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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ANC	African National Congress
AU	African Union
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CVT	Centre for Victims of Torture
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
EU	European Union
GA	General Assembly of the United Nations
HRC	Human Rights Council of the United Nations
HRW	Human Rights Watch
ICC	International Criminal Court
ICI	Independent Commission of Inquiry
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISIS	Islamic State of Iraq and ash sham
LMG	Like-minded group
LRA	Lord's Resistance Army
NGO	Non-governmental organisation
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
SC	Security Council of the United Nations
UN	United Nations
UPDF	United People's Defence Force
US	United States
VCLT	Vienna Convention on the Law of Treaties

'The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated.'

Justice Robert Houghwout Jackson
(opening statement of the Nuremberg trials, 21. November 1945)

Africa and the International Criminal Court: The Delegitimisation of the ICC?

I. Introduction

The establishment of the International Criminal Court ('ICC' or 'the Court') by the Rome Statute¹ in 1998, which came into force in 2002, was heralded as a significant moment for international criminal law and justice.² It is not only the first permanent international criminal court, but it also holds accountable those individuals responsible for grave violations of international criminal law, which would otherwise commonly enjoy immunity. The mandate of the ICC extends to hold those individuals criminally accountable, who are responsible for war crimes, genocide and crimes against humanity. The Court's mandate also extends to crimes against aggression as provided in Article 5 of the Statute, but the Court will not be able to exercise its jurisdiction over this crime until the 1. January 2017 at the earliest.³

The states of the African continent played a significant role in the realisation and establishment of the ICC. Presently, Africa also has the highest regional representation to the Statute with 34 out of 123 state parties.⁴ However, since the Statute's adoption in 1998, Africa's relationship with the ICC deteriorated after the Court issued an arrest warrant for the head of state of Sudan, Omar Hassan Ahmad Al Bashir, and even further with the indictment of the Kenyan head of state, Uhuru Kenyatta. Speculations and accusations have been raised that the ICC targets African states, due to the fact that all currently accused individuals before the Court are African nationals. Other critics of the ICC propose a conspiracy or emphasise that the Prosecutor of the ICC openly 'targets' high-ranking officials, who should allegedly enjoy immunity under customary international law and that the Court disregards the sovereignty of states. Furthermore, prosecutions and the search for justice have been said to undermine the achievement of actual peace.⁵ The African Union ('AU') has gone as far as to pass resolutions to cease cooperation with the Court. In fact, the main agenda for this year's summit concerned a possible mass withdrawal of African states from the Rome Statute and

¹ Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; henceforth referred to as the 'Rome Statute' or 'Statute'.

² Rowland J.V. Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', 14 *Melbourne Journal of International Law* (2013) 670-698, 670.

³ *The Crime of Aggression*, ICC-ASP/RC/Res.6, adopted at the 13th plenary meeting on 11 June 2010, during the Review Conference of the Rome Statute, Kampala (Uganda), 31 May-11 June 2010; see Chapter II.C.

⁴ Currently, 123 states are state parties to the Rome Statute: 34 African states; 19 Asia-Pacific states, 18 Eastern European states, 27 Latin American and Caribbean states, and 25 Western European and other states; International Criminal Court, 'The State Parties to the Rome Statute' <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 15 August 2015.

⁵ Rowland J.V. Cole, *supra* note 2, 671f.

the possibility of expanding the mandate of the Court of Justice of the AU to also prosecute grave violations of international criminal law⁶. The proposal envisions the already established court to merge with the African Human Rights Court in order to then also encompass human rights, thereby creating the African Court of Justice and Human Rights, and rendering the ICC obsolete in regards to the African continent. The AU stands firm on its agenda in regards to the ICC and has also continuously, during its last summits, called on its members to stand as a united front against the Court.

The ICC has always had critics who believed that the institution was destined to fail. However, with the recent considerations of African states, which comprise roughly 28% of the ICC's state parties, to withdraw from the Rome Statute, delegitimisation of the Court seems a prominent threat. Delegitimisation would result in diminishing the Court's role, limiting its power and preventing it from carrying out its important role in the fight against impunity. Delegitimisation would undermine its ability to achieve its prerogatives. Consequently, this paper attempts to answer if the recent allegations by African states led to the delegitimisation of the International Criminal Court and what would the consequences for international criminal law as well as the fight against impunity be? Are there any viable solutions, which could be implemented to preserve and strengthen the ICC to continue its fight against impunity?

In order to adequately assess these questions, the politics of the construction of the ICC will be examined in Chapter II, as well as the institution's importance and structure in order to deal with grave violations of international human rights law and humanitarian law. The idea of an international criminal court was introduced even before the realisation of the United Nations ('UN'). However, it was only with and after the establishment of the two ad hoc tribunals in the 1990s as an implication of the atrocities committed in the former Yugoslavia and Rwanda that the international community agreed that an international criminal court was needed for the successful fight against impunity. The structure and legal procedure embodied in the Rome Statute aims to guarantee an independent international criminal court, which adequately considers the relevant political context of each situation, but which is not subject to political interferences. Additionally, as an innovative international organisation, being the first to focus on international criminal law, the ICC's Rome Statute also encompasses innovations to customary international law principles.

⁶ *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC)*, AU Doc Assembly/AZ/Dec.547 (XXIV).

Chapter III outlines the allegations brought forth against the ICC, mainly by its current African opponents, even though African states played a significant role in the drafting of the Rome Statute and the establishment of the ICC as the institution it is today. The criticism voiced by opponents essentially evolve around an alleged bias against the African continent in light of prosecutorial discretion as well as the apparent failure to apply certain principles of customary international law. Subsequently, some of the situations currently before the ICC will be made use of in order to understand these criticisms in a political context.

Chapter IV subsequently analyses the aforementioned claims of opponents to the ICC in light of the legal basis of the Court, as well as the political situations surrounding them in a global context. The question of delegitimation by the opposition to the Court by the AU and African states becomes prominent, and calls for the need to outline legitimacy as well as to analyse the subsequent problem of possible delegitimation the Court may face as a result. As an international organisation with limited resources the ICC heavily relies on the cooperation of its state parties, so that a delegitimation could have far-reaching implications, not only for the functioning and effectiveness of the Court itself but also for the greater fight against impunity.

Chapter V focuses on possible solutions to a potential delegitimation of the International Criminal Court as the first permanent court dealing with international criminal law. The main objective of this section will be focused on an enhanced legitimisation of said court in order to allow its continued and effective work. Possible solutions may be the establishment of Independent Commissions of Inquiry prior to ICC referrals in order to satisfy the call for peace preceding the implementation of justice. Furthermore, current non-state parties may also provide legitimisation as well as Western powers, which are already state parties to the Rome Statute, by demonstrating their newfound support or emphasising their pre-existing support for the Court and its mandate. Non-governmental organisations ('NGOs') also played a significant role in the drafting of the Rome Statute as well as in the campaign for its speedy ratification by states. Their participation led to the necessary 60 ratifications for the Statute's entry into force within four short years. Their role cannot be underestimated in light of the current difficulties the ICC may face, especially when it comes to obtaining enhanced support by (non-) state parties. Similarly to NGOs, civil society as well as the general public may be able to assert their position and support for the ICC as a necessity in the fight against impunity in order to enhance the ICC's legitimacy as a court. They have the potential to be the ICC's possibly greatest ally. Another possible, viable solution may be the

expansion of the mandate of the Court of Justice of the African Union as proposed by the AU to also encompass violations of international human rights, humanitarian law and international criminal law, similar to the ICC, in order to create the African Court of Justice and Human Rights. The AU envisions this court to make the ICC redundant in the sense that it allows 'Africans to deal with African problems' themselves. However, a simple expansion of this court may not suffice in order to bypass the ICC and it becomes necessary to assess whether or not regional complementarity will prevent the competition of the two courts. On the other hand, proactive complementarity enacted by the ICC may suffice to ensure the effective primacy of domestic jurisdiction while simultaneously allowing the Court to assist domestic courts, solving the problem of possible delegitimation as well as the accusations that the ICC enforces justice at the cost of peace and that the Court is essentially a tool for Western powers to exercise control over African states.

While the thesis will conclude that the allegations against the Court may not have a convincing legal basis, the threat of a possible delegitimation of the Court would have far-reaching consequences for the International Criminal Court itself, but also for the international community's fight against impunity. Although the ICC is not the only tool with such an agenda, it has widely been accepted as being the most efficient and effective. Consequently, it will be necessary to put aside the political considerations hindering the Court so as to allow it to carry out its mandate successfully.

II. An Overview of the International Criminal Court

A. The creation of the ICC

The 1990s entailed some key moments for international criminal law and the fight against impunity, but the idea of an international criminal court arose much earlier. Before the ad hoc tribunals and the ICC, prosecution of war crimes largely took place on the national level before domestic courts, and were considered ineffective especially in situations where those responsible remained in power. After the Hague Conventions of 1899 and 1907 codifying the laws of war, the first, although unsuccessful, efforts to create specialised war tribunals could be found in the Peace Treaties after World War I, such as in the Treaty of Versailles⁷. Subsequently, the Belgian Baron Édouard Descamps suggested the establishment of a ‘high court of international justice’, based on the concept of the Martens clause:

[...] populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience. ”⁸

Such an institution was first deemed ‘premature’⁹ until the Assembly of the League of Nations drew up a draft proposal for such an international criminal court in 1937. However, the proposal never entered into force, due to the lack of sufficient ratifications.

The first ‘breakthrough’ for the fight against impunity was the Nuremberg Tribunal after the Second World War. The text was largely based on the 1937 draft proposal for an international criminal court by the League of Nations. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal¹⁰ was the basis for the prosecutions of Nazi war criminals. The mandate extended to crimes against peace, war crimes as well as crimes against humanity, and resulted in the indictment of 24 Nazi leaders.¹¹ Similarly, the Allied powers established the International Military Tribunal for the Far East in order to carry out the Tokyo trials.

⁷ Versailles Peace Treaty (signed 28 June 1919, entered into force 10 January 1920) TS 4.

⁸ Preamble of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of Law on Land (signed 29 July 1899); henceforth referred to as the ‘Hague Convention 1899’.

⁹ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2001), 4.

¹⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (,IMT’), Annex, (signed 8 August 1945, entered into force 1951) 82 UNTS 280.

¹¹ William A. Schabas, *supra* note 9, 5ff.

Following the Nuremberg and Tokyo trials, the General Assembly ('GA') of the United Nations charged both the International Law Commission ('ILC') and a committee with drafting the statute for an international criminal court. The work of the ILC was, however, suspended in 1954, due to the at the time ongoing political tension of the Cold War, and only resumed in 1989, after a corresponding GA Resolution at the request of Trinidad and Tobago¹². The ILC submitted the final version of the draft statute for an international criminal court to the GA in 1994. This draft statute did not, however, play such a fundamental role in respect to the final Statute of the International Criminal Court.

As previously mentioned, the 1990s entailed some key moments for international criminal law and the fight against impunity. These included the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY')¹³ and the International Criminal Tribunal for Rwanda ('ICTR')¹⁴ by UN Security Council ('SC') Resolutions, as well as the tribunals in Sierra Leone, and Cambodia, all with the support of the UN. The ICTY was mandated to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991', in accordance with customary law principles of international humanitarian law. The mandate of the ICTR was similar to that of the ICTY, in order to prosecute genocide and other serious violations of humanitarian law committed in Rwanda in 1994.¹⁵ Both the ICTY as well as the ICTR were geographically confined with a limited temporal duration. On the national level, truth commissions were established across the world.¹⁶ It seemed as if states were ready to focus on the fight against impunity in cases of gross violations of international humanitarian law and human rights. All these mechanism laid the groundwork for the establishment of the ICC, which was dubbed 'arguably the most significant international organisation to be created since the [UN]'.¹⁷

The drafting of the Rome Statute of the ICC and the corresponding negotiations revealed almost overwhelming differences in firstly the attitude towards an international criminal court, and secondly in the scope of such an institution. The driving forces in the drafting of the Statute were on one hand the 'like-minded' group ('LMG') of states, and on

¹² GA Res. 44/89.

¹³ SC Res. 827(1993).

¹⁴ SC Res. 955(1994).

¹⁵ William A. Schabas, *supra* note 9, 10ff.

¹⁶ David Tolbert, 'A Debate Whose Time Has Come' in the Debate (online), 'Is the International Community Abandoning the Fight Against Impunity?' (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/impunity/opening-remarks>> accessed 15 August 2015.

¹⁷ William A. Schabas, *supra* note 9, 20.

the other a coalition of NGOs¹⁸, while the United States ('US') unsuccessfully attempted to increase the opposition for the Court. 'Like-minded' groups are commonly governments with similar views in regards to one or more issues and are usually formed in the process of negotiations. In this case, the LMG was founded during the first session of the Preparatory Committee to the Rome Statute in 1996 and continued its work throughout.¹⁹ The states within the LMG shared similar views in regards to some of the key aspects of the future ICC, as well as the importance of such an international court in light of the mass atrocities committed in the 20th Century throughout the world. The LMG consisted of a wide variety of states, including European as well as African and Latin American states. To date, the European Union ('EU') remains one of the key supporters of the Court. African states were also a driving force in the drafting of the Statute and the establishment of the International Criminal Court, so that the repeal of their support of the Court could result in far-reaching hurdles for the Court's legitimacy. In 1998, 25 African states adopted the Dakar Declaration for the Establishment of the International Criminal Court²⁰, supporting the creation of an effective and independent international criminal court. Additionally, the Grand Bay Declaration and Plan of Action²¹ formulated during the first Ministerial Conference on Human Rights of the Organisation of African Unity ('OAU') by the African Commission on Human and Peoples' Rights ('ACHPR'), as the predecessor to the AU, called on all African states to ratify the Rome Statute and to implement it into their domestic legislations, contrary to the AU's latest decisions. The numerous declarations issued in this respect are only indicative of the initial strong support by African states, and they also played a large role during the negotiations. Some African states, including South Africa and Senegal, had already participated in the ILC draft statute in 1993 and 1994. Furthermore, 14 African states, in particular, participated in the negotiations as part of the Southern African Development Community ('SADC'), similar to the LMG, and 47 African states were present during the drafting of the Statute in July 1998.²² The extensive participation of African states in the negotiations for the Rome Statute helped shape the present ICC.

The negotiations were characterised through their inclusive nature as well as the prevailing notion of the preference for bargaining rather than coercion in order to allow for

¹⁸ John Washburn, 'Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11 *Pace International Law Review* (1999) 361-377, 367.

¹⁹ *Ibid.*, 368.

²⁰ Dakar Declaration for the Establishment of the International Criminal Court in 1998 (2 February 1998).

²¹ African Commission on Human and Peoples' Rights, Grand Bay (Mauritius) Declaration and Plan of Action (16 April 1999).

²² Rowland J.V. Cole, *supra* note 2, 673f.

open negotiations with all interested parties²³ so that the final Statute displays the *opinio juris* of the majority of states. The final vote resulted in 120 states in favour, 21 abstentions and seven votes against, which included the US, Israel, China as well as several Arab and Islamic States.²⁴ The vast majority of African states voted in favour of the final statute with Senegal the first state globally to ratify the Statute in February 1999. African states thereby again demonstrated their initial strong support for the International Criminal Court.

Since its establishment the ICC has become ‘the most powerful symbol of the progress made in the fight against impunity for international crimes’.²⁵ The states and NGOs, which took part in the conference, had not anticipated that the 60 required ratifications would be reached as soon as 2002, so that the ICC could tackle its first conflict as early as 2003. To date, over 120 states have ratified the Statute. ‘[T]his is a huge tribute to the determination of states across all regions of the world to foster accountability’²⁶ and despite its limited jurisdiction and its need for states’ cooperation, it has been able to make headway in some of the most heinous crimes since its existence. In 2005, the ACHPR adopted another resolution calling on African states once more to implement the Statute into their domestic legislations²⁷, contrary to the most recent decisions of the AU. Although a lot of states of the international community fully supported the idea of an international criminal court, others were and still are reluctant, such as the United States, Russia and China. The fact that three permanent members of the SC are not state parties to the Rome Statute also causes delegitimisation problems for the Court.

²³ Micheal J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan 2008), 157.

²⁴ William A. Schabas, *supra* note 9, 18.

²⁵ Zeid Ra’ad Al Hussein, ‘Despite Setbacks, Fight Against Impunity Continues’ in the Debate (online), ‘Is the International Community Abandoning the Fight Against Impunity’ (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/despite-setbacks-fight-against-impunity-continues>> accessed 15 August 2015.

²⁶ *Ibid.*

²⁷ *Report of the African Commission on Human and Peoples’ Rights*, 8th session, AU Doc. Ex.CL/236(VIII) Rev.1 (16-21 January 2006) annex III (*Resolutions Adopted during the 38th Ordinary Session*) 42 (Resolution 87 of the 38th Ordinary Session of the African Commission on Human and Peoples’ Rights: *Resolution Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court*).

B. The purpose and importance of the ICC

The Rome Statute's legal significance was described by the judges of the ICTY, in *Prosecutor v. Furundzija*, as follows²⁸:

'It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. 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 *com 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.'²⁹

The Rome Statute is therefore not only useful in assessing the *opinio juris* of states, but it is also the result of the commitment of the vast majority of states to the fight against impunity, demonstrating the initial legitimacy the Court enjoyed. By enforcing the 'Hague laws'³⁰ the ICC is meant to put an end to the practice of states judging for themselves whether their actions and subsequent justifications are within the bounds and applicability of such laws.³¹

In the past, leaders and dictators were rarely held accountable for their crimes. They did not necessarily have to fear prosecution because they acted in the name of the state. As such, they were 'untouchable' and able to escape criminal prosecution. Temporary international criminal tribunals changed this approach, but were only created to account for specific atrocities, such as the Nuremberg and Tokyo trials. The ad hoc tribunals, the ICTY and ICTR, gave states the final incentive needed to commit to the fight against impunity by establishing a permanent and independent international criminal court, with the ability to also hold accountable those in power, namely heads of states, dictators and other high-ranking government officials.

The ICC was envisioned to put an end to impunity by prosecuting individuals who are responsible for war crimes, crimes against humanity and/or genocide. The states, by ratifying the Rome Statute, established a strong, independent court, with the potential to effectively

²⁸ William A. Schabas, *supra* note 9, 24.

²⁹ *Prosecutor v Furundzija* (Judgement, Case No. IT-95-17/IT)(10 December 1998) para. 227.

³⁰ International humanitarian law as codified by the Hague Conventions of 1899 and 1907.

³¹ Michael J. Struett, *supra* note 23, 1.

ensure the prosecution of perpetrators responsible for gross violations of international criminal law³², demonstrating their commitment to combat and stop further atrocities from being committed. Although recently African states have voiced their dissatisfaction with the Court and threatened to withdraw *en masse* from the Rome Statute, the ICC undoubtedly plays an important role in Africa considering the continent's long history and continued reality of atrocities committed, which are frequently met with impunity.³³

The Court has the potential to establish itself as the efficient and successful prosecutor of individuals responsible for at least some of the worst international crimes committed. Yet it is still uncertain whether or not the ICC will be able to establish a deterrent effect for such crimes. Generally, no legal system has been able to deter crimes in their entirety³⁴, but the ICC has been able to make some headway, for example in Senegal, where the former government avoided post-election violence in 2012, for fear of possible ICC prosecution.³⁵ This could result in *jus ad bellum* no longer being viewed as a justification for a state's action in order to condemn those of its enemies, but rather enforce the general understanding of the prosecution of violations of international criminal law in such situations. Another benefit and simultaneous importance of the Court lies within the fact, that a permanent court does not require a constant initial investment by states, unlike ad hoc tribunals, in order to commence investigations and prosecutions in each situation. The required investments by states in order to effectively establish each of the ad hoc tribunals were tremendous. A permanent court, such as the ICC, also allows for the creation of high standards for a consistent punishment of perpetrators where required.³⁶ As a permanent institution, the ICC would be able to apply these standards at least to its state parties.

Furthermore, the creation of the ICC also resulted in a change in the extent of state sovereignty, in particular of its state parties, because the international organisation essentially has the authority and discretion to decide, among others, whether or not a particular use of force by government officials could constitute criminal conduct amounting to international crimes. By creating its own standard of accountability for such violations, the ICC could limit

³² *Ibid.*

³³ Coalition for the International Criminal Court (CICC) Global Justice, 'Africa and the ICC: Moving the narrative forward' (*World Press* (online), 23 June 2015) <<https://ciccglobaljustice.wordpress.com/2015/06/23/africa-and-the-icc-moving-the-narrative-forward/#more-2658>> accessed 25 August 2015.

³⁴ Gustavo Gallón, 'The International Criminal Court and the Challenge of Deterrence' in Dinah Shelton (eds), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsey 2000), 93.

³⁵ CICC Global Justice, 'Africa and the ICC', *supra* note 33.

³⁶ *Ibid.*

the lawful means by which states make use of force. The problem of limiting state sovereignty was in fact a major issue the states were faced with during the negotiations to the Rome Statute. The state parties to the Rome Statute will therefore no longer be able to assess by themselves whether or not a specific action could constitute a war crime, a crime against humanity or genocide.³⁷

The Court's importance is essentially that it establishes a permanent institution, designed in a manner as to avoid political interference and which is responsible for fighting and putting an end to impunity, where in the past individuals responsible for the commitment of crimes within the Court's jurisdiction went unpunished.³⁸ However, its importance and role will only be able to be properly determined over time, depending on its long-term institutionalisation and its power to punish grave violations of international human rights law, humanitarian law as well as international criminal law. The hope is that a strong Court will ultimately be able to also serve as a deterrent of future atrocities.

C. The structure of the ICC

The International Criminal Court was established by the Rome Statute as a multilateral treaty with its own legal personality³⁹. It is therefore not a part of the 'UN family' nor is it part of any other international organisation. As a treaty, and in accordance with Article 34 of the Vienna Convention on the Law of Treaties⁴⁰ ('VCLT'), it is only binding on its state parties. Nevertheless, the Rome Statute grants considerable authority to the ICC.

As previously mentioned, the Court's mandate extends to the crime of genocide, war crimes, as well as crimes against humanity and the crime of aggression. However, due to the only recent agreement on the definition of aggression at the Review Conference of the Rome Statute in Kampala/Uganda⁴¹, the Court will only be able to exercise its jurisdiction over aggression at the earliest from the 1. January 2017 onwards, depending on the number of ratifications by states.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Art. 4 of the Rome Statute, *supra* note 1.

⁴⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332.

⁴¹ *The Crime of Aggression*, ICC-ASP/RC/Res.6, adopted at the 13th plenary meeting on 11 June 2010, during the Review Conference of the Rome Statute, Kampala (Uganda), 31 May-11 June 2010.

Before addressing and examining the criticisms and allegations voiced against the ICC, currently expressed predominantly by African states, it is first necessary to examine the structure and the legal proceedings of the ICC especially concerned by the allegations.

i. The jurisdiction of the Court

There are three possibilities how a situation, which concerns one or more of the crimes within the ICC's mandate, may be brought before the Court: self-referral, referral by the UN Security Council or *proprio motu* prosecution. The Rome Statute therefore does not grant the ICC universal jurisdiction in order to investigate or prosecute any situation worldwide. To this date, self-referrals under Article 14 of the Rome Statute, by which a concerned state grants the ICC jurisdiction over a situation, are the most common, so that these states bear a significant responsibility for which cases are currently before the ICC. After a case has been referred to the Court, the Office of the Prosecutor investigates the situation to determine whether or not a crime has been committed under the Statute. The second possibility is for a situation to be referred to the ICC by the SC under Chapter VII of the UN Charter as envisioned in Article 13(b) of the Rome Statute. A resolution of this kind does not refer individual cases, but situations as a whole to ensure a wide scope for investigations, to prevent bias and political influences, allowing the Prosecutor to act in a neutral position when conducting investigations. Ultimately the Prosecutor decides whether or not to take up investigations in a referred situation and who will be the subject of possible prosecutions. However, the means by which such situations are brought before the ICC are outside of its reach, namely by a referral of the international community represented by the SC. The last possibility by which the ICC can exercise its jurisdiction is via the *proprio motu* prosecution power of the Prosecutor in accordance with Article 15 of the Rome Statute. Such a commencement can only be done 'on the basis of information on crimes within the jurisdiction of the Court'.⁴² The Prosecutor can therefore take action in light of a conflict where such action can be deemed necessary as long as it concerns a conflict within the territory of a state party to the Rome Statute. In order to initiate investigations *proprio motu*, the Office of the Prosecutor has to first notify the concerned state, and then make an application to the Pre-Trial Chamber to authorise subsequent actions, if the state has not informed the Prosecutor of its intent to exercise its jurisdiction over the crimes. The Pre-Trial Chamber will generally only grant authorisation in cases where it is satisfied that the concerned state is unable or unwilling to

⁴² Art. 15 of the Rome Statute, *supra* note 1.

conduct genuine investigations.⁴³ The information comprising the reasonable basis has to furthermore be provided by reliable sources.

Not only does every case undergo serious scrutiny of the evidence during pre-trial proceedings, but the Prosecutor is further constricted and subject to judicial scrutiny, so that she may not operate her functions arbitrarily.⁴⁴ Supporters of the Court maintain that the independence granted to the Prosecutor is essentially one of the Court's greatest assets because it weakens the possibility of states invoking political considerations in order to shield perpetrators from being held accountable. This is especially important in cases involving heads of state or other government officials. In fact, the provisions the ICC adhere to grant the Prosecutor wide reaching discretion when considering whether or not a prosecution may or may not be wise, also allowing the Prosecutor to consider a specific political context on her own account.⁴⁵ On the other hand, many opponents argue that the prosecutorial independence lacks appropriate accountability. However, the Rome Statute as well as other legal checks and the state parties generally provide for the necessary accountability. The preliminary hearing is constructed in such a manner, which ensures that referrals to the Court have merit. The ICC would not confirm allegations unless there was reasonable basis for the validity that an accused individual has committed grave crimes. Considering the required high standard of proof, it can be construed to ensure that the allegations are reliable and that the principle of 'innocent until proven guilty', a cardinal principle in criminal law, is applied, especially in the confirmation hearing. The Court therefore doesn't prosecute individuals on an arbitrary basis, but rather on grounds of substantial merit, regardless of geographical location or an alleged bias.

The jurisdiction of the Court does not, however, encompass every violation of international criminal law. In order to fall within the jurisdiction of the ICC a certain degree of gravity of the crime within the Court's mandate is required. The jurisdiction of the Court over such crimes is further limited temporally to crimes committed after the 1. July 2002 as well as territorially to crimes committed in the territory of or on the basis of the perpetrator's nationality of a state party to the Statute. The latter limitation applies in the cases of self-referrals and prosecution *proprio motu* only.⁴⁶

⁴³ Art. 17 of the Rome Statute, *supra* note 1.

⁴⁴ Art. 15(3) and (4) of the Rome Statute, *supra* note 1.

⁴⁵ Michael J. Struett, *supra* note 23, 151.

⁴⁶ Art. 12 of the Rome Statute, *supra* note 1.

ii. The principle of complementarity

Additionally, the ICC is further restricted by what is commonly referred to as the complementarity principle in Article 17 of the Statute. This principle enables states to prosecute grave crimes under the mandate of the ICC themselves, without the Court taking action. States are given primacy to prosecute crimes committed by their nationals or in their territory. Only if they cannot or will not do so, if they are therefore ‘unwilling or unable’⁴⁷, can the ICC exercise jurisdiction over such crimes and consequently prosecute alleged perpetrators of crimes which took place in the concerned state.

This principle plays a significant role in light of ensuring sufficient possibility to respect the political context of each situation, which may fall within the mandate of the ICC. To the extent that states and their domestic courts have effective and proper legal procedures and the resources for providing accountability, the ICC will not take action.⁴⁸ If concerned states do not wish to have the ICC investigate grave international crimes, they are urged to prosecute the respective perpetrators themselves, thereby effectively excluding the ICC’s jurisdiction.

However, in situations, where states cannot provide an appropriate legal system, international procedures in front of the ICC function as a substitute to ensure accountability. In cases before it, the Court relies on state cooperation for example to carry out arrests or detain suspects, but it is likely that it will also allow cooperation in such international investigations with the states. The ICC thereby ensures that the concerned state is not completely excluded from the investigations and prosecutions of its corresponding situation, but rather can still provide assistance and an input. The desire of many states, especially of various conflict-ridden states, including many on the African continent, to have an effective institution in place, which would allow for successful criminal prosecutions, led to their support for the establishment of the ICC in the first place.⁴⁹ While for many states the institutionalisation of criminal prosecutorial responsibility is welcomed to deter conflicts, dictatorial leaders face different challenges. Dictatorial leaders would often remain in power for as long as possible, partially also due to the fact that this position ensures their immunity from prosecution. However, with the creation of the International Criminal Court, this

⁴⁷ Art. 17 of the Rome Statute, *supra* note 1.

⁴⁸ Michael J. Struett, *supra* note 23, 162.

⁴⁹ *Ibid.*, 163.

immunity no longer applies, and it provides the domestic opposition of dictatorial leaders with a chance to retaliate and prosecute such leaders for their crimes.

Generally, the ICC is respectful of state sovereignty due to its complementarity provision and will remain inactive where domestic courts of the concerned states conduct genuine investigations and prosecutions themselves. However, due to the principle of complementarity enshrined in Article 17 of the Rome Statute, the Court does have the power to exercise jurisdiction when states are either unable or unwilling to do so. This balance is necessary in order to ensure that the independent Prosecutor of the ICC has the tools to ‘pressure’ states to act, even in such situations where it may be easier for the state not to do so, usually for political reasons, and allow the ‘crimes to go unpunished’.⁵⁰

The result of the principle of complementarity is therefore that the ICC is limited to handling cases that domestic courts fail to adjudicate, regardless of reasoning. The ICC will not however exercise its jurisdiction in such cases where domestic courts have successfully carried out trials and found the alleged perpetrators not guilty nor will it hear cases in which a decision has already otherwise been rendered, unless the corresponding trial was intended to shield the accused from proper prosecution. The complementarity provision of the Rome Statute allows the Court itself to assess whether or not domestic courts have carried out trials with a genuine intent to prosecute the concerned crimes, and therefore subsequently hold the authority to determine whether or not the Prosecutor may initiate proceedings concerning a specific case. This core concept in the ICC’s design played an important role for the support of states in the Court’s creation.⁵¹

iii. The question of immunity

Under international law heads of state, high-ranking government officials and members of parliament commonly enjoy immunity *ratione personae*, or at the least *ratione materiae*. Consequently, they enjoy immunity for acts carried out in an official as well as in a personal capacity, in case of immunity *ratione personae*, and cannot be brought before the domestic courts of third states. In the landmark *Arrest Warrant* case⁵², the International Court of Justice (‘ICJ’) held that immunity of heads of state was a necessity in order for them to

⁵⁰ *Ibid.*, 165.

⁵¹ *Ibid.*, 8f.

⁵² *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), Judgement of the International Court of Justice, 14. February 2002.

carry out their respective functions effectively, and that no domestic national courts of third states could therefore exercise jurisdiction over them. The ICJ did, however, also hold that this limitation does not extend to international tribunals or criminal courts. There are only four exceptions under which heads of state or other high-ranking government officials can be held accountable for their crimes: 1. The authorities of their own state undertake the prosecution; 2. The competent authorities of their home state waive immunity, allowing for prosecution in a third state; 3. The concerned person is no longer head of state or a high-ranking government official and faces criminal prosecution for private acts or for acts committed at a time outside of 'office'; or 4. The charges are brought before an international tribunal or criminal court.

As such, the International Criminal Court is an innovation for the fight against impunity, not only because it is the first permanent court with its mandate, but also because Article 27(2) of the Rome Statute strictly stipulates that the Court's jurisdiction cannot be barred for reasons based on immunities, which an individual might enjoy under national or international law. It is therefore irrelevant if a person acted in his official capacity. Article 27(1) specifically refers to the official capacity as a head of state or government, members of a government or parliament, but also 'simple' government officials.

This provision was deemed necessary and of utmost importance in order to ensure the accountability of those responsible for mass atrocities. The experiences with atrocities committed in the past have shown that those responsible are commonly individuals in power, namely heads of state and government officials. Since customary international law and the principle of state sovereignty results in their immunity before domestic courts of third states, and their own domestic courts are likely to grant them impunity, it is necessary for the ICC to bar such immunity before it in order to make headway in the prerogative of the fight against impunity and to ensure accountability of these perpetrators.

III. African Opponents and their Allegations

Even though African states played a significant role in the establishment of the ICC, their enthusiasm has recently turned to criticism. It has to be noted, however, that African states do not speak out against the ICC as a united front. The AU, although not the only critic, has established itself as a strong voice against the Court in order to assert itself internationally. It is the objective of the AU to promote and defend issues of common interests to as well as of states of the continent⁵³ and as a result aims, among other things, to protect the continent's political and economic interests as well as finding African solutions to African problems.⁵⁴ It is based on these considerations that the AU has asserted that: 1. the ICC is biased against African states, 2. the ICC is part of a political conspiracy against Africa, 3. the Court does not respect state sovereignty, 4. nor does the Court apply head of state immunity in accordance with international law and 5. that the enforcement of justice by the ICC is counter-productive for the necessary peace processes in the affected states and, more importantly, communities. Other strong voices in the cause to delegitimize the ICC and/or to 'replace' it with the African Court of Justice and Human Rights are, among others, Uganda and Kenya, who both currently have nationals of their respective states before the ICC.

A. Bias against the African continent

The most prominent criticism against the ICC is its alleged exclusive focus on Africa.⁵⁵ The former President of the African Union Commission, Jean Ping, once stated that 'we are not against the ICC, but...the ICC seems to exist solely for judging Africans'.⁵⁶ After all, 'only Africans are wanted for prosecution or have been indicted before the Court'.⁵⁷

It cannot be disputed that only African nationals and situations on that continent are currently under investigation by the Court. These include situations in the Democratic Republic of the Congo ('DRC')⁵⁸, Uganda⁵⁹, two in the Central African Republic ('CAR')⁶⁰,

⁵³ Art. 3(d) of the Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15, 2158 UNTS 3.

⁵⁴ Rowland J.V. Cole, *supra* note 2, 678f.

⁵⁵ Rowland J.V. Cole, *supra* note 2, 679.

⁵⁶ Christoph Ayad, 'Nous Sommes Faibles, Alors On Nous Juge et On Nous Punit', (*Libération*, Paris) CRS transl.

⁵⁷ Rowland J.V. Cole, *supra* note 2, 676.

⁵⁸ *The situation in the Democratic Republic of Congo*, ICC-01/04; *Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court, ICC-01/04-01/06); *Prosecutor v Bosco Ntaganda* (International Criminal Court, ICC-01/04-02/06); *Prosecutor v Germain Katanga* (International Criminal Court, ICC-01/04-01/07); *Prosecutor v Callixte Mbarushimana* (International Criminal Court, ICC-01/04-01/10); *Prosecutor v Sylvestre Mudacumura*

Darfur/Sudan⁶¹, Kenya⁶², Libya⁶³, Côte d'Ivoire⁶⁴ and Mali⁶⁵. However, most of these cases were referred to the ICC by the concerned states themselves. They therefore bear a significant responsibility for bringing the accused individuals and situations before the ICC. For example, President Yoweri Museveni of Uganda referred the situation in northern Uganda to the ICC in December 2003, being the first to do so since the Rome Statute came into force in 2002. Alternatively, the situations in Sudan and Libya were referred to the ICC by the SC under Chapter VII⁶⁶ of the UN Charter⁶⁷. In fact, the Prosecutor of the Court has only twice made use of the power of *proprio motu* in order to launch investigations in situations, namely in Kenya and Côte d'Ivoire, out of the nine currently pending situations before it.

However, the issuance of the arrest warrant against Sudan's sitting head of state, Al Bashir, led to an exacerbation of criticism against the ICC, replacing the initial support the Court enjoyed from some states. The situation in Darfur was referred to the ICC by the SC. Following the attempt to prosecute Al Bashir, the AU requested the SC to suspend the arrest warrant in order to promote the peace process to end the Darfur conflict. Although the SC did consider a deferral⁶⁸ of the ongoing investigation, it ultimately decided against it. It was for

(International Criminal Court, ICC-01/04-01/12); *Prosecutor v Mathieu Ngudjolo Chio* (International Criminal Court, ICC-01/04-02/12).

⁵⁹ *The situation in Uganda*, ICC-02/04; *Prosecutor v Joseph Kony, Vincent Otti and Okot Odhiambo* (International Criminal Court, ICC-02/04-01/05); *Prosecutor v Raska Lukwiya (Decision to Terminate Proceedings against Raska Lukwiya)*, (International Criminal Court, ICC-02/04-01/05-248, 11 July 2007); *Prosecutor v Dominic Ongwen* (International Criminal Court, ICC-02/04-01/15).

⁶⁰ *The situation in the Central African Republic*, ICC-01/05; *Prosecutor v Jean-Pierre Bemba Gombo* (International Criminal Court, ICC-01/05-01/08); *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (International Criminal Court, ICC-01/05-01/13); and *the situation in the Central African Republic II*, ICC-01/14.

⁶¹ *The situation in Darfur, Sudan*, ICC-02/05; *Prosecutor v Ahmad Muhammad Harun („Ahmad Harun“) and Ali Muhammad Ali Abd-Al-Rahman („Ali Kushayb“)* (International Criminal Court, ICC-02/05-01/07); *Prosecutor v Omar Hassan Ahmad Al Bashir* (International Criminal Court, ICC-02/05-01/09); *Prosecutor v Bahar Idriss Abu Garda* (International Criminal Court, ICC-02/05-02/09); *Prosecutor v Abdallah Banda Abakaer Nourain* (International Criminal Court, ICC-02/05-03/09); *Prosecutor v Abdel Raheem Muhammad Hussein* (International Criminal Court, ICC-02/05-01/12).

⁶² *The situation in the Republic of Kenya*, ICC-01/09; *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (International Criminal Court, ICC-01/09-01/11); *Prosecutor v Uhuru Muigai Kenyatta* (International Criminal Court, ICC-01/09-02/11); *Prosecutor v Walter Osapiri Barasa* (International Criminal Court, ICC-01/09-01/13).

⁶³ *The situation in Libya*, ICC-01/11; *Prosecutor v Saif Al-Islam Gaddafi* (International Criminal Court, ICC-01/11-01/11).

⁶⁴ *The situation in Côte d'Ivoire*, ICC-02/11; *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (International Criminal Court, ICC-02/11-01/15); *Prosecutor v Simone Gbagbo* (International Criminal Court, ICC-02/11-01/12).

⁶⁵ *The situation in the Republic of Mali*, ICC-01/12.

⁶⁶ Referral of the situation in Darfur, Sudan via SC Res. 1593 (2005), and referral of the situation in Libya via SC Res. 1970 (2011).

⁶⁷ Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 Oct. 1945) 1 UNTC XVI.

⁶⁸ Art. 6 of the Rome Statute, *supra* note 1.

this political consideration, among others, that the AU first passed a resolution not to cooperate with the ICC in regards to the arrest of Sudan's head of state.

While all the current situations under investigation before the ICC are located in Africa, it cannot be neglected that the majority of situations before the Court were initiated by the concerned states themselves and that the Court is currently also undertaking preliminary examinations in Afghanistan, Colombia, Nigeria, Georgia, Guinea, Honduras, Iraq, Ukraine and Palestine. Only two of these cases are located on the African continent, while the remaining seven are geographically located in different parts of the world. As a result, the accusation of the ICC being biased against Africa is further diluted, as the AU and other current opponents of the ICC fail to take them into account. The argument of the AU stems from a political standpoint in a regional context and has to be considered in the global political system of states. The AU seeks to provide a united front of African states after the continents decolonisation in order to gain greater importance in the world's economic markets as well as in the international world order. Tensions are likely to arise, as the relatively newly independent voices emerge.⁶⁹ While the AU may not be considered a significant power bloc in the international world order, it has become a significant regional voice for African states.

B. The political factor – a conspiracy?

In the view of Paul Kagame, head of state of Rwanda and another prominent critic of the ICC, the vision of the Court is 'imperialistic, colonialist and even racist',⁷⁰ and aims to control African states. On the other hand, Rwanda's commitment to international justice was demonstrated by the government's cooperation in the establishment of the International Criminal Tribunal for Rwanda, although Rwanda did try to limit the jurisdiction of the ICTR as much as possible to one side of the perpetrators of the genocide, namely Hutus, only. But it is no secret that the 'support' the ICTR initially enjoyed subsided. Again, much like the AU, also Kagame's view is based on political considerations, such as that states in which situations are under investigation have no leverage against the ICC. This assertion would be accurate if the ICC was set up similar to the ICTR, neglecting the principle of complementarity contained in the Rome Statute.

⁶⁹ Rowland J.V. Cole, *supra* note 2, 682.

⁷⁰ David Kezio-Musoke, 'Rwanda: Kagame Tells Why He Is against ICC Charging Bashir' (*Daily Nation* (online), 3 August 2008) <<http://allafrica.com/stories/200808120157.html>> accessed 15 August 2015.

Some critics talk of a ‘politicisation of the ICC’ and imply that the goal of international law is to impose control over poor states and that the ICC has been established to do precisely that.⁷¹ They assert that the ‘inviolable’ principle of sovereignty does not have the same meaning in the international world order for Western powers on one hand and African and the Middle Eastern states on the other. Western powers have made themselves the protectors of human rights worldwide and have instituted the ICC as their tool to target Africans.⁷² This argument is based on the premise that international law as such was ‘created’ by Western powers and used to gain control and dominance over others. As a result, the ICC could itself be part of this system. It is also commonly asserted that opponents of the United States are more likely to be prosecuted and condemned than its allies. The United States has, however, not ratified and has in fact withdrawn its signature from the Rome Statute under the Bush administration. It is not a secret that the US, while preaching a commitment to international justice, has been an opponent of the ICC as early as negotiations of the statute. While the position of the US has gradually changed to a more positive approach towards the ICC⁷³, it cannot be asserted that the US would politically influence the ICC’s examinations or investigations in the suggested manner.

According to others, a real threat exists that international justice will increasingly be determined by ‘Western’ value systems, rather than by objective criteria and principles, resulting in negative effects of a ‘globalisation of justice’.⁷⁴ If the sovereignty of smaller and weaker states would deteriorate, the notion of the equality of states would cease to define international relations, and would be replaced by power.⁷⁵ This consideration is also political in nature, and fails to consider the legal aspects and processes of the ICC.

⁷¹ Rowland J.V. Cole, *supra* note 2, 685.

⁷² Mahmood Mamdani, ‘Darfur, ICC and the New Humanitarian Order’ (*Pambazuka News* (online), 17 September 2008) <<http://www.pambazuka.net/en/category.php/features/50568>> accessed 15 August 2015.

⁷³ see below, Chapter V.A.ii.1.

⁷⁴ Bruce Baker, ‘Twilight of Impunity for Africa’s Presidential Criminals’, 25 *Third World Quarterly* (2004) 1487-1499, 1497.

⁷⁵ Rowland J.V. Cole, *supra* note 2, 685.

C. A new concept of State Sovereignty

Another objection raised, not limited to African states, but the United States has also voiced its discontent with this design already during negotiations, is that the Rome Statute in certain circumstances grants the Court the ability to prosecute nationals of states, which have not ratified the Statute.⁷⁶ Consequently, the opponents to the ICC argue that the Rome Statute implies and unfairly creates obligations for non-state parties. Generally, Article 34 of the Vienna Convention on the Law of Treaties stipulates that a treaty does not create obligations for a third state without its consent. The VCLT is widely acknowledged to represent customary international law. The Rome Statute itself limits its jurisdiction to its state parties. This principle also arises from the sovereign immunity every state enjoys under international law. The opponents' arguments focus on: 1. situations where nationals of non-state parties commit crimes on the territory of a state party to the Rome Statute, in accordance with Article 12(2)(a), and 2. SC referrals of a situation as a whole to the ICC, in accordance with Article 13(b) of the Statute and Chapter VII of the UN Charter. Two SC referrals have taken place to date, namely in connection with the situations in Darfur/Sudan as well as in Libya. In fact, the matter of state sovereignty was already an issue during the 1998 Conference establishing the ICC, and had the potential to halt the realisation of the Court.⁷⁷ It is still a seemingly unresolved topic of discussion whether or not the aforementioned provisions of the Rome Statute result in a violation of a customary international law principle by creating obligations for non-state parties.⁷⁸

As previously mentioned, the relationship between the ICC and the AU deteriorated with the issuance of the arrest warrant for Sudan's sitting head of state, Al Bashir, for multiple reasons. He was the first sitting head of state to have been indicted by the ICC. Consequently, the AU questioned and criticised the ICC's jurisdiction over the situation in Darfur. One of the main concerns was that Sudan is not a party to the Rome Statute. In order for a treaty to be applicable to a state, the state must give its consent to be bound to it. Based on the basic aforementioned considerations, the ICC does not have jurisdiction over the situation in Darfur and could therefore not indict Al Bashir. Unlike other African states, who are state parties to the Rome Statute and over which the ICC therefore has jurisdiction, the Sudanese government consistently rejected the issued arrest warrant against its head of state. As a third party, Sudan

⁷⁶ Michael J. Struett, *supra* note 23, 156.

⁷⁷ Rowland J.V. Cole, *supra* note 2, 686.

⁷⁸ Michael J. Struett, *supra* note 23, 156.

is under no legal obligation to abide to the ICC. In accordance with Article 25 of the UN Charter, Sudan is however obliged to comply with resolutions passed by the SC. Resolution 1593 of the SC referred the situation in Darfur to the Court, and called on Sudan and other state parties of the Rome Statute to cooperate with and provide necessary assistance to the ICC.

The referral of the situation in Darfur further raised the question of the appropriateness of SC referrals in the first place. Referrals by the SC have the purpose to allow the ICC to investigate and prosecute situations in third states to the Rome Statute, which would otherwise not be in its jurisdiction. The AU challenged the ‘moral authority’⁷⁹ of the SC to do so and criticised subsequent referrals to not represent the will of the international community, because the permanent members of the SC can easily influence such a resolution. It suggested that since the SC consists of only few states, a referral by the UN General Assembly would result in greater democratic legitimacy.⁸⁰ This suggestion neglects that resolutions of the GA are not binding upon the members of the UN. Additionally, three out of the five permanent members of the SC are also not state parties to the Rome Statute. To date, only France and the United Kingdom of Britain have ratified the Rome Statute. In the ICC’s early years and especially under the first term of the Bush administration, the United States itself has been a strong opponent of the ICC, trying to shield its government officials from possible prosecution by the Court. In recent years, the attitude of the US has gradually commenced to change positively in favour of the ICC.⁸¹ Regardless, the criticism of unequal powers of the members of the SC should not be directed against the Court because, firstly, a veto power may prevent a referral but cannot otherwise politically influence it, and secondly, it forms part of a political debate, which is separate from the ICC.

D. Immunity of state officials

In connection with the ICC’s arrest warrant issued against Sudan’s head of state, another significant concern for the AU was that Al Bashir enjoys immunity because he is still in office. Under customary international law, this immunity *ratione personae* extends to domestic courts of foreign states for both civil and criminal matters, including arrest as well as arrest warrants. There are only four exceptions under which a (sitting) head of state or other

⁷⁹ Rowland J.V. Cole, *supra* note 2, 688.

⁸⁰ *Decision on the Meeting of African States Parties to the Rome Statute*, AU Doc Assembly/AU/Dec.245 (XIII) Rev.1, para 8.

⁸¹ see Chapter V.A.ii.1.

high-ranking government official can be held accountable for his crimes: 1. The authorities of his own state undertake the prosecution; 2. The competent authorities of his home state waive immunity, allowing for prosecution; 3. The person is no longer head of state or a high-ranking government official and faces criminal prosecution for private acts or for acts committed at a time outside of ‘office’; or 4. The charges are brought before an international tribunal or criminal court. While sitting heads of state therefore enjoy immunity before domestic courts of third states, they may be prosecuted by international tribunals and courts, such as the ICC, that have jurisdiction to do so. However, in its Assembly in October 2013, the AU made it clear that any international court or tribunal should not be able to prosecute sitting heads of state and proposed that African states considering self-referrals to the ICC should first inform and consult with the AU.⁸²

When Al Bashir took part in a summit meeting in Malawi in 2011, the ICC unsuccessfully prompted the Malawian government to adhere to their obligations under the Rome Statute and thereby arrest Sudan’s sitting head of state in accordance with the arrest warrant issued by the ICC on the 4. March 2009. However, Malawi maintained that Al Bashir enjoys immunity *ratione personae* as a sitting head of state, and that Article 27 of the Rome Statute could not lift such immunity, because Sudan is not a state party to the statute. In accordance with this line of argumentation, an arrest of Al Bashir would have been in violation to international law, and Malawi could therefore not detain him.⁸³ Other African states, such as Kenya and most recently South Africa have also failed to arrest Al Bashir during his visits to their territories.

After the ICC indicted Kenya’s sitting head of state, Kenyatta, as well as its Vice-President William Ruto for allegedly having committed crimes against humanity in the post-election violence in Kenya in 2007 – 2008, the AU again voiced its discontent with the Court for allegedly disregarding the immunity granted to both under international law. Unlike the situation in Sudan, Kenya is a state party to the Rome Statute. However, like Al Bashir, Kenyatta is also a sitting head of state, and the case was the most advanced yet in regards to a person in such a position before the ICC. Because Kenya is a state party to the Rome Statute, its provisions fully apply. Through its ratification, Kenya has implicitly waived the immunity of its head of state as well as its government officials, because of Article 27 of the Statute,

⁸² *Decision on Africa’s Relationship with the ICC*, AU Doc Ext/Assembly/AU/Dec.1 (October 2013), para 10(i).

⁸³ August Reinisch [Hrsg], Hanspeter Neuhold [Hrsg], *Österreichisches Handbuch des Völkerrechts*. 2. Materialienteil (Manz 2013) D195, 475.

which stipulates that no immunity will be applicable before the Court. Three years after the violence first started, in which 1,200 people were murdered, many more injured, and over 600,000 people displaced⁸⁴, the Prosecutor of the ICC requested the authorisation to commence an investigation into the matter, because the state would not hold those responsible accountable. At that time, only few cases of murder had been investigated on the national level, and no further effective steps were taken to prosecute other atrocities.⁸⁵ The situation in Kenya is also the first situation in which the ICC did not only investigate one side of the conflict, but rather looked into both, which meant that both Kenyatta and Ruto were not to be exempt as members of the two opposing political parties. It is necessary to reiterate that in order for international justice to be legitimate, it has to also be impartial, extending to both sides of the conflict.

However, it was precisely because Kenya's head of state as well as its Vice-President were indicted before the Court, that the AU again called for the non-cooperation of the African state parties to the Rome Statute with the ICC. While both Kenyatta and Ruto cooperated with the ICC in light of their trials, they also successfully promoted the allegation of the ICC as a neo-colonial tool of Western powers pinned against the African continent. Kenya is still at the forefront in the call for the African Court of Justice and Human Rights and supports the AU's call for a mass withdrawal from the Rome Statute.⁸⁶ Regardless, both of the accused kept their composure before the Court: Kenyatta readily appeared before the Court and in December 2014 the Prosecutor withdrew the charges against the sitting head of state for lack of evidence due to Kenya's non-cooperation. Although the public initially supported the intervention by the ICC, the governmental campaign against the international court soon resulted in protests by the public against the Court they had previously welcomed and the government failed to provide further requested assistance such as evidence to the Court. Vice-President Ruto still stands before the ICC, but has been permitted to continue to carry out his function as a government official. At the last summit meeting of the AU in June 2015, the Assembly again condemned the ICC's 'negligence' towards the international law principles stipulating the immunity of high-ranking government officials.⁸⁷ While it

⁸⁴ Chantal Meloni, 'Kenya and the ICC: a Boomerang Effect?', Analysis for the Institute for International Political Studies (2014), 2.

⁸⁵ Mark Kersten, 'The Lesson the ICC Shouldn't Learn in the Wake of Kenyatta', (*Justice Hub* (online), 7 December 2014) <<https://justicehub.org/article/lesson-icc-shouldnt-learn-wake-kenyatta>> accessed 15 August 2015.

⁸⁶ see below, Chapter V.D.

⁸⁷ *Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court*, AU Doc Assembly/AU/Dec.586 (XXV) (June 2015).

recommended Kenyatta for taking charge of the situation, it simultaneously condemned the ICC for proceeding with the trial against Ruto and again called for the non-cooperation of the states with the prosecution before the ICC.⁸⁸

E. Justice v. peace

The International Criminal Court has been set up as a tool to promote justice for grave crimes against international humanitarian law and human rights. But justice may not simultaneously equal or result in peace. The AU, among others, criticises the ICC for its premature interventions before a conflict has been resolved: the indictment of possible offenders only stunts peace talks and exacerbates the situation. The situation in Uganda is a prime example.

The conflict in northern Uganda between the Lord's Resistance Army ('LRA') and the United People's Defence Force ('UPDF') has been ongoing since 1986. In 2003, Uganda's head of state Museveni referred the situation to the ICC, being the first to do so since the Court's establishment, and in July 2005 formal investigations were launched into the crimes committed by the LRA. Although legally permissible, the involvement of the ICC was met with strong criticism⁸⁹: Peace must come before justice and the ICC's involvement was said to neglect traditional, indigenous forms of justice. Moreover, since Museveni, as the head of state, referred the situation to the ICC, many assumed that this was done with the intent to save the UPDF from prosecution for their atrocities during the conflict. In fact, no member of the government or of the UPDF has yet been indicted by the Court. Uganda passed an Amnesty Act for LRA leaders in the process of peace talks between the government and the LRA, which allowed them to return to their communities without fear of possible prosecution if they renounced violence. Some argue that the involvement of the ICC in Uganda is therefore a breach of the Amnesty Act. The issuance of arrest warrants by the ICC for Joseph Kony, the alleged Commander-in-Chief of the LRA, and for four other high-ranking commanders, did cause Kony to abandon peace talks in light of their possible arrest. But who was to say that Kony was serious about peace talks to begin with? The growing numbers of LRA fighters, which accepted amnesty under Uganda's Amnesty Act were conceived as a threat⁹⁰, and the LRA responded in 2004 by attacking a camp in Pagak, at a time when peace

⁸⁸ *Ibid.*

⁸⁹ Janine Natalya Clark, 'The ICC, Uganda and the LRA: Re-framing the Debate', *African Studies* 69:1 (2010) 141-160, 141.

⁹⁰ *Ibid.*, 145.

talks had already begun. Naturally, it is not unrealistic to assume that leaders involved in a conflict are more reluctant to agree to peace talks if prosecution was to follow a conclusion of peace agreements. In fact, Kony has refused to sign any peace agreement until the ICC lifts its arrest warrants. And yet the relationship between justice and peace is more complex and intricate than some would suggest. Can the ICC's arrest warrants really be a threat to the peace considering that there hasn't been peace in Uganda since 1986? Furthermore, no agreement reached between the government and LRA has yet successfully led to the end of violence. Another issue with the argument that peace should precede justice is the question of how much peace is necessary before justice can be sought?⁹¹ Peace and justice do not have to be mutually exclusive, but should rather be viewed as mutually beneficial and reinforcing.

The allegation that the ICC will interfere in ongoing conflicts, without taking the implication of criminal proceedings on the necessary peace process sufficiently into account could be one of the most serious objections to the design of the Court.⁹² The focus of this argument lies with the Prosecutor's *proprio motu* power to initiate investigations and trials in accordance with Article 15.

During the drafting process of the Rome Statute, the aim was to ensure that the Court would have independence from individual states and their political context in order to be able to prosecute the perpetrators of grave violations of international human rights law and international humanitarian law effectively and without discrimination. However, now opponents to the ICC assert that the *proprio motu* power of the Prosecutor effectively places the proceedings of the Court outside of accountability methods. Article 15 grants the Prosecutor the power to legally investigate situations, essentially without the consent of the concerned state. Supporters, on the other hand, counter that the ICC can only exercise jurisdiction in accordance with the complementarity principle, so that the concerned state could still pursue genuine domestic investigations or legal proceedings without the Court's interference. Domestic courts are given primacy to deal with the prosecution of international crimes, and only if the concerned state is 'unwilling or unable [to] genuinely...carry out the investigation or prosecution'⁹³ would the ICC be able to assert jurisdiction over the case. When the former Prosecutor of the ICC, Luis Moreno Ocampo, formally started in his investigation over the situation in northern Uganda, he was indeed aware of and concerned

⁹¹ *Ibid*, 147.

⁹² Michael J. Struett, *supra* note 23, 155.

⁹³ Art. 17(1) of the Rome Statute, *supra* note 1.

not to jeopardise the ongoing peace initiative by the Ugandan government. The government, however, made little process, so that the former Prosecutor reached the decision to intervene and issued the aforementioned arrest warrants in mid-2005.⁹⁴ In Kenya, the former Prosecutor attempted a ‘positive complementarity’ strategy by engaging in a form of dialogue with the Kenyan government, and supporting the domestic legal system to carry out the subsequent investigations and prosecutions. However, the Kenyan judiciary only investigated a few murder allegations and their entire conduct was generally viewed as a malicious attempt by the Kenyan government to delay proceedings before the ICC.⁹⁵ The Rome Statute does ultimately leave the authority to determine whether domestic proceedings are genuine or not to the ICC itself. Decisions of this nature will likely be controversial, particularly in situations where the conflict has not yet been settled and peace has not yet been achieved in the region or state concerned.

African states argue that traditional justice systems might be more constructive than international criminal justice by the ICC, as they are based on restorative principles. They argue that it may sometimes be necessary to avoid accountability in order to prevent the threat of a renewed outbreak of the conflict.⁹⁶ The key problem here is again that these concepts are portrayed as alternatives, rather than complementary forms of justice.⁹⁷ Similarly, international prosecutions of human rights have been criticised for ‘threatening the delicate political bargains, where present, between a regime on one hand and reformers on the other.’⁹⁸ Slobodan Milosevic’s case before the ICTY, as well as the *Pinochet* case before British domestic courts, raised the question if and when the international community should call for the prosecution of perpetrators before an international tribunal or court considering their potential to worsen domestic instabilities.⁹⁹ Closely related, is the question of amnesties granted to possible perpetrators, in order to ensure truth rather than justice, before the ICC. However, amnesties have not been addressed in the Rome Statute. It would seem plausible that if an amnesty was only issued to shield perpetrators from prosecution, the ICC would have the authority to exercise its jurisdiction, in accordance with Article 17.

⁹⁴ Janine Natalya Clark, *supra* note 89, 145.

⁹⁵ Chantal Meloni, *supra* note 84, 2f.

⁹⁶ Garth Meintjes, ‘Domestic Amnesties and International Accountability’ in Dinah Shelton (eds), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley 2000) 88.

⁹⁷ Janine Natalya Clark, *supra* note 89, 148.

⁹⁸ Michael J. Struett, *supra* note 23, 163.

⁹⁹ *Ibid.*

In any case, there may always exist a tension between the goals of retribution and justice on one hand, and reconciliation and peace on the other. The ICC does also not represent the only mechanism, which aims to provide justice for grave crimes of interest to the international community, as is implied by the Rome Statute's complementarity principle. The Court is one of last resort, therefore truth commissions and/or domestic criminal procedures remain a relevant possibility for concerned states. Ultimately, the international community, and the ICC, support domestic peace mechanisms and legal procedures by placing an emphasis on states addressing atrocities committed on their territories, but states are also no longer able to solely decide whether or not perpetrators should be held accountable.¹⁰⁰

¹⁰⁰ Garth Meintjes, *supra* note 96, 89.

IV. Assessment of the Allegations

The ICC has always had critics who believed that this institution was destined to fail, but the criticisms against it have been on the rise: with the recent considerations of African states to withdraw from the Rome Statute, a delegitimation of the Court seems a prominent threat. Delegitimation would result in diminishing the Court's role, limiting its power and preventing it from carrying out its important role in the fight against impunity. Delegitimation would also undermine its ability to achieve its objectives and prerogatives. In order to assess whether the aforementioned allegations have achieved such a result, it is necessary to analyse them in light of the legal structure of the Court, as well as in a broader political context.

A. The situations before the ICC

As previously mentioned, there are only three means by which a situation can be brought before the Court: self-referral, referral by the SC or *proprio motu*. From the nine situations currently under investigation by the ICC, five have been brought before it via self-referrals. The situations in the DRC, Uganda, the CAR (I and II) and Mali were self-referrals in accordance with Article 14 of the Rome Statute, so that these states bear a significant responsibility for which (geographically located) situations the ICC investigates. The situations in Libya and Darfur were referred to the ICC by SC Resolutions, due to the lack of genuine efforts of the states to carry out effective prosecutions of the perpetrators. Additionally, the UN Commission of Inquiry made the recommendation for the referral of the Darfur situation to the ICC, which was the basis for the subsequent SC Resolution. The Prosecutor therefore only made use of his *proprio motu* power in order to initiate prosecutions under Article 15 of the Rome Statute twice: in the situations in Kenya and in Côte d'Ivoire. While the situation in Côte d'Ivoire still demonstrates similarities to a self-referral, the situation in Kenya was the main proper use of the Prosecutor's *proprio motu* power to date. However, the ICC employed a 'positive complementarity' strategy, conducting dialogues with the Kenyan government and granting it essentially two years to provide accountability for the crimes committed during the post-election violence in 2007 – 2008. Only once the Kenyan authorities failed to do so, the ICC took action.

While *proprio motu* prosecutions can only be instigated on reasonable basis from reliable sources, over 'the worst crimes', which fall into the jurisdiction of the Court, all situations before the ICC undergo serious scrutiny of the evidence. The Court would not

confirm allegations unless there was a reasonable basis for the validity that an accused individual has committed grave crimes. The Court demonstrated this when it declined to confirm the charges against Henry Kiprono Kosgey and Mohammed Hussein Ali¹⁰¹, Bahar Idriss Abu Garda¹⁰², and Callixte Mbarushimana¹⁰³.¹⁰⁴ Considering the required high standard of proof, it can be construed to ensure that the allegations are reliable and that the principle of ‘innocent until proven guilty’, a cardinal principle of criminal law, is strictly applied by the Court, especially in the confirmation hearing, but also extending beyond it throughout the entire procedure before the Court. The Court demonstrated this when the charges against Kenya’s head of state, Uhuru Kenyatta, were withdrawn, because of lack of evidence to provide a reasonable basis.¹⁰⁵ Additionally, the Court initially refused to confirm the charges against Laurent Gbagbo¹⁰⁶, former head of state of Côte d’Ivoire, as well as against Dominic Ongwen¹⁰⁷, one of the Lord’s Resistance Army’s commanders, because there was insufficient evidence for the high standard set out by the Court. Instead, the Court decided to postpone both of these cases until the 10. November 2015 and the 21. January 2016 respectively.

Considering most situations the Court concerns itself with are brought before it by self-referrals of the concerned states themselves, discredits the claim that the ICC is ‘Afro-focused’¹⁰⁸. Preliminary examinations in states outside of Africa further support this. In fact, only two out of the currently nine preliminary examinations are conducted in Africa, namely in Nigeria and Guinea. The remaining seven preliminary examinations are located in Afghanistan, Columbia, Georgia, Honduras, Iraq, Ukraine and Palestine. The ICC is therefore not only present in Africa but also in South and Central America, Europe as well as Asia. In all of these situations, the ICC aims to employ complete independence as well as impartiality

¹⁰¹ *Prosecutor v Ruto (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 23 January 2012); *Prosecutor v Muthaura (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012).

¹⁰² *Prosecutor v Garda (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010).

¹⁰³ *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011).

¹⁰⁴ Rowland J.V. Cole, *supra* note 2, 690.

¹⁰⁵ *Prosecutor v Uhuru Muigai Kenyatta (Decision of the withdrawal of charges against Mr. Kenyatta)* (International Criminal Court, Trial Chamber V(b), ICC-01/09-02/11-1005, 13 March 2015, pursuant to Prosecutor’s notice on the 14 December 2014).

¹⁰⁶ *Prosecutor v Laurent Gbagbo (Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 3 June 2013).

¹⁰⁷ *Prosecutor v Dominic Ongwen (Decision Postponing the Date of the Confirmation of Charges Hearing)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/15-206, 6 March 2015).

¹⁰⁸ Rowland J.V. Cole, *supra* note 2, 676.

and abides fully to the Rome Statute and its high standard requirements. ‘Impunity is not an option’ as the current Prosecutor of the ICC, Fatou Bensouda, proclaimed.¹⁰⁹

The process before the ICC by which cases and situations are brought before it are legally constructed in such a manner as to require grave violations and a high standard of proof. The ICC is often criticised for being a political tool for Western powers, yet the acceptance of and the referral by the SC provide for a wide scope for investigations in order to provide neutrality of the Prosecutor. The political doubts of the SC voiced by some states should not be mirrored onto the ICC.

B. The situations not before the ICC

In connection to the accusation that the ICC is biased against African states, the AU also questions why perpetrators in other regions are not brought before the Court in order to be held accountable. Although a justified question, it implies that because others aren’t prosecuted for similar crimes, it is a reason not to be prosecuted themselves.¹¹⁰ Political considerations and obstacles play an important role in this context. The ICC is not able to prosecute conflicts in states, which are not state parties to the Rome Statute and the reality is that there is still a large number of states, which have not ratified the treaty. Consequently, in order for the ICC to enjoy jurisdiction over these conflicts, the ICC has to rely on a referral by the SC. However, international relations coupled with political factors and the fear that smaller and weaker states are likelier targets to unequal treatment causes concern. The greater political influence of Western powers, especially of the permanent members of the SC, over developing states, and the premise that leaders in other parts of the world seem unlikely to be prosecuted for similar crimes as opposed to African leaders, results in problems of legitimacy for the ICC in Africa.¹¹¹ In fact, China and Russia recently vetoed a SC referral for war crimes and crimes against humanity committed in the conflict in Syria, and have indicated that they will also not support a referral of the Democratic People’s Republic of Korea (‘DPRK’) to the ICC.¹¹² One is left to wonder whether the crimes committed in Libya were more serious than

¹⁰⁹ Fatou Bensouda, ‘Our Resolve to Create a More Just World Must Remain Firm’ in the Debate (online), ‘Is the International Community Abandoning the Fight Against Impunity?’ (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm>> accessed 15 August 2015.

¹¹⁰ Rowland J.V. Cole, *supra* note 2, 691.

¹¹¹ Rowland J.V. Cole, *supra* note 2, 691.

¹¹² Mark Kersten, ‘The Security Council’s Appalling Record of Referring Situations to the ICC’ (*Justice in Conflict*, 23 May 2014) <<http://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/>> accessed 15 August 2015.

those committed in Syria to justify the referral of one case and not the other. The blocked resolution implies that Bashar Al Assad, Syria's head of state, does not currently face a threat of prosecution. The failure of a SC referral of the Syrian conflict to the ICC stands itself in divergence with 'the need to end impunity' as emphasised by the SC itself.¹¹³ Furthermore, at the present time, the permanent members of the SC are divided on the issue of referrals, so that there is a possibility that the SC will fail to refer further conflicts to the Prosecutor of the ICC in the future. Consequently, there are many situations where grave violations are currently committed in states, which are neither state parties to the ICC nor have accepted its jurisdiction voluntarily, and which are therefore outside its grasp. Consequently, although the drafters of the Rome Statute envisioned a Court free from political interference, the ICC will in this respect be limited by political realities.

The explanations Russia proclaimed for making use of its veto power are similar to arguments voiced by African opponents of the ICC: a referral would be counterproductive for the peace process. This ignores the fact that war crimes and crimes against humanity have been continuously committed in Syria since 2011 with complete impunity. Russia goes on to argue that a referral would be the stepping-stone to military intervention by outside forces. Even though Chapter VII of the UN Charter enables a referral to the ICC, it does not imply that such an action cannot be taken independently from the use of force. Russia's strongest justification lies in its implication that double standards are applied within the SC regarding referrals:¹¹⁴ On the insistence of the United States, referrals by the SC include an exemption clause which precludes the ICC from exercising jurisdiction over nationals of states which are not state parties to the Statute, with the exception of nationals of the concerned state whose situation is in the process of being referred to the ICC. This clause is in itself inconsistent with the Rome Statute and further stands in dispute with one of the key purposes of the United Nations, to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.¹¹⁵ But not every state supports the inclusion of this exclusion clause: Argentina took a strong stand against it at the SC meeting for the respective resolution¹¹⁶, and other states are encouraged to follow suit. It seems as if the priority of the permanent members of the SC is to follow and protect their individual political interests and alliances rather than to enact their mandate to maintain

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Preamble of the UN Charter, *supra* note 67.

¹¹⁶ 7180th Meeting of the Security Council on the Referral of the Situation in Syria to the ICC, SC/11407, 22 May 2014.

international peace and security impairs the body's credibility and effectiveness. The failure of the SC to refer conflicts to the ICC, over which it would otherwise not have jurisdiction, should not be viewed as the latter's failure to fight impunity and to prosecute war crimes, crimes against humanity and genocide.

However, in such situations in which the ICC could enjoy jurisdiction, it has to be pointed out that the Preamble of the Rome Statute stipulates that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. Consequently, states do not only have the right, but the obligation to exercise its criminal jurisdiction, ideally allowing the ICC to function as a court of last resort. This obligation to deliver justice exists towards their populations.¹¹⁷ Consequently, the complementarity principle hinders the ICC to take jurisdiction in such instances, as envisioned by the drafters of the Statute. In situations where domestic courts exercise their jurisdiction over perpetrators of war crimes, crimes against humanity or genocide, the ICC does not have the authority to act. These cases can therefore not come before the Court. Essentially, exercising criminal jurisdiction is one of the constitutive elements of sovereignty enjoyed by the state¹¹⁸ and the Rome Statute does not completely defer it to the Court, but rather establishes an additional, alternative mechanism.

C. The inapplicability of immunity before the ICC

Since international human rights law requires that all perpetrators of extensive violations of human rights are held accountable for their crimes, Article 27 Rome Statute specifically provides that any immunity, national or international, cannot be used as defence to bar the Court's jurisdiction. This provision only applies to those heads of state and government officials of state parties to the Rome Statute, such as in Kenyatta's case, and to those in which situations in their country have successfully and legitimately been referred to the Court, such as in Al Bashir's case. A different approach may be necessary for heads of state and government officials of non-state parties. The denial of immunities for heads of state and government officials of state parties to the Rome Statute is uncontroversial because they agreed to waive their immunity through the ratification of the treaty. It does, however, remain controversial in regards to heads of state and government officials of non-state parties, who

¹¹⁷ Zeid Ra'ad Al Hussein, 'The Long Walk to Accountability' in the Debate (online), 'Is the International Community Abandoning the Fight Against Impunity' (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/long-walk-accountability>> accessed 15 August 2015.

¹¹⁸ *Ibid.*

may be brought before the Court in accordance with Article 12(2)(a) of the Rome Statute, because they have not waived their immunity, explicitly or implied, through ratification or otherwise.¹¹⁹ The principle set out in Article 34 VCLT¹²⁰ may have been undermined by the new concept brought forth in international criminal law in respect to the principle of sovereign immunity as well as the immunity of heads of state and government officials. While sitting heads of state enjoy immunity before domestic courts of third states, they may be prosecuted by international tribunals or criminal courts, such as the ICC, that have jurisdiction to do so. The latter is much discussed and disputed by some, because criminal tribunals are a fairly recent phenomenon. A reason for the distinction between domestic courts on one hand, and international tribunals and courts on the other, finds its basis in the principle of sovereignty itself: one sovereign state cannot adjudicate on the conduct of another state, because they are essentially equal. However, this principle does not also apply to international tribunals and courts, because they are established by the international community, and therefore are neither part of a state nor organs of states.¹²¹

As previously mentioned, some state parties to the Rome Statute have not complied with the ICC's arrest warrant for Al Bashir on the basis that it would be contrary to international law to arrest a sitting head of state, since Article 27 of the Rome Statute cannot lift the immunity of a sitting head of state from a third state. Article 98(1) of the Statute indeed stipulates that '[t]he Court may not proceed with a request for surrender or assistance which should require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.' The ICC, in a case against Malawi and its failure to cooperate, did not however agree with the argument that Article 27 of the Statute was therefore not applicable¹²². The Pre-Trial Chamber gave a number of reasons for that argument's rejection: Firstly, international tribunals have continuously rejected heads of state immunity since World War I. Secondly, prosecutions of heads of state have occurred more frequently and have gained acceptance since the end of the 20th Century. This extends to the prosecutions of Slobodan

¹¹⁹ Roger O'Keefe, 'The United States and the ICC: the force and farce of the legal arguments', 24 *Cambridge Review of International Affairs* (2010) 335-355, 346.

¹²⁰ Vienna Convention on the Law of Treaties, *supra* note 40.

¹²¹ August Reinisch [Hrsg], Hanspeter Neuhold [Hrsg], *supra* note 83, 477.

¹²² *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, ICC-02/05-01/09-139, 12 December 2011).

Milosevic, Charles Taylor, Laurent Gbagbo, Hissène Habré as well as Omar Al Bashir and Uhuru Kenyatta. Thirdly, the fact that the predominant majority of states have now ratified the Rome Statute and therefore waived the immunities of their heads of state and government officials is an indication of the acceptance of the fact that immunity should not bar a prosecution before the ICC. Fourth and most importantly, the ICC was established in order to exercise ‘its jurisdiction over persons for the most serious crimes of international concern’.¹²³ As the Pre-Trial Chamber stated in regard to Malawi’s non-cooperation, ‘it is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way [...] would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.’¹²⁴ The Chamber essentially concluded that there was no conflict between Malawi’s obligations under the Rome Statute and international law, so that Article 98(1) could not be invoked.¹²⁵

In any case, because it is ‘disputed’ whether or not international tribunals are able to lift immunity, it has been suggested that Al Bashir’s immunity was lifted by the SC Resolution 1593 to the extent that the referral by the SC had the effect of binding Sudan to cooperate with the ICC as if it were a state party to the Rome Statute.¹²⁶ In such a situation, Article 34 VCLT cannot be said to have been undermined by the Rome Statute, because Sudan’s obligation to cooperate is based on the binding effect of the UN Charter and not on obligations derived from the Statute to third states. Taking into account that there are only three methods by which a situation may be brought before the ICC, the Rome Statute does not in fact create obligations for non-state parties.

Taking into consideration that African states played a significant role in the realisation of the ICC, it would not have been farfetched to assume that they supported the piercing of head of state immunity from prosecution. It seems, however, that the AU to some extent still applies the same concept of Pan-Africanism¹²⁷ as its predecessor, the Organisation of African Unity, did. It may be possible that African states did not at the time anticipate the inclusion of

¹²³ *Ibid.*

¹²⁴ *Ibid.*, para. 41.

¹²⁵ August Reinisch [Hrsg], Hanspeter Neuhold [Hrsg], *supra note* 83, 478.

¹²⁶ Rowland J.V. Cole, *supra note* 2, 687.

¹²⁷ ‘[...] the promotion of solidarity, brotherhood and a sense of we-ness among Africans to address common political, economic and development challenges’ in Edward Ansah Akuffo, ‘Cooperating for peace and security or competing for legitimacy in Africa? The case of the African Union in Darfur’, 19 *African Security Review* 4 (2010) 74-89, 76.

Article 27 of the Rome Statute; otherwise they would possibly not have been as enthusiastic about the establishment of a permanent criminal court, given their current objections. However, as both the LMG and the SADC played a key role in shaping the provisions of the Rome Statute, it would seem that African states did initially support the concept of Article 27 with the understanding that such a provision was necessary in order to achieve an effective fight against impunity.

Although the loudest criticism in regards to immunity before the ICC concerns itself with heads of state and high-ranking government officials, it is not limited to these persons. Domestic amnesties granted to an individual in order to establish peace and to find the truth also cause concern for opponents to the ICC. Domestic amnesties are as such not directly addressed in the Rome Statute, and consequently some scholars assert that ‘there can be no amnesty where a treaty requires prosecution’¹²⁸. This applies for example to the Genocide Convention of 1948¹²⁹, and is generally considered to embody customary international law. Indeed, domestic amnesties are commonly viewed as instruments of impunity rather than of justice because states cannot use domestic amnesties, as national legislation, to bar international criminal liability.¹³⁰ The participating states in the negotiations to the Statute for the ICC were divided on this topic, resulting in the ambiguity of the Rome Statute. While the US strongly supported the consideration of domestic amnesties before the International Criminal Court, other countries saw amnesties as possibilities for perpetrators, especially those in power, such as dictators, to escape accountability.¹³¹ As the Rome Statute does not contain a provision addressing domestic amnesties, the Court would probably have the possibility to consider such amnesties in certain circumstances. However, domestic amnesties, as the name indicates, serve to avoid domestic rather than international prosecution, and as such should not have an effect of the decision of whether or not to conduct an investigation and prosecution by the ICC. On the other hand, the ICC could decide to respect domestic amnesties in cases where such were issued based on reasoned decisions rather than to avoid prosecution. The complementarity principle should be considered the starting point for such an assessment: whether or not a domestic amnesty was granted, satisfying the unwillingness requirement for the ICC to exercise jurisdiction over the situation. The unwillingness to

¹²⁸ Naomi Roht-Arriaza, ‘Amnesty and the International Criminal Court’ in Dinah Shelton (eds), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley 2000), 77.

¹²⁹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

¹³⁰ Garth Meintjes, *supra* note 96, 83 and 86.

¹³¹ *Ibid.*, 83.

prosecute by the domestic courts is given if the ‘proceedings were or are undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court [...]’.¹³²

The situation in northern Uganda encompasses the issue of domestic amnesties. In order to facilitate peace talks between the government and the LRA, the Amnesty Act was passed, which allowed members of the LRA to return to their communities without fear of possible prosecution if they renounced violence. Some argue that the involvement of the ICC in Uganda, although on referral by Uganda itself, is therefore a breach of the Amnesty Act. When investigations by the ICC formally began, the former Prosecutor, Luis Moreno Ocampo, was concerned not to jeopardise the ongoing peace initiative by the Ugandan government. Since the government made little progress the former Prosecutor eventually reached the decision to intervene and exercise jurisdiction over the situation. The domestic amnesties, which may have been sporadically issued in accordance with Uganda’s Amnesty Act, were of little significance in the subsequent proceedings before the ICC, since none of the individuals indicted by the Court were granted such domestic amnesties under national legislation.¹³³

Prosecutorial discretion may also constitute a possibility to solve the existing ambiguity in regards to domestic amnesties. The decision regarding the applicability of a domestic amnesty before the ICC is very much politically charged.¹³⁴ The Prosecutor may seek a ruling from the Court regarding admissibility, so that the political element will be lessened and the decision will be legal more so than political. But the Prosecutor may also rely on Article 53 of the Rome Statute, which allows him not to investigate if, ‘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.’ The decision whether or not a specific domestic amnesty finds applicability before the Court will have to be balanced, taking into consideration a wide-range of case-specific criteria.

Another possible approach seeks to assert the compatibility of domestic amnesties with the relevant state’s international legal obligations, including human rights and international humanitarian law. A number of domestic courts apply this practice to their state’s amnesties in order to assess their applicability before domestic courts. The ICC could

¹³² Art. 17(2)(a) of the Rome Statute, *supra* note 1.

¹³³ Janine Natalya Clark, *supra* note 89, 145.

¹³⁴ Naomi Roht-Arriaza, *supra* note 128, 81.

also apply this practice, assessing domestic amnesties in light of the issuing state's international commitments, and may then subsequently reach the conclusion either that the national legislation cannot bar the prosecution of the concerned crimes or that amnesty will also be applied before the ICC.¹³⁵

The international community, demonstrated by the structure of the ICC, on one hand, encourages and supports the efforts of peacemakers at the national level, by requiring them to resolve atrocities committed but generally granting them discretion, and on the other hand, by limiting said discretion regarding the decision on whether or not individuals should be held criminally liable for such crimes.¹³⁶

D. The relationship of non-state parties to the Rome Statute

The referral of situations in states, which are not state parties to the Rome Statute, effectively placing these states under the jurisdiction of the ICC, as well as Article 12 of the Statute extending the jurisdiction to non-state nationals if grave crimes were committed on the territory of a state party, caused further uneasiness among African states and others. State sovereignty is, after all, a cornerstone of international law. However, under the Rome Statute, the concept of state sovereignty has undergone some changes, different from its original conception. The debate over sovereignty in international criminal law was quite heated and a serious obstacle during negotiations to the ICC, due to its significance to both general international law as well as international criminal law.¹³⁷ It could be asserted that the states, whose nationals would most likely face prosecution and are implicated in crimes within the mandate of the ICC, are among the least likely to submit to the Court's jurisdiction voluntarily.¹³⁸ The problem at the core of the debate around the extent of jurisdiction the ICC may exercise over non-state party nationals, which is the result and has its source in the subsequent need to balance firstly the requirement of the ICC to have extensive authority to prosecute perpetrators of war crimes, crimes against humanity and genocide, and secondly, at

¹³⁵ *Ibid.*

¹³⁶ Garth Meintjes, *supra* note 96, 89.

¹³⁷ Rowland J.V. Cole, *supra* note 2, 686.

¹³⁸ Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' in Dinah Shelton (eds), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley 2000), 219.

the same time, provide that states are able to exercise the appropriate discretion regarding the lawfulness of concerned ‘official acts’.¹³⁹

The general principle of state sovereignty provides states with the authority and power to act without interference by third states. However, the rights and obligations states enjoy resulting from the principle of sovereignty have changed over time.¹⁴⁰ One of its fundamental elements is still the (judicial) equality of states. In spite of this, some scholars maintain that legal equality of states is essentially a fiction, which masks the importance of power differences among states to influence international law. The ICC was established specifically with the aim to prevent political interferences in its work. If the Court operates in a fair as well as professional manner, applying its set standards without distinction, the Court could potentially contribute to weakening the perception that international law essentially only serves the interests of powerful states at the expense of weaker and smaller states. On the other hand, the ICC also directly challenges the traditional conception of state sovereignty, similar to other international tribunals and courts, because it is an international judicial authority with the ability to determine whether or not a particular act or use of force by government officials or other individuals amount to violations of international law as international crimes. But the ICC also relies on its state parties to function efficiently. The most intrusive change in state sovereignty for state parties is when the ICC exercises its jurisdiction over a situation, which took place on the territory of the concerned state or involves one or more of its nationals. Ideally, the concerned state party will openly cooperate and assist the Court with the investigation and possible subsequent prosecution where necessary.

However, the Rome Statute also has sovereignty implications for states that have not ratified the Rome Statute and which are therefore not state parties to the ICC. The biggest implication for non-state parties is not that the Rome Statute also extends to them. Although in a strict sense it does not, the Statute does grant the ICC jurisdiction over their nationals in cases where they commit crimes on the territory of a state party, which fall into the mandate of the ICC. Additionally, and almost more importantly in light of the recent criticism, nationals of non-state parties could be tried by the ICC through SC referrals. The latter development does, however, not change the legal situation or add obligations that UN member states faced before the establishment of the ICC. As previously mentioned, the

¹³⁹ *Ibid.*, 279.

¹⁴⁰ Michael J. Struett, *supra* note 23, 168ff.

obligation of Sudan to abide by the ICC did not stem from the Rome Statute itself, since Sudan is not a state party, but it does result from the SC Resolution which referred the situation in Darfur/Sudan to the ICC. Sudan is therefore obliged to comply with SC Resolution 1593, which called on it and state parties of the Rome Statute to cooperate with and provide necessary assistance to the ICC. The resolution did not go as far as to also oblige other non-state parties to the Rome Statute to cooperate with the Court, so that they, with the exception of Sudan, are not obliged to abide by the ICC. The obligation for non-state parties to abide by the ICC in specific cases therefore stems from their UN membership and their obligation in accordance with Article 25 of the UN Charter to accord to Security Council Resolutions.

The jurisdiction of the ICC over nationals of non-state parties, although limited, does raise more far-reaching questions. The territorial principle in international criminal law would allow the ICC to exercise jurisdiction over individuals even if their state of nationality is neither a state party to the Rome Statute nor consented to the prosecution by the Court. The question over the extent of jurisdiction of the ICC was in fact very contested in the process of negotiations. On one hand, it would be logical to grant the Court extensive authority with compulsive jurisdiction in order to avoid perpetrators of international crimes escaping accountability. However, the Court does have a limited jurisdiction to internationally recognised grave crimes of concern to the international community. In support of the logical perspective of compulsory jurisdiction of the Court, it would seem necessary that no state, as part of the international community, regardless of whether it is or is not a state party to the Rome Statute, could raise 'legitimate objections to the Court's jurisdiction over their nationals'.¹⁴¹ On the other hand, the ICC effectively enjoys jurisdiction not only for cases of individual culpability, but also for cases that focus on the lawfulness of official acts of states as carried out by government officials and heads of state. Some scholars argue that in the latter case, the ICC will 'resemble less that of a municipal criminal court than that of an international court for the adjudication of interstate legal disputes' and that this function was not considered by the drafters at the time.¹⁴² Especially the latter case brings with it a number of additional, more extensive, problems in regards to state sovereignty. In consideration of the previously mentioned, the drafters faced the difficulty of crafting an international criminal court, that would allow for the effective fight against impunity as agreed to by the states, but

¹⁴¹ Madeline Morris, *supra* note 138, 220.

¹⁴² *Ibid.*, 221.

also not as far reaching as to interfere in the rights of states, which would choose not to become a party.

Another difficulty was to not fashion the Court in such a manner so that it would adjudicate in situations of interstate dispute settlement between states, because firstly the Court's focus lies on prosecuting individual criminal liability, and secondly, states are to retain their discretionary right in choosing their methods for dispute settlement. If the Rome Statute was envisioned for interstate dispute settlement, ratification would have ultimately meant a permanent consent to the Court for adjudication of such disputes. All existing international courts or forums for dispute settlement, such as the ICJ or the WTO dispute settlement system, however, only extend their jurisdiction on the basis of consent by the parties to their treaties. In general, states have not been willing to cede the decision over jurisdiction in its entirety. The Rome Statute, in this respect, differs to other international courts, at least in regards to some nationals of non-state parties, because the ICC would not rely on the consent of the affected non-state party in order to exercise jurisdiction in such cases.¹⁴³

Another issue affecting non-state parties in this regard is that the ICC, unlike other international courts, does not provide for discretion in military nor security-related matters. Instead, the Rome Statute allows the Court to exercise jurisdiction over a national of any state on the basis of that individual having committed a crime, which is within the mandate of the Court, on the territory of a state party. This could logically be justified in the nature and purpose of the ICC as opposed to other international courts: while other international courts aim to resolve disputes between states, the ICC's purpose is to prosecute individuals for committing crimes of concern to the international community. Since the ICC concerns itself with the criminal liability of individuals, it is quite similar to domestic criminal courts as opposed to other international courts.

In light of Article 12 of the Rome Statute, many of the ICC's opponents argue that Article 34 of the VCLT stipulates that a treaty does not create obligations for a third state without its consent. Some scholars have argued that the Rome Statute violates precisely this principle. However, the Rome Statute does not in fact impose obligations as such, in the traditional sense of duties and responsibilities, on non-state parties. It more so diminishes the

¹⁴³ *Ibid.*, 228.

pre-existing right of those affected states¹⁴⁴, under state sovereignty, similar to the way domestic courts would if they were to try a national of another state on the basis of the criminal law principle of jurisdiction based on territoriality, or even based on the principle of universality. The ICC therefore only makes use of the delegated criminal jurisdiction by its state parties¹⁴⁵, but it does not exercise its jurisdiction on the basis of the principle of universality since it was not provided for in the Statute. It could therefore be asserted that the Rome Statute neither infringes the principle enshrined in Article 34 of the VCLT nor the sovereignty of non-state parties. The Rome Statute does clearly state that its content cannot 'be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute.'¹⁴⁶ However, the ICC may still have the power to '[shape] the legal enforcement norms concerning international crimes'¹⁴⁷ within its jurisdiction through its precedent-setting capability as a prominent international organisation. From a political standpoint, this has the potential to weaken the ability of non-state parties to the Rome Statute to develop international standards and norms to suit their needs and to their liking, once the Court has managed to establish precedents.

E. The question of delegitimisation

With the recent considerations of African states to withdraw from the Rome Statute *en masse*, even as the result of at times unconvincing considerations, a delegitimisation of the Court seems a prominent threat. Delegitimisation would result in diminishing the Court's role, limiting its power and preventing it from carrying out its important role in the fight against impunity. Delegitimisation would also undermine its ability to achieve its prerogatives and objectives. It is therefore necessary to assess whether the recent allegations against the ICC have resulted in the delegitimisation of the Court.

i. The meaning of legitimacy

The aim of the ICC is to promote both justice and peace in the fight against impunity and to prosecute 'the most serious crimes of concern to the international community as a whole'¹⁴⁸. It focuses on individual criminal liability of those responsible for the most serious

¹⁴⁴ *Ibid.*, 234.

¹⁴⁵ Roger O'Keefe, *supra* note 119, 343.

¹⁴⁶ Art. 10 of the Rome Statute, *supra* note 1.

¹⁴⁷ *Ibid.*

¹⁴⁸ Preamble of the Rome Statute, *supra* note 1.

human rights violations. Legitimacy is not the same as institutionalisation.¹⁴⁹ As an international organisation, the ICC enjoys institutionalisation, but this does not simultaneously mean that it is conceived as being legitimate. Max Weber's theory of legitimacy has been widely accepted: legitimacy is the belief 'in the legality of patterns of normative rules and the right of those elevated to authority under such rules to issue commands'.¹⁵⁰ For the ICC, therefore, legitimacy is the extent to which the international community and the people in general perceive it as legal and accord to as well as support its decisions. This does not only include the extent to which state parties to the Rome Statute comply with formal directives of the Court, but also the extent to which the public, other organisations and government officials consider these formal directives as binding and 'right' for their governments to accord to.¹⁵¹ Therefore, the legitimacy of the Court is also partially drawn from the beliefs of non-state parties to the Rome Statute. In order to carry out its mandate effectively, the Court relies on its legitimacy to obtain the support of the international community.

The participants of the conference for the establishment of the Court aimed to ensure that the Court would be equipped with enough judicial independence as any court to effectively combat impunity, including procedural rules, which aim to restrict the possibility of politically motivated prosecution or prosecutions which would intervene with the sovereignty of states.¹⁵² The ICC should enjoy extensive legitimacy due to the open negotiations and their open nature that led to the conclusion of the Rome Statute, through the participation of not only states but also of NGOs.

Regardless of the United States' campaign to foster opposition to the Court, the number of state parties to the Rome Statute has steadily increased to encompass the vast majority of states. Consequently, the legitimacy of the ICC could be said to be developing. Two specific principles of the Court's design may help add legitimacy to the alleged controversial court: the Court's permanence and its complementarity as a last resort court. The Court's permanence allows it to establish precedence in a fragile, political field and to subsequently strengthen its position due to its success over time. It allows the ICC to define new but also enforce universal norms and standards. These considerations are both beneficial

¹⁴⁹ Micheal J. Struett, *supra* note 23, 153.

¹⁵⁰ Max Weber, *The Theory of Social and Economic Organisation*, translated by A. M. Henderson and Talcott Parsons (Free Press 1947) 328.

¹⁵¹ Michael J. Struett, *supra* note 23, 153.

¹⁵² *Ibid.*, 151.

for and based on greater legitimacy of the Court. Another fundamental element of the ICC is the complementarity principle enshrined in the Rome Statute¹⁵³. If the Court would attempt to impose a universal solution for all crimes of concern to the international community as a whole and disregard case-specific traits relevant for the affected populations, the ICC would subsequently be vulnerable to more criticism. Instead, the Court is established as one of last resort in order to encourage the governments of states and the domestic courts to hold perpetrators accountable themselves. This ensures that local political conditions enjoy sufficient consideration. The ICC will only exercise its own jurisdiction where states allow for perpetrators to go unpunished.

As of August 2015, 123 states have ratified the Rome Statute in a sign of ‘the determination of states across all regions of the world to foster accountability’.¹⁵⁴ This wide acceptance also displays the widespread approval of the Court’s rules and standards, also due to the fact that they were drafted by ‘consent rather than coercion’.¹⁵⁵

ii. The problem of delegitimisation

‘Regardless of the limits of its jurisdiction, the ICC has become a prominent feature in any discussion on how the international community ought to respond to a given conflict, whether in Ukraine, Iraq, Syria, Palestine or South Sudan.’¹⁵⁶ A delegitimisation of the Court would harm it in the sense that it would diminish its role, limit its power and prevent it from carrying out its important role, and in this way undermine its ability to fight impunity. Like many other international organisations, the ICC requires the support of its state parties, the importance of which is further enhanced because it does not have the required resources, not unlike many international organisations, to effectively carry out its important mandate. The ICC does not have the resources to obtain or detain suspects or to secure the necessary and sufficient evidence without the cooperation of states, in particular assistance and cooperation from the concerned state itself, where the crimes have been committed.¹⁵⁷ As a result, the Court requires the cooperation of the state parties to the Rome Statute in order to carry out investigations, to obtain perpetrators and to execute sentences of the Court within its jurisdiction.¹⁵⁸ This constitutes a serious concern for the success of the Court. Part IX of the

¹⁵³ Art. 17 of the Rome Statute, *supra* note 1.

¹⁵⁴ Zeid Ra’ad Al Hussein, ‘Despite Setbacks, Fight Against Impunity Continues’, *supra* note 25.

¹⁵⁵ Michael J. Struett, *supra* note 23, 154.

¹⁵⁶ Fatou Bensouda, *supra* note 109.

¹⁵⁷ Michael J. Sturett, *supra* note 23, 166.

¹⁵⁸ Gustavo Gallón, *supra* note 34, 103.

Rome Statute contains provisions for international cooperation and judicial assistance by the state parties, therefore carefully regulating the obligations of the state parties in this respect in detail. All state parties must therefore cooperate fully with the ICC.¹⁵⁹ The imposition of justice by the ICC will not only require the exercise of political power, but the cooperation may also be required when force may become necessary.¹⁶⁰ The states have the obligation to cooperate with the Court as well as assist the Court through diplomatic, economic and even military means. Cooperation is a sensitive topic, especially because the ICC also has the ability to indict sitting heads of state. Although immunity is officially not an issue under the Rome Statute, states are reluctant to arrest other heads of state. In case of non-cooperation by a state party, Article 88(7) of the Rome Statute provides that the matter may be transferred to the Assembly of States Parties or to the SC. This provision alone, however, is not enough to ensure the cooperation of the states, as practice has shown. The provisions contained in Part IX of the Statute are of a positive nature, and yet it can be argued that in order to grant the ICC the means and the authority to implement its decisions the relations of states in the international regime have to further evolve. ‘Otherwise, its capacity to halt and deter human rights violators will be very weak’¹⁶¹ as the current difficulties the ICC faces demonstrate.

States are not only reluctant to cooperate with the Court, especially in cases involving heads of state or other high-ranking government officials, but recently also questioned the ICC’s worth because three of the permanent members of the SC are, to date, not state parties, namely the United States, Russia and China. These states have significant political influence in the international community, and have continuously voiced their discontent with the ICC and its power to prosecute also their nationals if the prerequisite of territoriality for its jurisdiction is given. The United States has, in particular, made its concern publicly known, by concluding numerous so called ‘Article 98’ agreements, which exclude its nationals from the jurisdiction of the ICC. African states, which are currently particularly vocal of their discontent for the aforementioned reasons, not surprisingly see this as a cause for concern. Why should they fall into the jurisdiction of the Court while others, especially the permanent members of the SC, do not place themselves under the Court’s jurisdiction? In light of this, states are more hesitant to cooperate.

¹⁵⁹ Art. 86 of the Rome Statute, *supra* note 1.

¹⁶⁰ Michael J. Struett, *supra* note 23, 165.

¹⁶¹ Gustavo Gallón, *supra* note 34, 103.

In any case, the Prosecutor of the ICC and its judges will likely be successful in their mandate of holding perpetrators of grave crimes accountable if they assert themselves as a moral authority and prosecute those individuals who without significant doubt or little to none political implications, committed international crimes of concern to the international community. If they are too aggressive in their approach, they run the risk of losing the support of the international community and the Court will subsequently become an international organisation with little ability to function effectively. The ICC relies to a massive extent on the cooperation of states in order to commence and carry out investigations as well as arrests. Although the ICC was established with the aim to remain free from political interferences, states therefore still maintain a significant discretionary authority when deciding whether or not a specific situation should be pursued and prosecuted. State parties do have a legal obligation to cooperate with arrest warrants, indictments and other formal directives issued by the Court. Nevertheless, as recent events have demonstrated, state parties have not always accorded to their obligations under Part IX of the Rome Statute. Therefore, the Court will likely be most successful in pursuing prosecution when it focuses on cases where it is clear that a particular individual is responsible for having committed gross violations and where it seems realistic that justice, in such an instance, can be achieved, without hindering political implications.¹⁶² On the contrary, it would seem unlikely that the Prosecutor would attempt to prosecute a case where these elements are not given, especially considering the limited legitimacy it may at the moment enjoy. No international Prosecutor can successfully prosecute a sitting head of state without significant political backing. The political self-interest of states partially outweighs the call for the fight against impunity and unless the SC, especially its permanent members, support the ICC as well as the Prosecutor and award it the necessary opportunity, intelligence and capabilities, and unless states, in particular African states, assist and cooperate with the ICC politically, the Court faces an uphill battle to secure successful prosecutions.¹⁶³

Due to the lack of cooperation, the prosecution in the situation in Kenya came to an abrupt halt, and five years after the indictment of Al Bashir, the head of state of Sudan remains at large, enjoying partial support by his African colleagues, and the ICC was forced to suspend active investigations until further notice. In Libya, Saif al-Islam Al Gaddafi, son of the state's former head of state, Muammar Al Gaddafi, has now been sentenced to death by a

¹⁶² Michael J. Struett, *supra* note 23, 166f.

¹⁶³ Michael Ignatieff, 'International Justice Possible Only When in the Interest of Powerful States' in the Debate (online) 'Is the International Community Abandoning the Fight Against Impunity?' (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/justice-interests-of-powerful-states>> accessed 15 August 2015.

Libyan court, although the controversial verdict was passed *in absentia* and it is still uncertain whether or not he should be tried in The Hague instead¹⁶⁴. There remains no sign of the eagerly awaited justice the international community has promised, while any semblance of peace and order has disappeared in the state. In fact, Libya's minister of justice determined that Saif Al Gaddafi's trial in Libya was illegal and should commence in The Hague instead, where he faces charges of crimes against humanity committed in February 2011, yet no further steps were taken. The failure to refer the situations in Syria, in Ukraine, in the DPRK and in Iraq to the ICC could also be interpreted as a lacking confidence in the ICC as well as its legitimacy. However, there have been efforts to document the crimes committed in order to prepare for post-conflict accountability in the cases of Syria and Iraq.¹⁶⁵ The reason why no action has been taken in these situations is because they have 'turned on politics, not law.'¹⁶⁶

Since African states comprise almost $\frac{1}{3}$ of the ICC's state parties, a mass withdrawal from the Rome Statute inherently brings with it the threat of the delegitimisation of the ICC. As it currently stands, the AU is not a united front when it comes to 'the issue' of the ICC. However, some African states have already openly disregarded their treaty obligations under the Rome Statute by welcoming Al Bashir into their territories, rather than implementing the ICC's arrest warrant. Among those states are also the DRC and Kenya, who has been the strongest voice in the AU to call for a mass withdrawal by African state parties to the Rome Statute. On the other hand, the DRC adopted a bill to incorporate the Rome Statute into domestic legislation, including provisions to strengthen the cooperation with the Court, on the 2. June 2015. The bill is now before the DRC Senate.¹⁶⁷ Simultaneously, other states, at the forefront Botswana, South Africa and Senegal, have reaffirmed their commitment to the fight against impunity and the ICC and warned Al Bashir that he would be arrested if he were to be found on their territories.¹⁶⁸ However, contrary to South Africa's official stance, Al Bashir was not arrested during the 25th AU summit in June 2015, which was held in South Africa.¹⁶⁹

¹⁶⁴ K.M., 'Where will Saif al-Islam be tried?', (*Justice Hub* (online), 10 March 2015)

<<https://justicehub.org/cartoon/where-will-saif-al-islam-be-tried>> accessed 15 August 2015.

¹⁶⁵ Zeid Ra'ad Al Hussein, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

¹⁶⁶ David Tolbert, 'As Debate Closes, Global Action to Reinignite the Fight against Impunity Begins' in the Debate (online), 'Is the International Community Abandoning the Fight Against Impunity?' (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/debate-closes-global-action-reinvigorate-fight-against-impunity-begins>> accessed 15 August 2015.

¹⁶⁷ CICC Global Justice, 'New DRC law criminalises ICC crimes, strengthens cooperation with Court' (*World Press* (online), 24 June 2015) <<https://ciccglobajustice.wordpress.com/2015/06/24/new-drc-law-criminalizes-icc-crimes-strengthens-cooperation-with-court/#more-2661>> accessed 15 August 2015.

¹⁶⁸ Isaac Terwase Sampson, 'Africa in Dilemma', *Africa Insight* 41:3 (2011) 127-141, 136.

¹⁶⁹ Angela Mudukuti, 'If not the ICC, what else?' (*IOLmobile* (online), 2 July 2015) <http://www.iol.co.za/the-star/if-not-the-icc-what-else-is-there-1.1879599?utm_source=CICC+Newsletters&utm_campaign=e4705fed62-

While the South African government asserted that they did not have the authority to arrest Al Bashir, even on the basis of the ICC arrest warrant, because he was in the territory in his official capacity as a head of state, the civil organisation the Southern African Litigation Centre brought a suit before an South African court in order to compel the arrest. Although the South African court held that Sudan's head of state should remain in South Africa until a ruling was made, the government allowed Al Bashir to leave the state before a decision was made.¹⁷⁰

It is also important to note that some states, which initially opposed the ICC, such as Uganda, have refused to support Kenya's call for a mass withdrawal and itself referred a conflict to the ICC in the past. Even though the AU has passed a resolution to disregard the arrest warrant issued for Al Bashir and recently another for non-cooperation in the Kenya situation, a number of its member states have reaffirmed their commitment under the Rome Statute. Consequently, although some African states expressed their discontent with the ICC, no affirmative action has been taken by them to support the call for withdrawal and others openly cooperate with the international organisation.¹⁷¹ Three previous attempts by the AU to urge African states to withdraw from the Rome Statute have also failed. It is therefore too soon to speak of a delegitimisation by the African state parties. However, it remains of utmost importance for the ICC to gain greater legitimacy worldwide in the years to come to prevent it from becoming 'an empty shell'¹⁷²: a mere reminder of a former representative of the hopes the international community had to fight impunity when the Court was first established, but without the powers or means to actually achieve its prerogatives.

F. The ICC and the UN Security Council

The International Criminal Court is its own international organisation with its own legal personality, and although it has a special relationship¹⁷³ with the United Nations, it is as such not part of the 'UN family'. Yet the SC still has some far reaching powers, one of which being that the Rome Statute grants the SC the authority to refer situations to the ICC by means

[7_10_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-e4705fed62-408795633&ct=t\(7_10_15_GlobalJustice_Weekly\)#.VaEBY4t4XFF](https://www.ciccglobaljustice.org/2015/06/18/what-just-happened-with-al-bashir-in-south-africa/) accessed 15 August 2015.

¹⁷⁰ CICC Global Justice, 'What just happened with Al-Bashir in South Africa?' (*World Press* (online), 18 June 2015) <<https://ciccglobaljustice.wordpress.com/2015/06/18/what-just-happened-with-al-bashir-in-south-africa/>> accessed 15 August 2015.

¹⁷¹ *Ibid.*

¹⁷² Michael Ignatieff, *supra* note 163.

¹⁷³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations (adopted 4 October 2004) ICC-ASP/3/Res.1 in accordance with Article 2 of the Rome Statute.

of resolutions, which may otherwise not have been within the Court's jurisdiction. Consequently, such resolutions also have the effect of binding non-state parties of the Rome Statute to the ICC, as long as they are member states to the UN. To date, the SC has made use of this power twice: in the situation concerning Darfur/Sudan¹⁷⁴ as well as in the situation in Libya¹⁷⁵. African states in particular, being the respondents in both of the SC referrals, have questioned the 'moral authority'¹⁷⁶ of the SC to conduct such referrals, ultimately infringing the concerned state's sovereign powers due to the fact that every situation referred by the SC will concern a non-state party to the Rome Statute. The AU argues that the SC does not represent the will of the international community as a whole, because the power of the permanent members within the SC is too great and influences the resolutions passed. It could be asserted that international justice will only enjoy support when it does not infringe the interests of powerful states. Prosecutions tend to be more successful in situations where the members of the SC, especially the permanent members, agree that such a prosecution would be in their and in the international community's best interest. Similarly, states are more inclined to hand over individuals to the Court if it lies in their interest. However, the SC is charged with the maintenance of international peace and security. Its very purpose is to speak on behalf of the international community and in its best interest, not only in the best interest of the states, which at the time have a seat on the SC. The UN Charter grants the SC the authority to decide on a broad range of measures, also extending to the use of force as well as sanctions, as long as these measures are necessary to maintain international peace and security.¹⁷⁷ The SC therefore plays a vital role in addressing threats to international peace and security, including war crimes, crimes against humanity as well as genocide. The SC addresses a wide variety of issues, so that a resolution calling for a referral to the ICC is not considered to be one of the Security Council's sternest instruments. Although a resolution referring a situation to the SC finds its legal basis in Chapter VII of the UN Charter, it does not automatically result in an authorisation for the use of force in the concerned situation. The SC can therefore choose from a wide variety of measures, which it deems most appropriate, rather than automatically being forced to employ the whole array of measures at its disposal.

¹⁷⁴ SC Res. 1593 (2005).

¹⁷⁵ SC Res. 1970 (2011).

¹⁷⁶ Rowland J.V. Cole, *supra* note 2, 688.

¹⁷⁷ The Global Campaign for Ratification and Implementation of the Kampala Amendment on the Crime of Aggression, 'The ICC and the UN Security Council' <<http://crimeofaggression.info/role-of-the-icc/the-icc-and-the-un-security-council/>> accessed 15 August 2015.

A mere resolution, although binding on all UN member states, is not binding on the ICC or on its Prosecutor. A resolution referring a situation to the Court refers situations as a whole, rather than individual cases or individuals, in order to ensure a wide scope for investigations, as well as to prevent political influences such as bias. The Prosecutor is therefore in a neutral position when determining whether or not investigations will be taken up in a referred situation and who will be subject of possible prosecutions. A referral by the SC does not automatically lead to the ICC taking action in the referred case. Furthermore, any determination by the SC in accordance with Article 39 of the UN Charter is not binding on the ICC. The judicial independence the ICC enjoys vis-à-vis the SC is therefore preserved, allowing the Court to make its own assessment on whether a crime within its mandate has been committed.¹⁷⁸ Nevertheless, the SC, especially its permanent members, are currently divided over the issue of referrals to the ICC so that it is uncertain if situations, which would otherwise be outside the jurisdiction of the Court, will be referred to it in the near future.¹⁷⁹ The failure of the SC to refer conflicts to the ICC, over which it would otherwise not have jurisdiction, should not be viewed as the latter's failure to fight impunity and to prosecute war crimes, crimes against humanity and genocide.

In any case, the debate over the appropriateness of SC referrals to the ICC, in the first place, focuses around the political influence the permanent members are able to assert over the Court, guaranteeing that only those individuals will be held criminally liable, who are not considered allies of those powers. The AU's allegations in this regard reflect the increasing view of developing countries regarding the dominance of a few powerful states, at the forefront the permanent members of the SC, in the global political context and international relations.¹⁸⁰ However, the criticism of unequal powers of the members of the SC should not be directed against the Court because, firstly, a veto power may prevent a referral but cannot otherwise politically influence it, secondly, as we have seen above, the SC does not have the power to influence the ICC in which situations it will investigate and prosecute and thirdly, it forms part of a political debate, which is separate from the ICC. As such these criticisms should not be viewed as against the ICC, therefore not adding to the threat of a possible delegitimation, but rather against the UN Security Council as such.

¹⁷⁸ *Ibid.*

¹⁷⁹ see above, Chapter IV.B.

¹⁸⁰ Rowland J.V. Cole, *supra* note 2, 677.

V. Seeking Enduring Solutions

Recently, also due to the current criticisms voiced by African states, scholars have concerned themselves with the question whether or not the international community has abandoned the fight against impunity. In the last few months, the international community has experienced and witnessed horrific atrocities being committed not only by Boko Haram in Nigeria and the Islamic State of Iraq and ash sham ('ISIS'), which have enjoyed widespread media coverage, with a seeming lack of a coherent and efficient strategy as to deal with these situations. The conflict in Syria continues, with masses of civilian casualties, while the SC is divided over the issue of referrals to the ICC. Gaza is struggling to recover, with new reports revealing more violence, fighting continues in eastern Ukraine and the 'super powers' are in disagreement¹⁸¹ on how to deal with the civilian plane shot down on the 17. July 2014, where 298 people lost their lives, after Russia vetoed the establishment of an international tribunal.¹⁸² The LRA have seemingly remained unstoppable in their path of destruction, even though the situation is within the ICC's jurisdiction. The African continent further continues to battle with conflicts in CAR, Côte d'Ivoire, Egypt, Kenya, Libya, Mali, Niger, Nigeria, Somalia, South Sudan, Sudan and Tunisia. Many more atrocities are being committed on a daily basis, but the prospect of perpetrators being held accountable and prosecuted seems slim, resulting in a bleak outlook for justice being delivered to the victims of such horrors.¹⁸³ Generally, there have been many setbacks in the fight against impunity since the adoption of the Rome Statute. As the first permanent international criminal court, to which the majority of states are parties, it is considered to be 'the most powerful symbol to the progress made'¹⁸⁴ in this field and the ICC often finds itself the centre of such discussions. However, the fight against impunity is versatile and not limited to the ICC. It has many different levels and forms, involves many different actors on different planes and makes use of different mechanisms; all aimed towards the same goal, such as judicial proceedings, both international and domestic, truth commissions, documentation of crimes and atrocities, but also diplomatic methods. In order to strengthen the fight against impunity once more it will be necessary to not only strengthen the ICC in order to regain the support it enjoyed when it was first established, but it may also be necessary to look to viable alternatives. After all, the ICC

¹⁸¹ Malaysia, Australia, Netherlands, Belgium and the Ukraine have called on the UN Security Council to establish an ad hoc international tribunal for the Malaysian Airlines flight 17, which was shot down on the 17. July 2014, but Russia has most recently vetoed such a tribunal.

¹⁸² BBC, 'MH17 crash: Russia vetoes UN resolution for international tribunal' (*BBC News* (online), 29 July 2015) <<http://www.bbc.com/news/world-europe-33710088>> accessed 15 August 2015.

¹⁸³ David Tolbert, 'A Debate Whose Time Has Come', *supra* note 16.

¹⁸⁴ Zeid Ra'ad Al Hussein, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

carries out its work simultaneously or immediately after other actors, which focus on conflict resolution, peace building, humanitarian relief, peace keeping and security, but may also extend to other justice initiatives. The ICC does therefore not work alone. This Chapter will first seek solutions, which could enhance the legitimacy of the ICC, and then goes on to outline other possible alternatives such as the proposed African Court of Justice and Human Rights by the AU.

A. Enhanced legitimacy

It is not without reason that the International Criminal Court was heralded as an innovation and a significant development for international criminal law and the fight against impunity. The realisation of a permanent international criminal court took almost half a century to finally come to fruition in 1998 with the adoption of the Rome Statute. The Court is now seen as a key player in the fight against impunity as well as a key enforcer of human rights. As demonstrated, the ICC has recently been the subject of many allegations and criticisms against it, possibly resulting the Court to face delegitimisation if it cannot carry out its mandate efficiently and effectively. It is therefore necessary to strengthen the ICC and regain the support it once enjoyed. Although the majority of states are already state parties to the Rome Statute, a significant amount of the international community has still not fully embraced the ICC in order to effectively provide their support or recognise the ICC's potential for the enhancement of peace and justice worldwide. The norms on which the Court is based have nevertheless established themselves as widely accepted customary international law, and have become viable mechanisms available to the international community in the fight against impunity.

i. Independent Commissions of Inquiry

Independent Commissions of Inquiry ('ICI') function as fact-finding missions, established by the UN Human Rights Council ('HRC'). They may be used to investigate situations with human rights implications regardless of whether they also entail elements of international humanitarian law implications.¹⁸⁵ Among their numerous objectives are the mandates 'to establish impartiality whether violations of human rights law and/or humanitarian law have occurred; to investigate whether or not violations are systematic and

¹⁸⁵ UN Human Rights Council, Commissions of Inquiry Conference brief (1 December 2011) <<http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf>> accessed 15 August 2015.

widespread; to report on a state's ability to deal with the violations; to highlight the root causes of the situation; to suggest ways of moving forward; and to produce a historical record of events that have occurred'¹⁸⁶ etc. Every commission's 'primary objective should be to establish accountability for violations that have taken place, ensuring that those responsible for violations are brought to justice.'¹⁸⁷ It is necessary that a commission can act independently and without interference to carry out investigations on the concerned territory in order to establish the relevant facts firsthand, within an appropriate timeframe, and to ensure its effectiveness as well as fulfil its purpose. The ICI's final report should cover facts, qualify acts and clearly indicate where which crimes have been committed, including a preliminary assessment on the accountability of both state and non-state actors. Finally, the ICI report will include a recommendation of possible follow-up mechanisms and/or a referral of the situation to the ICC by the SC where necessary. The ICI is encouraged to also define the applicable standard of proof in every case.

To date, a number of ICIs have been set up in various situations, which have the capacity to fall within the ICC's jurisdiction. As a matter of fact, the referral of the situation in Darfur/Sudan was preceded by a recommendation by a Commission of Inquiry¹⁸⁸. The five-member body had concluded that war crimes and crimes against humanity had been committed on the territory.¹⁸⁹ A number of other ICIs have been established to report on violations taking place worldwide, such as in the CAR, the Democratic People's Republic of Korea, Eritrea, Gaza, Syria as well as Libya. An Office of the High Commissioner for Human Rights' ('OHCHR') investigation to this effect is also taking place in Sri Lanka. All these ICIs function to identify concrete accountability measures, internationally as well as domestically, and to ensure that those responsible for atrocities are held accountable. The Commission of Inquiry on Syria has to date published a number of detailed and comprehensive reports, with an emphasis on the necessity to fight impunity and the need for accountability for the atrocities committed. The SC has not yet, however, referred the situation to the ICC, and it remains uncertain whether or not this will occur in the near future. Similarly, the DPRK Commission has played a vital role in documenting and recording specific violations of human rights. Exposing details of such violations in public reports results in a renewed international awareness to the necessity to fight impunity and the

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Report of the Independent Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004* (25 January 2005).

¹⁸⁹ Rowland J.V. Cole, *supra* note 2, 681.

situation affected populations find themselves in, even in deep-rooted and especially in long-ongoing situations.

The reports play a vital role in publishing human rights violations and other crimes in situations, because they are discussed in a large variety of forums, domestically and internationally as well as openly and publicly. They are discussed by human rights activists, by government officials as well as in regional and international organisations and bodies, such as the UN Human Rights Council, the GA as well as the SC. They provide an important step towards holding those responsible accountable, while simultaneously not being able to provide justice themselves. The reports play a crucial role in uncovering and exposing the truth publicly through documentation and preservation of evidence for subsequent accountability mechanisms where possible.¹⁹⁰

The ICI on the Gaza conflict was charged with investigating alleged abuses of international human rights as well as international humanitarian law in that region, and subsequently released its report on the 22. June 2015. In its findings, the members of the ICI concluded that both Israel and armed groups of Palestine are likely to have committed international humanitarian law violations, which could amount to war crimes as defined in the Rome Statute. Prior to the ICI report, a board of inquiry dealing with the conflict in the region came to the conclusion that Israel had bombed UN schools, resulting in the deaths of civilians. Israel's Prime Minister Benjamin Netanyahu, in a response to the ICI report, criticised it as 'flawed and biased' and asserted that 'Israel does not commit war crimes.'¹⁹¹ These developments, including the recently issued report, could have an impact on the preliminary examination on the situation in Palestine before the ICC. It has been acknowledged that the Commission's report could serve the ICC by functioning as a 'road map' for the latter's preliminary examination, and may be helpful to the Prosecutor when assessing the 'reasonable basis' for meeting the requirements of jurisdiction, admissibility and interest of justice. A possible prosecution will also have to have sufficient evidence, so that this also comprises a relevant factor in the Prosecutor's initial assessment. Since the Commission of Inquiry also attempts to secure evidence where possible for future accountability measures, such as the

¹⁹⁰ Zeid Ra'ad Al Hussein, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

¹⁹¹ Tom Buitelaar, 'The Independent Commission of Inquiry's Gaza report: Implications for the ICC' (*The Hague Institute for Global Justice* (online), 7 July 2015) <http://thehagueinstituteforglobaljustice.org/index.php?page=Commentary-Commentary_Articles-Recent_Commentary-The_Independent_Commission_of_Inquiry's_Gaza_report:_Implications_for_the_ICC&pid=176&id=421> accessed 15 August 2015.

ICC, the Court could draw on the report as the Commission's findings and conclusions for its ongoing preliminary examination. Additionally, on the 3. July 2015, following the ICI report, the UN HRC adopted a resolution calling for the accountability of the perpetrators of alleged war crimes in the Gaza conflict in 2014, while simultaneously urging both states, Israel and Palestine, to fully cooperate with the ICC.¹⁹² The resolution was supported by 45 states, including Germany, France and Britain, however, the United States voted against it. As a Human Rights Council resolution, it is not binding. The Prosecutor is also further not bound to the findings of the ICI, but she could reference the report and its findings and conclusions to support the required 'reasonable basis' to open investigations, or to assist in the determination of the gravity of the crimes allegedly committed. The ICI report concluded that 'the scale of the devastation was unprecedented.'¹⁹³ Furthermore, the findings of the report could be useful as a reference tool for subsequent investigations into the situation, if it comes to that, because it provides information to the ICC for which it may otherwise have to rely on the concerned states to make available.¹⁹⁴ Commissions of Inquiry may therefore not only provide the ICC with assistance in regards to fact-finding and support, but it may also provide greater legitimacy of the ICC to intervene in a situation and to take jurisdiction because of the objective, publicly issued reports.

However, as past experiences have shown, in particular the ICI action in Darfur, that such a report does not necessarily strengthen the ICC's position in a given situation. An ICI report creates momentum and raises international awareness of possible atrocities committed, but opponents to the ICC will likely not be swayed by a recommendation by a commission for the ICC to take action by means of either Article 13(b) or 15 of the Rome Statute. It is also to be expected that, while Palestine has demonstrated its commitment to the ICC by providing further documents, Israel will not cooperate with the Court as a non-state party and general opponent of the ICC. As previously demonstrated, the ICC will be faced with enhanced difficulties to carry out independent and objective, even effective investigations into the conflict, in cases of non-cooperation of states.

¹⁹² CICC Global Justice, 'GlobalJusticeWeekly – Human Rights Council calls for accountability in Gaza' (*World Press* (online), 10 July 2015) <<https://ciccglobaljustice.wordpress.com/2015/07/10/globaljusticeweekly-human-rights-council-calls-for-accountability-in-gaza/#more-2721>> accessed 15 August 2015.

¹⁹³ Tom Buitelaar, *supra* note 191.

¹⁹⁴ *Ibid.*

ii. Legitimation

1. Through Western powers and non-state parties

As an international organisation, the International Criminal Court is dependent on its member states, also known as state parties. To date, 123 states across the globe have ratified the Rome Statute, demonstrating their commitment to the fight against impunity. However, recent criticism by African states and the AU's call for a mass withdrawal of African states from the Rome Statute threaten the Court's legitimacy. Consequently, the Court's position would be strengthened by the support of further states, which are to date not yet state parties to the Rome Statute. If current non-state parties were to express their support by ratifying the Rome Statute, the ICC would gain greater authority and legitimacy on the international plane and would likely be able to carry out its mandate more efficiently. Since the AU has recently criticised that the majority of the SC's permanent members are not state parties to the ICC, it would be a momentous step towards enhanced legitimacy if the remaining permanent members, namely Russia, China and the United States, would ratify the Rome Statute and fully assist the Court in accordance with Part IX of the Statute. However, the ICC and its Prosecutor also need to be mindful of political implications, especially when it comes to exercising its jurisdiction over the crime of aggression, regardless of the ICC being an independent international court.

One of the strongest, and loudest critics of the ICC, already during the negotiations for an international criminal court, was the United States of America. However, the US did also play a major role in the draft of the ILC in 1994 and was initially strongly engaged in promoting the establishment of the Court as well as a leading force in including the current scope of crimes against humanity into the treaty¹⁹⁵, but it was not content with key aspects of the final version of the Rome Statute: the role of the SC as well as the extensive powers and independence of the Prosecutor of the Court caused the US concern. The concern was that a Prosecutor, although meant to be independent, would have the ability to launch biased proceedings against the US by targeting its government officials or service personnel, and that the US would be 'helpless' against such actions, even when taking its permanent seat on the SC into consideration.¹⁹⁶

¹⁹⁵ David Scheffer, 'The United States and the ICC' in Dinah Shelton (eds), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley 2000), 203.

¹⁹⁶ Roger O'Keefe, *supra* note 119, 338.

Under the Clinton administration, the Rome Statute was initially signed on the 31. December 2001, without the recommendation for ratification by Congress. As dissatisfaction increased, the signature to the Rome Statute was repealed by the Bush administration, being the first state to ‘unsign’ from a treaty. The hostility towards the ICC demonstrated by the Bush administration and other US government officials was based on the ‘ideological enmity’ the state also generally demonstrated towards any international organisation or institution, which may harbour the possibility to affect the interests of the US, without the US being able to manipulate said organisation or institution.¹⁹⁷ Some have asserted that ‘[m]uch of the world is now quite convinced that the United States aims to exempt itself entirely from compliance with the rules of international humanitarian law.’¹⁹⁸ The potential exercise of the Court’s jurisdiction over nationals of non-state parties became the focus of the opposition to the ICC by the US, especially in regard to peacekeeping forces and humanitarian activities. The US asserted that this provision of the Rome Statute amounts to a violation of treaty law, and infringed the sovereignty of states.¹⁹⁹ Consequently, the US concluded a large number of so called ‘Article 98’ agreements with non-state parties but also a few with state parties to the Rome Statute, with the aim of ensuring that US government officials, employees as well as citizens of the US could not become ‘targets’ of the ICC. In reality, a number of checks ensure that the Court would only prosecute nationals of non-state parties, if the case would be admissible, if it was evident that this individual committed the alleged crimes and if the prosecution has the potential to succeed. The Rome Statute itself therefore minimises the probability of a US national being prosecuted by the ICC and should, in theory, put the US at ease in relation to its assertions and criticism. In fact, the Rome Statute neither alters nor reduces the United State’s rights and obligations, but rather increases the probability of prosecutions for violations of international criminal law worldwide because the treaty created an international independent permanent criminal court.²⁰⁰

As a matter of fact, the hostility towards the ICC decreased during the second term of the Bush administration.²⁰¹ This can be demonstrated by the US’s abstention rather than veto on the SC Resolution 1593 in 2005, which referred the situation in Darfur to the ICC. The resolution further obliged Sudan, as a non-state party to the Rome Statute to ‘cooperate fully with and provide any necessary assistance to the Court’. Indeed, as the ICC took up its

¹⁹⁷ *Ibid.*, 335.

¹⁹⁸ Michael J. Struett, *supra* note 23, 177.

¹⁹⁹ see above, Chapter IV.D.

²⁰⁰ Michael J. Struett, *supra* note 23, 177.

²⁰¹ Roger O’Keefe, *supra* note 119, 352.

investigation in the situation, the US approved its subsequent actions, and supported continuous calls for the assistance of the ICC in accordance with the SC Res. 1593. These positions and actions by the US demonstrated the state's tolerance or even acceptance of the ICC and support of its work to the extent that the latter did not affect the rights of the United States, even when the Court has been criticised and accused of being a 'de facto organ of the international legal order'.²⁰² The US may have started to see the potential of the International Criminal Court in light of situations such as Darfur, as long as the state's own interests aren't impinged. On the other hand, Western Powers were reluctant to support the ICC regarding the situation in Kenya, because for them the backing of Kenya's sitting head of state in the fight against al Shabab militants in Somalia, was more important. Under the Obama administration, the US Permanent Representative to the SC, Ambassador Susan Rice acknowledged:

'The International Criminal Court, which has started its first trial this week, *looks to become an important and credible instrument* for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur.'²⁰³ [emphasis added]

Not only has the United States since viewed the issuance of the arrest warrant against Sudan's sitting head of state positively, but it has also since participated in some of the sessions of the Assembly of States Parties to the Rome Statute as an observer. The US government has also provided forces to assist in the manhunt for Joseph Kony, the Commander-in-Chief of the LRA, against whom the ICC has also issued an arrest warrant.²⁰⁴ It remains to hope that the increased support may potentially lead to the ratification of the Statute by the US. The legitimacy of the ICC would greatly benefit if another of the permanent members of the SC were to join the ranks of state parties to the ICC, especially a 'superpower' such as the US. Even though the ICC may not necessarily require the support of a superpower to effectively and efficiently carry out its mandate and functions, because a group of smaller states may be just as successful in for example obtaining an individual, the United States as a superpower does have significant political influence and therefore bears a substantial symbolic importance for the legitimacy of the ICC.

Unlike the United States, the European Union has been and continues to be one of the ICC's greatest supporters and proponents. The EU has established itself as a key player on the

²⁰² *Ibid.*

²⁰³ Susan Rice, 'Statement by Ambassador Rice on Respect for International Humanitarian Law', (USUN Press Release, 29 January 2009).

²⁰⁴ Helene Cooper, 'More U.S. Troops to Aid Uganda Search for Kony' (*New York Times* (online), 23 March 2014) <http://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html?_r=0> accessed 15 August 2015.

international market but also as a significant voice on the international plane in general. It does not only provide the Court with financial, political as well as technical support in order to provide for the Court's effective functioning, but the EU is further determined to advertise the permanent court and to achieve an effective prevention of crimes of concern to the international community as well as ending impunity and ensuring accountability of perpetrators of such crimes.²⁰⁵ For these reasons, the EU played a key role during the negotiations of the Rome Statute and further in the establishment and subsequent strengthening of the ICC.²⁰⁶ All member states of the EU, with the exception of Cyprus, are also state parties to the Rome Statute.

One way the European Union seeks to fight impunity and simultaneously promote the Rome Statute is through the inclusion of 'ICC-related language' in its agreements and treaties with third states, including with non-state parties to the Rome Statute.²⁰⁷ Due to the fact that the EU offers valuable political as well as technical support to many third states, the EU made use of the opportunity at hand to expand the fight against impunity worldwide. The High Representative of the Union for Foreign Affairs and Security Policy also continuously issues numerous statements in this regard. The EU's commitment to the fight against impunity is demonstrated by its significant contribution to not only the ICC, but also to the ICTY, the ICTR and justice initiatives by NGOs.²⁰⁸ On the other hand, the EU's commitment has at times been criticised for either not providing enough support or by the means of support given by the EU²⁰⁹, but the EU has in fact demonstrated and upheld a continuous supporting approach towards the ICC.

Since the adoption of the Rome Statute, the EU has continuously adopted a Common Position on the ICC²¹⁰, which resulted in an Action Plan in February 2004. The Action Plan included methods and measures, which were envisioned to, on one hand, achieve the universal ratification and implementation of the Rome Statute by third states and, on the other hand, the effective functioning of the ICC, while remaining independent. Furthermore, the member states of the EU are not only urged to assist the ICC in carrying out its mandate, but the EU has also adopted specific means to enable member states to assist each other in both

²⁰⁵ The European Union, 'The International Criminal Court & the fight against impunity' <http://ec.europa.eu/external_relations/human_rights/icc/> accessed 15 August 2015.

²⁰⁶ CICC, 'European Union' <<http://www.iccnw.org/?mod=eu>> accessed 15 August 2015.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ see Common Position on the ICC 2001/443/CFSP; 2002/474/CFSP; 2003/444/CFSP.

the investigation as well as the prosecution of crimes within the mandate of the Court. Such measures are intended to increase internal cooperation as well as to ensure a cohesive approach in the prevention of such crimes. Examples of these are the European network of contact points with respect to persons responsible for genocide, crimes against humanity and war crimes²¹¹, as well as the Council Decision of 8 May 2003²¹², which deals with the issues of investigation and prosecution of genocide, crimes against humanity, and war crimes.

On the 6. December 2005, the EU and the ICC concluded an agreement on cooperation and assistance, and in March 2011, the Council of the EU replaced the Common Positions of the last decade by adopting the Decision on the International Criminal Court. Similar to the prior Common Position and the Action Plan, the goal of the Decision is universal ratification of the Rome Statute, and universal support of the ICC, while simultaneously maintaining the effective functioning of the Court and its independence, with an emphasis on supporting both cooperation as well as complementarity. The Decision resulted in a new Action Plan, finalised in July 2011. While the new Action Plan contains similar provisions and measures of the previous Plan, it also includes new elements, such as specific suggestions and means on how to tackle the difficulties faced in light of cooperation with the ICC as well as on the principle of complementarity. The European Parliament, as an organ of the European Union, has been one of the ICC's earliest, most continuous and outspoken proponents. The European Parliament has committed itself to actively support and promote the ICC and the fight against impunity, through their consideration in all EU policies, by adopting the resolution on the 'EU support for the International Criminal Court: Facing challenges and overcoming difficulties'. A fraction in the European Parliament further committed itself to adopt a proactive role in order to support the ICC.²¹³

The EU therefore established numerous measures and methods by which to support the ICC and by which to strengthen the ICC in regards to other state parties as well as non-state parties. The supranational organisation accomplished invaluable efforts in light of the legitimisation of the ICC, both due to its extensive efforts but also through its position in the international political context and relations. As a valuable proponent of the ICC, the EU has the ability to further enhance the Court's legitimacy among states.

²¹¹ Established through a European Council Decision on the 13 June 2002 (2002/494/JHA).

²¹² European Council Decision on the 8 May 2003 (2003/335/JHA).

²¹³ CICC, 'European Union', *supra* note 206.

2. Through the ICC's possibly greatest allies

The inclusive nature of the negotiations that led to the Rome Statute allowed for a prominent participation of NGOs. But not only did NGOs help the drafting processes, but they also still play an important role in strengthening the ICC to date by promoting the international organisation and its work worldwide among non-state parties and the general public. Since the final draft of the Rome Statute does not provide for universal jurisdiction of the ICC, civil society, NGOs and also the broader general public, have worked hard in order for states to either ratify the Statute or accept the jurisdiction in the Court for individual situations where necessary. The legitimacy of the Court will increase with the number of ratifications of the Rome Statute and the general support it enjoys.

NGOs played a prominent role during the negotiations to the Rome Statute and helped shape the terms of the debate by repeating them frequently and with urgency, such as for example the extent of the Court's jurisdiction, even though they lack the legal ability to conclude treaties. In the course of the negotiations, their arguments were frequently gained wide acceptance among state delegates on the grounds that they were logical and provided rational possibilities as opposed to focusing on individual interests. The participation of NGOs was further significant for the legitimacy of the Court, because NGOs generally represent the interests of the public. After the ILC draft in 1994, NGOs also played a key role in ensuring that the momentum for the establishment of a permanent international criminal court did not subside, by elevating the fight against impunity to a political issue in need of urgent attention by the international community.²¹⁴ NGOs did not only contribute through verbal lobbying with state delegates and representatives, but also published a large number and wide variety of formal policy recommendations between 1994 and 1997. These policy recommendations were very extensive and defined the, in their opinion, most urgent and serious issues, which ultimately remained the subject of debate until July 2002. Because they were comprehensive, logical and well structured, the papers issued by NGOs, at the forefront by Amnesty International and the Human Rights Watch ('HRW'), were consulted by state delegates when developing their own policies. Delegates and negotiators of various states considered the statements and provisions included in the policy recommendations to be 'authoritative' as well as 'influential' during the negotiations for the Rome Statute.²¹⁵ The

²¹⁴ Michael J. Struett, *supra* note 23, 85.

²¹⁵ *Ibid.*, 86.

process of drafting the Rome Statute was generally characterised by rational consent rather than by strategic compliance as a result of coercion.

The HRW strongly argued for ‘the need to limit impunity for the most egregious human rights crimes – genocide, serious violations of the laws and customs applied in armed conflicts, and crimes against humanity – that have proliferated in the last several years.’²¹⁶ Additionally, NGOs played an important role in the framing of the Court’s jurisdiction and the introduction of the complementarity principle into the Rome Statute. Many states were concerned that a permanent international criminal court would impede on the (discretionary) right and the capability of states to make use of their own national legal systems to determine whether or not crimes of interest to the international community have been committed and whether a particular individual should be held accountable. Contrarily, other states, with the support of NGOs, feared that the ICC would forfeit the potential for accountability, especially in situations where heads of state are responsible, if too much authority remained with the national legal systems of the individual states. Subsequently, NGOs argued logically that such rules would allow for a continuation of impunity for many perpetrators of international law crimes and consequently defeat the purpose of an international criminal court.²¹⁷ NGOs were therefore able to frame the debate on a permanent international criminal court on the urgency to fight impunity while aware of the fact that states will very reluctantly defer some of their sovereign power onto an international organisation, by which they would also place themselves under the threat of possible prosecution. They played a crucial role in the final decision of the extent of sovereignty deferred by the states to the ICC, by applying pressure in order to allow for an effective international criminal court. A crucial context in the realisation of the ICC and contributing to the success of the efforts by NGOs were the ‘state-sponsored’ atrocities²¹⁸ the international communities witnessed and populations endured in the last decades. The NGOs’ proposal enjoyed the favour by the delegates of the states to the negotiation against this historical backdrop.²¹⁹ Furthermore, NGOs emphasised the importance and aimed towards a universally accepted international organisation, without subjecting to possible cohesion to serve the interests of powerful states. Consequently, their arguments were influential for a wide number of states and gained the support of state

²¹⁶ Human Rights Watch, ‘Commentary for the Preparatory Committee on the Establishment of an ICC’ (1996).

²¹⁷ Michael J. Struett, *supra* note 23, 95.

²¹⁸ Michael J. Struett, *supra* note 23, 6.

²¹⁹ *Ibid.*

delegates and representatives. The influence of NGOs was surprising because it ultimately came at the expense of the desires of powerful states, such as the US.

In order to continue NGOs' valuable input, NGO roundtables are held by the ICC bi-annually and represent an important opportunity for the organisations to agree on and subsequently pursue a common directive for the fight against impunity through the ICC.²²⁰ The 20th annual roundtable took place in June 2015 between NGOs from around the world participated and the staff of the ICC including the Presidency and the Office of the Prosecutor. The staff provides an update on their activities, while the NGOs are given the opportunity to discuss and comment on the past, current as well as prospective activities of the Court. In accordance with the Prosecutorial Strategy, the interaction with NGOs is valuable and will be considered throughout the Prosecutor's activities, including the 'development of policies or practices, prevention, promotion of domestic legislation and proceedings, preliminary examinations, investigations, prosecutions, cooperation, maximising the impact of its work' and 'understanding by victims and affected communities'.²²¹

But the influence of NGOs is not limited to the negotiation process of the Rome Statute or to bi-annual dialogues: Civil society, human rights activists as well as the general public are also vital in informing the world of current acts of violence and cruelty and simultaneously calling for their accountability.²²² Additionally, civil societies are also generally able to have an effect on governmental policies. Governments have been swayed by loud calls from the public and civil society in the past. Similarly, civil society displays an interest in the ICC to prosecute international crimes. The public will therefore also be able to assert a strong influence, especially over liberal states, through a vocal demand to prosecute such crimes. Although it is often argued that the ICC only provides symbolic justice, because victims may not be compensated and may be far removed from the proceedings, especially in regards to conflicts in poor countries, it provides justice nevertheless. This may be more than can be expected in some states by domestic courts. Angela Mudukuti, member of the Southern Africa Litigation Centre, has pointed out: 'The ICC is not without its flaws but its importance cannot be ignored [...] but threatening to withdraw from the only institution that is striving to provide justice for African victims is unwise.'²²³

²²⁰ CICC Global Justice, '20th annual ICC-NGO roundtable kicks off' (*World Press* (online), 5 June 2015) <<https://ciccglobaljustice.wordpress.com/2015/06/05/2597/#more-2597>> accessed 15 August 2015.

²²¹ *Ibid.*

²²² Zeid Ra'ad Al Hussain, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

²²³ Angela Mudukuti, *supra* note 169.

The conflict in eastern Ukraine is a prime example: Ukraine is not yet a party to the Rome Statute, and unless the SC refers the situation to the ICC under Chapter VII of the UN Charter, which will be unlikely, the ICC generally does not have jurisdiction over the crimes committed in the concerned region. The commission of grave crimes can be deterred, however, if Ukraine becomes a state party, sending a clear signal that their commission will not be tolerated. On the 20. February 2015, Ukrainian President Petro Poroshenko received a letter, urging him to ratify the Statute without delay, from the Coalition for the International Criminal Court ('CICC'). The CICC is a global network of more than 2,500 NGOs and civil society organisations in over 150 countries, which calls on non-state parties to ratify the Rome Statute. Additionally, preliminary examinations are currently taken place for the conflict in Ukraine for the timeframe of the 21. November 2013 to 22. February 2014, following a special declaration by the Ukrainian government²²⁴ accepting the Court's jurisdiction for that specific period. The ICC does not enjoy jurisdiction over more recent events. Not only civil society backs the ICC and the need for its jurisdiction, but also scholars from assorted human rights associations, such as the HRW, join in agreement. As a result, the Ukrainian parliament passed a resolution on the 4. February 2015²²⁵ calling for the ICC's limited jurisdiction to be extended beyond the 22. February 2014 and to specifically focus on the crises in Crimea and the eastern Ukraine. Ukraine's head of state, Poroshenko, still needs to issue a formal declaration on this matter so that the ICC's jurisdiction can be extended. The international community has begun looking to the ICC as a suitable mechanism for the prosecution of the perpetrators,²²⁶ including the Council of the European Union, who 'reiterates the importance of moving forward with the ratification of the Rome Statute by Ukraine, as it has committed to in the Association Agreement [between the Ukraine and the European Union].'²²⁷

Civil society organisations in Africa have also continuously voiced their support for the ICC. Not only have organisations called on the Ugandan government to honour its obligations under the Statute and to cooperate with the ICC²²⁸, but the public, affected by the conflict in the north, has called for new investigations, not only of the LRA but also of the

²²⁴ *Declaration of the Verkhovna Rada of Ukraine*, No 790-VII, 25 February 2014; *Declaration by Ukraine lodged under Art. 12(3) of the Rome Statute*, No 61219/35-673-984, 9 April 2014.

²²⁵ *Declaration of the Ukrainian Parliament in pursuance to Art. 21(3) of the Rome Statute*, 4 February 2015.

²²⁶ CICC Global Justice, 'Civil society calls on Ukraine to join ICC' (*World Press* (online), 20 February 2015) <<https://ciccglobaljustice.wordpress.com/2015/02/20/globaljusticeweekly-civil-society-calls-on-ukraine-to-join-icc/>> accessed 15 August 2015.

²²⁷ Council of the European Union Conclusions 5755/15, 054952/EU XXV.GP, 29 January 2015.

²²⁸ Human Rights Network-Uganda (HURINET-U) and the Uganda Coalition on the International Criminal Court (UCICC), 'A Call to Uganda's Commitment and Cooperation to the ICC', Press Release, 14 October 2014.

government-backed UPDF.²²⁹ The public is aware that the only way the perpetrators will be brought to justice is by the ICC, while still dissatisfied by the fact that the ICC seems to apply double standards by not prosecuting the UPDF, because they enjoy the government's support. In 2010 the complaints against the UPDF were initially analysed and the former Prosecutor, Ocampo, indicated that all parties who were responsible for crimes committed in the region would be investigated, yet no charges were brought against any Ugandan soldiers or state officials. Essentially, it is at the discretion of the Prosecutor to decide whether specific individuals will be prosecuted by the ICC or not and for which crimes. Survivors of the conflict in northern Uganda also want Dominic Ongwen, who was obtained and transferred to the Court in January 2015, tried in Barlonyo, a province where the LRA massacred 300 people in 2004.²³⁰ This would help the public and survivors obtain first-hand information on the case, and rectify the view of the ICC's justice as merely symbolic. The calls were prompted by Ongwen's surrender in January 2015. The ICC can indeed, under certain circumstances, conduct a trial at the conflict site instead of in The Hague. Considering that civil society and the public could be the ICC's greatest ally in strengthening its position internationally, Chief Prosecutor Fatou Bensouda should consider the request of the Ugandan people.

In preparation to the 25th AU summit in June this year, 25 African and international civil society organisations prepared letters for the state delegations and representatives calling on them to 1. openly support and commit to cooperate with the ICC during the AU summit; 2. ensure that the decisions, declarations and resolutions of the Assembly of the African Union echoes the aforementioned support; 3. consider the implementation of the Rome Statute into the states' national legal systems thereby ensuring that victims of atrocities within the mandate of the ICC have a recourse to hold the perpetrators accountable even in situations where the Court may not exercise jurisdiction; and more.²³¹

Civil society organisations in Ukraine and Uganda are not the only ones who have called for the action of the ICC, or the action of their respective governments to allow for the jurisdiction of the ICC. The Kenyan people initially also called on the ICC to prosecute the

²²⁹ Samuel Okiror, 'ICC Uganda visit prompts fresh calls for state „crimes“ probe' (*IRIN News* (online), 2 March 2015) <<http://www.irinnews.org/report/101182/icc>> accessed 15 August 2015.

²³⁰ Bill Oketch and Elizabeth Alaba, 'LRA survivors want Ongwen tried in Barlonyo', (*The Monitor* (online), 6 March 2015) <<http://www.monitor.co.ug/News/National/LRA-survivors-want-Ongwen-tried-in-Barlonyo/-/688334/2643890/-/v83xf8z/-/index.html>> accessed 15 August 2015.

²³¹ CICC Global Justice, 'GlobalJusticeWeekly – African Union: Bolster progress towards justice' (*World Press* (online), 12 June 2015) <<https://ciccglobaljustice.wordpress.com/2015/06/12/globaljusticeweekly-african-union-bolster-progress-towards-justice/#more-2663>> accessed 15 August 2015.

perpetrators of the post-election violence in 2007-2008. Civil society will hopefully continue to stand up for human rights in order to persuade their governments into the right direction. They are a viable option to stimulate the once strong commitment to the fight against impunity once again.

Civil society and the public do not only have the power to influence their government's policies, but they may also have a great influence on which situations and trials may be brought before the ICC. The Rome Statute itself grants important authority to civil society and victims of atrocities by allowing them to report atrocities and alleged violations of human rights and international humanitarian law to the UN Human Rights Council as well as to other independent bodies. The publicity of these atrocities will increase the likelihood of holding those responsible accountable and therefore contribute to the fight against impunity for crimes of concern to the international community.²³² Civil society as well as the public have generally been able to influence whether a specific situation will be subject of an international trial.²³³ A prime example represents the former dictator of Chad Hissène Habré's trial before the Extraordinary African Chambers in Senegal. Not only is this trial unprecedented in that it is the first where a domestic court of one state legally prosecutes a former head of state of a third state, it is also the first in which a court in Africa applies universal jurisdiction, but more importantly, the trial demonstrates the power and tenacity of civil society and the victims of Habré's rule.²³⁴ Habré was indicted in July 2013 and his trial commenced on the 20. July 2015 in order to prosecute war crimes, crimes against humanity and torture committed during the dictator's rule from 7. June 1982 to 1. December 1990. The Extraordinary African Chambers, separate from the ICC, also enjoys the support of the AU. The role of the victims in the fruition of this trial played an important role, not only because it was them who filed the initial complaint against their former dictator in Senegal in 2000, but also because they did not give up and continued to campaign for Habré's prosecution, when their first complaint was rejected in 2001. The public presence of the victims throughout the initial stages before the actual realisation of the trial led to a different dynamic than would be

²³² Zeid Ra'ad Al Hussein, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

²³³ James G. Stewart, 'Corporate Impunity: A Startling Ethical Anomaly' in the Debate (online), 'Is the International Community Abandoning the Fight Against Impunity?' (International Center for Transitional Justice, 9 February 2015 – present) <<https://www.ictj.org/debate/article/corporate-impunity-startling-ethical-anomaly>> accessed 15 August 2015.

²³⁴ International Center for Transitional Justice, 'Reed Brody: Hissène Habré Trial Shows Power of Victims' and Civil Society's Agency' <[https://www.ictj.org/news/reed-brody-hissène-habré-trial-shows-power-victims'-and-civil-society's-agency?utm_source=CICC+Newsletters&utm_campaign=e4705fed62-7_10_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-e4705fed62-408795633&ct=t\(7_10_15_GlobalJustice_Weekly\)](https://www.ictj.org/news/reed-brody-hissène-habré-trial-shows-power-victims'-and-civil-society's-agency?utm_source=CICC+Newsletters&utm_campaign=e4705fed62-7_10_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-e4705fed62-408795633&ct=t(7_10_15_GlobalJustice_Weekly))> accessed 15 August 2015.

usual for an international prosecution, where either the Prosecutor or the international community, but not the victims per se, pursue the accountability of those responsible. The ICJ ultimately ordered Senegal to either prosecute or extradite Habré to Belgium²³⁵, and the Chadian government waived any immunity, which Habré may have still enjoyed. In a case that seemed almost futile, the victims made it clear that they were tenacious and would continue to fight for justice. The *Habré* case effectively demonstrates that victims, with the support of NGOs and with determination, can also act as a driving force for an international trial and create the necessary ‘political conditions’ for the establishment of a successful jurisdiction for prosecution, even when the accused is a former head of state.²³⁶ In this regard, the trial represents a milestone in the fight against impunity and against former dictators on the African continent.

Now also under the Rome Statute, victims as well as civil society organisations have the opportunity to raise awareness over war crimes, crimes against humanity as well as genocide, and to bring the situation to the Prosecutor for consideration. Similarly to the *Habré* case, civil society may achieve to bring situations before the ICC for prosecution, as long as the requirement of the Court’s limited jurisdiction was fulfilled in a specific situation and the Prosecutor exercises her discretion to pursue the matter further.

iii. The ICC’s Integrated Strategy for External Relations, Public Information and Outreach

Not only other actors, but the International Criminal Court itself can contribute to enhancing its own legitimacy. For this reason, the Court has various external communication mechanisms defined in the Integrated Strategy for External Relations, Public Information and Outreach. The Outreach Programme, as well as External Relations and Public Information Programmes play an important role in this context.

Firstly, the External Relations Programme envisions a constructive dialogue between the ICC and state parties, as well as with non-state parties, international organisations and

²³⁵ *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgement of the International Court of Justice, 20. July 2012.

²³⁶ International Center for Transitional Justice, ‘Reed Brody: Hissène Habré Trial Shows Power of Victims’ and Civil Society’s Agency’, *supra* note 234.

other relevant actors.²³⁷ Its objective is based on building as well as maintaining support and cooperation for the Court so that it can effectively carry out its mandate. Secondly, the Public Information Programme makes use of various means such as the media in order to provide accurate and timely information to the public, with a particular focus on the Court's principles, objectives and current activities.²³⁸ Outreach, on the other hand, is necessary in order for its role and activities to be understood by the wider public, and in particular by the affected communities in situations currently before the Court.²³⁹ Such an understanding, and possible subsequent support by the public, is necessary for the Court to effectively carry out its functions. The ICC's Outreach Programme was established with the intent to inform the affected communities of situations, which are currently before the ICC, of its activities and the different phases of its work, in order for them to understand their purpose and meaning.²⁴⁰ Essentially, the Programme is intended to ensure that the affected community is not left out and so that they may experience the strife for justice rather than a mere symbolic justice. In order to fulfil these objectives sustainable, two-way communication is established between the Court and each community affected by a situation, which is subject to either investigations or prosecutions. The aim is to promote the understanding and to encourage and obtain the support from these communities for the judicial processes at the various stages before the ICC. Through the Programme, the Court also aims to clarify any misunderstandings and mistaken beliefs and to allow the affected public to effectively follow the trial through a variety of different media, such as live streams from the courtrooms.²⁴¹ One of the Outreach Programme's biggest worth also stems from its healing effect for affected communities and populations of atrocities. The extent and content of outreach activities depends on the situation the Court addresses itself, as well as the individual stages of procedures, the phases of the judicial process as well as different demands and needs of the affected communities, witnesses and the general audience. The Court has decided on a general Strategic Plan for Outreach in addition to specific situation-related strategies as well as action plans. The corresponding action plans are generally implemented by the field staff of the Court in accordance with the general Strategic Plan to allow for coherence. The Outreach Unit, located at the Court in The Hague, as a subdivision of the Public Information and Documentation

²³⁷ International Criminal Court, 'Integrated Strategy for External Relations, Public Information and Outreach' <http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed 15 August 2015.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ International Criminal Court, 'Outreach' <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx> accessed 15 August 2015.

²⁴¹ *Ibid.*

Section of the Registry, has the function of a secretariat and acts as a coordination mechanism between the organs, on one hand, which plan and support activities, and the offices, on the other hand, which implement them. They also provide support for the field staff.²⁴²

Outreach Programmes are conducted individually for each of the situations before the ICC. The Outreach Programme in Kenya was established following the Prosecutor's request to initiate an investigation *proprio motu* into the alleged crimes against humanity committed during the post-election violence in 2007-2008.²⁴³ At first the activities focus on promoting the understanding of the judicial process before the Court among the public, as well as specific target groups, such as various national, regional and international NGOs, women's groups, journalists and especially among the directly affected communities. Interactive sessions were held in order to remedy any misunderstandings, and to provide the affected communities with an opportunity to voice their opinions with regard to the ICC exercising its jurisdiction over their situation. The activities of the Outreach Programme in Kenya were increased following the decision²⁴⁴ to grant the Prosecutor the permission to launch a *proprio motu* investigation into the situation. The Outreach Unit sent a third mission to Kenya with the objective to explain the Court's decision, elaborate on the ensuing steps and what to expect as well as to address any concerns the population might voice. Taking the outcome of the third mission into consideration, a plan for the outreach in Kenya for 2010 to 2011 was developed, with a particular focus on elected target groups as well as the directly affected communities, and specifically those which were most affected by the post-election violence in Kenya.²⁴⁵ The Outreach Programme also intended for the participation of the population in the plan's core programmes, such as the Legal Outreach Programme for lawyers and other legal practitioners, and local authorities; the Academic Outreach Programme for schools and universities; and in particular the Community Outreach Programme focusing on women and displaced populations. Because information provided for the general public by the Court represents an essential element of the strategic plan, every Outreach Programme also includes a Media section, in order to re-enforce the impact of the Court's various activities.²⁴⁶ The

²⁴² *Ibid.*

²⁴³ International Criminal Court, 'Outreach in Kenya' <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/kenya/Pages/outreach%20in%20kenya.aspx> accessed 15 August 2015.

²⁴⁴ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation of an Investigation into the Situation in the Republic of Kenya* (International Criminal Court, Pre-Trial Chamber II, ICC-01/09-19, 31 March 2010).

²⁴⁵ International Criminal Court, 'Outreach in Kenya', *supra* note 243.

²⁴⁶ *Ibid.*

Court undertook wide reaching efforts in order to ensure that the ongoing judicial proceedings would reach the affected communities, where possible, in real time.

In the situation in Uganda, the Outreach Programme focused on dialogues and consultations, resulting in the creation of a network of partners in 2006, to foster and facilitate the work of the ICC in the state. This network consists of a number of important Ugandan civil society organisations. The focus of the Outreach Programme was on the districts, which were located in the most affected regions by LRA attacks, in particular Acholi, Lango, Teso and later on also the districts of the West Nile Region.²⁴⁷ Furthermore, in order to shed the image of the ICC providing symbolic justice only to victims of atrocities under its mandate, the Court has initiated a project to provide for the rehabilitation and compensation of victims of the LRA. Shs 2.7 billion (approx. 735.000€) will be contributed to the Trust Fund for Victims to facilitate the project, which represents the sixth project of this kind. Its implementation will be carried out together with other legacy projects of the Trust Fund for Victims, which have been ongoing since 2008 in conjunction with the Association of Volunteers in International Service, and since 2009 in conjunction with the Centre for Victims of Torture. The aim is to ensure physical and psychosocial assistance to the affected communities.²⁴⁸ The Programme implemented in Kenya was essentially very similar to the Programme initiated in northern Uganda, because each subsequent Outreach Programme is based on the lessons learnt from previous Programmes.

The International Criminal Court is therefore aware of the importance of numerous and extensive communications with external partners, not limited to only state parties to the Rome Statute, but also extending to the affected communities of situations before the Court and the general public. However, the difficulties of establishing and conducting efficient and effective Outreach Programmes in each of the situations before the Court should not be underestimated. Similar to other activities of the Court in the concerned states, the ICC is faced with logistical difficulties, sometimes consisting of widely dispersed affected communities, as well as the possibility of strong opposition to the Court. These and other

²⁴⁷ International Criminal Court, 'Outreach in Uganda' <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/uganda/Pages/uganda.aspx> accessed 15 August 2015.

²⁴⁸ Bill Oketch, 'ICC Unveils Shs2.7 Billion Assistance for LRA Victims' (*The Monitor* (online), 5 July 2015) <<http://www.monitor.co.ug/News/National/ICC-unveils-Shs2-7-billion-assistance-for-LRA-victims/-/688334/2775558/-/543vly/-/index.html>> accessed 15 August 2015.

difficulties amount to substantial obstacles to the Court's work.²⁴⁹ It should be noted that, although the ICC's approach to Outreach Programmes has gained momentum, it will still be necessary to provide appropriate resources in order to carry out the objectives of the Programmes effectively. By engaging these populations directly, the Court will slowly be able to eliminate the conception of the ICC's 'symbolic justice' and demonstrate the support and commitment for the fight against impunity by the international organisation as well as by the international community. However, it is unlikely that the ICC's campaign and Outreach Programmes will affect the view of hardliners. On the other hand, as affected communities accept the ICC as a viable option to achieve justice, which in some states will exceed the opportunities for justice in the domestic legal system, the ICC's capabilities will more likely be accepted, enhancing its legitimacy as well as the respect for rule of law and human rights.

B. Proactive complementarity

States have the primary responsibility to prosecute perpetrators of crimes and hold them accountable. This responsibility was also recognised and enshrined in the Preamble of the Rome Statute: '[...] it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.' This provision does not only imply the primary right of states to prosecute atrocities and grave crimes of concern to the international community, but it in fact stipulates an obligation of states to exercise their jurisdiction in order to provide accountability and justice for their populations. The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, stated: 'Rendering criminal justice is not merely an attribute of sovereignty; it is an essential characteristic of sovereignty, one of its constitutive elements.'²⁵⁰ As previously demonstrated, states are often very reluctant to concede and defer part of their sovereignty to other entities. This is why the criminal liability and consequent prosecution of individuals remains a sensitive topic at the international level.²⁵¹ The Rome Statute addresses this issue by stipulating the primacy of domestic jurisdiction over the ICC, so that the latter functions as a court of last resort.

Since some African states demand 'African solutions to African problems', one solution would be to commit the domestic courts of African states to effectively and impartially prosecute international crimes on the domestic level, rather than referring the

²⁴⁹ Human Rights Watch, 'Outreach and Communications' <<http://www.hrw.org/reports/2008/icc0708/8.htm>> accessed 15 August 2015.

²⁵⁰ Zeid Ra'ad Al Hussein, 'The Long Walk to Accountability', *supra* note 117.

²⁵¹ Rowland J.V. Cole, *supra* note 2, 692.

situation to the ICC and running the risk of a confrontation with either the ICC or the AU. Although, it remains questionable if states will prosecute their heads of states for atrocities. Yet, as long as there is ongoing violence and impunity on the continent and moreover worldwide, the need for prosecution will also continue. The purpose of Article 17 of the Rome Statute, which contains the principle of complementarity, is to ensure that the Court complements domestic jurisdictions in case they are unable or unwilling to genuinely carry out investigations or prosecutions for international crimes. This provision also clarifies that the state parties did not intend to defer their primary responsibility to prosecute such perpetrators to the ICC.

The compliance with the principle of complementarity by the ICC itself has also had to endure some criticism. Critics allege that instead of according to a ‘policy of proactive complementarity’²⁵², the Prosecutor has deviated from this principle, applying passive complementarity in order to be able to directly prosecute international crimes. Instead, the Prosecutor and the ICC should much rather encourage and where possible or necessary assist domestic courts in prosecuting international crimes themselves. The current practice of passive application of the complementarity principle leaves the Court in a shadowing role, waiting to take any action when a state is unable or unwilling to hold perpetrators accountable. Consequently, the ICC would be more valuable to states in an encouraging and assisting role to domestic courts, thereby applying the principle in a proactive manner. The Court could provide judicial as well as technical assistance where necessary. The office of the Court’s registrar could be tasked to monitor and coordinate between the concerned states and relevant organs of the ICC.

While the emphasis on proactive complementarity would likely result in less disputes with states as to whether the ICC was entitled to exercise jurisdiction, therein also lies the same potential to cause damage to the relationship between the Court and states, as is currently the issue, when the ICC’s action will ultimately be viewed as interference. In order to avoid such allegations, the Court would have to apply ‘skilful diplomacy’ and be cautious of the extent of its support as to not amount to interference.²⁵³ Additionally, the Court would require more resources in order to successfully be able to provide the required assistance the principle of proactive complementarity compels. Moreover, while the intent of the Court is to

²⁵² William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008) 49 *Harvard International Law Journal*, 53-108, 55.

²⁵³ Rowland J.V. Cole, *supra* note 2, 694.

provide individual criminal liability where domestic courts fail, and the ICC may have mechanisms in place to assist those courts, neither the Rome Statute nor other legal documents of the Court envisioned it to mainly act as a supporting mechanism, but rather as a global court of last resort to exercise jurisdiction where it is in the interest of the international community that the perpetrators of international crimes are brought to justice. It would therefore be more appropriate for African states to develop their legal systems and frameworks in order to allow for an effective prosecution by their domestic courts, so that the international community as a whole would be satisfied with the level of accountability achieved, as well as to incorporate the Rome Statute into their legal frameworks, much like the DRC is currently in the process of.²⁵⁴

C. Truth Commissions

Truth commissions and reconciliation commissions are commissions with the objective of discovering, revealing and documenting past atrocities committed by governments and non-state actors alike in the hope of resolving the conflict and restoring peace. Justice, in light of atrocities, has been most successful, long lasting, and achieved reconciliation in situations where the affected population of the state, including perpetrators and their victims, were able to face each other in order to establish the truth. The truth processes in Argentina, Chile and South Africa can be counted among them.²⁵⁵ Building on past experiences, truth commissions are now a common feature, with some recently having been set up or are in the process of being established in Colombia, Nepal and Tunisia. The National Truth Commission in Brazil has, for example, been able to publicly reveal military brutality in a recently issued report.²⁵⁶ Generally, truth commissions and other transitional justice initiatives have the ability to reconcile the affected populations on one hand, as well as address the committed atrocities in a factual manner on the other hand. The legitimacy is often enhanced by the support of the United Nations, including the UN Human Rights Council.²⁵⁷

In fact, the institution of truth commissions worldwide has become an accepted practice and they are viewed as a valuable tool for the transition from autocracy to democracy. The truth commission established in post-apartheid South Africa further helped

²⁵⁴ see above, Chapter IV.E.ii.

²⁵⁵ Michael Ignatieff, *supra* note 163.

²⁵⁶ *Ibid.*

²⁵⁷ Zeid Ra'ad Al Hussein, 'Despite Setbacks, Fight Against Impunity Continues', *supra* note 25.

shape the procedures and operations of modern day commissions, due to its effectiveness and impact on the population. The period of apartheid in South Africa resulted in masses of human rights abuses, which almost certainly amounted to crimes within the mandate of the ICC. However, rather than demanding accountability of the perpetrators through their prosecution, the international community to a large part supported South Africa's decision to establish a truth commission in order to obtain the truth, but also to provide some measure of justice instead of establishing an ad hoc tribunal similar to the ICTR or ICTY. The South African Truth and Reconciliation Commission ('TRC')²⁵⁸ carried out its mandate from 1995 to 2002²⁵⁹, and consisted of a combination of a truth commission, reparations and rehabilitation, as well as an 'amnesty-for-confession scheme'. South Africa's former minister of justice, Dullah Omar, argued that 'a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.'²⁶⁰ It was established in order to investigate gross human rights abuses that were committed under the Apartheid regime from 1960 to 1994, including torture, murder and abductions, and encompassed a mandate, which extended beyond the perpetrators in the government. The most controversial feature of the TRC was its ability to grant amnesties. It consisted of three different committees: the Human Rights Violations Committee, the Amnesty Committee and the Reparations and Rehabilitation Committee. Despite the TRC's limitations and challenges, the international community generally considered the commission to be a success and displayed the importance of the participation of the public in transitional justice initiatives throughout its process. Due to the TRC in South Africa being the first truth commission to hold public hearings in which it both addressed the perpetrators of the atrocities as well as heard the victims, it further enjoyed global attention. Even though amnesties are generally viewed as incompatible with international law²⁶¹, the TRC granted a select few in rare circumstances and was thereby able to provide a reasonable basis for amnesties as a useful compromise in order to seek the truth and obtain sought after confessions of perpetrators.²⁶² In the period from 1995 to 2002, amnesties were granted in 849 cases and refused in 5.392, while the commission received 7.112 amnesty applications in total. Although amnesty was denied in numerous cases, few trials were actually held. While

²⁵⁸ established through the Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (26 July 1995).

²⁵⁹ Naomi Roht-Arriaza, *supra* note 128, 81.

²⁶⁰ Truth and Reconciliation Commission, <<http://www.justice.gov.za/trc/>> accessed 15 August 2015.

²⁶¹ see above, Chapter IV.C.

²⁶² Britannica, 'Truth and Reconciliation Commission, South Africa (TRC)' <<http://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa>> accessed 15 August 2015.

several high-level members of the former police were convicted for murder, many others, including the former minister of defence, Magnus Malan, were acquitted. 21.000 victims were ordered to receive reparations, although the actual sum they received was far lower than the amount recommended by the TRC.²⁶³ The government and the head of state at the time, Nelson Mandela, fully approved the TRC's final report while the African National Congress ('ANC') retained 'serious reservations'. Subsequently, a body was created to monitor the implementation of the TRC's recommendations, especially for reparations and exhumations.

As a truth commission, the TRC in South Africa had little similarities with the Nuremberg Tribunal. However, it was considered as an 'innovative model for building peace and justice' with the ability to hold the perpetrators accountable for their atrocities, even if this element was not the primary objective of the commission. At the same time, it allowed for and facilitated the reconciliation process among the South African people. As previously mentioned, the South African TRC has become the basis for modern truth commissions due to its effectiveness and innovation, even in circumstances, where the mandates may not necessarily overlap with that of the TRC. The Truth and Reconciliation Commission has demonstrated that such a transitional justice initiative can be used as an alternative, yet successful tool in the fight against impunity.²⁶⁴

The South African TRC provides evidence that in some situations truth commissions may be valuable alternatives to prosecutions, domestic and international. However, truth commissions also have their limitations and disadvantages. The ICC was not only established to prosecute alleged perpetrators of mass atrocities, but also to function as a deterrence effect for possible future perpetrators. While truth commissions may have a deterrence effect in the same state or region, for which the commission was established to begin with, it is unlikely to have the same effect elsewhere. Additionally, truth commissions are usually created by the concerned government of a state, however, a government which remains in power and has committed such atrocities will be unlikely to create such a commission and thereby run the risk of being subject to it as well as expose their actions publicly. While truth commissions are generally sought to enhance reconciliation within the community after a conflict, their flaw is essentially that it will not have the ability to set a precedent for future truth commissions, with the exception of their structure. Nevertheless, truth commissions may

²⁶³ United States Institute of Peace, 'Truth Commission: South Africa' <<http://www.usip.org/publications/truth-commission-south-africa>> accessed 15 August 2015.

²⁶⁴ Britannica, 'Truth and Reconciliation Commission, South Africa (TRC)', *supra note* 262.

serve an important purpose for individual states and communities in specific circumstances, and may also enjoy the support of the international community. They may therefore be valuable and even preferred in some situations as opposed to the exercise of jurisdiction by the International Criminal Court. It will depend on each individual conflict and case as well as careful considerations whether a truth commission or whether domestic or international prosecution may best serve the interest of the affected community.

D. The African Court of Justice and Human Rights

Currently under consideration at AU summit meetings is the merger of the African Human Rights Court and the Court of Justice of the African Union to form the African Court of Justice and Human Rights ('ACJHR' or 'merged Court'), which would also have an international criminal chamber in order to prosecute international crimes already within the mandate of the ICC. The merged Court would therefore have jurisdiction over human and peoples' rights, 'general affairs' as well as individual criminal liability. The AU essentially plans to replace the ICC's jurisdiction over African states with the new ACJHR as a retaliatory measure for the indictment of sitting African heads of state and the ICC's alleged sole focus on African nationals. The idea of the merged Court arose already previous to the AU summit meeting held in February 2009 when the AU Assembly adopted a decision²⁶⁵ to request the AU Commission to assess possible implications of such an endeavour. In the AU summit meeting from 30. June to 1. July 2011, the AU Assembly adopted the decision²⁶⁶ to actively pursue the realisation of the ACJHR. Consequently, in 2012 the AU's Final Court Protocol was realised as well as the amended Draft Protocol of the 23rd AU summit meeting in 2014, better known as the Malabo Protocol.²⁶⁷ The ACJHR would be the first and only regional court with the jurisdiction to prosecute individuals for international crimes.²⁶⁸

Not only is the Court controversial because it was initially envisioned as a retaliatory measure against the ICC due to its alleged focus on African states as well its 'disregard' of the

²⁶⁵ *Decision on the Abuse of the Principle of Universal Jurisdiction*, AU Doc Assembly/AU/Dec. 292 (XV), Doc.EX.CL/606 (XVII).

²⁶⁶ *Decision on the Implementation of the Assembly Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec. 366 (XVII), Doc.EX.CL/670 (XIX).

²⁶⁷ Mbori H. Otieno, *The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solution?*, 1ff.

²⁶⁸ International Justice Research Center, 'African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute' (2 July 2014) <<http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>> accessed 15 August 2015.

immunity heads of state enjoy under international law, but the Malabo Protocol further added to its controversy. In its 23rd summit meeting at the end of June 2014, the AU decided to specifically exempt heads of state as well as other high-ranking government officials from prosecution by the ACJHR. The merged Court is intended to have jurisdiction over international crimes and therefore enforce individual criminal liability by prosecuting perpetrators of these atrocities. However, the merged Court's mandate will now not extend to sitting heads of state, contrary to international tribunals or courts such as the Nuremberg Tribunal, the ICTY, the ICTR, the Special Court for Sierra Leone and the ICC. Article 46a *bis* of the Malabo Protocol stipulates that '[n]o charges shall be commenced or continued before the [ACJHR] against any serving African Union Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure of office.'²⁶⁹ The AU hoped that the amendment would increase cooperation and compliance with the ACJHR among African states, and would furthermore result in a speedy ratification of the protocols. However, this provision stands in contrast to the ICJ's finding in its *Arrest Warrant* case²⁷⁰, in which the ICJ found that international tribunals and courts neither apply immunity *ratione personae* nor immunity *ratione materiae*, and is clearly the result of the AU's dissatisfaction with the ICC's action in Africa. Heads of state and (high-ranking) government officials generally enjoy immunity before domestic courts of third states, but this does not generally apply to international tribunals or courts.²⁷¹

This amendment has also been strongly criticised by international organisations as well as civil societies, such as the HRW and many more based in Africa. Consequently, in August 2014, more than 140 organisations, of which at least 40 are located in African states, published a mass declaration²⁷² calling on African states to deny immunity before the ACJHR

²⁶⁹ *Decision on the Draft Legal Instruments*, AU Doc. Assembly/AU/Dec.529(XXIII), Decisions, Declarations and Resolution of the Assembly of the Union, Twenty-Third Ordinary Session, 27 June 2014; African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

²⁷⁰ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), *supra* note 52.

²⁷¹ see Chapters II.C.iii. and IV.C.

²⁷² *Call for African States to Reject Immunity for Serious Crimes by African Civil Society Organisations and International Organisations with a Presence in Africa* (25 August 2014) <<https://www.hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society>> accessed 15 August 2015; see also *Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights* (12 May 2014) <<https://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court>> accessed 15 August 2015.

thereby rejecting the Malabo Protocol.²⁷³ In the past, however, only few states have publicly rejected immunity *ratione personae* for serious international crimes.²⁷⁴ Additionally, the organisations have voiced their concern that the new amendment would essentially be an incentive for perpetrators of such crimes to remain in power indefinitely, since the provision only stipulates immunity for sitting heads of states, but not also for those formerly in such positions. Generally, ‘Africa should be moving forward in the fight against impunity, not regressing’.²⁷⁵ Granting immunity to heads of state and high-ranking government officials for criminal prosecutions results in a ‘two-tiered system of justice’²⁷⁶ and raises concerns that the Court will be unable to deliver impartial justice, as the amendment effectively places some individuals above the law, contrary to the principles of the rule of law. In addition, the amendment is also contrary to the purpose of international criminal law to fight impunity, as heads of state are commonly the perpetrators of such atrocities, as well as to the AU’s Constitutive Act²⁷⁷ itself. Article 4 of the Act rejects impunity for serious crimes. Therefore, the Malabo Protocol adopted by the AU stands in conflict with the AU’s Constitutive Act.

Another problem African states will likely face if the ACJHR is realised is the merged Court’s relationship to the ICC. Both courts will essentially have the same mandate: to prosecute individuals for committing war crimes, crimes against humanity or genocide although the merged Court also incorporates further ‘international’ crimes such as mercenarism and unconstitutional change of government. The AU envisioned the ACJHR to ideally take precedence over the ICC, in order to ‘keep the ICC out’²⁷⁸, and to deal with Africa’s problems themselves. However, the African state parties to the Rome Statute will likely be in conflict with its provisions and therefore violate their obligations under the international treaty if the relationship between the two courts is not adequately considered. As such, neither of the protocols of the ACJHR contains a provision, which would stipulate how a conflict of jurisdiction between the courts will be resolved. At the time of drafting the Rome

²⁷³ *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, Human Rights Watch (13 November 2014) <<https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and>> accessed 15 August 2015.

²⁷⁴ *Ibid.*

²⁷⁵ Stephen Lamony of Coalition for the ICC in CICC Global Justice, ‘Civil Society opposes immunities in proposed expansion of African Court’ (*World Press* (online), 4 June 2014) <<https://ciccglobajjustice.wordpress.com/2014/06/04/civil-society-opposes-immunities-in-proposed-expansion-of-african-court/>> accessed 15 August 2015.

²⁷⁶ *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, *supra* note 273.

²⁷⁷ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15, 2158 UNTS 3.

²⁷⁸ Rowland J.V. Cole, *supra* note 2, 694.

Statute, there was also no talk of a regional court with similar jurisdiction, so that such a possibility was also not considered in the ICC's Statute. It could however be asserted that the Rome Statute's complementarity clause in Article 17 may be applied analogous. The principle of complementarity, as contained in the Rome Statute, was generally drafted with domestic courts in mind. No reference to regional courts can be found in the treaty itself or in its *travaux préparatoires*. It has to also be noted that regional tribunals and courts are generally intended to determine whether or not a member state to a regional treaty or organisation has violated its obligations under the relevant treaty and possibly also provide redress for affected citizens. Their objectives have to date not included a discretionary element on whether a human rights violation may also amount to international crimes.²⁷⁹ Their original composition and objective therefore differ from international criminal tribunals and courts. As a matter of fact, the AU also initially supported the position in favour of the traditional differentiation, demonstrated when the Assembly first rejected a proposal to provide the ACJHR with a criminal chamber when it adopted the Protocol of the African Court of Justice and Human Rights²⁸⁰. However, as the AU's dissatisfaction with the ICC intensified, the merged Court's jurisdiction was extended to also include a criminal chamber with immunity for heads of state and high-ranking government officials. As previously mentioned, this results in the ACJHR being unique among regional courts. Unless the principle of complementarity of the Rome Statute can be understood to also apply as regional complementarity, both courts will likely be in competition with each other rather than mutually beneficial.

Although the ACJHR definitely has its flaws and limitations, as its protocols stand now, it could also have the potential, as a regional court, to benefit from a 'high level of convergence and coherence between states'.²⁸¹ States have the opportunity to better assert and merge their political and economic positions as well as social ties on a regional level, with states that are usually likeminded. The ACJHR could represent an opportunity for abrupt response in urgent matters with a higher degree of realisation of international criminal law. The merged Court could also have a relative advantage over the ICC in light of obtaining evidence and information, as well as when dealing with victims and witnesses. Generally speaking, any further opportunity to achieve justice should be supported, as long as it also

²⁷⁹ *Ibid.*, 695f.

²⁸⁰ Protocol on the Statute of the African Court of Justice and Human Rights (signed and entered into force 1 July 2008).

²⁸¹ Tefera Degu Addis, 'Some reflections on the current Africa's project on the establishment of African Court of Justice and Human Right (ACJHR)' (*AfricLaw* (online), 29 June 2015) <<http://africlaw.com/2015/06/29/some-reflections-on-the-current-africas-project-on-the-establishment-of-african-court-of-justice-and-human-right-acjhr/>> accessed 15 August 2015.

guarantees fair, impartial investigations and prosecutions, in accordance with the standard established by the international community through the International Criminal Court in The Hague. If the African Court could assert itself as strong and independent, with none or little political interference, the African continent would benefit from its establishment, and would thereby create an ‘African solution to African problems’, especially in regards to the fight against impunity. However, this is doubtful in light of the immunity granted to heads of state and government officials before the ACJHR. Consequently, it is not unlikely that the ACJHR will only be able to deliver a lower quality of criminal justice in the cases over which the merged Court would exercise its jurisdiction.

However, it is doubtful whether or not the merged Court will even come into fruition. In order for the Malabo Protocol to enter into force 15 ratifications are required. It has to be noted that the Protocol merging the two African courts in the first place has also not yet received the required quorum of ratifications with 30 signatures but only five ratifications. At the AU summit meeting at the beginning of 2015, Kenyatta, campaigned for the ACJHR, emphasising the threat of conflicts in a number of African states, but also that the ICC ‘is a grave risk to peace and security’ in Africa. He also pledged to contribute 1 million US dollars to the ACJHR’s budget.²⁸² Despite his campaigning, the required threshold was not met, with only a few signatures so far. Regardless, the AU adopted a decision²⁸³ reminding all African states of the AU’s previous decisions concerning the ICC and to urge them to ratify the Malabo Protocol. On the other hand, some scholars suggest that there is only a very slim chance of establishing the ACJHR for the simple reason that the AU cannot afford it. It has been estimated that the expanded mandate will require a budget of 4 million US dollars annually for the merged Court alone.²⁸⁴ It has to be noted that 60% of the AU’s budget is in fact not paid by the African member states to the AU but by the European Union as the biggest supporter of the ICC, the United States and China.²⁸⁵ The European Union is unlikely to allow the effective creation of a merged Court, which would ultimately be in competition to the ICC, with its funds.

²⁸² The Hague Trials, ‘Can African allies like Mugabe boost Kenya’s anti-ICC campaign?’ ((online), 3 February 2015) <<https://thehaguetrials.co.ke/article/can-african-allies-mugabe-boost-kenyas-anti-icc-campaign>> accessed 15 August 2015.

²⁸³ *Decision on the Report of the Commission on the Progress of the Implementation of the Previous Decisions Concerning the International Criminal Court*, AU Doc Assembly/AU/Draft/Dec.2(XXIV)/Rev.1, Doc.Assembly/AU/18(XXIV).

²⁸⁴ Fred Oluoch, ‘Mixed reactions to Kenya’s push to establish African court’ (*The East African* (online), 7 February 2015) <<http://www.theeastafrican.co.ke/news/Mixed-reactions-to-Kenya-s-push-to-establish-African-court/-/2558/2616388/-/12dkljgz/-/index.html>> accessed 15 August 2015.

²⁸⁵ *Ibid.*

VI. Conclusion

The Rome Statute came into force in 2002 creating the International Criminal Court as the first permanent institution to try war crimes, crimes against humanity, genocide and aggression. African states played a great influential role in its establishment and shaped the institution as it is today. However, recently African states have criticised the ICC for being biased against the African continent; for being a political tool for Western powers to strengthen their influence over the African continent; for disregarding sovereign immunity of states and the immunity awarded to heads of state and high-ranking government officials under customary international law; as well as constituting a threat to the peace process by striving for justice prematurely. The ICC does aim to promote justice and peace as complementary concepts.

An examination of the voiced allegations shows that they, for the most part, can easily be discredited when taking into consideration the legal basis and proceedings for investigations before the Court as stipulated by the Rome Statute. Most cases before the Court were referred to it by the concerned states themselves, so that they remain responsible for those situations before the ICC. In fact, the Prosecutor only made use of the *proprio motu* power twice since the Court was ready to take its first case in 2003, namely in the situations in Kenya and Côte d'Ivoire. The UN Security Council under Chapter VII of the UN Charter furthermore referred the remaining two situations currently before the Court to it, namely Darfur/Sudan and Libya respectively. It was the referral of the situation in Darfur/Sudan and the subsequent issuance of the arrest warrant for the sitting head of state that first lead to the exacerbation of criticisms against the Court.

The ICC does face a grave threat by the AU's continuous call for African states to withdraw from the Rome Statute. African states comprise the highest regional representation of the 123 state parties to the ICC. If they were to withdraw *en masse*, the ICC would surely be faced with a prominent threat of delegitimisation. But the states represented in the AU do not stand as a united front. While some states support the AU's call and were influential in the passing of the subsequent decisions, a large number of African states proclaimed their continued commitment to the ICC and the fight against impunity on an international level. The fact that three previous calls by the AU for its member states to withdraw from the Rome Statute failed, further supports that the ICC has not yet been delegitimized. Yet the fact that some states have refused to cooperate with the ICC has further complicated its proceedings,

because the ICC relies on the cooperation of states to obtain the accused as well as evidence and to enforce sentences issued by the Court.

The International Criminal Court is not, however, the only tool to fight impunity, although it has been widely acknowledged to be the most likely mechanism to ensure a consistent application without political interference worldwide. Consequently, it would be in the international community's interest to enhance the legitimacy the ICC currently enjoys, especially in regards to the current threat faced by African states. This could be done by either engaging Independent Commissions of Inquiry by the UN Human Rights Council before referring a situation to the Court, as was done in the situation in Darfur. Public fact-finding missions raise the awareness of civil societies and consequently obtain their support for any possible future interference by the Court in order to prosecute perpetrators. The Court itself also conducts external communication programmes, such as the Outreach Programme, in order to inform the public of the functioning and the purpose of the Court as well as the current phase of procedures and subsequent actions in case of an investigation or prosecution. However, the most significant impact can be made by the ratification of the Rome Statute by current non-state parties such as the remaining permanent members of the SC. NGOs, civil society and the public have a valuable input when it comes to swaying states and their respective governments. As the ICC's possibly greatest ally, they could play an important role in increasing the state parties to the Statute, thereby enhancing the legitimacy the Court enjoys, even in light of the criticism it endures by African states at the moment.

Another prominent proposition of the AU has been the merger of the already existing African Human Rights Court and the Court of Justice of the African Union in order to create the African Court of Justice and Human Rights, with an extended mandate to also prosecute grave violations of international criminal law, similar to the mandate of the ICC. Although the merged Court may be a viable option if it didn't allow immunity of heads of state and government officials before it, it will likely stand in competition with the ICC if it is realised. However, the Malabo Protocol envisions exactly that for the ACJHR, raising doubts among not only NGOs and civil societies, but also among African states, which support the fight against impunity and realise that most atrocities committed under the ACJHR's and ICC's mandate are committed by heads of state and government officials.

It can generally be asserted that no international prosecutor can successfully prosecute a sitting head of state without significant political backing. Generally, it can be asserted that in almost the majority of cases, the Prosecutor will likely have to face political implications,

sometimes more and sometimes less sensitive. The political self-interest of states partially outweighs the call for the fight against impunity and unless the Security Council, especially its permanent members, support the ICC and the Prosecutor, and award it the necessary opportunity, intelligence and capabilities, and unless states, in particular African states, assist and cooperate with the ICC politically, the Court faces an uphill battle to secure successful prosecutions.²⁸⁶ In order to strengthen international justice and the position of the ICC, the Court itself will have to exercise restraint, as well as those in the international community who support the ICC, extending to which cases the Court will prosecute. On the other hand, it is also of great significance that the ICC exercises its jurisdiction and acts prudently in situations where grave crimes of concern to the international community do occur, extending to all states within its jurisdiction and not solely one continent. In order to successfully carry out its mandate in the future, it is crucial for the Rome Statute to obtain the same level of universality as the UN Charter. This would allow victims throughout the world to obtain the possibility of effective justice. An effective international criminal court could essentially be the only effective and meaningful opportunity to prosecute perpetrators of grave crimes of concern to the international community as a whole in many circumstances. It is to hope that there is still time to adjust the current situation for the better and to ensure that the ICC will flourish into the successful tool in the fight against impunity states envisioned back in 1998.

²⁸⁶ Michael Ignatieff, *supra* note 163.

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Abstract (English)

The International Criminal Court ('ICC' or 'the Court') came into existence in 2002 and was ready to take on its first cases as soon as 2003. It was heralded as a significant moment not only for international criminal law, but also justice. A large variety of actors contributed to the international organisation's creation, which holds those individuals responsible for grave atrocities accountable. Amongst them were African states, as well as others from around the globe, and NGOs; all determined to deter gross violations of international humanitarian and human rights law.

African states continue to play an important role in the context of and surrounding the ICC. However, recently the African Union ('AU'), with the support of a number of African states, has voiced its discontent with the Court and expressed allegations that the international court only focuses on the African continent therefore solely targeting that specific population. The relationship between the two sides further deteriorated with the ICC's 'practice' of indicting sitting heads of state. Consequently, the African Union has continuously called on its member states to cease cooperation with the Court in light of the allegations expressed against the international organisation, and has asked African state parties to the Rome Statute to withdraw en masse.

The African Union's policy towards the ICC has the potential of jeopardising the Court's objective to hold perpetrators of gross atrocities accountable, deter future acts of violence as well as contributing to the fight against impunity. A mass withdrawal of African states from the Rome Statute would likely result in the delegitimisation of the International Criminal Court, subsequently undermining its ability to achieve its prerogatives. The current political impediments have the prospect of hindering the international community, through the ICC, to effectively fight against impunity and to simultaneously provide justice.

Abstract (German)

Der Internationale Strafgerichtshof (,IStGH') entstand 2002. Bereits ein Jahr später nahm er seine ersten Fälle an. Dieses Ereignis wurde von der internationalen Staatengemeinschaft als ein bedeutender Augenblick für das internationale Strafrecht aber auch für ,Gerechtigkeit' allgemein, begrüßt. Der Internationale Strafgerichtshof zieht jene Personen zur Rechenschaft, die für schwerwiegende Grausamkeiten verantwortlich sind. Eine Vielzahl von Akteuren trug zur Schaffung dieser Internationalen Organisation bei. Vertreter der internationalen Staatengemeinschaft, darunter eine große Anzahl afrikanischer Staaten, und NGOs, alle entschlossen gravierende Verletzungen von humanitären Völkerrecht und Menschenrechten abzuschrecken.

Im Kontext mit und um den IStGH spielen afrikanische Staaten auch weiterhin eine wichtige Rolle. Jedoch hat die Afrikanische Union (,AU'), mit Unterstützung von mehreren afrikanischen Staaten, jüngst ihre Unzufriedenheit mit dem Gerichtshof zum Ausdruck gebracht und Letzteren beschuldigt sich nur auf den afrikanischen Kontinent zu fokussieren. Dadurch werde nur auf eine bestimmte Population abgezielt, hieß es. Die Beziehung zwischen beiden Seiten verschlechterte sich nochmalig mit der ,Praxis' des IStGH auch gegen amtierende Staatsoberhäupter vorzugehen. Aufgrund dessen rief die Afrikanische Union ihre Mitgliedstaaten mehrmals auf jede Kooperation mit dem Gerichtshof zu beenden und forderte die afrikanischen Vertragsstaaten des Rom-Statuts auf en masse auszutreten.

Die gegenwärtige Politik der Afrikanischen Union gegenüber dem IStGH hat das Potential die Verfolgung der Hauptanliegen des Gerichtshofs zu gefährden indem es Letzteren unmöglich gemacht wird sowohl Verursacher von schwerwiegenden Grausamkeiten zur Verantwortung zu ziehen, als auch künftige Taten von solchem Ausmaß vorzubeugen oder in der Bekämpfung der Straffreiheit dienlich zu sein. Ein Massenaustritt afrikanischer Staaten vom Rom-Statut hat voraussichtlich die Delegitimierung des Internationalen Strafgerichtshofs zur Folge, wodurch seine Fähigkeit unterminiert wird seine festgelegten Ziele zu erreichen. Die derzeitigen politischen Widerstände haben das Potential die internationale Staatengemeinschaft, durch den IStGH als Hilfsmittel, daran zu behindern effizient gegen Straffreiheit anzukämpfen und gleichzeitig Gerechtigkeit zu fördern.