations to Foreboding**

Initial signs of uncertainty may be related to the issuance, by the ICC Prosecutor, of the first arrest warrant for the then President of Sudan Omar Hassan Ahmad Al-Bashir.<sup>15</sup> On 5 March 2009, the very next day after the issuance of that arrest warrant, the Foreign Ministry Spokesperson released a statement indicating that Russia shared concerns raised by African and other States over the immunity of the Head of State in office, above all of a State, which was not a party to the Rome Statute. The other issue was striking the right balance between the needs of justice and those of peaceful settlement.<sup>16</sup>

Russia voted for the referral of the situation in Libya to the ICC Prosecutor,<sup>17</sup> only to subsequently observe that the Prosecutor focused on the alleged abuses by the Gaddafi regime, rather than violence against civilians attributable to other parties.<sup>18</sup>

Likewise, Russia co-operated with the Office of the Prosecutor ('OTP') during the preliminary examination into the situation in and around South Ossetia.<sup>19</sup> However, it expressed growing apprehension of the course of that examination which, in Russia's perception, was focusing

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<sup>15</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Pre-Trial Chamber I, Decision, Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09-1 (<http://www.legal-tools.org/doc/814cca>).

<sup>16</sup> Statement by Russian MFA Spokesman Andrei Nesterenko Regarding the Issuance by International Criminal Court of an Arrest Warrant against Sudanese President Omar al-Bashir, 5 March 2009 (<http://www.legal-tools.org/doc/n6zumk/>).

<sup>17</sup> United Nations Security Council Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011, adopted by unanimous vote (<http://www.legal-tools.org/doc/00a45e/>).

<sup>18</sup> Statement by the Permanent Representative of the Russian Federation to the United Nations at the Security Council Briefing by the ICC Prosecutor on the Report Pursuant to the UNSCR 1970 (2011), 11 November 2014 (<http://www.legal-tools.org/doc/yhnmvk/>).

<sup>19</sup> Remarks to that effect were made during the Briefing of the MFA Spokesperson on 21 July 2009, see above note 13.

on crimes allegedly committed by South Ossetian militias and Russian military, while being rather lenient towards the Georgian side.<sup>20</sup>

Finally, Russian official statements reflect repudiation of approaches of the OTP with respect to the preliminary examination into the situation in Ukraine, whether in matters of fact or, again, the balance between peaceful settlement and justice, concluding that the ICC was unable or unwilling to be part of the settlement.<sup>21</sup> It is remarkable that initial sharp reaction to the OTP approach to the situation in Ukraine appeared the next day after the promulgation of the Executive Order regarding Russia's intention not to become party to the Rome Statute and three days after the release of the 2016 Report on Preliminary Examination Activities where the Prosecutor discussed the situation in Ukraine.<sup>22</sup> However, it was not cited as a reason for Russia's ultimate decision regarding the Rome Statute, though it would be fair to say that avenues chosen by the ICC in the examination of situations in Georgia and Ukraine put Russia into a positive disengagement mode.

#### **23.4. Formal Disengagement**

There has not been any practical legislative action, whether a submission of the treaty for consideration to the State Duma (a legislative chamber of the Federal Assembly) or, as is standard practice in ratification proceedings, appointment of the President's representative at ratification hearings. As to other domestic processes, this author is aware that in early 1999, even prior to Russia's signing of the Rome Statute, the State Duma had been contemplating parliamentary hearings on the practicality and practicability of participation in the Rome Statute. One of the issues that legislators pondered was the compatibility of the Statute with the Russian Constitution. Whether those hearings ever took place is beyond this author's knowledge. However, the Russian Association of International Law initiated an expert round table at the State Duma which was held in December 2001. The two lead-in speakers were Ambassador Kirill Gevorgyan, Deputy Head of the Russian

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<sup>20</sup> Briefing by Foreign Ministry Spokesperson Maria Zakharova, on the beginning of the ICC investigation of events in South Ossetia in August 2008, Moscow, January 29, 2016 (<http://www.legal-tools.org/doc/afeaf2/>).

<sup>21</sup> Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, November 17, 2016, para. 14 (<http://www.legal-tools.org/doc/aumknc/>).

<sup>22</sup> ICC-OTP, "Report on Preliminary Examination Activities 2016", 14 November 2016, pp. 33–42 (<http://www.legal-tools.org/doc/f30a53/>).

Delegation at the Rome Conference,<sup>23</sup> and this author. Ambassador Gevorgyan discussed the Conference and commented on the Rome Statute, while his co-reporter addressed possible issues of constitutionality and ways to harmonize the Rome Statute and the Russian Constitution.<sup>24</sup>

As to constitutional issues,<sup>25</sup> hypothetically those could include the surrender of own citizens to the ICC, complementarity, in so far as it makes the ICC part of the domestic judicial system, immunity of senior government officials, the right to be tried by jury, right to request pardon and respective presidential prerogative to grant pardon, exclusive authority of the State Duma to declare amnesty, right to appeal judicial decisions, and right to petition international human rights bodies. In the opinion of this author, those issues could be resolved by the Constitutional Court, if properly petitioned, without either interference with the Rome Statute, or tampering with constitutional rights, freedoms and authority. In fact, the most straightforward way would have been for the Constitutional Court to declare a lack of jurisdiction. The reason is that the Constitution and the governing statute<sup>26</sup> authorize the Constitutional Court to review international treaties that are not yet in force. It could be argued that the Rome Statute should not be reviewed due to it being in force prior to it being challenged. Conversely, the Constitutional Court could focus on the Rome Statute not being in force with respect to the Russian Federation, thus meeting the test of admissibility.<sup>27</sup>

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<sup>23</sup> Formerly Director of Legal Department of the Russian Ministry of Foreign Affairs, who also led the Russian Delegation at the Kampala Review Conference (see note 14 above), judge at the ICJ since 2015.

<sup>24</sup> This author's remarks were later developed into a published article: Bakhtiyar Tuzmukhamedov, "Rimskiy Statut Mezhdunarodnogo Ugolovnogo Suda: Vozmozhnye Voprosy Konstitutsionnosti" (The Rome Statute of the International Criminal Court: Possible Issues of Constitutionality), in *Moscow Journal of International Law*, 2002, vol. 46, no. 2, pp. 165–173.

<sup>25</sup> The constitutionality of the Rome Statute was further discussed in multiple publications by this author, including in Bakhtiyar Tuzmukhamedov, "The ICC and Russian Constitutional Problems", in *Journal of International Criminal Justice*, 2005, no. 3, pp. 621–626, commissioned by the late Professor Antonio Cassese.

<sup>26</sup> Federal'niy Constitutsionniy Zakon: "O Konstitutsionnom Sude Rossiyskoy Federatsii" (Federal Constitutional Law: "On the Constitutional Court of the Russian Federation"), 21 July 1994, No. 1-FKZ (<http://www.legal-tools.org/doc/f142c1/>).

<sup>27</sup> For further discussion of the Constitutional Court's jurisdiction with focus on its interaction with international sources, see Bakhtiyar Tuzmukhamedov, "The Russian Constitutional Court in international legal dialogues", in Martin Scheinin, Helle Krunke and Marina Aksenova (eds.) *Judges as Guardians of Constitutionalism and Human Rights*, Edward Elgar Publishing, 2016, pp. 224–250.

But again, currently, this is a mere hypothetical discussion.

Incidentally, when Judge Philippe Kirsch, the then ICC President, visited Moscow in February 2004 to meet Russian officials and address a conference on the Rome Statute, this author's name had been struck off the list of speakers at the eleventh hour. Such was the mood at the time that some organizers, as this author had been discreetly advised, were concerned that President Kirsch would be upset by remarks about constitutionality that might put into doubt the prospects of ratification of the Statute. That notwithstanding, a private meeting had been set up for President Kirsch and this author, resulting in an enlightening and broad-ranging discussion.<sup>28</sup>

Ultimately, the most apparent and single subsequent public action was the above-referenced Presidential Executive Order promulgated on 16 November 2016 by which the Ministry of Foreign Affairs was instructed to notify the United Nations Secretary General of Russia's intention not to become a party to the Rome Statute.<sup>29</sup> It was followed by the Statement of the Ministry of Foreign Affairs which expounded the Executive Order and gave reasons for Russia's actions, including the ICC failure "to become a truly independent, authoritative international tribunal" and, more specifically, the Court's "attitude vis-à-vis the situation [in South Ossetia] of August 2008".<sup>30</sup>

While citing the Vienna Convention on the Law of Treaties ('Vienna Convention') as legal authority for not becoming party to a treaty which Russia has already signed, the Statement opined that Russia acted "to withdraw its signature from the Statute".<sup>31</sup> That part of the Statement, at least in the opinion of this author, is not without a flaw.<sup>32</sup> It should be recalled that, under Article 18 of the Vienna Convention:

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<sup>28</sup> The episode is recapped with kind permission of Judge Philippe Kirsch.

<sup>29</sup> See above note 8.

<sup>30</sup> Statement by the Russian Foreign Ministry, 16 November 2016 (<http://www.legal-tools.org/doc/e4qrh0/>).

<sup>31</sup> *Ibid.*

<sup>32</sup> Regrettably, a published review of the Nuremberg Forum attributed to this author a "condemnation" of Russia's decision not to become a party to the Rome Statute, whereas in reality it was the concept of 'unsigned' a treaty that had been subjected to critical appraisal in opening remarks, and then during a constructive exchange with the former UN Under-Secretary-General Hans Corell that followed panel presentations (see Alexander Heinze, "The 20th Anniversary of the Rome Statute. A Review Essay about the Nuremberg Forum 2018", in *Criminal Law Forum*, 2019, vol. 30, p. 129, where he writes that this author "con-

a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.<sup>33</sup>

While the ‘clarity’ requirement has certainly been met, the concept of ‘withdrawal of signature’ or ‘unsinging’ a treaty seems to be deficient. In the opinion of this author, a declaration of intention not to become a party to the treaty envisaged by Article 18(a) terminates the interim period which begins at the moment a State indicates its intention to become a party, that indication being expressed by the signing of an authentic copy of a treaty, and lasts till either the instrument of ratification, acceptance or approval, or declaration of intention not to become a party, is placed in the custody of a depositary. Moreover, it is doubtful, to say the least, that the lead-in phrase of Article 18 gives a State, which has deposited a declaration of intention not to become a party to the treaty a free hand to “defeat the object and purpose of a treaty”. As to the signature, it belongs to the treaty and remains, or for that matter hibernates, in the domain of the depositary. Whether and how that hibernation can ever be interrupted is anyone’s guess.

### **23.5. Concluding Observation: Shades of Disengagement**

No political or legislative action by Russia regarding the Rome Statute or the ICC should realistically be expected any time soon, if at all. However, occasional references to events at and around the ICC are likely, such as were remarks by the Foreign Ministry Spokesperson critiquing the attack against the ICC launched by the then United States National Security Adviser John Bolton in his speech at the Federalist Society in Washington, D.C. on 10 September 2018.<sup>34</sup> Russian representatives will not sit idle during ICC-related briefings and debates at the United Nations (‘UN’). There

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demned the ‘unsinging’ of the Rome Statute by Russia in November 2016”). On the other hand, since the same term – ‘condemn’ and its derivative ‘condemnation’ – was used by Heinze in his descriptions of several presentations, it might be merely his innocent *mot favori*.

<sup>33</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 27 January 1980 (<http://www.legal-tools.org/doc/6bfcd4/>).

<sup>34</sup> Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, September 13, 2018, para. 12 “Statements by US President’s National Security Adviser John Bolton with regard to ICC” (<http://www.legal-tools.org/doc/9iq99f/>).

will be continued official reaction to the ICC activities with respect to Georgia and Ukraine situations.

Despite the definitive and seemingly final executive decision of Russia with respect to the Rome Statute, the legal community in Russia, both academics and practitioners, is well aware of the Statute and the ICC, and that includes judges at the senior level. Such awareness was demonstrated by at least three judges of the Constitutional Court who turned to the ICC and the Statute to seek arguments in support of their separate opinions.<sup>35</sup>

The Russian legal community is open to active interaction with international criminal judges and prominent academics at various fora in Russia. Apart from a visit by Judge Kirsch in the early days of the ICC, another former President of the ICC, Judge Sang-Hyun Song, participated in several events, including the Martens Readings on Contemporary Issues of International Humanitarian Law in 2017, as did over a dozen judges of the UN ICTY and ICTR in 2015, and before then, in 2011, the late Hans-Peter Kaul who at the time had been the Vice-President of the ICC. At various times, the Martens Readings benefitted from insights of Benjamin Ferencz, the Chief Prosecutor at the *Einsatzgruppen* Trial in Nuremberg, and Professor William Schabas. The Martens Readings, a biennial conference with a venue in St. Petersburg, is a joint venture of the Russian Association of International Law, the Regional Delegation of the International Committee of the Red Cross, and Department of International Law of the St. Petersburg State University.<sup>36</sup>

Judge Anita Ušacka, formerly of the ICC, and the Special Tribunal for Lebanon ('STL') President Ivana Hrdličková have become regular participants in professional events organized by various institutions in Russia.<sup>37</sup>

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<sup>35</sup> Constitutional Court of the Russian Federation, Judgment No. 16-P, 2 July 2013, Separate Opinion of Judge Sergey Kazantsev (<http://www.legal-tools.org/doc/cavp5p/>); Ruling No. 1248-O, 28 June 2012, Separate Opinion of Judge Nikolay Bondar (<http://www.legal-tools.org/doc/17w3vg/>); Ruling No. 174-O-O, 17 January 2012, Separate Opinion of Judge Sergey Knyazev (<http://www.legal-tools.org/doc/ldq1z8/>).

<sup>36</sup> The program and video feed from the most recent Martens Readings are available on its web site.

<sup>37</sup> Judge Ušacka, as well as then President of the UN ICTR Judge Vagn Joensen, participated in the Panel on "International and National Criminal Justice: Compatibility and Interaction" which was part of the Fifth St. Petersburg International Legal Forum ('SPBLF') in 2015 (the program is available on the SPBLF's web site).

In November 2018, this author had the privilege of moderating a panel on evidence in international criminal tribunals which included Judge Hrdličková, ICC Judge Kimberly Prost, Lord Iain Bonomy, a retired Judge of the UN International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the Supreme Courts of Scotland, and Peter Kremer, Queen's Counsel, a retired senior trial attorney at the ICTY. That panel was part of a one-day seminar put together by the Moscow-based International and Comparative Law Research Center.<sup>38</sup> Between 5 and 16 August 2019, the Center hosted the Second Summer School on Public International Law with the STL President Hrdličková teaching a course on individual criminal responsibility in international law.<sup>39</sup>

International criminal law and justice are part of curricula at the Russian State University of Justice which is an educational adjunct of the Supreme Court of Russia. It trains would-be judges and provides upgrade instruction to judges-in-office. Its Chair of International Law offers courses in international criminal law and international criminal justice.<sup>40</sup>

Similar courses are taught at law schools of internationally reputable Russian universities. To offer but a few brief examples, the Chair of International Law at the Law Faculty of the Moscow State University offers a course in international judicial proceedings and, optionally, in international courts and tribunals;<sup>41</sup> several instructors at the Chair of International Law at the Law Faculty of the St. Petersburg State University teach courses in international criminal law and in international judicial institutions.<sup>42</sup> Courses offered by the Chair of Criminal Law, Criminal Procedure and Criminology at the International Law Faculty of the Moscow State Institute (University) of International Relations are more focused and include: theory of international criminal law; international criminal proceedings and

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<sup>38</sup> International and Comparative Law Research Center, "Scientific Workshop: Evidence before International Courts and Tribunals: Distinct Fora, Similar Approaches?", 9 November 2018 (<http://www.legal-tools.org/doc/ewrlgf/>).

<sup>39</sup> International and Comparative Law Research Center, "The Summer School on Public International Law, Summer School 2019" (available on its web site).

<sup>40</sup> The description of the Chair of International Law of the University of Justice with links to courses offered and resumes of instructors can be found on its web site.

<sup>41</sup> The description of the Chair of International Law of the Moscow State University with list of offered courses and links to resumes of instructors can be found on its web site (available only in Russian).

<sup>42</sup> The description of the Chair of International Law of the St. Petersburg State University with links to courses offered by instructors can be found on its web (available only in Russian).

human rights; international law enforcement institutions (with a module on ICC and other international criminal courts and tribunals); international standards of criminal proceedings.<sup>43</sup>

The Russian-language ICC Moot Court Competition, which started in 2012 as a joint endeavour of several enthusiastic younger faculty members from the Higher School of Economics and Moscow State University, has developed into a regular and highly professional event, with support from the ICC, which brings together law students from Russia and several other former Soviet republics.<sup>44</sup> That annual competition culminates in finals held on the premises of the ICC in The Hague.

Finally, teams from Russia are not alien to the Nuremberg Moot Court. Students from Kazan Federal University in Central Russia participated in two instalments of the Nuremberg Moot Court, and in 2017 reached the semi-finals.

On balance, it should be safe to assume that, official disengagement notwithstanding, the Russian expert and academic community, including prospective jurists, will continue to engage the ICC, its jurisprudence, as well as personalities, associated with that and other international criminal courts and tribunals and research thereof.

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<sup>43</sup> Links to detailed description of relevant courses offered by the Chair (Department) of Criminal Law, Criminal Procedure and Criminology of the Moscow State Institute of International Relations can be found on its web site (available only in Russian; a general description of the Chair is also available in English).

<sup>44</sup> The online notice board of the Russian-language ICC Moot Court Competitions is available on the website of the Faculty of Law at HSE University.



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## Speech by Foreign Minister Heiko Maas at the Nuremberg Forum 2018 Marking the Twentieth Anniversary of the Rome Statute

Heiko Maas\*

On my way here today, I had an image in my mind that is probably familiar to almost all of us from our history books – a black-and-white photo from 1946 that shows this room, Courtroom 600 of the Nuremberg Palace of Justice.<sup>1</sup>

Over there, in the dock, sat the leading figures of the Nazi regime, their lawyers in front of them. Opposite them sat the judges and prosecutors of the Allies. The press, spectators and police were also in attendance. It was almost like a normal criminal trial.

And yet the photo of this scene is indelibly etched into our minds. The more I thought about it, the clearer it seemed to me that the remarkable, historic thing about it was precisely this sense of normality. It was here that men sat in court, men who were responsible for the most heinous crimes in history and had acted against all principles of human civilization.

And yet their judges were not out to get revenge, but granted the defendants a fair trial, thus confronting them with the very same principles of human civilization that they had so infamously violated.

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\* **Heiko Maas** is Federal Minister for Foreign Affairs of Germany, appointed on 14 March 2018. He studied law at the Universität des Saarlandes. He was elected twice as member of the Saarland Landtag (1994–1996 and 1999–2013). Mr. Maas held different positions in Saarland: State Secretary at the Ministry of Environment, Energy and Transport (1996–1998); Minister of Environment, Energy and Transport (1998–1999); Minister of Economy, Labor, Energy and Transport and Deputy Minister-President (2012–2013). Prior to his current function, he served as Federal Minister of Justice and Consumer Protection (2013–2018).

<sup>1</sup> This text is based on the keynote speech held at the Nuremberg Forum 2018 in Nuremberg, Germany, 19 October 2018. The original speech is available on the web site of the German Federal Foreign Office, “Speech by Foreign Minister Heiko Maas at the Nuremberg Forum 2018 marking the 20th anniversary of the Rome Statute”, 19 October 2018.

This triumph of civilization over inhumanity is what characterizes the Nuremberg Trials to this day and makes this place, Courtroom 600, so significant. It was here that the foundations were laid not only for the efforts to come to terms with the National Socialist era in Germany. Nuremberg of all places, the city of the National Socialists' party congresses, became the birthplace of a new understanding of law and justice: no one is above the law – not even the most powerful!

Robert H. Jackson, prosecutor at the Nuremberg Trials, put it thus in his plea:

This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors. This trial is part of the great effort to make the peace more secure.

To put it another way, justice is a vital prerequisite for lasting peace.

For me, this realization contains one of the most important, if not the most important, lesson from the past century. This lesson finds its expression in the Rome Statute, whose twentieth anniversary we are celebrating today. It is embodied by the International Criminal Court, which, more so than almost any other international organization, stands for the primacy of the rule of law over injustice. When some people now declare this institution, of all institutions, to be dead in the water, then we must not allow that to go unchallenged. On the contrary, we should take it as an incentive to continue doing all we can to promote acceptance of the International Criminal Court and its jurisprudence around the globe.

Universality remains our goal – in the interests of the victims and with the support of all those who, like us, place their trust in the civilizing power of the law.

The *zeitgeist* of our age appears to militate against this. We are all aware of the difficulties that the Court has to contend with and which you, Ms. Bensouda, will doubtless address in a moment.<sup>2</sup> These difficulties are not an isolated problem facing international criminal law or the International Criminal Court, but rather the symptoms of what is in part a conscious renunciation of the rules-based order, of a worldwide crisis of multilateralism.

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<sup>2</sup> See Fatou Bensouda, "Speech by Prosecutor Fatou Bensouda at the Nuremberg Forum 2018 marking the Twentieth anniversary of the Rome Statute", Chapter 25 of this book.

It goes without saying that this crisis does not stop at the International Criminal Court, which, after all, stands for compliance with the elementary rules of humanity.

No matter how much this development worries us, I am confident that we will be equal to it. This confidence is based on three things.

Firstly, despite all opposition, we have succeeded in furthering international criminal law step by step. I admit that it took a long time until the International Criminal Court was granted jurisdiction over the crime of aggression this summer, over 70 years after Nuremberg. But it was granted this jurisdiction. The four elements that form the heart of international criminal law have thus been laid down. However, what is more important is that we have come somewhat closer to achieving the dream of men like Jackson – the dream of leaving war as a means of conducting politics behind us, once and for all.

Secondly, I feel optimistic because I see that determination is growing among those who defend the International Criminal Court against undue criticism and political pressure and stand up against the erosion of its authority.

In recent weeks, I have held talks with many of my counterparts on what we can do to prevent the disintegration of the international order. This gave rise to the idea of an alliance of multilateralists – an alliance of countries that pool their strengths in order to underpin and continue to develop the rules-based order. There is great interest in this idea, particularly as regards international criminal jurisdiction.

Just a few weeks ago, six North and South American countries joined forces and sent a referral regarding the preliminary examination of the situation in Venezuela launched by you, Ms. Bensouda. We expressly welcome this, also because this example shows that people believe in the International Criminal Court, and not only here in Nuremberg, but also in many parts of the world.

My third and last point concerns the crucial issue of accountability. We also feel pain and rage when the worst war crimes and crimes against humanity go unpunished. I'm thinking of the terrible poison gas attacks in Syria, for example. However, looking beyond this conflict, which receives extensive media coverage, terrible crimes are committed time and again in many other places. But we are not simply standing by and letting this happen. Along with our partners, we have drawn up new ways to secure evi-

dence. In Syria, for instance, we are ensuring that evidence is not irretrievably lost. Our message to perpetrators and victims is that justice will prevail. We will also be guided by this maxim as a non-permanent member of the United Nations Security Council. We want to ensure that perpetrators are consistently held to account. In view of the fronts in the Security Council, this will be no easy task. However, the fight for justice requires courage and stamina, particularly from Germany, as this fight always means striving for human dignity.

Ladies and gentlemen, this battle could not be won without the creativity and courage of civil society, without people who often take great risks in the struggle for human rights, without partners like all of you here in this room. I am very grateful indeed to you for this partnership and for your support and stamina.

In particular, I would like to thank our host, the International Nuremberg Principles Academy, whose goal is expressed in its name – namely, to implement the principles that guided Robert H. Jackson and the authors of the Rome Statute in the city where the history of international criminal law began.

Let us continue to further this history together, without ignoring the great challenges that the crisis of multilateralism poses for us, but instead with confidence and faith that the rule of law will ultimately prevail over injustice. That is the legacy of Nuremberg.

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## Speech by Prosecutor Fatou Bensouda at the Nuremberg Forum 2018 Marking the Twentieth Anniversary of the Rome Statute

Fatou Bensouda\*

On the occasion of the Nuremberg Forum 2018 marking the twentieth anniversary of the adoption of the Rome Statute, I am delighted and honoured to speak to you.<sup>1</sup> Allow me at the outset to thank His Excellency, Minister Maas, for his principled remarks in support of the International Criminal Court ('ICC' or the 'Court') and international criminal justice, and similarly, our gracious hosts, the International Nuremberg Principles Academy, in particular my friend and former colleague, Mr. Klaus Rackwitz, for inviting me to this impressive gathering.

### 25.1. The Rome Statute Has Set the Course and the ICC Is Moving Ahead

Physics teaches us that the forward thrust of an object and the faster it moves through time and space, the greater the resistance it encounters. Whereas the adoption of the Rome Statute, with the establishment of the ICC, was in and of itself a new tidal force that changed the *status quo* of the world for the better, two decades after the Rome Conference, the system of international criminal justice created by the Statute continues to make significant waves towards building a culture of accountability for

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\* **Fatou Bensouda** is the Prosecutor of the International Criminal Court, having been elected in 2011 by consensus by the Assembly of States Parties. She is the first woman to assume the position. Under her leadership, she has greatly reinforced the capacity of her Office through a number of strategic and managerial initiatives and expanded her Office's activities to cover 13 investigations and nine active preliminary examinations in conflicts around the world. She is the recipient of numerous awards and recognitions and listed by *Time* magazine as one of the 100 most influential people in the world, and by *Jeune Afrique* as one of 50 African women who advance the African continent. In 2018, she joined the roster of International Gender Champions.

<sup>1</sup> This text is an updated version of the keynote speech held at the Nuremberg Forum 2018 in Nuremberg, Germany, 19 October 2018.

atrocities crimes. The Rome Statute has set the course and the ICC is moving ahead, with dedication and determination. The support and encouragement of its many proponents, and the plight of victims of atrocities crimes, are the driving forces, which propel it forward. Whilst not bereft of challenges, we must acknowledge that its work in practice is increasingly shaping norms, casting a deterrent shadow across the globe.

The Nuremberg Forum 2018 offers yet another opportunity to not only pay homage to the Rome Statute but reflect on our responsibilities, methods and means at our disposal to ensure the enduring value of this important international legal instrument to humanity.

On my part, it is my pleasure to provide through this address a reflection on the ICC's practice since the adoption of the Rome Statute, with an emphasis on the work and strategies of my Office – the Office of the Prosecutor of the International Criminal Court – and while doing so, share with you a number of important challenges we face when conducting our core activities. I could not think of a more fitting venue for this occasion – Courtroom 600 of the Nuremberg Palace of Justice –, so poignantly reminding us why we are here today.

## **25.2. The International Criminal Justice Project Is a Child of War**

Indeed, reflecting on the events that led to the trials that took place in this very room, some 70 years ago, it was perhaps inevitable that the international criminal justice project, with the ICC as its nucleus, should be a child of war. It was conceived in the wake of centuries of human suffering with lawless violence and impunity wreaking havoc on the lives of countless victims.

As we know, the critical mass pushing the balance towards accountability for atrocities crimes began to gain real momentum after the Second World War, on the heels of the experience of the Military Tribunals of Nuremberg and Tokyo and the International Nuremberg Principles. It was thanks to the efforts of countless dedicated individuals, some present here today, from Government, civil society or other proponents of accountability for atrocities crimes, from all continents and different legal systems and cultures, that the ICC was made a reality at the Rome Conference, in 1998.

## **25.3. Stocktaking – Challenges and Setbacks**

Since its operational start in 2003, the ICC Office of the Prosecutor has opened investigations in 13 situations, from the Democratic Republic of the

Congo in 2004, to Bangladesh/Myanmar and Afghanistan in 2019 and 2020, respectively. The Government of Afghanistan has since requested that the Office defers to investigations it states it is conducting. My Office is currently carefully analysing the information and considering whether the information provided has an impact on our intended investigations. In view of this ongoing assessment, in addition to practical restrictions due to the world health crisis, we are not currently taking active investigative steps, but are meeting our obligations under the Statute.

Across our investigations and related prosecution of cases, we have achieved successes but also faced setbacks. The past 15 years of operations have been informed by a multitude of factors. These have included the establishment of the Office through its prosecutorial strategies and investigative and prosecutorial work, which has been tested and guided by the Judges in the courtroom, thus giving concrete shape to the Rome Statute provisions in practice. Other defining factors have been the large scale criminality followed by mass victimization, coupled with insecurity on the ground, as well as the changing political climate in situation countries but also in other countries and international or regional bodies supporting the Court. Our resource capacity has also been far from ideal, and we have seen varying degrees of operational assistance if not flat-out denial of co-operation by some States.

Overall, the demands for the Court's intervention and expectations for what it ought to deliver continue to increase. The latter becomes evident by, merely, looking at the hundreds of communications my Office receives annually under Article 15 of the Statute, from States, international organizations, NGOs, or others, bringing alleged criminality to our attention for assessment.

#### **25.4. Stocktaking – The Office of the Prosecutor as the Engine of the ICC**

Despite these challenges and realities, in the past 15 years, the Office – as the engine of the Court – has in many ways set the wheels of the Rome Statute, the Court it created, and the international criminal justice system as a whole, in motion. There are also no signs of slowing down those wheels in the future, as one can appreciate by looking at the Office's ongoing preliminary examinations in situations spread across the world from Nigeria to Ukraine, Iraq, the Philippines and Venezuela. Important progress has been made in many of these situations.

In relation to the Palestine situation, my Office's preliminary examination concluded in 2019 with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met. It will be recalled that in December 2019, I requested from Pre-Trial Chamber I of the Court, a jurisdictional ruling on the scope of the territorial jurisdiction of the ICC in Palestine pursuant to Article 19(3) of the Rome Statute. A consultative process before the Pre-Trial Chamber unfolded, with various submissions by States Parties, as well as *amici curiae* and other submissions, including from regional organizations. This is something that we welcome and proposed to the Chamber in our initial request. A decision is currently pending before the Pre-Trial Chamber.

There are still too many situations in the world today where grave crimes appear to be committed outside the Court's jurisdictional reach: Yemen, Syria, or South Sudan are just a few examples of conflicts that remind us of the importance of accountability for atrocity crimes and universality to ensure that all citizens may benefit from the protection of the law offered by the Rome Statute.

When I assumed office as Prosecutor in 2012, it was, in my assessment, a critical moment to engage in an honest and open look at the Office's track record, and to draw lessons from the early years of our operations. It is also my firm belief that notwithstanding external challenges, my Office and the ICC, more broadly, bear the first burden to build and strengthen the reputation and credibility of the ICC and the international criminal justice project through performance and the effective exercise of the important mandate we shoulder under the Rome Statute. That year and those following, we introduced significant changes to our prosecutorial strategy, presented through the first Strategic Plan of my term,<sup>2</sup> with specific investigative and prosecutorial standards and policies as factors deemed critical for increased success. We built on the strength of the changes in this first strategic plan of my term with our subsequent strategic plans.<sup>3</sup> These changes were also designed to respond to the challenges of our operational environment. We also took a number of important concrete steps to ensure

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<sup>2</sup> ICC-OTP, "Strategic Plan 2012–2015", 11 October 2013 (<http://www.legal-tools.org/doc/954beb/>).

<sup>3</sup> ICC-OTP, "Strategic Plan 2016–2018", 6 July 2015 (<http://www.legal-tools.org/doc/7ae957/>); ICC-OTP, "Strategic Plan 2019–2021", 17 July 2019 (<http://www.legal-tools.org/doc/19d75r/>); ICC, "Report on the implementation of the OTP Strategic Plan 2016–2018", 23 August 2019 (<http://www.legal-tools.org/doc/5siv5j/>).

the Office abides by the highest standards of professionalism as an investigating and prosecuting office with a critical mandate under the Rome Statute. At the OTP, we have taken a vigorous approach, as a matter of policy and practice, to ensure that there are no deviations from the applicable rules governing conduct by members of the Office in all spheres of activities, and remedial action is taken where warranted in strict conformity with the Court's legal framework governing staff conduct. In addition to the Court's legal framework governing staff conduct, we have put in place a Code of Conduct for the Office (which also applies to the Prosecutor and the Deputy Prosecutor), and have instituted a Core Values project of the Office. Mandatory trainings for all members of the Office are organized for both the Code and the Core Values. All incoming staff undergo presentations on ethics and expected standards of conduct as part of the Court's on-boarding programme with the participation of specialized staff across the Court. Across the organs, when official complaints of unsatisfactory conduct are filed, they are duly processed as per the existing legal framework, and where warranted, disciplinary sanctions imposed. These are merely some highlights. Professional ethics is the cornerstone of legitimacy and we pay strict homage to this important principle in practice.

Coming back to our investigative methods, as a key shift in focus, we started performing in-depth, open-ended quality investigations while maintaining focus; at the same time working to be as trial-ready as possible from the earliest phases of proceedings, such as when seeking an arrest warrant and no later than the confirmation of charges proceedings. Also, where appropriate, we started implementing a building-upwards strategy, by first investigating and prosecuting a limited number of mid-level perpetrators in order to ultimately have reasonable prospects of conviction for the most responsible. Additionally, in our investigations, in order to ensure the adequate gathering of reliable evidence, we have been undertaking efforts to reduce the time gap between events on the ground and the Office's investigations, by creating or strengthening existing partnerships with first responders in order to preserve the 'golden hour' of evidence collection as much as practically possible.

Simultaneously, we have been creating gateways for crime reporting and we have been working with appropriate partners to preserve relevant information on the internet.<sup>4</sup> In all this, it has been essential to increase our

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<sup>4</sup> Such a platform has been devised for instance for the investigation in the situation in the Central African Republic II (available on the ICC's web site).

ability to collect different forms of evidence through continuous enhancement of our scientific and technology-related capabilities.

While doing so, we critically look at and continuously review our investigative and prosecutorial standards. Likewise, process improvement projects, performance indicators, lessons learned, and development of new capabilities help to further shape the quality and consistency of the Office's output. While it is difficult to predict outcomes in the courtroom, we treat each investigation and case with the utmost integrity, meticulousness and dedication they deserve. It is thanks to some of these strategic approaches, that we are slowly starting to see results in practice. Of course, I hasten to add that we still face significant challenges, even major disappointments at times, but the trend, I am convinced, is a positive one. We certainly aim to set the bar higher and prepare for any obstacle as we head towards new challenges, with ever intensifying activities, whether in number, complexity or geographical scope. While noting that in the past years the percentage of charges confirmed and the rate of convictions has already increased, ultimately it is not the quantity but the quality of investigations and prosecutions that we are constantly focusing on.

### **25.5. States Parties Must Voice Greater Support and Condemn Attacks on the Court**

I would like to stress here that as my Office undertakes its difficult but necessary work, it must be allowed a safe space to focus on its duties, free from unwarranted resistance and attempts at politicizing its legal work. Attacks on the Court to undermine its important work or in the service of Machiavellian schemes to shield the culpable must continue to be met with the determined and unequivocal voices of support from principled States Parties and civil society, who stand by international criminal justice without reserve or distinction.

While the notions and benefits of a multilateral rules-based order are increasingly devalued in certain quarters, we must be vigilant to ensure the achievements and progress of the past are not lost to these concerning trends. In this regard, I must say I was heartened by the very timely and vocal support from States Parties and the civil society during my most recent mission to the United Nations General Assembly, with positive refer-

ences to the ICC “as the centrepiece of the international criminal justice system” and a “fundamental part of a rules-based order”.<sup>5</sup>

Some 20 States stood up in partnership with the Court and announced their support for the ICC, during the General Debate, while other declarations were jointly signed by countless other States Parties, including by the host-State of this Forum, Germany, which I salute. Since then, there have been many other instances of State Party vocal support for the Court when under frontal assaults to undermine its works and interference with its prosecutorial and judicial independence. Such vocal support is indeed crucial in times such as these, but equally important is tangible co-operation, especially when faced with pressure from actors who would like to see the Court fail in delivering its critical mandate. This co-operation is key at the operational level, where my Office will continue its work, undeterred, and in conjunction with the myriad of other actors with whom we interact.

### **25.6. States Parties Must Actively Co-operate With the Court**

The Office, and the Court by extension, cannot effectively execute our mandate under the Rome Statute alone. Closing the impunity gap can only succeed through a network of partnerships, promoting high quality investigations and prosecutions at both the national and international levels in complementary fashion. Eventually, the effectiveness of any such efforts will also depend on external factors, including the resources the Court is provided to face increasing demands, and on the level of co-operation it receives for its core activities, in particular regarding the arrest and surrender of suspects. Investment in accountability for atrocity crimes and its deterrent dividends costs only a fraction of the vast expenditures and economic loss in times of war and conflict.

There is also a great need for proactive efforts to ensure the arrest and surrender of the individuals for whom the ICC Chambers have issued warrants. The continued presence and influence of the 15 suspects at large in the situations we investigate contributes to protracted tensions and violence. It is important for States Parties to be more aware of the inefficiency unimplemented arrest warrants present to the whole Rome Statute system, and take remedial responses by devising action, whether in the form of

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<sup>5</sup> ICC, “ICC Prosecutor, Fatou Bensouda, attends 73rd Session of the UN General Assembly to highlight & advance the work of her Office”, 4 October 2018, ICC-OTP-20181004-PR1413 (<http://www.legal-tools.org/doc/a6ed51/>).

tracking and intelligence gathering, operational assistance, such as the provision of transport for suspects, or providing the diplomatic and political support to effect arrests and surrender. The Office itself, in collaboration with the Court's Registry where appropriate, has been enhancing its efforts in this regard from tracking to co-ordination and co-operation to increase prospects for arrests. These efforts must be matched by States Parties. This could include the provision of extra resources for investigative and analytical purposes geared to effecting arrests.

In sum, the fact is that we rely by necessity and by the design of the Rome Statute system on the co-operation and assistance of States in a myriad of areas, from identifying the whereabouts of persons of interest to the protection of victims and witnesses. Tangible and swift co-operation would allow our investigations and cases to proceed more efficiently. We hope to count on this crucial support and are committed to continuing to do our part.

## **25.7. Conclusion**

I will conclude by observing that as we commemorate the twentieth anniversary of the Rome Statute in this historically significant courtroom in the life of international criminal justice, lest we forget that the creation of the ICC, and its embodiments of the principle of the rule of law for atrocity crimes, was not merely an accident of history but an absolute necessity, based on the costly human experience of centuries of suffering from unchecked atrocities.

As custodians of the Rome Statute and its values, States Parties must, first and foremost, champion the goals of the Rome Statute, including its implementation in practice. Principled support and decisions in relation to all areas affecting the Court's work are needed, respecting its value and long-term goals.

This is the only way to ensure that the seeds of international criminal justice that were planted in this very courtroom will bear fruit as we work together to advance a more rules-based global order where atrocities as merely politics by other means are no longer tolerated as an accepted norm. The cause of international criminal justice is an awakening in our collective consciousness and it is a reality; there must be no going back in this forward march of humanity. We all bear a responsibility in this regard.

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## The Twentieth Anniversary of the Rome Statute of the International Criminal Court

Bertram Schmitt\*

### 26.1. Introduction

Since this conference dealt with the twentieth anniversary of the Rome Statute of the International Criminal Court ('Rome Statute'), it seems apt to have the Rome Statute have its say at the beginning of these closing remarks.<sup>1</sup> The Preamble describes its rationale with these emblematic words: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished".<sup>2</sup>

Thus, crimes against humanity, war crimes, genocide and the crime of aggression,<sup>3</sup> as well as the victims of these crimes, must not be forgotten. The punishment of such crimes ought not to be left to history or the Last Judgment. They "deeply shock the conscience of humanity", as the Preamble also formulates. They, therefore, concern all peoples and not only the

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\* **Bertram Schmitt** is Presiding Judge of Trial Chambers V and IX at the ICC. In the course of his career, Judge Schmitt has directed the proceedings as presiding judge in a multitude of criminal trials at a Regional Court, dealing as a fact-finding instance with crimes such as homicide, sexual violence against women and children and all forms of organized crime. He has served on the bench of the Federal Court of Justice, Germany's Federal Court of Justice for civil and criminal matters, from 2005 until 2015. From 2009 until 2015 Judge Schmitt was also *ad hoc* judge at the European Court of Human Rights and has represented Germany on Eurojust's Joint Supervisory Body in The Hague. Judge Schmitt has an extensive academic record. Since 2000 he is an adjunct professor for criminal law, criminal procedure and criminology at the University of Würzburg. He is one of two authors of the standard German commentary on criminal procedure, which includes the annotation of the European Convention on Human Rights.

<sup>1</sup> This text is based on the closing remarks held at the Nuremberg Forum 2018 in Nuremberg, Germany, 20 October 2018. The speech is also available on the website of *Just Security*, "ICC Judge Schmitt Counsels Resilience to Preserve International Justice", 13 February 2019.

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, Preamble (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>3</sup> Alex Whiting, "Crime of Aggression Activated at the ICC: Does it Matter?", in *Just Security*, 19 December 2017 (available on its web site).

ones directly affected. It follows that national sovereignty never can be an argument for impunity for the perpetrators. If we bear this in mind, I think it is fair to say that the Rome Statute imposes quite an ambitious mandate on the Court, a mandate that raises a lot of hopes and expectations.

Have we been able to meet them? Or at least have we made progress in fulfilling this mandate? Where do we stand today, and what are the prospects for the future?

We have come a long way since 1998. When the Rome Statute entered into force on 1 July 2002, the International Criminal Court ('ICC' or 'Court') still existed only on paper. An advance team of five persons entered the empty offices in Maanweg 174 in The Hague and organized first the purchase of five telephones, a fax machine, some office furniture and stationery. Since 2002, the Court has grown from five advance team members to 1063 staff members from over 100 countries. The new premises in Scheveningen are visible proof of the institutional growth of the ICC.

That sounds and looks impressive and seems to speak in favour of a steady progress in the Court's work and its global impact. Alas, as we all know, the reality is much more complex. There is light, but there are also shades of grey; there are achievements, but there are also challenges that seem hard to overcome.

I want to share with you some thoughts on the achievements of the Court to date, on its challenges and on the ramifications of the Court being situated in that delicate position between justice and politics.

## **26.2. Achievements**

To start on a positive note: what achievements can the Court claim? Let me mention just some of them.

It cannot be denied that the existence of the ICC and its operations are an essential contribution to the rule of law in international affairs. This is something the States Parties can and should be proud of.

The activities of the Court also are a sign that the universality of human rights moves on. The sheer concept of penalizing crimes against humanity before a permanent International Criminal Court underscores the recognition that rights belong to all human beings, without distinction. Insofar as the ICC constantly reflects the close relationship with human rights law and international humanitarian law in terms of goals, values and terminology, it also symbolizes significant progress in terms of civilization. Fur-

ther proof for the dissemination of the principles of the Rome Statute is the fact that many countries have incorporated international crimes into their domestic legal framework. This is a precondition for the exercise of the principle of complementarity. It is also a contribution by the States Parties to the rule of law in international affairs. It is a contribution to the development of a global legal culture.

All of this is even more remarkable because it was achieved against the resistance of the so-called ‘superpowers’.

### **26.2.1. The Participation of Victims**

Another major achievement of the Rome Statute is the participation of victims. For the first time, victims have the right to participate in proceedings and the possibility to receive reparations in case of a conviction. I personally see this as a unique feature of the ICC. I would even label it as one of the defining factors of the Court’s right to exist. Those who have suffered, those who have experienced first-hand the worst human rights violations imaginable, are not only the mere objects of scrutiny by the parties and the judges anymore, but they are active participants in the proceedings. I think all of us who were present during the first panel today and heard the reference to the statement of witness 480<sup>4</sup> in the Bemba case<sup>5</sup> will agree.

This is major progress in international criminal law that should not be belittled. By recognizing and conceding the victims’ independent procedural rights in criminal proceedings against the alleged perpetrators, the concept of human rights is significantly expanded. How could it be different? As Amanda Ghahremani, the legal director of the Canadian Center for International Justice, rightly put it this morning: “Without victims, no international criminal law”.<sup>6</sup>

And victims do participate in high numbers in the proceedings. This is a sign of trust and commitment to the Court that cannot be taken for granted and should be appreciated. Victims should not be viewed as annoy-

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<sup>4</sup> Alexander Heinze, “The 20th Anniversary of the Rome Statute. A Review Essay About the Nuremberg Forum 2018”, in *Criminal Law Forum*, 2019, vol. 30, no. 1, pp. 109–135.

<sup>5</sup> ICC, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (<http://www.legal-tools.org/doc/edb0cf/>).

<sup>6</sup> This quote is taken from the speech by Amanda Ghahremani at the Nuremberg Forum 2018 in Nuremberg, Germany, 19 October 2018 (available on the International Nuremberg Principles Academy’s website).

ing participants who delay the Court's proceedings – an allegation that has never been factually proven. They also should not be seen as potentially endangering the rights of the accused to a fair trial. Article 68(3) of the Rome Statute gives the judges the necessary legal leeway to balance the personal interests of the victims and the rights of the accused to a fair and impartial trial. It is up to the judges to exercise their prerogative in that spirit.

### **26.2.2. A Rule of Law Process to Establish the Truth**

Another achievement of the Court that is often ignored is the effect of its mandate to establish the truth in a formal process that follows the rule of law. Accurate accounts of the facts and circumstances of a situation or a case contribute to truth-finding far beyond the individual criminal acts of an accused. They also help to establish the historical truth of a whole conflict and thus secure the right of the victims to truth.

I do not want to be misunderstood: I do not say that the purpose of the trials at the ICC is to write history. Far from that. The central purpose of any criminal trial is to find out if the accused is guilty beyond reasonable doubt. I also do not say that the ICC is actually writing history. I am far from overestimating our capacities in that respect.

Yet judicial truth and historical truth are connected in many ways. It becomes apparent that a side effect of the judicial proceedings is that, often, the facts that form the base of historical truth are established with more reliability than historians could ever achieve. This is because witnesses testify under oath, and their testimony is tested in the courtroom. If you will, their statements come about in a compulsory setting that is a completely different situation to a non-binding interview with a researcher. Furthermore, the authenticity of documents is checked and all the evidence – witnesses, experts and documents – is assessed holistically by the judges.

It should also be mentioned that all details of the hearings are kept on record. This ensures that the objective content of the evidence is accessible immediately and comprehensively and for generations to come. Insofar as the trials at the ICC become part of a broader narrative of historical truth, that narrative stands independently of – and has legitimacy outside – the legal process. But the Court also gives the narrative meaning. This is not a minor accomplishment in times of 'alternative facts' and when the dividing lines between facts and opinions are blurred.

### **26.3. Challenges**

I am now passing into the challenges section, which is – as you may have already guessed – a quite extensive one. Within the scope of these closing remarks, I can again only address a few: withdrawals, selectivity of justice, lagging co-operation and the length of proceedings.

Withdrawals or threats to withdraw from the Rome Statute are one of the main reasons why the current state of affairs of the ICC is often labelled as a ‘crisis’. Withdrawals are, of course, a problem for the ICC. The fewer States Parties, the less the Court can claim universality and the more difficult it is to achieve the goal – to end impunity for the most horrendous crimes.

At the same time, withdrawals are, of course, the sovereign right of States Parties, and, as a result, the right to withdraw is inherent in any international treaty. Other international entities, like the European Union and UNESCO, recently have painfully experienced this phenomenon too. But withdrawals or threats to withdraw are not a sign of a ‘crisis’ of the ICC. Instead, they tell us more about the situation in the States Parties in question. If you will, withdrawals are rather a sign of a ‘crisis’ in the concerned State than at the ICC.

Withdrawals certainly do not influence our judicial work and should not influence our policies. If we tried to accommodate States Parties’ interests in order to keep them in the Rome Statute system, we would betray our mandate. The difficult situations in which the Court may find itself at times are meant to happen. The Court is supposed to render displeasing and uncomfortable decisions. Challenging discussions regarding the question in which ‘situation’ the Office of The Prosecutor decides to commence an investigation, or regarding co-operation of States and immunities of high-level officials like sitting presidents, are a natural consequence of our mandate and the statutory framework.

#### **26.3.1. Not a Comfort Zone**

The Court is not meant to be a comfort zone. It must remain a staunch defender of those principles enshrined in the Rome Statute and not try to be complacent in reaction to the current international political climate. I am convinced that, in the long run, the Court will benefit from being perceived as a principled and firm judicial institution.

Instead of focusing its efforts on preventing withdrawals, the ICC and the Assembly of States Parties should actively try to promote universality. It should make efforts to motivate more States to become Parties to the Rome Statute. There are a lot of blank spots on the map that should be filled or where I see at least potential to fill them. I am not talking about powerful States or those that want to be seen as such. However, there are a lot of other countries that might be willing to break free from the firm grip of more powerful States, and which might decline to let other States dictate to them what to do and what not to do.

Potential candidates I can think of first are the 30 States that have signed the Statute but have not yet ratified it. In some regions of the world – Asia, for example – respective initiatives are underway; we have to support and intensify them. Actively engaging to let States join the Rome Statute is definitely better than waiting until the political environment changes.

It should also be mentioned that the ICC is one of the few international institutions where all States Parties actually have – and not only on paper! – an equal right to voice their position or concerns on any matter of substance, irrespective of how big, powerful, or rich they are.

That is a striking difference from most international organizations that are governed by the usual political, military and economic powers. The so-called ‘superpowers’ do not dominate the ICC simply because they are not States Parties.

### **26.3.2. Selectivity of Justice**

Another huge challenge for the ICC is the selectivity of justice that it has the capability to deliver. Such selectivity is not something negative in itself. With regard to practicability and gravity, a selection of situations and cases will always have to take place. It is also a sign of autonomy of the Office of the Prosecutor – you obviously cannot catch all.

Yet it has to be admitted that international criminal law still exhibits a little bit of ‘catch as catch can’ procedure. It is realistic that the Court will predominantly have to deal with accused individuals who have lost their power base or their support from the ‘superpowers’. This is, however, not a principled objection to international criminal justice, but rather an incentive to improve the system and create precedents that can be applied worldwide in the future.

We all know that most of the situations and all of the cases that we deal with still originate from Africa. Given the global situation, this is not a satisfying state of affairs. It is important for the future that the ICC is able to demonstrate that it is not exclusively focused on Africa. This is, of course, easier said than done. Attempts to go outside Africa are in the record, but we all know that such steps are extremely difficult. In these situations, political resistance is particularly fierce and political support and co-operation often insufficient or non-existent.

However, the Court should not be disheartened. It must remain relevant in the international discourse. The Court, including the Office of the Prosecutor, must be seen as reacting in a more timely manner to international developments and conflict situations. The latest successful request regarding the Rohingya people<sup>7</sup> could be an example for such a policy.

Selectivity would be a lesser problem if the United Nations Security Council would meet its responsibilities. However, any such hope might not seem realistic in light of the present political dynamics. It is regrettable that there is a blockade by certain Security Council members regarding referrals of situations, for example in Syria, Yemen and South Sudan. It is also rather disappointing that the Security Council has not reacted to the ICC's numerous decisions in relation to findings of non-co-operation of certain States.

However, the ICC must be ready in case the conditions change. That might not be easy to imagine today. Yet, looking over the past decades – look at the fall of the Berlin Wall and the collapse of the Soviet Union, for example – I can only say that no political state of affairs lasts forever.

Regrettably, co-operation by States also leaves much to be desired. It suffices to mention that warrants of arrest against 15 individuals and corresponding surrender requests are still outstanding. The ICC is fully and entirely dependent on co-operation with States. Simply put: no co-operation, then no activities in The Hague. The ICC is only as strong as the States allow us to be.

### **26.3.3. Length of Proceedings**

The reasons for the length of proceedings are manifold and complex. I can only touch upon them superficially. When we criticize the Court in that re-

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<sup>7</sup> Steven Feldstein, “Why the ICC Investigation of Forced Displacement in Myanmar Is a Big Deal”, in *Just Security*, 1 November 2018 (available on its web site).

spect, it should not be forgotten that the nature of the crimes subject to the jurisdiction of the Court entails long and resource-intensive proceedings. To prove, for example, a ‘widespread or systematic attack’ as an element of crimes against humanity or a ‘plan or policy’ as an element of war crimes requires comprehensive investigations by the Prosecutor and clarification in the courtroom that goes far beyond the individual criminal acts; it extends to a whole, often very far-reaching and complex, conflict.

While it is the declared ambition of the Court to hold proceedings expeditiously, this is not an end in itself. The speed and costs involved cannot be decisive factors; rather, quality and excellence should be added to the assessment.

This consideration is not meant to be an excuse to stubbornly preserve old ways that have been proven inefficient. Not every unfamiliar attempt to conduct proceedings more effectively can be simply dismissed as unfair. The ICC still has to find satisfying, practical solutions on how to blend the Common Law and Civil Law elements in the Rome Statute.

To this end, it has to be accepted that the drafters of the Rome Statute did not favour one of these main legal systems of the world over the other. Instead, they deliberately created a unique procedure combining both. Many provisions in the Rome Statute even allow different answers for the same procedural problem that are all legitimate under the Statute, whether implementing more Civil Law or more Common Law concepts.

Examples are the admissibility of evidence and the conduct of the proceedings. To establish feasible solutions within the framework of the Rome Statute requires openness towards perhaps unfamiliar systems of justice and the attitude that no legal system is superior to another.

#### **26.4. The Court Between Law and Politics**

Let me conclude with a few general remarks on the Court and politics. I think it is fair to say that the current trend in international affairs is not in favour of international organizations and entities. It is not in favour of a global order governed by internationally recognized rules. Nationalism and ruthless enforcement of national interests seem to be predominant. I am always astonished when I realize how many countries think they are special or, most notably, better than all the others. The laws of logic do not seem to support such a pretentious attitude.

However, the ICC also feels this general tendency. *Realpolitik* fights back vehemently against the loss of sovereignty, power and influence. Crit-

ics of the Court are often fierce and even verbally aggressive. The challenges to the Court's authority are enormous, the resistance is huge; we act constantly under pressure to demonstrate legitimacy, and we sometimes have to fight exaggerated expectations.

But no one could have expected that it would be easy to break with the culture of impunity for international crimes that existed for thousands of years. Resistance and setbacks were inevitable and must be expected. The implementation of the Rome Statute's ideals and the development of the ICC is a learning process that has not been completed. The evolution of international criminal justice was never and will never be a linear progress.

#### **26.4.1. The Power and the Will to Stay the Course**

And yet words and conferences and celebrations will not be enough to narrow the gap between the objectives and promises of the Rome Statute, on the one hand, and the reality of our time, on the other. What we need – more than ever – is the power and the will to stay the course for the ICC. We have to shape the future and not succumb to the imposition of current political circumstances.

When I speak of 'we', I am referring to all those favourably inclined toward the ICC – primarily the States Parties themselves, the Court and its principals. I also mean civil society and all those who so crucially support the cause of the ICC, many of them present in this room.

Above all, a source of hope is the young generation. All over the world, there are young activists and dedicated jurists who are not willing to accept the idea of impunity for the most heinous crimes dictated by Realpolitik.

In July, the annual Nuremberg Moot Court took place in these premises. More than 50 teams from all over the world participated. Many of them came from countries that are not Parties to the Rome Statute, for example from China, Russia, the United States, India and Pakistan. You could sense how impressed they were by the atmosphere in this historic Courtroom 600. They were full of enthusiasm for the ideals that the Rome Statute symbolizes and for the ICC as an institution. Compared with at least most of the speakers and panellists during this conference, they have one advantage: they are young, the future belongs to them, they could be multipliers for the objectives of the Rome Statute in their countries, and they could be the ones who shape the future for the better.

I know we have a tedious task ahead, but it has never been different in the history of the Court and it will never be any different in the future. We have come a long way, but the road ahead will also be long. And yet, it is worth supporting the Court and the idea it embodies. The mandate of the ICC is as important and relevant today as it was 20 years ago.

Let us let the Rome Statute have the last say at this conference:

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes [...] and Resolved to guarantee lasting respect for and the enforcement of international justice.<sup>8</sup>

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<sup>8</sup> Rome Statute, 17 July 1998, Preamble, see above note 2.

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