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LEGITIMACY CHALLENGES AGAINST THE INTERNATIONAL CRIMINAL COURT: AN EVALUATION ON THE LEGITIMACY DIALOGUE OF THE ICC

MASTER'S THESIS

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ABBREVIATIONS

AC	:	Appeals Chamber
ASP	:	Assembly of States Parties
AU	:	African Union
BIA	:	Bilateral Immunity Agreement
CA 3	:	Common Article 3 of the 1949 Geneva Conventions
CIL	:	Customary International Law
EOC	:	Elements of Crimes
ECtHR	:	European Court of Human Rights
GGI	:	Global Governance Institutions
IAC	:	International Armed Conflict
ICC	:	International Criminal Court
ICL	:	International Criminal Law
ICT	:	International Criminal Tribunal
ICTY	:	International Criminal Tribunal for the Former Yugoslavia
ICTR	:	International Criminal Tribunal for Rwanda
LRV	:	Legal Representatives of Victims
NIAC	:	Non-International Armed Conflict
OTP	:	Office of the Prosecutor
POW	:	Prisoner of War
PTC	:	Pre-Trial Chamber
P-5	:	Permanent Members of the United Nations Security Council
RS	:	Rome Statute of the International Criminal Court
SCSL	:	Special Court for Sierra Leone
SOFA	:	Status of Forces Agreement
SP	:	State Party
UN	:	United Nations
UNGA	:	United Nations General Assembly
UNSC	:	United Nations Security Council
USA	:	United States of America
TC	:	Trial Chamber
VCLT	:	Vienna Convention on the Law of Treaties
WTO	:	World Trade Organization

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RÉSUMÉ

La légitimité est un concept qui a été utilisé dans différents contextes dans différentes disciplines des sciences sociales. Tant les perspectives sur ce concept que son contenu et ses critères varient considérablement. Consciente de ces différences, cette thèse s'appuiera principalement sur la compréhension néo-wébérienne du concept. Par conséquent, la légitimité s'entend des croyances subjectives des acteurs quant au bien-fondé d'un ordre ou d'une autorité. En vertu de cette thèse, cette autorité sera la première cour criminelle internationale permanente jamais établie par la communauté internationale: la Cour Pénale Internationale («CPI»).

La thèse se composera de trois sections. Chacune de ces sections adoptera une perspective différente. La première section présente le cadre théorique du concept de «légitimité» basé sur les études de diverses disciplines, tandis que la seconde section aura une approche mixte. En conséquence, la présente section examinera d'abord les objections de légitimité à l'encontre de la CPI sur le plan des faits, puis les considérera comme normatives. Enfin, la troisième section procédera à un examen juridique critique des deux enquêtes récentes lancées par la CPI sur la situation en Afghanistan et au Myanmar/Bangladesh.

La conceptualisation webérienne affirme que l'importance de la légitimité repose sur l'idée que la croyance en la légitimité de l'autorité conduira à une obligation morale interne d'obéir aux ordres de cette autorité. En conséquence, cette obligation morale sera «indépendante du contenu» dans le sens où l'acteur ressentira l'obligation d'obéissance quel que soit le contenu d'un ordre particulier. La première section, basée sur la littérature néo-wébérienne, a conclu que la CPI peut être associée à deux types idéaux d'autorité légitime: «l'autorité formelle-rationnelle» et «l'autorité matérielle-rationnelle». Selon la première, la légitimité de la CPI découle de sa base juridique en tant qu'organisation internationale et cour internationale autorisée par un instrument de droit international par l'organe compétent de nombreux États: le Statut de Rome. En outre, cette dernière affirme que la CPI tire sa légitimité de la croyance en sa compétence et sa compétence pour être un conciliateur raisonnable entre les règles juridiques et les normes juridiques (autorité rationnelle par les valeurs), d'une part, et entre les objectifs généraux et les moyens spécifiques (autorité rationnelle par le but), d'autre part.

Bien qu'elle soit basée sur une conceptualisation webérienne, la première section bénéficiera également d'une abondante littérature sur la légitimité. Par conséquent, la légitimité n'est pas un concept à sens unique. La légitimité se réfère plutôt au dialogue cyclique continu entre l'autorité et sa masse de légitimité. En ce sens, les deux parties de ce dialogue voudront assurer la légitimité continue de l'autorité. Le mécontentement de la masse de légitimité se traduira par des critiques et des objections de légitimité contre l'autorité. En revanche, l'autorité, désireuse d'être

plus efficace, élaborera une stratégie de légitimation pour apaiser ces critiques et objections, en éliminant la nécessité d'offrir des pénalités ou des récompenses, et en veillant à ce que ses ordres soient suivis par une obligation morale indépendante du contenu. Dans le contexte du débat actuel, la CPI n'ayant pas la possibilité d'offrir des sanctions ou des récompenses aux États, son existence et son fonctionnement dépendent dans une large mesure de sa perception comme légitime. Dans ce contexte, étant donné que la communauté internationale est une instance professionnelle et ouverte, il a été conclu qu'une croyance généralisée en l'illégitimité à l'égard de la CPI pourrait facilement se transformer en une croyance en l'invalidité de la Cour. En d'autres termes, la communauté internationale ne permettra pas qu'un ordre ou une autorité ait une «fausse validité» ou une «validité coercitive».

La CPI est à la fois une institution juridique et politique. En conséquence, cette section présentera et analysera les différents éléments de légitimité qui seront regroupés sur la base des trois niveaux de la CPI. Ces niveaux sont les suivants: a) la CPI en tant qu'organe judiciaire, b) la CPI en tant qu '«institution de gouvernance mondiale», et c) la CPI en tant que tribunal international (pénal). À cet égard, la section en question traitera d'une douzaine d'éléments non limitatifs relatifs à la légitimité de la CPI: légalité, raisonnement juridique, cohérence, indépendance, impartialité, respect des procédures/procès équitable, consentement, efficacité, transparence, responsabilité, formation et équité. Ces explications viseront à démontrer la pertinence et l'importance de chacun de ces éléments pour les différents publics de légitimité de la CPI. Ce pluralisme découle du fait que les acteurs évaluent et décident de leur légitimité les croyances sur une autorité basée sur les critères normatifs qu'ils hiérarchisent et les phénomènes dont ils sont conscients. De même, ces critères normatifs et l'interaction entre eux dépendront largement de la nature de la relation entre un acteur et la CPI.

A deuxième section exposera et examinera les objections et les critiques spécifiques de la légitimité à l'égard de la CPI et du Statut de Rome, sans prétendre à une liste complète. Cette liste exemplaire mais largement représentative d'appels et de critiques contribuera à déterminer l'ampleur et la nature de la crise de légitimité à laquelle la CPI est confrontée. En d'autres termes, la section explorera les causes et les motivations des parties prenantes concernées pour construire une compréhension holistique des questions de légitimité de la CPI. À cette fin, la section traitera des critiques et des appels en faveur de la légitimité lancés par des acteurs étatiques et non étatiques. Les critiques, objections et opinions d'acteurs non étatiques seront compilées à partir de monographies, d'articles de revues universitaires, d'articles de blogs universitaires, d'articles de journaux et de rapports d'organisations non gouvernementales. D'autre part, les critiques, les objections et les opinions des États découleront des décisions des organisations internationales telles que les Nations Unies et l'Union Africaine, des déclarations des gouvernements trouvées dans diverses sources, y compris les comptes rendus des réunions des organisations internationales telles que le Conseil de Sécurité des Nations Unies ou l'Assemblée des États contractants de la CPI, ou des déclarations officielles de la presse, des procédures nationales et de la législation des États, et des déclarations politiques trouvées dans les journaux électroniques.

Tout d'abord, si la diversité des situations et des affaires de la CPI dans le monde est envisagée, il est impossible pour une seule étude de regrouper l'ensemble des documents de la CPI. En outre, compte tenu de la diversité et de la pluralité des

parties prenantes de la CPI dans 123 États contractants et de nombreux autres États non contractants, la portée des sources, objections, critiques et opinions possibles sur la CPI est illimitée. Enfin, en raison du fait qu'il fait l'objet d'un débat mondial animé, les développements liés à la CPI sont un fleuve qui coule continuellement. Consciente des limites de toute recherche sur la légitimité de la CPI, en particulier une thèse de maîtrise, qui fait l'objet de critiques et d'opinions de milliers de professionnels et de non-professionnels, cette étude vise à ne présenter que les aspects les plus vitaux de la crise de légitimité de la CPI.

Sans être limitatives, les critiques et les appels de légitimité examinés à la section deux sont suffisants pour illustrer les problèmes fondamentaux de la CPI. En conséquence, présenter la CPI et son personnel comme une entreprise charismatique et héroïque était une tentative d'établir une «autorité charismatique» au sein de la CPI. Cependant, ce type idéal d'autorité légitime est la forme d'affirmation d'une autorité instable, insoutenable et non rationnelle qui ne convient pas à la CPI. À cet égard, les critiques formulées à l'égard du personnel de la CPI visaient essentiellement à le limiter à ses limites juridiques et professionnelles, le cas échéant.

En outre, des acteurs non étatiques ont également critiqué l'approche hautement orientée vers l'État et tolérante du Statut de Rome en ce qui concerne les obligations des États de coopérer contre la CPI. Ces dispositions limitent la CPI à la capacité de demander la coopération des gouvernements de jure; dans certaines circonstances, elles donnent aux États contractants la liberté de donner suite aux demandes d'extradition ou aux demandes de remise de la CPI; elles permettent aux États contractants de soumettre des exceptions de sécurité nationale aux demandes de divulgation d'éléments de preuve de la CPI; elles permettent aux États contractants d'échapper à leur compétence pour conclure des «accords d'immunité» avec des États contractants qui ne sont pas parties; et, en fin de compte, elles n'envisagent pas de mesures juridiques et politiques pour les États contractants non coopérants dans le cadre d'un régime spécifique. En conséquence, ces dispositions, qui ont été majoritairement ajoutées par les initiatives diplomatiques américaines lors de la Conférence de Rome, ont créé de nombreuses faiblesses pour le régime de coopération de la CPI. En conséquence, ces faiblesses ont rendu la CPI vulnérable aux préférences politiques des États contractants, qui tiennent principalement compte des considérations de légitimité de la CPI et des intérêts nationaux ou régionaux.

En outre, dans la deuxième section, les critiques et les objections des États ont été examinées sur la base des relations de la CPI avec le Conseil de Sécurité des Nations Unies («CSNU») et de l'approche de la CPI à l'égard de l'immunité des chefs d'État non contractants. La relation entre la CPI et le CSNU a été critiquée pour avoir placé l'équilibre politique déformé de l'ONU dans la CPI et ainsi politiser structurellement la justice pénale internationale. En ce sens, le fait que le CSNU ait exercé ses pouvoirs de «renvoi» et de «report» dans le cadre du Statut de Rome en accordant l'immunité de facto et de jure à d'autres tout en sélectionnant politiquement certains groupes de situations devant faire l'objet d'une enquête de la CPI a suscité des critiques.

Principalement, les États africains ont critiqué l'approche de la CPI à l'égard de l'immunité des chefs d'État non contractants comme «néocolonialiste» et «néo-impérialiste». Cette section analysera chronologiquement la justification juridique par la CPI de l'immunité du chef d'État sur la base de différents arguments. Sur la base de

cette analyse, le principal problème s'est avéré être l'insuffisance et l'incohérence de la justification juridique de la CPI selon laquelle l'ancien président soudanais Al-Bashir n'avait pas l'immunité du chef de l'État devant la CPI. Par conséquent, bien que les politiciens l'aient exprimé comme étant la malveillance politique de la CPI, la question était plutôt liée à l'incompétence juridique et à l'incohérence de la CPI.

Il a été suggéré qu'une étude empirique de la légitimité d'une cour criminelle internationale particulière devrait tenir compte de trois aspects: «origine», «processus» et «conséquences». Cependant, dans le cas de la CPI, il n'y a pratiquement pas de débat ni d'objection à son origine. Parce que la Cour a été créée sur la base du consentement d'un accord international. Par conséquent, la troisième section portera sur le «processus» et les «conséquences» de la CPI en général, dans le contexte des deux dernières enquêtes en Afghanistan et au Myanmar/Bangladesh. As encore donné de résultats concrets, cette dernière section se concentrera principalement sur le processus de la CPI en analysant les fondements juridiques utilisés par les départements de la CPI lors de l'autorisation de ces enquêtes.

La dernière section révélera que les Chambres de la CPI ont interprété au sens large les pouvoirs et la compétence de la CPI et donnent au Bureau du Procureur («BP») un pouvoir discrétionnaire presque illimité. Plus précisément, le raisonnement juridique utilisé par la CPI était vicié et incohérent à bien des égards. En modifiant délibérément le libellé des documents constitutifs et en choisissant arbitrairement les preuves juridiques, le tribunal a obtenu la compétence universelle presque de facto, concluant que les deux conditions fondamentales du lien crime de guerre-conflit armé étaient alternatives. Enfin, la Cour a accordé au BP un espace de liberté que BP ne considérait même pas avoir et n'a pas demandé aux Chambres de lui accorder.

En général, la thèse remet en question la question de savoir si le Procureur et les Chambres ont l'intention d'établir une réponse dans le dialogue sur la légitimité de la CPI par le biais de leurs enquêtes et de leurs décisions, dans le cadre d'une stratégie de légitimation. La thèse répondra positivement à cette question. Toutefois, cette réponse était fondée sur la performance médiocre de la CPI dans le dialogue sur la légitimité de la CPI. En ce sens, la CPI estime qu'en changeant le profil de ses affaires et en les diversifiant, on éliminerait les objections de légitimité les plus éloquentes. Cette thèse suggère que la CPI a identifié les questions de légitimité de manière incorrecte, au moins incomplète. En conséquence, les défauts fondamentaux de légalité et de raisonnement juridique, qui sont parmi les concepts liés à la légitimité qui constituent la base des deux types idéaux d'autorité légitime qui constituent la base de la légitimité de la CPI, ont constitué les principaux piliers de la crise de légitimité de la CPI. La thèse conclut qu'au lieu d'éliminer ces défauts, le développement d'une stratégie de légitimation en ignorant ces défauts et en y contribuant aggravera la crise de légitimité de la CPI.

La thèse se terminera avec la situation générale de la crise de légitimité de la CPI et ses effets sur le comportement de l'État. En conséquence, les États ont démontré de différentes manières leur malaise à l'égard de la CPI. En conséquence, la thèse proposera plusieurs modifications du Statut de Rome et des réformes structurelles de la CPI. Cependant, ces modifications et ces réformes ne semblent pas probables en raison des problèmes de légitimité de la CPI, qui affectent également l'étendue des pouvoirs que les États contractants pourraient vouloir transférer à la CPI. À cet égard, les propositions qui ne nécessitent pas de modification du Statut de Rome pourraient

être au centre de la stratégie de légitimation à court terme de la CPI. En général, l'établissement d'un dialogue ouvert avec la masse de légitimité sera proposé comme l'élément le plus important de toute stratégie de légitimation de la CPI.

ABSTRACT

Legitimacy is a concept that has been used in different contexts under different disciplines of social sciences. Both the perspectives towards this concept and its content and criteria varies significantly. Cognisant of these differences, this thesis will primarily be based upon the neo-Weberian understanding of the concept. Accordingly, legitimacy is understood as the subjective beliefs of actors concerning the appropriateness of an order or an authority. Within the context of this thesis, this authority will be the first permanent international criminal tribunal established by the international community so far: the International Criminal Court ("ICC").

The thesis will consist of three chapters. Each of these chapters will adopt a different perspective. While the first chapter will be presenting a theoretical framework of the concept of "legitimacy" based on the studies of various disciplines, the second chapter will have a combined approach. Accordingly, this chapter will firstly explore the legitimacy challenges against the ICC empirically and then evaluate these challenges normatively. Lastly, the third chapter will conduct a critical legal review of the initiation of two recent investigations into the situations of Afghanistan and Myanmar/Bangladesh by the ICC.

The Weberian conceptualisation purports that the significance of legitimacy rests upon the idea that the belief in the legitimacy of authority would ensue an internal moral obligation to comply with the commands of this authority. Accordingly, this moral obligation would be "content-independent" in the sense that the actor would feel the obligation to comply irrespective of the content of a specific command. Based on the neo-Weberian literature, the first chapter found that the ICC can be associated with two ideal types of legitimate authority: "formal-rational authority" and "substantive-rational authority". According to the former, the ICC's legitimacy stems from its legal foundation as an international organisation and international court empowered by the competent organs of several states through an international law instrument: the Rome Statute. In addition to that, the latter purports that the ICC derives its legitimacy from the belief in the competence and qualification of the ICC to be a reasonable mediator between, on the one hand, legal rules and legal norms (value-rational authority), and on the other hand general objectives and specific means (purposive-rational authority).

Though established upon a Weberian conceptualisation, the first chapter will also benefit from the extensive literature on legitimacy. Accordingly, legitimacy is not a unidirectional concept. On the contrary, legitimacy connotes the perpetual cyclical dialogue between authority and its legitimacy constituency. In that sense, both sides of this dialogue would aspire to ensure the lasting legitimacy of the authority. Dissatisfaction of the legitimacy constituency would reveal itself as criticism and legitimacy challenges towards the authority. In turn, aspiring to be more effective, the authority would devise a legitimation strategy to assuage these criticisms and

challenges, ensuring compliance to its commands through a content-independent moral obligation, which would dispense with the need for an offer of punishment or reward. In the context of the present discussion, as the ICC is deprived of the means to offer punishment or reward to states, its very existence and functioning depend on it to be perceived legitimate widely. In this context, it was concluded that a wide illegitimacy belief towards the ICC would readily turn into a belief in the invalidity of the Court, due to the nature of the international community as a professional and open forum. In other words, the international community would not allow an order or authority to have "false validity" or "forced validity".

The ICC is both a legal and a political institution. Accordingly, this chapter will present and analyse different legitimacy related elements, which will be grouped based on the three layers of the ICC. These layers are; a) the ICC as a judicial body, b) the ICC as a "global governance institution", and c) the ICC as an international (criminal) court. In that context, the chapter will discuss a dozen of non-exhaustive legitimacy related elements for the ICC: legality, legal reasoning, coherence, independence, impartiality, due process / fair trial, consent, effectiveness, transparency, accountability, composition, and equality. These explanations will aim to reveal the relevance and significance of each of these elements for the legitimacy of the ICC in terms of its diverse legitimacy constituencies. This plurality is dictated by the fact that actors evaluate and conclude their legitimacy beliefs concerning an authority based on the normative criteria they prioritise and the facts of which they are aware. In the same vein, these normative criteria and the interaction between them would substantially rely on the characteristics of the relationship between an actor and the ICC.

Without asserting a complete list, the second chapter will exhibit and analyse specific legitimacy challenges and criticisms against the ICC and the Rome Statute. This illustrative yet substantially representative list of challenges and criticisms will contribute to determining the extent and nature of the legitimacy crisis the ICC has been facing. In other words, the chapter will explore the reasons and motives of relevant stakeholders to establish a holistic understanding of the legitimacy problems of the ICC. To that end, the chapter will deal with criticisms and legitimacy challenges of both state and non-state actors. Criticisms, challenges and opinions of non-state actors will be collected from monographs, academic journal articles, academic blog posts, newspaper articles, and reports of non-governmental organisations. On the other hand, criticisms, challenges and opinions of states will be collected from decisions of international organisations, the United Nations and the African Union, statements of governments found in various sources such as the meeting records of international organisations, the UN Security Council or the Assembly of State Parties of the ICC, or official press releases, national acts and legislation of states, and political statements found in electronic newspapers.

First of all, imagining the range of different ICC situations and cases throughout the world, it is impossible for one study to gather all of the ICC materials together. Moreover, considering the diversity and multiplicity of the ICC stakeholders in 123 state parties and many other non-state parties, the extent of the possible resources, challenges, criticisms and opinions concerning the ICC is limitless. Lastly, due to constituting the subject of a global live debate, the developments concerning the ICC is an ever-flowing stream. Aware of the limitations of any research, especially of a master's thesis, on the legitimacy of the ICC, which has been the subject of

criticisms and opinions of thousands of professional and non-professional individuals, this study only aims to present the most vital aspects of the legitimacy crisis of the ICC.

Though not exhaustive, the criticisms and legitimacy challenges examined in the second chapter are sufficient for picturing the fundamental problems of the ICC. Accordingly, depicting the ICC and its personnel as a charismatic and heroic enterprise was an attempt to establish a "charismatic authority" for the ICC. However, this ideal type of legitimate authority is an unstable, unsustainable and non-rational form of asserting authority, which is inappropriate for the ICC. In this vein, the criticisms against the personnel of the ICC focused on ensuring they be duly confined to their legal and professional boundaries.

Moreover, non-state actors also criticised the overly state-oriented and state-lenient approach of the Rome Statute in terms of the cooperation obligations of states towards the ICC. These provisions were limiting the ICC to request the cooperation of only de jure governments; under certain conditions, providing state parties with liberty to carry out either the extradition requests of states or the surrender requests of the ICC; enabling state parties to assert national security exception to the requests of disclosure of evidence by the ICC; condoning state parties to conclude the so-called "immunity agreements" with non-state parties to avoid the jurisdiction of the ICC, and finally not prescribing a defined regime of specific legal and political remedies for incompliant state parties. Accordingly, these provisions, the insertion of which had mainly been achieved by the US diplomatic initiatives during the Rome Conference, created many soft spots for the ICC cooperation regime. In conclusion, these softs spots have made the ICC susceptible to political choices of state parties which predicate mainly on the considerations of ICC legitimacy and national, or regional, interests.

Furthermore, the second chapter examined the criticisms and challenges of states based on the relationship of the ICC with the United Nations Security Council ("UNSC") and the approach of the ICC to head of state immunity of non-state parties. The ICC-UNSC relationship was criticised for inserting the distorted political balance of the UN into the ICC, hence structurally politicising international criminal justice. In that sense, the usage of the UNSC of its "referral" and "deferral" powers under the Rome Statute has drawn criticisms for politically selecting certain groups of situations to be investigated by the ICC while endowing de facto and de jure immunity to others.

Mainly African states criticised the approach of the ICC to the head of state immunity of non-state parties as "neo-colonial" and "neo-imperial". The section will analyse the ICC legal reasoning on the head of state immunity based on the different argumentations of the ICC chronologically. Based on this analysis, the underlying problem was identified as the inadequateness and inconsistency of the ICC legal reasoning given for the absence of the head of state immunity of former Sudanese President Al-Bashir before the ICC. Accordingly, though articulated by politicians as a political bad faith of the ICC, the issue was related more to the legal inadequateness and inconsistency of the ICC.

It has been proposed that an empirical study of legitimacy of a specific international criminal tribunal should consider three aspects: "pedigree", "process" and "results". However, when it comes to the ICC, there is little to no controversy or

challenge directed against its pedigree. That is because the Court was established consensually through an international treaty. Therefore, the third chapter will generally focus on the aspects of "process" and "results" of the ICC in terms of the two recent investigations into the situations of Afghanistan and Myanmar/Bangladesh. Furthermore, as these investigations have not produced concrete results yet, this last chapter will primarily centre around the ICC process by analysing the legal reasoning of the ICC Chambers used during the authorisation of these investigations.

The last chapter will establish that the ICC Chambers have interpreted the powers and jurisdiction of the ICC expansively and provided the Office of the Prosecutor ("OTP") with almost unrestricted discretion. More specifically, the legal reasoning used by the ICC was defective and inconsistent in many respects. The Court acquired almost de facto jurisdiction and concluded the alternativeness of the two fundamental requirements of the war crime-armed conflict nexus by deliberately altering the wordings of constituent instruments and cherry-picking legal evidence. Lastly, the Court provided the OTP with a scope of liberty that the OTP itself did not contemplate having and did not request the Chambers to bestow.

Overall, the thesis will question whether the Prosecutor and Chambers intended to form a response in the ICC legitimacy dialogue through their investigations and judgements as part of a legitimation strategy. The thesis will answer that question affirmatively. However, this response predicated on ICC's poor listener performance in the ICC legitimacy dialogue. In that sense, the ICC believed that changing and diversifying the profile of its cases would assuage its most vocal legitimacy challenges. This thesis asserts that the ICC identified its legitimacy problems incorrectly, at least incompletely. Accordingly, fundamental deficiencies concerning the legitimacy related elements of legality and legal reasoning, which constituted the foundations of the two ideal types of legitimate authority for the ICC, were the main pillars of the ICC legitimacy crisis. The thesis concludes that instead of eliminating these deficiencies, devising a legitimation strategy by ignoring and contributing to these deficiencies will likely deepen the legitimacy crisis of the ICC.

The thesis will conclude with a general state of the legitimacy crisis of the ICC and its implications to state behaviours. Accordingly, states have demonstrated their discomfort towards the ICC in different forms. In line with that, the thesis will suggest a few amendments to the Rome Statute and structural reformations to the ICC. However, these amendments and reformations seem to be unlikely due to the legitimacy problems of the ICC, which also affects the extent of powers State Parties would be willing to transfer to the ICC. In this direction, those suggestions which do not require an amendment to the Rome Statute could be the focus of the short-term legitimation strategy of the ICC. In general, establishing an open dialogue with its legitimacy constituency will be suggested as the most crucial component of any ICC legitimation strategy.

ÖZET

Meşruiyet, sosyal bilimlerin farklı disiplinleri altında farklı bağlamlarda kullanılmış bir kavramdır. Hem bu kavrama yönelik bakış açıları hem de içeriği ve kriterleri önemli ölçüde değişiklik göstermektedir. Bu farklılıkların farkında olarak bu tez, temel olarak kavramın neo-Weberyen anlayışına dayanacaktır. Buna göre meşruiyet, aktörlerin bir düzenin veya otoritenin uygunluğuna ilişkin öznel inançları olarak anlaşılmaktadır. Bu tez kapsamında bu otorite, uluslararası toplum tarafından bugüne kadar kurulmuş ilk daimi uluslararası ceza mahkemesi olacaktır: Uluslararası Ceza Mahkemesi ("UCM").

Tez üç bölümden oluşacaktır. Bu bölümlerin her biri farklı bir bakış açısı benimseyecektir. Birinci bölüm çeşitli disiplinlerin çalışmalarına dayalı olarak "meşruiyet" kavramının teorik çerçevesini sunarken, ikinci bölüm karma bir yaklaşıma sahip olacaktır. Buna göre, bu bölüm öncelikle UCM'ye yönelik meşruiyet itirazlarını olgusal olarak inceleyecek ve ardından bu itirazları normatif olarak değerlendirecektir. Son olarak üçüncü bölüm, UCM tarafından Afganistan ve Myanmar/Bangladeş'teki durumlara ilişkin son zamanlarda başlatılan iki soruşturmanın eleştirel hukuki incelemesini yapacaktır.

Weberyen kavramsallaştırma, meşruiyetin öneminin, otoritenin meşruluğuna olan inancın bu otoritenin emirlerine uymak için içsel bir ahlaki yükümlülüğe yol açacağı fikrine dayandığını iddia eder. Buna göre, bu ahlaki yükümlülük, aktörün belirli bir emrin içeriğinden bağımsız olarak itaat zorunluluğu hissetmesi anlamında "içerikten bağımsız" olacaktır. Neo-Weberyen literatüre dayanan ilk bölüm, UCM'nin iki ideal meşru otorite türüyle ilişkilendirilebileceğini tespit etmiştir: "biçimsel-rasyonel otorite" ve "maddi-rasyonel otorite". İlkine göre, UCM'nin meşruiyeti, birçok devletin yetkili organı tarafından bir uluslararası hukuk belgesiyle yetkilendirilmiş bir uluslararası örgüt ve uluslararası mahkeme olarak onun hukuki temelinden kaynaklanır: Roma Statüsü. Buna ilaveten ikincisi, UCM'nin meşruiyetini, UCM'nin bir yandan hukuk kuralları ve hukuk normları (değer-rasyonel otorite), diğer yandan genel amaçlar ve belirli araçlar (amaç-rasyonel otorite) arasında makul bir uzlaştırıcı olma yetkinliğine ve yeterliliğine duyulan inançtan aldığını iddia eder.

Weberyen bir kavramsallaştırma üzerine kurulmuş olsa da birinci bölüm aynı zamanda meşruiyet hakkındaki geniş literatürden de faydalanacaktır. Buna göre meşruiyet tek yönlü bir kavram değildir. Aksine, meşruiyet, otorite ve onun meşruiyet kitlesi arasındaki sürekli döngüsel diyalogu ifade eder. Bu anlamda, bu diyaloğun her iki tarafı da otoritenin süregiden meşruiyetini sağlamayı arzulayacaktır. Meşruiyet kitlesinin memnuniyetsizliği, otoriteye yönelik eleştiri ve meşruiyet itirazları olarak kendini gösterecektir. Buna karşılık, daha etkili olmayı arzulayan otorite, bu eleştirileri ve itirazları yatıştırmak için bir meşrulaştırma stratejisi geliştirecek, ceza veya ödül teklif etme gerekliliğini ortadan kaldıracak içerikten bağımsız bir ahlaki yükümlülük

yoluyla emirlerine uyulmasını sağlayacaktır. Mevcut tartışma bağlamında, UCM devletlere ceza veya ödül teklif etme imkanlarından yoksun olduğundan, onun bizatihi varlığı ve işleyişi geniş ölçüde meşru olarak algılanmasına bağlıdır. Bu bağlamda, uluslararası toplumun profesyonel ve açık bir forum olma özelliği nedeniyle, UCM'ye yönelik yaygın bir gayri meşruiyet inancının, kolaylıkla Mahkemenin geçersizliğine ilişkin bir inanca dönüşebileceği sonucuna varılmıştır. Başka bir deyişle, uluslararası toplum bir düzenin veya otoritenin "sahte geçerlilik" veya "zoraki geçerliliğe" sahip olmasına izin vermeyecektir.

UCM hem hukuki hem de siyasi bir kurumdur. Bu doğrultuda, bu bölüm, UCM'nin üç katmanını esas alarak gruplandırılacak olan meşruiyete ilişkin farklı unsurları takdim ve analiz edecektir. Bu katmanlar şöyledir: a) bir yargı organı olarak UCM, b) bir "küresel yönetişim kurumu" olarak UCM ve c) bir uluslararası (ceza) mahkeme(si) olarak UCM. Bu bağlamda, söz konusu bölüm, UCM için meşruiyete ilişkin sınırlandırıcı olmayan bir düzine unsuru ele alacaktır: hukukilik, hukuki muhakeme, tutarlılık, bağımsızlık, tarafsızlık, usule uygunluk / adil yargılanma, rıza, etkililik, şeffaflık, hesap verebilirlik, oluşum ve eşitlik. Bu açıklamalar, bu unsurların her birinin UCM'nin meşruiyetinin muhtelif meşruiyet kitleleri bakımından ilgisini ve önemini ortaya koymayı amaçlayacaktır. Bu çoğulculuk, aktörlerin bir otoriteye ilişkin meşruiyet inançlarını, öncelik verdikleri normatif ölçütler ve farkında oldukları olgular üzerinden değerlendirip kararlaştırdıkları gerçeğinden kaynaklanmaktadır. Aynı şekilde, bu normatif ölçütler ve aralarındaki etkileşim, büyük ölçüde bir aktör ile UCM arasındaki ilişkinin niteliğine bağlı olacaktır.

İkinci bölüm, eksiksiz bir liste iddiası olmaksızın, UCM ve Roma Statüsüne yönelik belirli meşruiyet itirazlarını ve eleştirilerini ortaya koyacak ve inceleyecektir. Bu örneklendirici fakat büyük ölçüde temsil edici olan itiraz ve eleştiri listesi, UCM'nin karşı karşıya olduğu meşruiyet krizinin kapsamını ve niteliğini tespit etmeye katkıda bulunacaktır. Başka bir deyişle, bölüm, UCM'nin meşruiyet sorunlarına ilişkin bütünsel bir anlayış oluşturmak için ilgili paydaşların neden ve saiklerini araştıracaktır. Bu amaçla, bölüm hem devlet hem de devlet dışı aktörlerin eleştirilerini ve meşruiyet itirazlarını ele alacaktır. Devlet dışı aktörlerin eleştiri, itiraz ve görüşleri; monografilerden, akademik dergi makalelerinden, akademik blog yazılarından, gazete makalelerinden ve sivil toplum kuruluşlarının raporlarından derlenecektir. Öte yandan, devletlerin eleştiri, itiraz ve görüşleri; Birleşmiş Milletler ve Afrika Birliği gibi uluslararası kuruluşların kararlarından, hükümetlerin BM Güvenlik Konseyi veya UCM Taraf Devletler Meclisi gibi uluslararası örgüt toplantı kayıtları dahil çeşitli kaynaklarda bulunan açıklamalarından veya resmi basın açıklamaları, devletlerin ulusal işlem ve mevzuatları ve elektronik gazetelerde bulunan siyasi açıklamalardan elde edilecektir.

Her şeyden önce, dünya çapındaki farklı UCM durumlarının ve davalarının yelpazesi tasavvur edilirse, tek bir çalışmanın tüm UCM materyalini bir araya getirmesi imkansızdır. Ayrıca, 123 taraf devlette ve diğer birçok taraf olmayan devlette UCM paydaşlarının çeşitliliği ve çokluğu dikkate alındığında, UCM'ye ilişkin olası kaynak, itiraz, eleştiri ve görüşlerin kapsamı sınırsızdır. Son olarak, canlı bir küresel tartışmanın konusunu oluşturması nedeniyle, UCM ile ilgili gelişmeler sürekli akan bir nehirdir. Profesyonel olan ve olmayan binlerce kişinin eleştiri ve görüşlerine konu olan UCM'nin meşruiyetine ilişkin herhangi bir araştırmanın, özellikle de bir yüksek lisans tezinin sınırlılıklarının bilincinde olan bu çalışma, UCM'nin meşruiyet krizinin yalnızca en hayati yönlerini sunmayı amaçlamaktadır.

Sınırlandırıcı olmamakla birlikte, ikinci bölümde incelenen eleştiriler ve meşruiyet itirazları, UCM'nin temel sorunlarını resmetmek için yeterlidir. Buna göre, UCM'yi ve personelini karizmatik ve kahramanca bir girişim olarak göstermek, UCM'ye bir "karizmatik otorite" tesis etme girişimiydi. Ancak bu ideal meşru otorite tipi, UCM için uygun olmayan, istikrarsız, sürdürülemez ve rasyonel olmayan bir otorite iddia etme biçimidir. Bu doğrultuda, UCM personeline yönelik eleştiriler, onların yasal ve mesleki sınırlarıyla gereken şekilde sınırlandırılmalarına odaklanmıştır.

Dahası, devlet dışı aktörler ayrıca Roma Statüsünün fazlaca devlet odaklı ve devlete müsamahakar yaklaşımını devletlerin UCM'ye karşı iş birliği yükümlülükleri açısından eleştirmişlerdir. Bu hükümler, UCM'yi yalnızca *de jure* hükümetlerin işbirliğini talep edebilmekle sınırlıyor; belirli koşullar altında, taraf devletlere, devletlerin iade taleplerini veya UCM'nin teslim taleplerini yerine getirme özgürlüğü veriyor; taraf devletlerin, UCM'nin delilleri açıklama taleplerine karşılık ulusal güvenlik istisnası ileri sürmelerine olanak sağlıyor; UCM'nin yargı yetkisinden kaçınmak için taraf devletlerin, taraf olmayan devletlerle sözde "bağışıklık anlaşmaları" akdetmesine göz yumuyor ve nihayetinde, işbirliği yapmayan taraf devletler için belirli bir rejim çerçevesinde yasal ve siyasi tedbirler öngörmüyordu. Bu doğrultuda, Roma Konferansı sırasında çoğunlukla ABD diplomatik girişimleri ile eklenen bu hükümler, UCM iş birliği rejimi için birçok zayıf nokta yaratmıştır. Sonuç olarak bu zayıf noktalar UCM'yi, esas olarak UCM meşruiyeti mülahazaları ve ulusal veya bölgesel çıkarları dikkate alan taraf devletlerin siyasi tercihlerine duyarlı hale getirmiştir.

Ayrıca ikinci bölümde, UCM'nin Birleşmiş Milletler Güvenlik Konseyi ("BMGK") ile ilişkisi ve UCM'nin taraf olmayan devlet başkanı dokunulmazlığına yaklaşımı temelinde devletlerin eleştirileri ve itirazları incelenmiştir. UCM-BMGK ilişkisi, BM'nin çarpık siyasi dengesini UCM'ye yerleştirdiği ve dolayısıyla yapısal olarak uluslararası ceza adaletini siyasallaştırdığı için eleştirilmiştir. Bu anlamda, BMGK'nin Roma Statüsü kapsamındaki "sevk" ve "erteleme" yetkilerini, UCM tarafından soruşturulacak belirli durum gruplarını siyasi olarak seçerken diğerlerine *de facto* ve *de jure* dokunulmazlık vererek kullanması eleştirilere yol açmıştır.

Ağırlıklı olarak Afrika devletleri, UCM'nin taraf olmayan devlet başkanı dokunulmazlığına yaklaşımını "neo-sömürgeci" ve "neo-emperyalist" olarak eleştirmiştir. Bu kısım, UCM'nin farklı argümanlara dayanan devlet başkanı dokunulmazlığına ilişkin hukuki gerekçelendirmesini kronolojik olarak analiz edecektir. Bu analize dayalı olarak, temel sorunun, eski Sudan Devlet Başkanı El Beşir'in UCM nezdinde devlet başkanı dokunulmazlığının bulunmadığına ilişkin UCM hukuki gerekçelendirmesinin yetersizliği ve tutarsızlığı olduğu tespit edilmiştir. Buna göre, politikacılar tarafından UCM'nin siyasi kötü niyeti olarak ifade edilse de mesele daha ziyade UCM'nin hukuki yetersizliği ve tutarsızlığı ile ilgiliydi.

Belirli bir uluslararası ceza mahkemesinin meşruiyetine ilişkin ampirik bir çalışmanın üç yönü dikkate alması önerilmiştir: "köken", "süreç" ve "sonuçlar". Bununla birlikte, UCM söz konusu olduğunda, onun kökenine yönelik bir tartışma ve itiraz neredeyse yoktur. Zira Mahkeme, uluslararası bir anlaşmayla rızaya dayalı olarak kurulmuştur. Bu nedenle, üçüncü bölüm genel olarak, Afganistan ve Myanmar/Bangladeş'teki son iki soruşturma bağlamında UCM'nin "süreç" ve

"sonuçlarına" odaklanacaktır. Dahası, bu soruşturmalar henüz somut sonuçlar vermediğinden, bu son bölümde, öncelikle UCM Dairelerinin bu soruşturmaların yetkilendirilmesi sırasında kullandıkları hukuki gerekçeler analiz edilerek UCM süreci üzerinde durulacaktır.

Son bölüm, UCM Dairelerinin UCM'nin gücünü ve yargı yetkisini geniş bir şekilde yorumladığını ve Savcılık Ofisine ("SO") neredeyse sınırsız takdir yetkisi tanıdığını ortaya koyacaktır. Daha özel olarak, UCM tarafından kullanılan hukuki muhakeme, birçok açıdan kusurlu ve tutarsızdı. Mahkeme, kurucu belgelerin ifadelerini kasıtlı olarak değiştirerek ve hukuki delilleri keyfi şekilde seçerek neredeyse *de facto* evrensel yargı yetkisi elde edip savaş suçu-silahlı çatışma bağlantısının iki temel koşulunun alternatifliğine kanaat getirdi. Son olarak Mahkeme, SO'ya, SO'nun kendisinin dahi sahip olduğunu düşünmediği ve Dairelerden bahşetmesini de talep etmediği bir serbesti alanı sağladı.

Genel olarak tez, Savcı ve Dairelerin, bir meşrulaştırma stratejisinin parçası olarak, soruşturmaları ve kararlarıyla UCM'nin meşruiyet diyaloğunda bir yanıt oluşturma niyetinde olup olmadıklarını sorgulayacaktır. Tez bu soruya olumlu yanıt verecektir. Ancak bu yanıt, UCM'nin UCM meşruiyet diyaloğundaki yetersiz dinleyici performansına dayanmaktaydı. Bu anlamda UCM, davalarının profilini değiştirmenin ve çeşitlendirmenin en sesli meşruiyet itirazlarını gidereceğine inanıyordu. Bu tez, UCM'nin meşruiyet sorunlarını yanlış, en azından eksik tespit ettiğini ileri sürmektedir. Buna göre, UCM'nin meşruiyetinin zeminini oluşturan iki ideal meşru otorite tipinin temelinde bulunan meşruiyete ilişkin kavramlardan hukukilik ve hukuki muhakemeye dair esaslı kusurlar, UCM meşruiyet krizinin ana sütunlarını oluşturmuştur. Tez, bu kusurları gidermek yerine, bu kusurları görmezden gelerek ve bunlara katkıda bulunarak bir meşrulaştırma stratejisi geliştirmenin UCM'nin meşruiyet krizini derinleştireceği sonucuna varmaktadır.

Tez, UCM'nin meşruiyet krizinin genel durumu ve bunun devlet davranışları üzerindeki etkileri ile sona erecektir. Buna göre devletler UCM'ye karşı rahatsızlıklarını farklı şekillerde ortaya koymuşlardır. Bu doğrultuda tez, Roma Statüsünde birkaç değişiklik ve UCM'de yapısal reformlar önerecektir. Ancak, bu değişiklik ve reformlar, taraf devletlerin UCM'ye devretmek isteyebilecekleri yetkilerin kapsamını da etkileyen UCM'nin meşruiyet sorunları nedeniyle olası görünmemektedir. Bu doğrultuda Roma Statüsünde değişiklik gerektirmeyen öneriler, UCM'nin kısa vadeli meşrulaştırma stratejisinin odak noktası olabilecektir. Genel olarak, meşruiyet kitlesiyle açık bir diyalog kurulması, herhangi bir UCM meşrulaştırma stratejisinin en önemli bileşeni olarak önerilecektir.

INTRODUCTION

Following the development of international humanitarian law ("IHL"), international criminal law ("ICL") started to develop its enforcement mechanisms. Though sometimes enforced by national jurisdictions, international criminal law was thought to be best served by international courts which would prosecute individuals on behalf of the international community. To that end, international community established several international criminal tribunals ("ICT") with different temporal and geographical mandates. However, due to the failure of the efforts to establish a permanent ICT, these ICTs were established specific to each situation on an *ad hoc* basis. At last, the international community adopted the Rome Statute of the International Criminal Court ("RS") at the Rome Conference on 17 July 1998. With the entry into force of the RS on 1 July 2002, the International Criminal Court ("ICC") was established as the first permanent ICT.[1]

In the history of international criminal law, all of the four pioneering *ad hoc* international criminal tribunals received various criticisms and challenges throughout their mandates. As to the Nuremberg and Tokyo Military Tribunals, most vocal criticism was that they were fostering the "victor's justice" by prosecuting only the defeated parties of the Second World War.[2] In reply to these criticisms, the tribunals were defended as there were not many neutral states due to the worldwide aggression of the Axis Powers, hence the prosecution of international criminals had to be conducted either by the Allied Powers or by their own states. Accordingly, the latter option had been ruled out due to its prior failure in the aftermath of the First World War.[3] Furthermore, the Tribunals were endorsed by its Prosecutor from the US as "*one*

[1] Durmuş Tezcan, Mustafa Ruhan Erdem, Murat Önok, **Uluslararası Ceza Hukuku**, 6th ed., Ankara: Seçkin, 2021, pp. 289–363; Kai Ambos, **Treatise on International Criminal Law Volume I: Foundations and General Part**, Oxford: Oxford University Press, 2013, pp. 1–53.
[2] Richard H. Minear, **Victors' Justice: The Tokyo War Crimes Trial**, Princeton, New Jersey: Princeton University Press, 1971.
[3] Robert H. Jackson, 'Jackson's Opening Statement as Prosecutor in Chief for the Allies', **Experience 20**, no. 3, 2010, p. 23.

of the most significant tributes that Power has ever paid to Reason".[4] Lastly, fair procedures and judgements of these Tribunals were also considered as legitimating elements.[5]

The second pair of *ad hoc* international criminal tribunals – the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") – were established with the United Nations Security Council ("UNSC") resolutions to investigate and prosecute international crimes committed in the Former Yugoslavia and Rwanda. With this revolutionary approach, the UNSC demonstrated the interwoven nature of "international peace and security" and "the prosecution of international crimes" which later made the UNSC a prominent actor in the RS. In its first trial, the ICTY Trial Chamber addressed the criticisms against the Nuremberg and Tokyo Tribunals and displayed the differences between the ICTY and its predecessors by stating that the ICTY was "*an organ of the whole international community*" as opposed to its predecessors which were "*organs of a group of States*" that "*only the victors were represented*".[6]

The first criticism against the ICTY and the ICTR was concerning whether the UNSC had the power to establish them under the provisions of the UN Charter.[7] The second criticism was focusing on the inherent bias in the investigations, which, for example, did not include the alleged war crimes of NATO bombardments over Kosovo.[8] In line with that, another criticism was complaining of the non-establishment of new tribunals for similar incidents that would have warranted a similar response. Afterwards, as a political organ which does not have a legal guideline to determine the substance of its decisions, it is accepted that similar tribunals would not be established for the prosecution of nationals of permanent members of the UNSC ("P-5") or their

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[4] Ibid., s. 21.
[5] Larry May, Shannon Fyfe, 'The Legitimacy of International Criminal Tribunals', **The Legitimacy of International Criminal Tribunals**, ed. by Nobuo Hayashi, Cecilia M. Bailliet, Cambridge: Cambridge University Press, 2017, p. 30.
[6] Prosecutor v. Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (ICTY Trial Chamber 10 August 1995).
[7] Prosecutor v. Dusco Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (ICTY Appeals Chamber 2 October 1995); Christopher K. Penny, ''No Justice, No Peace?: A Political and Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia', **Ottawa Law Review**, vol. 30, no. 2, 1998, pp. 305–9.
[8] Robert M. Hayden, '191. Biased Justice: "Humanrightsism" and the International Criminal Tribunal for the Former Yugoslavia', **Wilson Center**, 12/1999.

allies and clients due to their veto powers in the UNSC.[9] Nonetheless, it should be questioned whether non establishment of similar tribunals is a legitimacy issue of these established tribunals or of the UNSC which treats different situations unequally.

After the experience of *ad hoc* prosecution of international crimes with temporal and territorial limitations, the time had come to establish a permanent ICT with a wider and predetermined jurisdiction. The motive behind the establishment of a permanent ICT was the intrinsic selectivity found in the establishment of *ad hoc* tribunals. In that sense, the International Criminal Court ("ICC") came to the fore due to its consensual foundation which established its jurisdiction prior to possible crimes and its capability to function without the need of political initiative. Furthermore, the establishment of a permanent ICT relieved the UNSC of its "tribunal fatigue".[10]

As a permanent and treaty-based ICT, the ICC might be perceived to be free of legitimacy problems. Although the problems of selective, non-consensual and *a posteriori* jurisdiction of the previous ICTs were remedied with the RS, different problems of legitimacy have arisen over time. The ICC has encountered multifarious legitimacy criticisms and challenges from different state and non-state actors based on various grounds. In this regard, this thesis aims to firstly explore the concept of legitimacy, and its related elements for the ICC. It then continues to understand certain legitimacy challenges against the ICC.

The ICC legitimacy crisis has deepened so far that two State Parties have withdrawn from the RS: Burundi in 2017 and Philippines in 2019. Moreover, the African States Parties have taken an explicitly hostile position towards the ICC by disobeying the arrest warrants issued by the ICC for the former head of state of Sudan Al Bashir. Additionally, the African Union ("AU") contemplated a withdrawal strategy from the RS and adopted the Malabo Protocol with the aim of vesting the African Court on Human and Peoples' Rights with jurisdiction to prosecute individuals

[9] Res Schuerch, **The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders**, The Hague: Springer, 2017, pp. 161–64.
[10] cited, p. 162,166; M. Cherif Bassiouni, 'Establishing an International Criminal Court: Historical Survey', **Military Law Review**, vol. 149, 1995, pp. 49–64.

for international criminal responsibility.[11] Though revoked by the Biden administration, the Trump administration had imposed visa restrictions to the ICC staff following the initiation of an investigation into the Afghanistan situation by the ICC.[12]

The legitimacy crisis of the ICC has been acknowledged and addressed by the ICC, as well. In 2017, the President of the ICC Judge Silvia Fernández de Gurmendi acknowledged that the ICC has been facing "increasing pushback".[13] By accepting that the enforcement of the ICC decisions depends on political decisions, the first ICC Prosecutor Luis Moreno Ocampo made a suggestion to the third ICC Prosecutor to "*call for a big conference to discuss the OTP policies and the Court challenges (…)*".[14]

From a historical perspective, it is observed that there has been a trend of ever-growing demand for legitimacy in international criminal adjudication. Until now, this trend and responses to these demands have been observed throughout different *ad hoc* tribunals over time. However, with the establishment of the first permanent ICT, we may expect that these demands and responses to them to take place within the ICC. This thesis will analyse the legitimacy challenges against the ICC in terms of their underlying motivations, legal basis, reasonableness, and fairness to discuss whether they consist of self-interested objections raised by certain stakeholders or they entail a critical evaluation of the ICC.

Other international courts and tribunals have legitimacy issues as well. Every international adjudication body has a litigation and legitimation strategy.[15] However, not all of these strategies work well for these bodies. While the litigation strategy for the European Court of Human Rights ("ECtHR") worked well, the strategy of the World Trade Organisation ("WTO") "misfired".[16] The legitimacy crisis of the WTO

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[11] 'The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol)', The African Union, 06/2014.
[12] Anthony J. Blinken, Secretary of State, 'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court', U.S. Department of State, 02/04/2021, https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.
[13] Judge Silvia Fernández de Gurmendi, 'Lectio Magistralis at the Conference: "New Models of Peacekeeping: Security and Protection of Human Rights. The Role of the UN and Regional Organizations"', Rome, Italy: International Criminal Court, 12/05/2017, p. 2.
[14] Luis Moreno Ocampo, 'ICC Prosecutor Symposium: The Challenges for the Next ICC Prosecutor', **OpinioJuris**, 04/08/2020.
[15] Shai Dothan, 'How International Courts Enhance Their Legitimacy', **Theoretical Inquiries in Law**, vol. 14, 2013, pp. 455–78.
[16] Carol Harlow, 'The Concepts and Methods of Reasoning of the New Public Law: Legitimacy', **LSE Law, Society and Economy Working Papers 19/2010**, 2010, p. 29.

in general has deepened over time, and efforts to enhance its legitimacy have partly worsened the crisis.[17] In that sense, "*(…) attempts to enhance the legitimacy of international institutions may rely on mistaken assumptions about what people (or states) want and may therefore be unsuccessful. So we also need to consider the responses to these reform efforts by affected groups, which provide more direct – and presumably more reliable – evidence of their attitudes about legitimacy*."[18]

In this context, this thesis aims to understand whether the ICC has been pursuing a legitimation strategy that aims to assuage its most vocal challenges. If so, the thesis will aim to address the questions whether the ICC understood the underlying motives of its legitimacy crisis correctly and whether this strategy is capable to be successful. For that end, the thesis will critically analyse the initiation of two recent investigations into the Afghanistan and Myanmar/Bangladesh situations. The result of this evaluation is vitally important for the ICC. As the ICC relies on the support and cooperation of states for its functioning and enforcement, the legitimacy of the ICC constitutes the pivotal concept for its very existence. This harsh truth had also been acknowledged by the former ICC Prosecutor: "*Arresting a head of state requires a consensus among the political elite. It is a matter of will*."[19]

It has been indicated that in day-to-day life mostly accustomedness or taken-for-grantedness controls the compliance and stability of an order. However, the stability of that situation runs the risk of fluctuation and overturn when "*the knowledge of, or even the mere belief in alternatives*" are revealed. Accordingly, habituation does not constitute a reliable basis in terms of long-term stability of an order.[20] A second basis might be use of force or promise of rewards by the authority. However, these are not sustainable ways of securing compliance either, because they are highly costly and pose an uncertainty in times of crises.[21] Moreover, these ways cannot be applied to

[17] Amrita Narlikar, 'From a Legitimacy Deficit to an Existential Crisis: The Unfortunate Case of the World Trade Organization', **The Crises of Legitimacy in Global Governance**, ed. by Gonca Oguz Gok, Hakan Mehmetcik, Abingdon, Oxon; New York, NY: Routledge, 2022, pp. 107–21.
[18] Daniel Bodansky, 'Legitimacy in International Law and International Relations', **Interdisciplinary Perspectives on International Law and International Relations: The State of the Art**, ed. by Jeffrey L. Dunoff, Mark A. Pollack, Cambridge: Cambridge University Press, 2012, pp. 321–42.
[19] Luis Moreno-Ocampo, 'Now End This Darfur Denial', **The Guardian**, (15/07/2010).
[20] Renate Mayntz, 'Legitimacy and Compliance in Transnational Governance', **MPIfG Working Paper 10/5**, Max Planck Institute for the Study of Societies, 2010, pp. 14–15.
[21] Tom R. Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', **Annual Review of Psychology**, vol. 57, no. 1, 2006, p. 377.

secure the compliance of states by the ICC. Accordingly, legitimacy is considered to be "*the best guarantee*" that strengthen and makes a government or any such authority more stable, enduring, durable, effective, efficient and resolute.[22]

The importance of the legitimacy of the ICC reveals itself in more different and specific ways, as well. Contrary to national judicial authorities, when the ICC loses its legitimacy widely, it may lose its validity and existence due to the voluntary basis of its jurisdiction. Having a general legitimacy as an authority would also have the opportunity to make up for the lack of legitimacy of a specific judgement, the content of which is criticised widely. Moreover, the ICC legitimacy is crucial for the extent of jurisdiction and discretion which can be allocated to the ICC concerning highly sensitive matters for state sovereignty, such as the prosecution of the crime of aggression or the extent of the obligation of cooperation of State Parties. Overall, the quality of the ICC legitimacy dialogue with its constituency is a vital topic of discussion. This topic is of interest to both the ICC itself and the rest of the international community, whether they are a part of the ICC or not. The progress and effectiveness of international criminal justice are of interest to any individual in the modern world.

[22] Max Weber, **Economy and Society: A New Translation**, trans. by Keith Tribe, Cambridge, Massachusetts London, England: Harvard University Press, 2019, p. 109; Richard Swedberg, Ola Agevall, **The Max Weber Dictionary: Key Words and Central Concepts**, Second Edition Stanford, California: Stanford University Press, 2016, p. 189; Münci Kapani, **Politika Bilime Giriş**, 52. Baskı Ankara: BB01 Yayınları, 2016, p. 107; Martin E. Spencer, 'Weber on Legitimate Norms and Authority', **The British Journal of Sociology**, vol. 21, no. 2, 1970, pp. 124, 131; Sebastián G. Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', **Journal of Classical Sociology**, vol. 15, no. 1, 2015, p. 75; Morris Zelditch, Henry A Walker, 'The Legitimacy of Regimes', **Power and Status**, ed. by Shane R. Thye, John Skvoretz, Advances in Group Processes, Vol. 20, Bingley: Emerald Group Publishing Limited, 2003, p. 218.

I. THE CONCEPT OF LEGITIMACY[23]

"*Some things are easier to legalize than to legitimate*."

Nicolas Chamfort

In this Chapter, the concept of legitimacy will be analysed and utilised as a tool[24] for the ensuing empirical and normative analysis with respect to the legitimacy of the ICC. To that end, the Chapter will capitalise on studies of different disciplines as the subject matter requires, including law, philosophy, sociology, psychology, political sciences, and international relations.[25]

A. The Nature of Legitimacy

In general and legal dictionaries, the concepts of "legitimacy" and "legitimate" are defined with reference to different values such as; 1) lawfulness: "*complying with the law; lawful*", "*lawfulness*", "*the quality of being allowed and acceptable according to the law*", "*the quality of being legal*", "*the fact of being allowed by law or done according to the rules of an organization or activity*", "*accordant with law or with established legal forms and requirements*"; 2) reasonableness: "*the quality of being reasonable and acceptable*", "*for which there is a fair and acceptable reason*"; and 3)

[23] The concept of legitimacy has been a focus of philosophical, political and sociological inquiry for over 25 centuries starting with Thucydides, Plato and Aristotle, moving on with Machiavelli, Locke, Rousseau, Marx, Weber and many other contemporary writers. Morris Zelditch, 'Theories of Legitimacy', **The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations**, ed. by John T. Jost, Brenda Major, New York: Cambridge University Press, 2001, pp. 33–35.

[24] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 66.

[25] Nobuo Hayashi, Cecilia M. Bailliet, Joanna Nicholson, 'Introduction', **The Legitimacy of International Criminal Tribunals**, ed. by Nobuo Hayashi, Cecilia M. Bailliet, Cambridge: Cambridge University Press, 2017, pp. 2–3; Filipe Dos Reis, Oliver Kessler, 'The Power of Legality, Legitimacy and the (Im)Possibility of Interdisciplinary Research', **The Power of Legality: Practices of International Law and Their Politics**, ed. by N. Rajkovic, T. Aalberts, T. Gammeltoft-Hansen, Cambridge: Cambridge University Press, 2016, pp. 99–124.

fairness: "*the state of being fair or honest*".[26] As can be seen, even though the dictionaries commonly focus on "legality", a number of these definitions go beyond it so as to touch upon certain extra-legal concepts. All these definitions refer to a rather general description of norms, actors, authorities, orders, persons, actions etc. Yet, in this thesis, the concept will be used in a more nuanced manner.

Spencer stated that "*the essence of legitimacy, whether it be of norms or authority, is the sense of duty, obligation, or 'oughtness' towards rules, principles or commands*."[27] Whimster defined it as "*the belief of the ruled in the validity of rulership*".[28] Accordingly, it is ultimately the subjective beliefs that make an order or authority legitimate in the eyes of the ruled, which is needed to be assessed empirically.[29] Generally, the concept of legitimacy is interpreted in terms of the legitimacy of states, governments or similar political institutions or sometimes other social orders.[30] In that sense, it has been inquired whether the use of force and compulsion of such political structures can be justified apart from the fact that they have the power and superiority to do so. It has been stated that when the use of power is based upon a right, hence legitimised, compliance to such legitimate authority becomes an obligation[31] "*as if the ruled had made the content of the command the maxim of their conduct for its very own sake*".[32] Within this context, "obligation" is not a liability imposed upon a person externally, on the contrary, it amounts to the self-identification of an action or inaction to be regarded as an obligation internally.[33] However, this internal conviction is different from morality in the sense that while "*legitimacy is a perceived obligation to societal authorities or to existing social*

[26] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/; Cambridge Dictionary, https://dictionary.cambridge.org/tr/; Merriam Webster Dictionary, https://www.merriam-webster.com/; Bryan A. Garner (ed.), **Black's Law Dictionary**, Ninth Edition USA: West Publishing Co., 2009, p. 984.
[27] Spencer, 'Weber on Legitimate Norms and Authority', p. 126.
[28] Max Weber, Sam Whimster, **The Essential Weber: A Reader**, London; New York: Routledge, 2004, p. 409.
[29] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 5; Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 190.
[30] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 189.
[31] Kapani, *Politika Bilime Giriş*, p. 78.
[32] Max Weber, **Max Weber on Law in Economy and Society**, trans. Edward Shils, Max Rheinstein, New York: Simon and Schuster, 1967, p. 328; Max Weber, **Economy and Society: A New Translation**, ed. and trans. Keith Tribe, Cambridge, Massachusetts London, England: Harvard University Press, 2019, p. 341.
[33] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', p. 378.

arrangements. Moral values are personal standards to which people attempt to align their behavior."[34]

The reasons of an actor having a belief in the legitimacy of an authority and how widely shared this belief in a given society or community are two separate questions which both require empirical enquiries.[35] This thesis will be based upon the legitimacy conceptualisation of Weberian and neo-Weberian understanding of the concept which establishes "*the roots of the modern approach to legitimacy*"[36]. However, this conceptualisation will be altered so as to make them better tools for the following evaluation. Lastly, from a sociological point of view, states should be conceptualised as actors who could possess a legitimacy conviction for an authority.[37]

1. Neo-Weberian Conceptualisation of Legitimacy

As a beginning, Weber categorized the aspects of legitimacy as "order" or "norms" (i.e., law, organisation or other orders), and "authority" (rule, rulership, domination)[38]. In the Weberian terminology, "order" has a sweeping meaning which works out at "*micro-, meso-, and macro-levels*". In general, it is defined as "*a prescription for how to act that has acquired a certain independence*".[39] In that sense, while "command of an authority" is attached to the authority, an "order" exists substantially independent of an authority ontologically and normatively. Similarly, norms are described as "*rules of conduct towards which actors orient their behaviour*".[40] The basis of authority is defined as "*a relationship between two or more actors in which the commands of certain actors are treated as binding by the others*".[41] Attention should be paid that these definitions do not mean that every norm or command of an authority will certainly and automatically be obeyed. The vital point

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[34] cited, p. 390.
[35] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 5.
[36] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', p. 378; Nienke Grossman, 'Legitimacy and International Adjudicative Bodies', **George Washington International Law Review**, vol. 41, 2009, p. 116.
[37] Larry May, Shannon Fyfe, 'The Legitimacy of International Criminal Tribunals', p. 35.
[38] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, pp. 88–91; Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', p. 73; Weber, *Economy and Society: A New Translation*, pp. 471–72; Barbara Cassin (ed.), **Dictionary of Untranslatables: A Philosophical Lexicon**, Princeton and Oxford: Princeton University Press, 2014, pp. 1196–98.
[39] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, pp. 235–37.
[40] Spencer, 'Weber on Legitimate Norms and Authority', p. 124.
[41] ibid.

here is that there is a *Chance*[42] or "calculable probability" that such an orientation and obedience will take place.[43]

Starting with "norms", Weber differentiated two concepts in terms of the **bases of legitimacy of legal norms:**[44] "Formal rationality" refers to "*the internal consistency of a body of law*" which deems a legal norm as legitimate so long as it has been enacted in accordance with accepted procedural ways. This rationality considers the "legality or procedural correctness" as the essential value. Conversely, "substantive rationality" means "*the relationship of law to some external criterion of justice or value*" which takes into account some "*extra-legal absolute values*" that are being protected and implemented via the legal norm.[45]

Continuing with "authority", one definitional aspect requires further clarification. While, generally, "domination" or "power" is understood as "*the ability to influence the behaviour of others*", authority is defined as "*the right to do so*".[46] Accordingly, when spoken of "authority" legitimacy is implied by definition. If this definition is to be accepted, saying "legitimate authority" would be redundant. However, this definition runs the risk of complicating the perspective towards the position of legitimacy placed next to domination by endorsing a scalar positioning of legitimacy. As it stands, authority = domination + legitimacy.

Nonetheless, picturing the legitimacy as a linear, or even cyclical or dialogical, process seems more convenient as that would make the conceptualisation more nuanced and workable. While "domination" will amount to the same meaning, i.e., sheer power and superiority, or the probability that a command will be obeyed; "authority" will be understood as "power with an assertion to legitimacy". Examples of domination can be a bully in a school, a psychopath holding hostages, a mob, gang, or cartel controlling an area, a foreign invasion force lacking any claim to legitimacy. Examples of authority might be states, parents, political leaders, doctors etc. On the

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[42] Weber, *Economy and Society: A New Translation*, pp. 464–65.
[43] cited, pp. 338, 340.
[44] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 285.
[45] Spencer, 'Weber on Legitimate Norms and Authority', p. 128.
[46] Andrew Heywood, **Politics**, Fifth Edition London: Red Globe Press, 2019, p. 37; Gürbüz Özdemir, 'Weberyan Anlamda Türklerde Otorite Ve Meşruiyet İlişkisi (15. Yüzyıl Osmanlı Dönemine Kadar)', **Akademik İncelemeler Dergisi**, vol. 9, no. 2, 2014, p. 74.

other hand, "legitimate authority" will imply "authority believed to be legitimate". Accordingly, an authority will be called as "legitimate authority" when the assertion or claim to legitimacy is answered affirmatively. When citizens endorse the belief that they have to obey the commands of their government as an obligation, we may conclude that *this government* is seen as a legitimate authority by *these citizens*.

Recourse to this different conceptualisation also requires introducing the differentiation which might be observed between the grounds of "legitimacy assertion" and basis of "legitimacy belief". Accordingly, while the grounds of legitimacy assertion of a state might be based on its legality; the basis of legitimacy belief of citizens might be due to traditional, religious, purposive or charismatic motives. In conclusion, the conceptualisation presented above helps to understand two different dimensions of authority and legitimacy: Firstly, the assertion to legitimacy might not be answered affirmatively always by everyone; secondly, the response to that assertion might be affirmative yet based on different grounds. With such conceptualisation, legitimacy can be seen as a "dialogue" between the authority and the audience.[47]

In terms of the typologies of authority and order, Weber introduced three **ideal types of (legitimate) authority** (i.e., traditional authority, charismatic authority and legal-rational authority)[48] and four **typical sources of legitimate validity of an order** (i.e., affectually-legitimated norms, traditionally legitimated norms, rational legal norms and absolute value norms). Yet these ideal types neither connote a normative "ought to be" premise, nor an example of factual cases. These types are representations of certain pure types which their "*combinations, mixtures, adaptations, or modifications*" could be found empirically and historically, not their pure forms.[49]

With respect to **the ideal types of legitimate authorities**, legal-rational authority means believing in the legitimacy of the authority and its commands and obeying them due to the legality of the authority. What is obeyed is the legal rules and

[47] Anthony Bottoms, Justice Tankebe, '"A Voice Within": Power-Holders' Perspectives on Authority and Legitimacy', **Legitimacy and Criminal Justice: An International Exploration**, ed. by Justice Tankebe, Alison Liebling, Oxford University Press, 2013, pp. 60–83.
[48] Weber, *Economy and Society: A New Translation*, pp. 341–42; Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, pp. 88–91; Kapani, *Politika Bilime Giriş*, pp. 100–104.
[49] Weber, *Economy and Society: A New Translation*, pp. 342, 473; Weber, *Max Weber on Law in Economy and Society*, pp. 336–37.

formal status, not the personality of the authority. As to the other two types; traditional authority denotes the legitimacy based upon long-established traditions. Lastly, charismatic authority can be explained as legitimizing an authority, a person, due to his/her exceptional and exemplary traits and characteristics.[50] Later on, many sociologists proposed a fourth ideal type of legitimate authority to fill the gaps present in the classical typology of Weber.[51] Some also argued that "legal legitimacy" itself, within the conceptualisation of Weber, included a substantive or material dimension beside a formal one.[52] However, in order for convenience, coherence and clarity, for the ongoing conceptualisation and analysis, Guzmán's typology will be used.

After renaming the "legal-rational authority" as "formal-rational authority"[53], Guzmán proposed a new and more comprehensive fourth ideal type of legitimate authority, which would correspond to many other examples of authority that could not be fully explicated with the classical typology. Guzmán termed this new type as "substantive-rational authority". This new type also consisted of two sub-categories: "value-rational authority" and "instrumental-rational authority". According to Guzmán, what provides legitimacy to such authority is the belief concerning the competence and qualification of the authority to be a reasonable mediator between abstract values and objectives, and concrete norms and means, respectively. Accordingly, value-rational authority is not based upon the mere existence of commonly agreed values, instead it is based upon "*the belief that an authority is a correct mediator between abstract ultimate values and concrete practical norms.*".[54]

Also, the instrumental-rational authority is different from obedience based on pure self-interest, in other words "instrumental rationality" or "purposively rationality" (*Zweckrational*)[55], owing to the difference between the need of legitimacy. In the former, the authority is obeyed as a result of having "*the belief that an authority*

[50] Weber, *Economy and Society: A New Translation*, pp. 341–42.
[51] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', pp. 77–78. In 1917, Weber himself was contemplating the introduction of a fourth type of legitimate authority that would be derived from the "will of the ruled". Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 89.
[52] Swedberg, Agevall, *The Max Weber Dictionary: Key Words and Central Concepts*, p. 191; Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 11.
[53] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', pp. 77–80.
[54] cited, p. 80.
[55] Weber, *Economy and Society: A New Translation*, pp. 102–3, 487.

is a correct mediator between ultimate goals and concrete means"[56]; whilst in the latter there is no confidence placed upon the authority yet only the pursuit of advantages – earning wage, utilizing from the benefits of patronage – and avoidance of disadvantages or undesired consequences – avoiding jail, punishment, reprimand, external intervention or loosing financial aids – as a result of obedience or disobedience. However, based on the translation of Tribe, the Author considers that "instrumental-rational authority" should be altered as "purposive-rational authority" as this would be more consistent with the more proper translation of the root term used by Weber: *Zweckrational*. This would shift the focus from "instruments" or "means" to "purposes", "ends" or "goals" as was intended both by Weber and Guzmán.[57]

The typical examples given by Guzmán were the philosopher king of Plato for value-rational authority, and doctor offering medical treatment for "purposive-rational authority".[58] In that sense, medical treatment offered by a doctor does not need legal or democratic basis to be considered as binding.[59] Yet in none of these cases a variation of substantive-rational authority is the sole source of legitimacy as in the case of other ideal types of authority. Moreover, referring to Weber, Guzmán stated that "*in law, value and instrumental-rational justifications can hardly be separated*".[60]

In law, we can consider the very act of judicial bodies of deducing "norms" from written "rules" as an example of substantive-rational authority. Peoples, states and organisations trust in judicial bodies because they believe in their capacity to interpret and apply the law to cases appropriately. In line with that, the relation between the concepts of "legal rules" and "legal norms" needs to be explained. "Legal rules", though they are not the only basis of legal norms, are those that have been prescribed into legal instruments to be made the basis of legal norms.[61] On the other hand, "legal norms" have been defined as "*those commanded, proscribed, authorized*

[56] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', p. 80. Mayntz stated that "expert authority" can also be considered as another shape of "rational legitimacy". Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 11.
[57] Weber, *Economy and Society: A New Translation*, p. 487.
[58] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', p. 80.
[59] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 11.
[60] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', p. 79.
[61] Ertuğrul Uzun, **Hukuk Metodolojisinin Sorunları**, 2. Edition İstanbul: Nora Kitap, 2017, p. 21.

or permitted for human acts".[62] Bearing in mind the significance of *jus non scriptum* in public international law, i.e., customary international law and general principles of law, deducing legal norms in this area of law is of even more importance. Following the construction of legal norms, either with or without legal rules, legal conclusions are produced based upon these legal norms as a result of their application to facts. Among those legal conclusions, judicial judgements occupy a central role as being decisive and enforced by law enforcement agencies and other organs of State.[63]

Accordingly, judges, prosecutors and advocates constitute a professional group who have extended and technical education which is proved by certain credentials.[64] As jurists, even though everyone can reach legal conclusions[65], they assert that they have the special capability to interpret rules of law and deduce legal norms with accuracy and coherence.[66] In that sense, their legitimacy is explained as being based upon "professional" authority.[67] Furthermore, as appointed officials to the ICC, judges and prosecutors of the ICC monopolize this capability towards their peer jurists, as well. In that regard, their legitimacy can be further explained as based upon "technocratic" authority. According to Guzmán, the legitimacy of professional and technocratic authority is based primarily on substantive-rational authority, and secondarily on formal-rational authority. Yet, for technocratic authority, Guzmán states, there is also a portion of charismatic authority as technocratic posts being highly selective which results in making them somewhat exemplary. Their official credentials, as Judges and Prosecutors of the ICC, only serve as a backup.[68] The opposite of that, formal credentials being the primary, maybe the sole, source of authority, would be correct for states that are authoritarian and glorified (both the state itself and its agents), which as was exemplified by kadi.[69]

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[62] cited, p. 20.
[63] cited, pp. 14–15.
[64] Weber, *Max Weber on Law in Economy and Society*, p. 353.
[65] Uzun, *Hukuk Metodolojisinin Sorunları*, p. 15.
[66] Weber explained this historical process as "the bureaucratization of the administration of justice". Weber, *Max Weber on Law in Economy and Society*, p. 351.
[67] Guzmán, 'Substantive-Rational Authority: The Missing Fourth Pure Type in Weber's Typology of Legitimate Domination', pp. 87–88.
[68] cited, p. 88.
[69] Uzun, *Hukuk Metodolojisinin Sorunları*, p. 17. Here, the concept "kadi justice" is understood as issuing legal judgements without legal justification/reasoning. There might be given various other

For every type of authority, except charismatic authority, the analysis of legitimacy would be made with respect to the appropriateness of the commands of the authority with the supervening values, principles, traditions, purposes and norms. If there are to be found contradictions, the values will be protected by declaring the authority as illegitimate.[70] This is due to the fact that, except for charismatic authority, which generates its norms on its own, all the other types of authorities are preceded by the relevant norms. Hence, for traditional, formal-rational and substantive-rational authorities; relevant norms, values and purposes generate and demarcate authorities.[71]

Inspired of the typology of legitimate authorities presented above, one would discern that the ICC could be considered to have formal-rational authority which is derived from "*the legal norms defining the sphere of jurisdiction*" and substantive-rational authority. Both of these ideal types are based on reason.[72] As a rather new organisation, it is deprived of traditional authority; and as a formal institution, which every personnel in it serves in an official and non-personal capacity, it lacks charismatic authority. That said, the portion of charismatic authority of technocratic authorities and the assumed tradition of modern world to comply with rulings of judicial bodies will be ignored. All these conclusions would compel the ICC to have a strict and coherent way of functioning that would be in accordance with the related values, purposes and legal rules adopted by the State Parties and international community, in order to attain and retain legitimacy.[73]

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reasons for lack of legal reasoning in kadi judgements: the multitude of the responsibilities of kadi which went beyond being strictly judicial, the absence of other legal professionals in the proceedings that could have provided a chance for legal discussion, and the lack of general legislations in the legal order. See for İstanbul Kadi Records http://www.kadisicilleri.org/; see for general information on kadi in the Ottoman State, İlber Ortaylı, **Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı**, 13th ed., İstanbul: Kronik Kitap, 2020.; see for the characteristic of kadi justice as focussing on substantive justice instead of formal (rule-based) justice, Jan Klabbers, 'Kadi Justice at the Security Council?', **International Organizations Law Review**, 2007, pp. 7–9.; see for critical analyses of the concept kadi justice, Osman Safa Bursalı, 'Mecmua - Max Weber'in Kadı Adaleti Kavramı', **BSV Bülten**, vol. 64, 2007, pp. 72–88.

[70] Spencer, 'Weber on Legitimate Norms and Authority', p. 131.

[71] cited, p. 125.

[72] ibid.

[73] Kapani, *Politika Bilime Giriş*, p. 101.

2. The Concept of "Validity"

As a closely related concept to legitimacy, "validity" is also needed to be explicated. According to Weber, "*validity is a collective consensus that observably governs the behavior of, and is binding on, the members of a collectivity*".[74] Accordingly, validity means the *Chance* that an order will be taken into consideration or will be oriented towards itself. This orientation does not need to manifest itself as adherence or compliance. What is important here is that the actor believes that the order "exists" and anticipates others, possibly, to orient their behaviours to that order. Other forms of behaviours that would signify a belief in the validity of an order might be concealment or justification[75] i.e., explaining infringement with good faith or as an exception to the norm.

Relating to the dissolution of validity, Weber stated that: "*if evasion or violation of the generally accepted meaning of an order becomes the rule, then the order retains only a limited "validity" or loses it altogether.*"[76] Weber observed that, it is acceptable, for sociology, the same group of people to have simultaneous contradictory orders which they orient their actions accordingly. That can take place even for the very same action, and "*mutually inconsistent orders can be simultaneously "valid".*"[77] Furthermore, same group of people might also have different *legal orders* in place simultaneously.[78] This is applicable for the international community as well.

Accordingly, while legitimacy denotes a belief in the rightfulness of an order, validity means a (collective) belief in the (collective) existence of this order. In that sense, an order can be valid without being legitimate. On the other hand, there might also be certain orders that are considered as illegitimate and invalid simultaneously. It has been stated that "*the stability of authority depends not on each individual's sense of propriety but on a collective process of social validation*."[79] Though this sentence underlies the importance of validity, it does not imply the insignificance of legitimacy. The basis for the significance of legitimacy stems from its relationship with validity.

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[74] Morris Zelditch, 'Processes of Legitimation: Recent Developments and New Directions', **Social Psychology Quarterly**, vol. 64, no. 1, 2001, p. 6.
[75] cited, pp. 6–7.
[76] Weber, *Economy and Society: A New Translation*, pp. 108–11.
[77] cited, p. 110.
[78] Cemal Bâli Akal, **Hukuk Nedir?**, 2. Edition İstanbul: Zoe Kitap, 2019, p. 244.
[79] Zelditch, 'Processes of Legitimation: Recent Developments and New Directions', p. 6.

Accordingly, "wide illegitimacy"[80] in a certain constituency might be capable to create invalidity in due course.

However, there might also be found two possible scenarios which validity is preserved despite wide illegitimacy in the constituency. These possibilities can be named as "forced validity" and "false validity". Forced validity is illustrated in a community living under an authoritarian regime. In this regime, while people consider the regime as illegitimate widely, they consider the authority valid due to its imposition by external force. With respect to the false validity, an order which is considered illegitimate widely in an isolated community can be given as an example. In this scenario, the members of the community are not capable to transfer their individual illegitimacy beliefs into the invalidity of the order because they are not able to communicate with each other effectively in terms of their legitimacy concerns. This lack of communication might stem from different reasons: fear, false assumptions, or self-doubt. As they continue to assume that everyone else is considering the regime legitimate, or at least valid, they also continue to act accordingly.

Nonetheless, though this conceptualisation can be applicable to closed societies in theory, it would not be applicable to the international community. Firstly, there is no supreme authority above equally sovereign states, which would be capable to force the validity of an order externally. Secondly, the international community is not devoid of means to share their legitimacy concerns with each other. On the contrary, this community consists of only a limited number of members which are governed by professionals. These institutions are capable to communicate with each other either bilaterally or multilaterally, on regular or exceptional basis. In conclusion, there are sound reasons to believe that any legitimacy concern of a state or another member of the international community would be capable to be disseminated throughout the rest of the international community effectively. These considerations suggest that wide illegitimacy beliefs among the international community is capable to turn into a belief in the invalidity of a particular authority.

[80] The phrase will be explained at I.A.6.

3. Descriptive Legitimacy and Normative Legitimacy

The distinction made with respect to the term legitimacy in terms of the ways to analyse it should also be mentioned. There are basically two types of ways to research on issues of legitimacy: "*descriptive legitimacy (also referred to as empirical, perceived, social, or sociological legitimacy) – whether the court is perceived to be, or believed to be, legitimate – or normative legitimacy (also referred to as moral legitimacy) – whether the court objectively fulfils normative standards or criteria*".[81] While the former would "*depend on empirical and explanatory arguments*", the latter would "*depend on arguments about moral, political and legal theory*".[82]

The differences between these perspectives can be outlined as follows: While descriptive legitimacy aims to reveal and understand established beliefs and convictions of legitimacy of a particular authority found in a particular constituency; normative legitimacy endeavours to make an assessment and evaluation of legitimacy of a particular authority altogether based on certain standards and criteria adopted by the beholder or researcher and predicated on facts gathered and composed by the beholder or researcher. In this definition, normative legitimacy does not assert "objectivity". However, it differs from other beliefs of legitimacy found in the pertinent constituency, which is investigated with descriptive legitimacy, in several ways. To illustrate, firstly, it includes a certain degree of deliberateness and carefulness as aiming to assess the legitimacy of a particular authority explicitly, which may not be found in the legitimacy beliefs of general constituency. Secondly, it reveals and explains criteria and facts that are used in the assessment explicitly and clearly, as opposed to legitimacy beliefs of general constituency which might be based on instinctive or underdefined criteria, and indecisive and fragmented facts.[83]

Though they are conceptually different, there is a certain degree of convergence to be found between these concepts. After all, though being implicit, every actor makes

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[81] Silje Aambø Langvatn, Theresa Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', **The Legitimacy of International Criminal Tribunals**, ed. by Nobuo Hayashi, Cecilia M. Bailliet, Cambridge: Cambridge University Press, 2017, pp. 43–44.
[82] Zelditch, 'Theories of Legitimacy', pp. 33–53; Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', **Crime and Justice**, vol. 30, 2003, p. 285; Bodansky, 'Legitimacy in International Law and International Relations', pp. 8, 14–15.
[83] *See* Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', p. 57.

his/her own legitimacy assessment on their own, as a normative assessment. Accordingly, any survey on these established beliefs will be studied as descriptive legitimacy by a researcher. On the other hand, beliefs in the legitimacy of an authority in a constituency could also be seen as a necessary, or even sufficient, requirement of normative legitimacy.[84] It was argued that "*an institution would not be legitimate if no one thought it so.*"[85] In conclusion, these two perspectives towards legitimacy should not be seen as completely detached from each other. In that sense, this thesis will capitalise on both aspects of legitimacy by firstly examining the legitimacy beliefs of different constituencies empirically, and secondly assessing these beliefs and the responses of the ICC normatively.

4. Evaluating the Existence of Legitimacy

It has been argued that there is no objective, absolute and universal definition, measure or understanding of legitimacy.[86] This is due to the fact that we live in a world which incorporates different and conflicting values simultaneously.[87] In that sense, with respect to international courts and tribunals, different formulations can be proposed changing in a given setting which would hinge on the types of parties, area of law and expectations of different constituencies. Various goals and objectives attributed to ICTs illustrate this phenomenon: "*retribution or holding perpetrators accountable, ending impunity, ending violations and preventing their recurrence, justice and dignity for victims, truth finding and establishing a record of past events, reconciliation, the rule of law, peace, to project norms of criminal justice, etc*.". These understandings could also change based on our perception of international relations in general and the way we look at these courts, i.e., whether we are comparing the present with its past or its potential future.[88]

It has been stated that, even though the elements, standards of legitimacy can be a concern of degree or volume; the legitimacy itself cannot be. Hence legitimacy itself is a concept that either exist or lack for a particular actor with respect to a

[84] cited, p. 44.
[85] Bodansky, 'Legitimacy in International Law and International Relations', p. 8.
[86] Kapani, *Politika Bilime Giriş*, pp. 94–95.
[87] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 8.
[88] Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', pp. 45–46.

particular authority.[89] This is due to the reason that legitimacy belief of a particular actor pertaining to a particular authority is of pragmatic and cognitive importance. An actor needs a conviction for self, whether she/he perceives the authority as legitimate, so that they can direct their behaviours accordingly. That said, it does not mean that every actor in a community has a clear-cut, unwavering conviction of legitimacy that is reasoned and voiced. In that sense, it may not be as explicit as conceptualised here.

Throughout the evaluation of legitimacy of an authority, it is not necessary that each of the elements given are unsatisfactory. For authorities which certain values has special connection with each other and with the characteristics of the authority itself, deficit in one or a few of these critical elements might be sufficient for establishing the illegitimacy of the authority. In the same vein, where such deficit is to be found, having a spotless record for other elements might not be able to secure the legitimacy. However, the reverse might also be true, meaning a critical legitimacy generating element might remedy the deficit of other aspects.[90]

Lastly, legitimacy belief of an actor or constituency is prone to change over time. This change may take place in either direction. Accordingly, legitimacy convictions are not timeless evaluations, on the contrary, they are susceptible to transform based on changing empirical and normative considerations.

5. "Wide-Sporadic Legitimacy" Instead of "High-Low Legitimacy"

It has been argued that as a ground of compliance to a rule, the existence of various degrees of compliance to various rules indicates the measurable nature of legitimacy.[91] In that sense, scholars classified legitimacy as "low legitimacy" and "high legitimacy" based on the level of compliance an authority or norm garners.[92] However, this thesis considers that this classification is inconvenient, at least for the purposes of this thesis. The first reason for the inconvenience is that this classification

[89] Allen Buchanan, 'The Legitimacy of International Law', **The Philosophy of International Law**, ed. by Samantha Besson, John Tasioulas, New York: Oxford University Press, 2010, p. 90. Contra Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', p. 54; Bottoms, Tankebe, '"A Voice Within": Power-Holders' Perspectives on Authority and Legitimacy', p. 73.
[90] Zelditch, Walker, 'The Legitimacy of Regimes', pp. 236–37.
[91] Thomas M. Franck, **The Power of Legitimacy Among Nations**, New York: Oxford University Press, 1990, p. 26.
[92] cited, p. 46; Kapani, *Politika Bilime Giriş*, p. 107.

perceives legitimacy as a "trait" or "characteristic" of an "authority" or "norm" by itself. Accordingly, it points to an "objective" account of legitimacy, that is defined based on the authority or norm in question. However, the conceptualisation of legitimacy in this thesis is mainly concerned with the "subjective beliefs of actors". Secondly, this conceptualisation equates compliance with legitimacy. Thirdly, it appears quite difficult, if not impossible, to measure the level of legitimacy of a particular authority or norm based on this account. This is because of the fact that, not even the very same actors act in absolute uniformity towards a particular norm or authority in different contexts. In that sense, this almost impossibility render the use of "high-low" adjectives almost meaningless.

As an alternative to this classification, this thesis proposes a different classification based on another criterion: "wide-sporadic legitimacy". This differentiation is based on the definition of legitimacy explained above: the legitimacy belief of an actor toward a particular authority or norm either exists or does not exist. Moreover, this classification differentiates wide and sporadic legitimacy not based upon the level of compliance an authority or norm can garner, instead, based upon how widely the legitimacy beliefs towards an authority or norm is found in a given community.[93] Furthermore, the question how widely the legitimacy of a particular authority or norm is found in a community is not answered based upon the level of compliance. This is due to the reason that legitimacy and compliance are not identical, and there is no strict causality between these concepts. Lastly, the "wide-sporadic legitimacy" conceptualisation is more measurable because it is based on the generality of legitimacy beliefs in a particular community, which can be measured sociologically.

6. Legitimacy – Compliance Relationship

Defining legitimacy as the belief to feel obliged to comply commands of an authority does not tantamount that legitimacy and compliance are identical or equivalent.[94] While legitimacy denotes to the internal conviction of an actor, compliance denotes to the external acts of this actor. Considerations of legitimacy might be a significant or an insignificant determinative factor in terms of the motives

[93] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', p. 377.
[94] Weber, *Economy and Society: A New Translation*, p. 340; Mayntz, 'Legitimacy and Compliance in Transnational Governance', pp. 6, 13.

of compliance.[95] Moreover, as stated above, the basis of legitimacy asserted by an authority might be different from the actual basis of authority internalized by individuals.[96] Accordingly, compliance following the command of an authority does not necessarily lead to the compliance based on the same motivation asserted by the authority. Lastly, legitimacy is only *an* internal factor; there might be other internal and external factors that would contribute to the act of compliance as well. This explanation of compliance defies the understanding that state conduct is only directed with rational considerations, i.e., interests and power. However, this explanation also considers the fact that interests and power have a role in shaping conducts of states and individuals.[97]

The other internal factors might be empathy, inspiration, persuasion by rational arguments or combinations of these three[98], individual weakness and helplessness[99], or the legitimacy of another authority which might come into conflict with the legitimacy of the first authority. In this scenario, the actor might be compelled to make sacrifice in the way of choosing to compel one of these authorities which are regarded to be legitimate simultaneously.

On the other hand, there might be three external factors that would surpass or conflict with the legitimacy belief: 1) pursuit of benefits and advantages, 2) avoidance of injuries and disadvantages, and 3) incapability to comply. Accordingly, an actor who is considering an authority as legitimate might not be complying to its commands because of these external considerations or, another actor who is considering an authority as illegitimate might be acting in accordance with its commands because of the first two factors as well. In that sense, it can be said that individualistic traits might also be effective in terms of how legitimacy would affect and shape compliance.

[95] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 14.
[96] cited, p. 6.
[97] Jutta Brunnée, Stephen J Toope, **Legitimacy and Legality in International Law: An Interactional Account**, Cambridge; New York: Cambridge University Press, 2010, pp. 92–94; Franck, *The Power of Legitimacy Among Nations*.
[98] Weber, *Max Weber on Law in Economy and Society*, p. 328.
[99] Weber, *Economy and Society: A New Translation*, p. 340.

7. The Complexity of Legitimacy Standards

Aside from this general conceptualisation of legitimacy, there can be found various "normative legitimacy" formulations specific to international courts or ICTs. However, it is neither feasible nor useful to include all of them here.[100] These formulations propose what an ICT "ought" to have and do, in order to be considered as legitimate. In that sense, they give preference and prioritize different values and concepts over others. However, this thesis will be presenting most of the relevant concepts and values that are deemed essential for the legitimacy of ICTs in a general manner, without asserting a firm normative legitimacy formula for ICTs in general. It will be the assessment of the beholder to choose among these values, or some other values that are not included in this thesis, to decide on the legitimacy of an ICT.

This thesis will discuss over a dozen of legitimacy generating elements for ICTs. In that sense, it presupposes that, the evaluations of legitimacy do not depend on a single and basic standard. This evaluation requires the beholder to conduct a multifactorial assessment. Moreover, there are two more aspects of the evaluation of legitimacy that contribute to the need to examine, almost, all of the reasonably possible legitimacy generating elements. Firstly, legitimacy standards are dynamic. They are prone to change over time based on the changing normativity of the beholder. Secondly, they are sensitive to the personal, social, institutional, and similar characteristics of the beholder. Accordingly, legitimacy standards are complex, dynamic and "*audience sensitive*"[101]. Below, "*accepted legitimating elements*"[102] with respect to the ICC will be presented and discussed.[103] In general, these elements can be considered as the basic and generally accepted concepts and values that could be used to assess the legitimacy of an ICT such as the ICC. However, considering "*the moral disagreement and uncertainty*"[104], some actors might use different elements other than those presented below. Moreover, the weight of each element and ways of

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[100] *See* for some of these normative legitimacy formulations: Grossman, 'Legitimacy and International Adjudicative Bodies', pp. 107–80; Allen Buchanan, Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', **Ethics & International Affairs**, vol. 20, no. 4, 2006, pp. 405–37; Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', **Leiden Journal of International Law**, vol. 25, 2012, pp. 491–501.

[101] Andrei Marmor, 'Authority of International Courts: Scope, Power, and Legitimacy', **International Court Authority**, ed. by Karen J. Alter, Laurence R. Helfer, Mikael Rask Madsen, Oxford University Press, 2018, pp. 378–80.

[102] Zelditch, Walker, 'The Legitimacy of Regimes', p. 222.

[103] *See* infra I.B.

[104] Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', pp. 418–19.

interaction between them, i.e., "regime-legitimating formula"[105], would also vary depending on the actor making the evaluation.[106]

Any classification of the elements which are used to assess the legitimacy of an authority must also take into consideration "*the kind of authority an institution is exercising, (...) the issue area or domain, (...) how much authority an institution is exercising*".[107] As the authority asserts obedience from those that have not consented, either directly or indirectly, or as the decisions and policies of the authority affect these groups, there will be needed different considerations to be taken into account.[108]

Lastly, the form of interaction between the authority and the beholder would also affect the content of legitimacy standard of the beholder. For example, it might result in different legitimacy standards if Individual A is a witness or an accused or a victim before the ICC. In the same vein, legitimacy standards for State A would also differ depending on whether it is party to the RS or not.

In conclusion, the content of legitimacy standards for an authority depends on the characteristics of the beholder, the authority, and the form of interaction between them. This complexity requires adopting a holistic approach for an evaluation of the legitimacy of the ICC.[109] A simplistic illustration of the relevant constituencies of the ICC might be as follows:

[105] *See* Zelditch, Walker, 'The Legitimacy of Regimes', pp. 222–23.
[106] Dothan, 'How International Courts Enhance Their Legitimacy', p. 457; Grossman, 'Legitimacy and International Adjudicative Bodies', p. 116; Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', pp. 54–55.
[107] Bodansky, 'Legitimacy in International Law and International Relations', pp. 13–14.
[108] Marmor, 'Authority of International Courts: Scope, Power, and Legitimacy', p. 378.
[109] Harlow, 'The Concepts and Methods of Reasoning of the New Public Law: Legitimacy', p. 37.

Table I.1 Constituency Groups of the ICC			
Constituency Groups	**Sub-Groups**		
Politicians	State Party Governments	Non-State Party Governments	Opposition Politicians
Lawyers/Experts	International Lawyers	Criminal Lawyers	Other Lawyers and Experts
Public	International Civil Society	National Civil Society	General Public
Crime-Related Individuals	Perpetrators	Victims	Witnesses

B. Legitimacy Related Elements for the ICC

The ICC is a complex organisation as being both a legal and political organisation. This is due to the fact that it was established by states with a political act so as to realise certain legal and political objectives through legal means, i.e., investigation and prosecution of criminals. In that sense, the ICC is a judicial body tasked with interpreting and applying the law to cases before it; it is a criminal court aimed to prosecute and sentence criminals, which are generally high ranking state officials; it is also an international criminal court which is established to investigate and prosecute crimes committed all over the world on a large scale without having any law enforcement agency, which makes it dependent to national authorities; and lastly it is a global governance institution ("GGI") which is tasked to fight against impunity throughout the world and bring justice and peace to communities suffered from violent international crimes.[110]

In order to encompass these different aspects of the ICC, the legitimacy related elements for the ICC will be divided into three categories. However, the following list is not an exhaustive list of the legitimacy related elements. For example, elements such as publicness, participation, and subsidiarity are left out due to their irrelevance to the ensuing evaluation in this thesis. However, it should be reminded that the ICC has received criticisms in terms of these elements, as well. Similarly, the explanations are

[110] Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', pp. 46–47.

not the exact and all-inclusive definitions of these elements. Instead, the elements are explained in terms of their significant and relevant aspects with respect to the legitimacy of the ICC as a formal-rational and substantive-rational authority.

1. Elements Related to Judicial Bodies

a. Legality

Not all laws are written laws. The development of law throughout history started as unwritten law. In that sense, being written is not an element of "lawness", hence, does not diminish the lawness of international law.[111] This unwritten law phenomenon continues to play a significant role in various modern laws, especially in public international law.[112] Being unwritten does not diminish the validity of a law as law. However, the complexities of the contemporary world, the centralized powers of various institutions and the need for providing legal guarantees and clarification for individuals and states increasingly oriented the communities to write down their laws starting from centuries ago.[113] As a result of this development, modern lawyers have become predominantly, almost exclusively, engaged in the process of reading and interpreting written laws and comparing the practice with the words of written laws.

However, "legal formalism" should not be considered something that can guarantee 100% clarity, predictability, certainty, even in criminal law which the principle is of primary importance. At best, legal formalism constitutes an ideal or an aspiration towards more clarity, predictability, and certainty.[114] At the outset, legal formalism prevents the adoption of certain legal norms that goes completely or significantly against legal rules. In that sense, even though legal formalism could not determine what law *is* precisely, it could determine what law *is not* substantially. By inevitably conceptualizing the reality of future in certain forms, legal formalism aims to provide for lawyers, and other interested and capable laypeople, the legal

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[111] *See* Akal, *Hukuk Nedir?*; Emre Öktem, Bleda Kurtdarcan, 'Uluslararası Hukuk Varmış, Ona Geçen Gün Yolda Rastladım', **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi**, vol. 1, 2007, pp. 51–68; Franck, *The Power of Legitimacy Among Nations*.

[112] Emre Öktem, **Uluslararası Teamül Hukuku**, 1st Edition İstanbul: Beta, 2013.

[113] Francis A. Allen, **The Habits of Legality: Criminal Justice and the Rule of Law**, New York and Oxford: Oxford University Press, 1996, pp. 3–4; Brunnée, Toope, *Legitimacy and Legality in International Law*, p. 45.

[114] Bostjan M. Zupancic, 'On Legal Formalism: The Principle of Legality in Criminal Law', **Loyola Law Review**, vol. 27, no. 2, 1981, p. 438.

components and tools which can be used by them to be recombined limitlessly in the future.[115] The intrinsic limitation of languages to convey a single, perfect, common understanding should also be kept in mind, yet this limitation should not be posed as a reason to completely discredit the importance of legal formalism.[116]

Legality deals with how an institution act in terms of the governing legal rules and principles.[117] It is generally considered to be the prominent basis of legitimacy in contemporary times, at least in terms of the basis of legitimacy asserted by formal-rational authorities.[118] Legality of an order can be established through two ways: 1- "*by virtue of an agreement among interested parties*", 2- "*by virtue of its imposition (…), and conformity*".[119] Sometimes, in the literature, the concept "legal legitimacy" is used to denote the aspect of the legitimacy of an authority which emanates from its adherence to law, or to define the legitimacy of a law or legal order.[120] In order to prevent confusion[121], only the concept "legality" will be used in this thesis with the meaning of adherence and conformity to legal rules/norms, as a critical legitimacy generating element for judicial bodies. For the ICC, "legality" has two main aspects: 1) as a court of law, and especially as a criminal court, the ICC is strictly bound to be in conformity with law; 2) as an international judicial body, established by an international statute, the ICC is bound to respect and uphold the agreed law of the SPs.

As to the first aspect, the main objectives of courts of law are to interpret, apply and uphold law. For criminal courts, that means prosecuting defendants based upon law and evidence collected according to law, while taking cognizance of principle of legality, presumption of innocence, rules of procedure, and human rights. The principle of legality is accompanied by notions such as "specificity, certainty, foreseeability and accessibility".[122] The principle of legality is of particular importance

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[115] cited, p. 450.
[116] Allen, *The Habits of Legality: Criminal Justice and the Rule of Law*, pp. 11–12.
[117] Kapani, *Politika Bilime Giriş*, p. 92.
[118] Mayntz, 'Legitimacy and Compliance in Transnational Governance', p. 6.
[119] Weber, *Economy and Society: A New Translation*, p. 115.
[120] *See* Brunnée, Toope, *Legitimacy and Legality in International Law*. For example, this book aims to provide an account of normative legitimacy of (international) law. For that end, it uses the concept "legal legitimacy".
[121] *See* Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', pp. 44–45.
[122] Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', **Journal of International Criminal Justice**, vol. 2, no. 4, 2004, p. 1008. *See* for different perspective of principle of legality in international criminal law cited, p. 1013; Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', p. 57.

in terms of the interpretation of criminal law rules. Classical approach of the criminal law is to strict/narrow interpretation of criminal law rules, or interpretation in favour of the accused. In that sense, the principle of legality is essential in order to provide a guarantee for the powerless individual who is facing a criminal charge from "the organized power of the state"[123], or the organizing power of the ICC which can request compliance from many states. This emphasis on legality for criminal courts would explain the principal position legality plays in terms of the legitimacy of the ICC.[124]

Secondly, when states sign and ratify a treaty, they do that either because it protects and promotes their interests, or certain common values that worthy of international legal protection. When it comes to the protection and promotion of the interests of states, they do that through bargaining and compromise. A treaty on a particular subject would be a compromise between the parties' differing opinions and interests. In line with that, when they consent to the jurisdiction of an international court concerning the interpretation and application of such a treaty, they expect the court to accord with that compromise. In the case of the ICC, the jurisdiction of the Court derives from the collective delegation of individual jurisdictions of the SPs through the RS. In addition to this delegation, the effective power of the Court also rests on the collective willingness of SPs to cooperate. Accordingly, by submitting to the Court both passively (by delegating jurisdiction) and actively (by undertaking cooperation), the SPs are in a position to expect the ICC to pay regard to the limits of this submission.

Fuller's eight "criteria of legality" might also be regarded as sub-elements of legality in terms of assessing the legitimacy of a legal order or formal-rational authority. In that sense, even though these elements are not considered as definitional requirements of a law[125], they might be considered as important elements for legality to play a greater role in legitimacy beliefs. These sub-elements can be outlined as follows: generality, promulgation, prospectivity, clarity, consistency, possibility, constancy, and congruence with practice.[126]

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[123] Zupancic, 'On Legal Formalism: The Principle of Legality in Criminal Law', p. 405.
[124] *See* Kenneth S. Gallant, **The Principle of Legality in International and Comparative Criminal Law**, New York, 2009.
[125] *Contra* Brunnée, Toope, *Legitimacy and Legality in International Law*, p. 351.
[126] *See* Lon L. Fuller, **The Morality of Law**, Revised Edition New Haven and London: Yale University Press, 1969.

Kapani stated that legality alone does not suffice for the establishment of the legitimacy of an authority. Nonetheless, the existence of legality is considered to be a presumption of legitimacy. The legitimacy built primarily upon legality found at the beginning might disappear in time. Conversely, the absence of legality at the beginning might come into existence afterwards. Kapani concluded that "*the problem of legitimacy does not arise solely from the* source *of the power, but also from the* usage *of it*." Two instances were identified regarding the dissolution of legitimacy which was built primarily on legality: 1) If the institution violates legal rules and principles that it has been founded upon in a deliberate and systematic ways, 2) Change of the prevalent understanding of legitimacy among the community.[127] In conclusion, "*an institution that purports to enforce the law must itself be bound by it*" throughout its mandate.[128]

b. Legal Reasoning

Discretionary powers are inevitable in any social setting. This discretionary space can also be observed in law, which is indeterminate due to, among other reasons, the intrinsic indeterminacy of language, indeterminacy and conflict of legal rules, nonuniformity of social values within a community, and instability of social life.[129] Allen expressed the aspects of legal reasoning as: "*In the system of criminal justice, as elsewhere, the task, then, becomes one of determining where and by whom discretion is being exercised, what discretionary powers are, in fact, essential to basic social purposes, and how the exercise of those powers may be guided and contained so as to give meaning to essential social values rather than to weaken or to destroy them.*"[130] In that sense, legal reasoning is the demonstration of the appropriate use of discretionary powers of judicial bodies.

At the outset, instead of having a practice of tossing coins for dispute resolution, the very existence of courts/tribunals in the modern world, amounts to the

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[127] Kapani, *Politika Bilime Giriş*, pp. 92–93.
[128] Michael F. Lohr, William K. Lietzau, 'One Road Away from Rome: Concerns Regarding the International Criminal Court', **United States Air Force Academy Journal of Legal Studies**, 1998, p. 36.
[129] Dothan, 'How International Courts Enhance Their Legitimacy', p. 468.
[130] Allen, *The Habits of Legality: Criminal Justice and the Rule of Law*, pp. 23–24.

will and aspiration of the conflicting parties and communities to solve legal problems in a reasonable and consistent manner.[131] In this context, "*rationality is related to ideas of procedural justice because it reflects neutrality and factuality in decision-making*."[132] More specifically, in a democratic order based on the rule of law, the legitimacy of judiciary and judicial decisions stems from their reasoning and rationality.[133] In these democratic social orders, judges adjudicate on behalf of people, and the people has a right to understand the reasons behind judgements which were delivered on their behalf. Accordingly, legal reasoning is a necessity in every rule-based legal order, in order for the public to witness that courts use their discretionary powers in a reasonable and acceptable manner.

According to the "interactional law theory", law is not something that is imposed one-sidedly. On the contrary, law is a process of constant interaction between interested parties. Law and its legitimacy are built upon the shared understandings of interested parties, the satisfaction of the criteria of legality (the theory refers to the eight criteria of Fuller) and supporting these two with "a continuing practice of legality".[134] The theory suggests that international institutions are capable to create "*spaces for engagement with and around legal norms*". In that sense, constant and diverse interaction of interested parties under the auspices of international institutions might be used as global forums to discuss, determine, and alter international law. The ICC is such a forum to clarify and develop international criminal law.

As explained in the previous section, authority implies a cyclical/dialogical relationship. In that sense, "*in a system that is reciprocally generated, issues of interpretation occupy 'a sensitive, central position' in the legal imagination.*"[135] Accordingly, the method of reasoning of a court would directly affect its legitimacy. As stated by Dothan: "*A court can try to increase its legitimacy by issuing judgments that are well reasoned, appear constrained by the law, and require actions that the public views as acceptable*." [136]

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[131] Marmor, 'Authority of International Courts: Scope, Power, and Legitimacy', p. 376.
[132] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', p. 384.
[133] Uzun, *Hukuk Metodolojisinin Sorunları*, p. 17.
[134] Brunnée, Toope, *Legitimacy and Legality in International Law*, p. 55.
[135] cited, p. 25.
[136] Dothan, 'How International Courts Enhance Their Legitimacy', p. 457.

"The sheer quality and integrity" of legal reasoning was presented as the primary legitimating element for the ECtHR.[137] In this regard, the quality of legal reasoning of an international court might affect legitimacy beliefs of different constituencies. The appreciation of the quality of the reasoning by jurists would allow it to be cited by national courts in their judgements.[138] Followingly, references to the jurisprudence of this international court would increase its credibility and visibility. This increased visibility would also, possibly, promote the public support towards the international court. Finally, this public support would compel the executive to comply with the judgements.[139] In conclusion, the quality of legal reasoning of an international court is not only important for jurists[140], on the contrary, it might have direct and indirect effects on public and politicians, as well.

It has been stated that judgements should have "determinacy", "coherence" and "adherence" to create legitimacy of the adjudicative body. Determinacy is understood as "a rule's clarity of meaning".[141] When they interpret treaties, courts should be able to clarify and unravel the complicated, and not to blur further their meaning. When they are dealing with the non-written international law such as general principles of law and customary international law, they ought to identify the existence or non-existence of rules based on the accepted sources of the law. What is required here is not that the reasoning convince any and every person that the judgement is *the* correct conclusion, instead it is required that it has the capability, clarity, and comprehensibility to convince that it is *one* of the correct conclusions. In that sense, legal reasoning is not of a requirement concerning conclusions, yet more of a processual and methodological requirement. Accordingly, a judgement might be failing the requirements of legal reasoning while fulfilling the requirements of legality.

For the sake of clarity, we can propose a classification for the requirement of legal reasoning of judgements: 1) positive legal reasoning, and 2) negative legal

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[137] Richard J. Goldstone, ''Achievements and Challenges – Insights from the Strasbourg Experience for Other International Courts', **European Human Rights Law Review**, 2009, p. 603. *as cited in* Harlow, "The Concepts and Methods of Reasoning of the New Public Law: Legitimacy", p. 30.

[138] Yonatan Lupu, Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', **British Journal of Political Science**, vol. 42, no. 2, 2012, p. 413.

[139] Dothan, 'How International Courts Enhance Their Legitimacy', pp. 455–78.

[140] *Contra* Harlow, 'The Concepts and Methods of Reasoning of the New Public Law: Legitimacy', p. 30.

[141] Franck, *The Power of Legitimacy Among Nations*, p. 84.

reasoning. Positive legal reasoning implies the generally understood meaning of the concept, i.e., legal explanation and justification of the legal conclusion reached by the court. Negative legal reasoning, on the other hand, means explaining the reasons of rejecting, reversing, omitting, or altering a precedent. As is known, precedent is not binding for the Chambers of the ICC. However, any legal conclusion reached by a Chamber implies that according to some other legal professionals, this conclusion was *one* of the reasonable legal conclusions.[142] Accordingly, any other Chamber should present compelling reasons to justify why it considers that the views of his/her peers were not *the* or *one of the* reasonable legal conclusions on this matter.

Beside the long-term effect of legal reasoning as a contribution to the legitimacy of a judicial body, reasoning is also crucial on its own right. Based on the general trend of not trusting authorities, Aarnio observed that "*what has replaced the belief in authorities: the requirement that opinions be justified*".[143] While legitimacy of an authority creates "diffuse support" which ensues content-independent support for the authority; specific support is created based on "the content of an individual judgment."[144] Accordingly, for those constituencies which do not have diffuse support towards the ICC, they might still be supportive of the ICC due to the specific support created based on an individual well-reasoned high-quality judgement. All in all, "*the support for a judgment depends on the combination of the specific support for its content, the legitimacy of the court, and the reasoning used.*"[145]

c. Coherence

Coherence means the conformity of the court with its proclaimed goals and previous actions, interpretations, and decisions. Although previous judgements of international courts are not bindings for courts or states other than those states which were parties to a particular dispute, they are to be considered as a subsidiary source for the determination of international law rules.[146] Hence, states and other international

[142] Grossman, 'Legitimacy and International Adjudicative Bodies', p. 156.
[143] Aulis Aarnio, **The Rational as Reasonable: A Treatise on Legal Justification**, Dordrecht, Holland: D. Reidel Publishing Company, 1987, p. xv; Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', p. 291.
[144] Dothan, 'How International Courts Enhance Their Legitimacy', p. 456.
[145] cited, p. 468.
[146] ICJ Statute, art. 38(1)(d).

actors would aspire to have a coherent and predictable set of judicial rulings on a subject that would allow them to direct their behaviours in a stable manner.[147]

Associated with coherence, legal reasoning as a legitimacy related element might be understood broader than the question of "how a court explain and justify its legal conclusions". This element could also include the timing and general strategy of legal reasoning of a court. For example, the ECtHR started its mandate to "*define the content of the Convention, drafted in very general terms, and set boundaries.*"[148] Establishment of the definitions of basic concepts, principles and boundaries is essential for these to-be "quasi-constitutional courts" as these definitions could be used to establish a coherent and strong jurisprudence over time. In other words, building these foundational pillars early on would allow an international court to develop a coherent and sophisticated case-law, and decide cases more easily based on the established definitions of basic concepts. Deprived of these basic definitions and boundaries, an international court would be scattered around without achieving its goals effectively.

d. Independence

Independence has different facets for an international judge. The first facet requires the international judge to be independent from the State which he/she is a national of, or the State which she/he was appointed by to the court.[149] Second facet requires the international judge to be independent from other States and international organisations. With respect to the ICC, this facet would be about the attitudes of the ICC judges towards the most contributing SPs to the ICC budget[150], and the UNSC.

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[147] Grossman, 'Legitimacy and International Adjudicative Bodies', p. 150.
[148] Harlow, 'The Concepts and Methods of Reasoning of the New Public Law: Legitimacy', p. 30.
[149] Dothan, 'How International Courts Enhance Their Legitimacy', p. 462; Eric A. Posner, Miguel F. P. de Figueiredo, 'Is the International Court of Justice Biased?', **The Journal of Legal Studies**, vol. 34, no. 2, 2005, p. 608.
[150] The top SP contributors to the ICC budget as at 31 December 2019 (in million euros): Japan: 24.2; Germany: 16.1; France: 12.5; United Kingdom: 12; Italy: 8.7; Canada: 7.2; Republic of Korea: 6.2; Australia: 5.8; Spain: 5.6; SPs with highest total outstanding (in million euros): Brazil: 10.4; Venezuela: 8.7; Argentina: 4.3. Assembly of States Parties, 'Financial Statements of the International Criminal Court for the Year Ended 31 December 2019', 07/12/2020, pp. 44–45; Elizabeth Evenson, Jonathan O'Donohue, 'States Shouldn't Use ICC Budget to Interfere with Its Work', **OpenDemocracy**,

Finally, the last facet requires the judges to be independent from their colleagues within the court and the bench.[151] Having multiple judges in a bench can only be meaningful when they evaluate and decide a case individually and without any sort of external pressure.

e. Impartiality

Impartiality is at the root of the very concept of international courts. The emergence of the ICJ's legitimacy was explained was traced back to "*a nineteenth-century practice of inserting arbitration clauses into treaties and gradual discontent with the need to appoint ad hoc arbitration panels. It draws for its legitimacy on the traditional understanding of adjudication as the 'decision or award of an impartial third party' and of courts as impartial adjudicators.*"[152] Accordingly, the very existence and legitimacy of international courts was based on the need to have an impartial third-party dispute settler. In that sense, any doubt regarding the impartiality of an international court would vitally impair its legitimacy.[153]

The concept of impartiality and objectivity have been one of the main reasons for the establishment of ICTs, as well. Independence, impartiality, and objectivity of ICTs have been regarded as their merits compared to domestic courts concerning the prosecution of international crimes. In that sense, the Commission of Experts appointed by the UN Secretary-General to investigate the events in Rwanda in 1994 concluded that "*municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees.*" Accordingly, being physically, politically and emotionally distanced

(23/11/2016), https://www.opendemocracy.net/en/openglobalrights-openpage/states-shouldn-t-use-icc-budget-to-interfere-w/. As at 31 August 2020, several SPs had debts unpaid for several consecutive years: Antigua and Barbuda: 2015-2020; Brazil: 2018-2020; Central African Republic: 2015-2020; Chad: 2015-2020; Comoros: 2007-2020; Congo: 2012-2020; Guinea: 2011-2020; Liberia: 2016-2020; Niger: 2009-2020; Senegal: 2017-2020; Suriname: 2018-2020; Venezuela: 2014-2020; Zambia: 2016-2020. Assembly of States Parties, 'Report of the Committee on Budget and Finance on the Work of Its Thirty-Fifth Session', 07/12/2020, pp. 40–42.

[151] Dothan, 'How International Courts Enhance Their Legitimacy', p. 471.

[152] Harlow, 'The Concepts and Methods of Reasoning of the New Public Law: Legitimacy', pp. 27–28.

[153] Dothan, 'How International Courts Enhance Their Legitimacy', p. 457.

from the venue of international crimes, ICTs would have had an advantage in terms of ensuring the independence and impartiality of prosecutions.[154]

Lastly, the impartiality of the ICC has a special meaning in terms of the relationship of the judicial and prosecutorial branches of the Court. The institutional embeddedness of these branches within the ICC should not divert us of the reality that the Chambers are ought to be impartial towards the OTP, as well.

f. Due Process – Fair Trial

There can be found several studies demonstrating the importance of procedural fairness in terms of legitimacy of legal authorities. This linkage is not only formed based on personal experiences of people with an authority. Beside these experiences, people would also evaluate an authority based on how it treats others. It has been stated that "*procedural fairness is often said to be the hallmark of legitimacy in courts*". Accordingly, procedural flaws are considered to be sufficient to cripple seemingly fair results.[155] On the other hand, procedural fairness is especially important for considering an unfavourable or unfair judgement as legitimate. This legitimacy belief is also influenced by the trust of individuals to the motives of the authority. Accordingly, people would form their legitimacy beliefs based on the quality of decision making ("*neutral, consistent, rule-based, and without bias*"), being treated with respect and dignity, understanding the behaviours of the authority, trusting to their motivations, and having the means to express their point of view.[156]

2. Elements Related to Global Governance Institutions

a. Consent

In the modern world, which centres on democratic values, sovereign people are thought to be the sole basis of legitimacy for political decisions. There have been legitimacy challenges against GGIs owing to their lack of democratic representation

[154] 'Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)', Annex to the Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, UN. Doc No S/1994/1125', United Nations Security Council, 04/10/1994, para. 136.
[155] Larry May, Shannon Fyfe, 'The Legitimacy of International Criminal Tribunals', p. 28.
[156] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', pp. 379–82; Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', pp. 283–357.

and accountability. However, it has been found impracticable to establish a GGI that would satisfy the demands of democratic standards as understood in nation-states.[157]

The concept of consent has three aspects with respect to the ICC: 1) Does the ratification of RS by States establish sufficient democratic legitimacy for public? 2) Why their consents are not sufficient for states to establish and sustain the legitimacy of the ICC? 3) Is it legitimate for the ICC to assert jurisdiction over nationals of non-SPs?

The first question is related to the fact that, as a judicial body, ICTs do not have a legislature which represents its constituency that would legislate the laws which ICTs would prosecute accordingly. [158] However, requiring a "democratic accountability or consent" in the sense of national political organisations could be impracticable and excessive due to the absence of a global *demos* and secondly, the depth and width of jurisdiction and power of any GGI which is far from similar to the sweeping jurisdiction and hard power national governments possess.[159] On the other hand, the second question omits the dynamic nature of a GGI or any other institution with autonomy which will embark on forming policy, and law-interpreting/law-making functions that would reasonably go beyond the initial will of the international community.[160] Accordingly, certain standards are required to assess the legitimacy of this institution as a self-standing entity throughout its mandate. Lastly, the third question disregards that the assertion of jurisdiction of a court over an individual is not solely based on the principle of active nationality.

b. Effectiveness

It is a particularly burdensome effort to assess the "effectiveness" of the ICC. The ICC asserts jurisdiction over 123 States and its impacts varies in terms of the perspective adopted. For example, Bassiouni criticised the ICC for having only four convictions (as of 2016) compared to the over 1-billion-dollar expenses since its

[157] Mayntz, 'Legitimacy and Compliance in Transnational Governance', pp. 8–9.
[158] Larry May, Shannon Fyfe, 'The Legitimacy of International Criminal Tribunals', p. 32.
[159] Bodansky, 'Legitimacy in International Law and International Relations', p. 11; Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', pp. 416–17.
[160] Buchanan, 'The Legitimacy of International Law', pp. 79–96.

establishment.[161] Does 250-million-dollar cost for one conviction indicate the ineffectiveness or inefficiency of the ICC? How many convictions the ICC should have had to be considered as effective or efficient?[162] Do the characteristics of cases and defendants matter in terms of the effectiveness of the ICC? Are there any other indicators that would signify the effectiveness of the ICC?

i. Interaction between effectiveness and legitimacy

The effectiveness created through compliance to the commands of an authority is a general phenomenon for any kind of authority.[163] Though it can be asserted that effectiveness would contribute to the belief of legitimacy and self-legitimacy of an authority[164], effectiveness of an authority is not equal to its legitimacy.[165] In general, effectiveness or ineffectiveness of an authority does not necessarily lead to its legitimacy or illegitimacy, or *vice versa*. Buchanan and Keohane explained this relationship as follow:

> "*Nevertheless, if an institution steadfastly remains instrumentally suboptimal when it could take steps to become significantly more efficient or effective, this could impugn its legitimacy in an indirect way: it would indicate that those in charge of the institution were either grossly incompetent or not seriously committed to providing the benefits that were invoked to justify the creation of the institution in the first place*."[166]

However, the relationship between effectiveness and legitimacy is not a one-way road. When the institution is accepted as legitimate, it would be more capable to achieve its goals effectively.[167] In this case, states and other parties would have "moral-reason based support" to obey it as compared to coercion which would be more

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[161] M. Cherif Bassiouni, 'Concerning the ICC Withdrawal Problem', **The International Criminal Court: Contemporary Challenges and Reform Proposals**, ed. by Richard H. Steinberg, Leiden; Boston: Brill Nijhoff, 2020, p. 118.
[162] The concepts of effectiveness and efficiency have different meanings. Yet, both of them focus primarily on the outcome produced by the Court. *See* Yuval Shany, 'The Effectiveness of International Courts: A Goal-Based Approach', **The American Journal of International Law**, vol. 106, no. 2, 2012, p. 237.
[163] Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', p. 284.
[164] Bottoms, Tankebe, '"A Voice Within": Power-Holders' Perspectives on Authority and Legitimacy', p. 77.
[165] Buchanan, 'The Legitimacy of International Law', p. 81.
[166] Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', p. 420.
[167] Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', p. 285.

expensive.[168] When the legitimacy of an authority is established a "content-independent moral obligation" would reveal itself which would generate compliance irrespective of the content of the command.[169] However, the concept of "content-independence" needs to be treated with care as that does not mean that every command of an authority will be obeyed blindfoldedly in every situation. This concept can only be understood as providing the authority "*for 'leeway' or slack in how legal, just, and acceptable the lower levels* (commands of authority) *have to be without losing its legitimacy and binding nature*".[170] In conclusion, actors give the legitimate authority the benefit of the doubt when they consider the commands as legitimate and carry them out. The legitimacy belief towards the legitimate authority creates an assumption of legitimacy for commands issued by this authority. With the presumption of legitimacy of commands, it can be expected the system to function more smoothly. In that sense, until and unless a command becomes overtly illegitimate, any doubt about its legitimacy would be eliminated by the legitimacy belief of the actor. In conclusion, legitimacy and legitimate authority have the capability to enable an order to function effectively so long as it does not issue explicitly and overtly illegitimate commands.

ii. "Goal-based approach to effectiveness"

Shany criticised the literature for the accepted definitions of effectiveness for international courts[171] which rest primarily on "judgement compliance", "usage rates", and "impact on state conduct". According to Shany, all these factors are open to be interpreted in different ways based on other considerations. In that sense, "*a low-aiming court, issuing minimalist remedies, may generate a high-level of compliance but have little impact on the state of the world*."[172] Accordingly, assessment on only these factors misses the effects of a court which is not visible through its cases and judgements. For that matter, Shany proposes an approach used in social sciences to assess the effectiveness of international courts that considers the effectiveness of an

[168] Buchanan, 'The Legitimacy of International Law', p. 81.
[169] Heywood, *Politics*, pp. 159–60; Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', p. 411.
[170] Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', p. 53.
[171] Shany, 'The Effectiveness of International Courts: A Goal-Based Approach', p. 229.
[172] cited, p. 227.

institution in terms of its capability to "*accomplish its specific objective aim*": goal-based approach.[173]

Table I.2 Conceptualisation of Goals of International Courts[174]

Classification Aspects	**Sub-Categories of Goals of International Courts**		
Source	*External* (Goals determined by external constituencies)	*Internal* (Goals determined by the actors within the organisation)	
Hierarchical Level	*Ultimate Ends* (Goals determined to be attained in the long term)	*Strategic or Intermediate Ends* (Goals determined to contribute to the attainment of ultimate ends which are inferior to them)	
Method of Articulation	*Explicit* (Goals explicitly stated in the instruments related to the ICC)	*Implicit* (Goals that can be reasonably inferred from these instruments)	*Unstated* (Goals accepted by the Court or the SPs without expressing or implying in texts)

To that end, firstly, specific goals of an international court should be determined. In order to make both the determination of these specific goals more accurate and functional, and the assessment of effectiveness more workable, Shany suggested a classification of goals of international courts. However, it must be kept in mind that determining goals of an international court is not absolute. The goals would change, at least in terms of priority and gravity, among different actors. As to the dynamic nature of determination of goals of an ICT, it has been stated that "*the aims and purposes of an ICT and the criteria of its legitimacy will have to be a dialectical*

[173] cited, p. 230.
[174] *See* cited, pp. 232–33.

and ongoing process, not least because the aims and purposes of an ICT can change over time". Lastly, it has been argued that ICTs may have "*multiple aims and objectives*", and the aims and objectives themselves might directly affect the legitimacy of an ICT.[175] Overall, these goals should be specific, realistic, and pre-determined in order to make them the subject of an effectiveness analysis.

c. Transparency

"*Transparency affects the legitimacy of international tribunals both directly and indirectly.*"[176] Transparency means the observers to see the process and outcomes produced by international courts clearly. This includes accessing and understanding hearings, judgements, and reasoning. Transparency is of relevance to international courts from different aspects. Firstly, it enables States and other international actors to assess whether a court's application and interpretation of law warrants support and cooperation. Transparency also contributes to accountability as a "democratic norm" and as a process. Being cognizant of the fact that the court is being observed would compel the decision makers to behave constrained. Similarly, judges would not want their professional prestige to be damaged due to poor reasoning.[177]

A specific transparency issue with respect to the ICC was, on 26 November 2019, the release of only the 5-page "executive summary" of an External Experts Review conducted with respect to the functioning of the OTP in the Kenya cases.[178] However, even this summary was of primary importance to get a glimpse at the inside

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[175] Langvatn, Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', pp. 55–56. Langvatn and Squatrito also stated that determination of "main agents and stakeholder groups" for a specific ICT would also be a challenge. However, this thesis will not be trying to find a "main actor" for the ICC. Point of views of different actors need to be taken into consideration in a balanced manner. *See* for the critical evaluations concerning the uncertainty or overabundance of goals of ICTs and the ICC: Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy', **International Criminal Law Review**, vol. 17, 2017, pp. 591–614; Mirjan Damaska, 'What Is the Point of International Criminal Justice?', **Chicago-Kent Law Review**, vol. 83, no. 1, 2008, pp. 329–65.

[176] Grossman, 'Legitimacy and International Adjudicative Bodies', p. 153.

[177] cited, pp. 153–59; Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', pp. 426–29.

[178] Office of the Prosecutor, 'Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation', 26/11/2019. The Review was commissioned by the OTP, and the full report was delivered in February 2018.

of the OTP.[179] In a similar direction, in December 2019 the ASP commissioned an "Independent Expert Review of the ICC and the RS System". The transparent aspect of this Review was the release of its 348-page Final Report[180], which followed by the Overall Response of the ICC to this Report[181]. The Report provides valuable insights to the internal and administrative functioning of the ICC as a whole. For example, these Reports include insights concerning the working culture of the ICC, including the bullying and harassment, decision making processes, staffing issues, and mutual distrust between the Court and the ASP. After the release of this Report, it has become possible for outsiders to evaluate the legitimacy of the ICC based on factual data, or comment on and make recommendations for the better functioning of the Court.

d. Accountability

Buchanan and Keohane identified three sub-elements of accountability as: 1) substantive standards of accountability, 2) availability of information to accountability holders, and 3) "the ability of accountability holders to impose sanctions". However, it is not sufficient for a GGI to be held accountable "somehow" by "somebody" according to "some standards", which was described as "narrow accountability". Rather, the system of accountability itself should also be amenable to reform based on the determinations of substantive standards of accountability, identification of accountability holders, and the interests represented by accountability holders. However, in order to answer these questions accurately, the role and goals of a GGI should be determined "in the pursuit of global justice".[182]

Courts are indispensable to ensure accountability in the modern world. They ensure that states and individuals are held accountable before the law. Although the

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[179] External Experts Review, 'ICC OTP Kenya Cases: Review and Recommendations Executive Summary of the Report of the External Independent Experts', Office of the Prosecutor, 26/11/2019, para. para. E8. "*OTP leadership, primarily in the person of Prosecutor 1, was a major contributing factor to the problems encountered in the Kenya cases. Prosecutor 1's leadership could best be categorized as autocratic, not open to contrary assessments or viewpoints, too often marginalizing those who disagreed with him or reacting angrily and threateningly. This leadership style discouraged candid, contrary assessments and viewpoints to the detriment of the cases*."

[180] Independent Expert Review, 'Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report', 30/09/2020.

[181] International Criminal Court, 'Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report": Preliminary Analysis of the Recommendations and Information on Relevant Activities Undertaken by the Court', 14/04/2021.

[182] Buchanan, Keohane, 'The Legitimacy of Global Governance Institutions', pp. 426–27.

above explanations might not be directly applicable to judicial bodies, it is important for accountability holders to be held accountable as well. Notwithstanding the fact that the judiciary is considered as the ultimate accountability holder, the RS might still adopt additional accountability mechanisms, or further implement existing mechanisms.[183] At present, the RS adopts a horizontal-vertical judicial and vertical prosecutorial accountability mechanism. Horizontal accountability mechanisms refer to the review of a decision by peers, i.e., the joint decision making of the ICC judges in a particular chamber. Vertical accountability mechanisms, on the other hand, refer to the procedures in which the decisions of ICC units are challenged and rectified before a higher unit. For example, this might be supplemented with a horizontal accountability mechanism, that would include a collegial OTP. This reform proposal will be further explained in the Conclusion.

3. Elements Related to International (Criminal) Courts

a. Composition

Here, it will be mentioned of both the required qualifications for individual judges to take place in a bench and how the balance in the composition of benches is sought for.

i. Qualifications of judges

All of the constituent instruments of international courts and tribunals seeks out certain qualifications to be elected or appointed as a judge or an arbitrator to their benches or panels. These requirements vary with respect to the relevant institution, however there are some common aspects as well. We may divide these qualifications into two sub-categories: Moral qualifications and professional qualifications. With regard to the first group, possessing "high moral character, impartiality and integrity"[184] is expected from judges generally. As to the second group, the content of professional qualifications varies based on the field of the court.

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[183] Independent Expert Review considered the levels of accountability in the ICC within three layers: "*Layer 1: Judicial and prosecutorial activity; Layer 2: Administration of justice; Layer 3: Administration of the international organisation*." "*Depending on the type or scope of an activity, it falls under one layer or the other. Every layer has a corresponding framework and requires different degrees of independence and accountability*." Independent Expert Review, 'Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report', paras 31–32.

[184] Rome Statute, art. 36(3).

In terms of professional qualifications, the RS envisages two groups of judges with two different qualification sets: a) criminal law and b) international law.[185] Of 18 judges, the RS prescribes there to be at least nine judges from list A, and at least five judges from list B.[186] It might be reasonable for the RS not to require the judges to have formal competence and experience in both of these fields of law simultaneously as that would have, presumably, narrowed the judge pool of the ICC significantly. However, it is apparent that the work of the ICC requires a substantial amount of knowledge and understanding in both of these disciplines. In other words, the judges of the ICC should accommodate the basic premises of both disciplines of law in its decisions in order to appear constrained by the law.

ii. Diversity of the bench

International courts are excepted to accommodate diversity in terms of gender and nationality.[187] As sociological and political understandings change, "the kinds of diversity parameters" might alter over time.[188] In line with that, this diversity should also be sought for in the prosecutorial structure of the ICC.[189]

b. Equality

The concept of equality is different than "impartiality". While impartiality connotes to the unbiased and equal treatment to the parties of a concrete case before the ICC, equality means treating States, situations, and possible suspects equally when initiating preliminary examinations, investigations and prosecutions, as required by the law. Accordingly, initiating an investigation over a situation while rejecting to initiate over another which shares same features would be against equality as a legitimacy related element unless this policy explained in reasonable terms.

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[185] Rome Statute, art. 36(3)(b).
[186] Rome Statute, art. 36(5).
[187] Rome Statute, art. 36(8)(a)(i-iii).
[188] Grossman, 'Legitimacy and International Adjudicative Bodies', p. 140.
[189] Currently, all the five senior prosecutors of the ICC are male: Prosecutor, Deputy Prosecutor, Director of the Investigations Division, Director of the Jurisdiction, Complementarity and Cooperation Division and Director of the Prosecutions Division. https://www.icc-cpi.int/about/otp/who-s-who/Pages/default.aspx (accessed 5.12.2021).

The concept of equality is particularly important for the ICC which came into existence within a structurally unequal international community with an aspiration to rectify the results of these inequalities.[190] Furthermore, this concept has a special meaning in terms of the legitimacy crisis of the ICC. The main challenge against the ICC was that it has been treating African and non-African nations differently. This sense of unequal treatment engendered the biggest drawback against the Court. This is understandable considering the fact that no person or community would accept an authority to exert its power unequally without providing a reasonable and principled justification.

[190] *See* Kamari Maxine Clarke, 'African Withdrawals and Structural Inequities', **The International Criminal Court: Contemporary Challenges and Reform Proposals**, ed. by Richard H. Steinberg, Leiden; Boston: Brill Nijhoff, 2020, pp. 120–24.

II. CRITICISMS AND LEGITIMACY CHALLENGES AGAINST THE ICC

"*To avoid criticism; say nothing, do nothing, be nothing*."

Elbert Hubbard

Challenges and criticisms against the ICC come from a variety of sources with an emphasis on different considerations. These challenges are very critical in terms of the state cooperation required for the functioning of the Court[191] which can only be materialised through the legitimacy of the Court.[192] Without the legitimacy of the Court, hence the support of the States, arrest warrants or other criminal procedures requiring state cooperation would not be executed, in turn, there would not be a credible justice system, a possibility of national reconciliation and an effective international criminal law regime.[193]

Since its entry into force on 1 July 2002, Burundi and the Philippines have withdrawn from the RS after the OTP initiated preliminary examinations for alleged crimes against humanity in these countries. In line with that, South Africa and Gambia revoked their withdrawal notifications prior to coming into effect.[194] The reason behind the revoked withdrawal notification of the Gambia, which was revoked by the

[191] Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', **European Journal of International Law**, vol. 10, 1999, p. 164.
[192] Julie Butters, 'External Factors Affecting Situation Selection: Political Influences', **The International Criminal Court: Confronting Challenges on the Path to Justice**, University of Washington, 2013, p. 30; Erika Murdoch, 'The Office of the Prosecutor: Charging Strategy', **The International Criminal Court: Confronting Challenges on the Path to Justice**, University of Washington, 2013, p. 70.
[193] Steven D. Roper, Lilian A. Barria, 'State Co-Operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects', **Leiden Journal of International Law**, vol. 21, 2008, p. 458.
[194] These States transmitted their withdrawal notifications on these dates: South Africa, 19 October 2016; Burundi, 27 October 2016; Gambia, 10 November 2016; Philippines, 17 March 2018. The withdrawals of Burundi and Philippines took effect one year after the dates of notifications.

newly elected President, was based on the African selectivity of the ICC.[195] In the case of South Africa, the withdrawal decision was made by the executive without the approval of the Parliament, which was required by the Constitution. Following a finding of a violation of the Constitution by the High Court of South Africa, the Government revoked the withdrawal notification.[196] South Africa had reasoned its withdrawal decision based on the perceived focus of the ICC on African states, the unclarity concerning the immunities of heads of states of non-SPs to the RS and the relationship of the UNSC with the ICC.[197] Russia and the AU supported the withdrawals from African countries and the AU considered them as in line with its withdrawal strategy.[198] Lastly, Russia, which were critical of the Court due to the initiation of an investigation concerning the situation of Georgia[199], withdrew its signature from the RS following the ICC "*classifying the Russian annexation of Crimea as an occupation.*"[200]

At the 17th Session of the ASP in December 2018, UK conveyed their misgivings concerning the inefficiency of the ICC compared to 1.5 billion euros spent over 20 years in exchange of 3 core crimes convictions. With respect to their disappointment, UK stated that "*As others have said, and I quote "it is undeniable that the Rome project still falls short of the expectations of the participants at that ground-breaking conference in Rome*"."[201] After the attempt of initiation of an investigation to the situation in Afghanistan, US threatened the ICC and stated that they "*will let the*

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[195] Gambia justified its withdrawal decision based on "*the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans.*" 'Gambia Withdraws from International Criminal Court', **Al Jazeera**, (26/10/2016).

[196] Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', **Criminal Law Forum**, vol. 29, 2018, pp. 64–67, 106, 109. In South Africa, the Government did not abide by the judgements of the High Court of South Africa concerning the arrest of Al Bashir.

[197] Government of South Africa, 'Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court', The Secretary-General of the United Nations, 25/10/2016; Richard Dicker, 'A Court Worth Having: Defending the Integrity of the Rome Statute', **The International Criminal Court: Contemporary Challenges and Reform Proposals**, ed. by Richard H. Steinberg, Leiden; Boston: Brill Nijhoff, 2020, p. 125.

[198] African Union, 'Decision on the International Criminal Court', Doc. EX.CL/1006(XXX), Assembly/AU/Draft/Dec.1(XXVIII)Rev.2, 30/01/2017, para. 6.

[199] The Ministry of Foreign Affairs of the Russian Federation, 'Briefing by Foreign Ministry Spokesperson Maria Zakharova Moscow: On the Beginning of ICC's Investigation of Events in South Ossetia in August 2008', 29/01/2016.

[200] Shaun Walker, Owen Bowcott, 'Russia Withdraws Signature from International Criminal Court Statute', **The Guardian**, (16/11/2016).

[201] Andrew Murdoch, 'UK Statement to ICC Assembly of States Parties 17th Session', Government of the United Kingdom, 05/12/2018.

ICC die on its own. After all, for all intents and purposes, the ICC is already dead".[202] It has also been stated by four successive former Presidents of the ASP, who have served between 2002-2014, that the ICC needed an independent expert assessment so as to close the gap between the objectives of the RS and its current functioning.[203]

The African States were the early proponents of the ICC, which continue to constitute the largest continental SP block with 33 states. Despite their early support, the African States started to challenge the ICC increasingly. Similarly, the early support of academics has turned into a criticism. The reasons behind the criticisms and challenges coming from state and non-state actors must be analysed in order to comprehend and address the legitimacy problems of the ICC holistically. The following list and analysis are not exhaustive. In addition to the below criticisms and challenges, there have been observed others, as well. These other objections include: flaws and deficiencies of the RS[204]; problems concerning the investigations; problems concerning victim participation[205].

A. Criticisms and Legitimacy Challenges of Non-State Actors

1. Fundamental Paradigm of the International Criminal Justice System

This title discusses the criticisms against the popular presentation and perception of the ICC and international criminal justice. These criticisms can be directed to the ICC itself because the ICC and its Prosecutor took active part in the production of these documentaries. In fact, the producer and director of *The Court*

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[202] Owen Bowcott, Oliver Holmes, Erin Durkin, 'John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack', **The Guardian**, (10/09/2018).
[203] Prince Zeid Raad Al Hussein et al., 'The International Criminal Court Needs Fixing', **Atlantic Council**, 24/04/2019.
[204] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', pp. 144–71; David J. Scheffer, 'The U.S. Perspective on the ICC', **The United States and the International Criminal Court**, ed. by Sarah B. Sewall, Carl Kaysen, Maryland: Rowman & Littlefield Publishers Inc., 2000, pp. 115–18; Lohr, Lietzau, 'One Road Away from Rome: Concerns Regarding the International Criminal Court', pp. 33–58; Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States', **The United States and the International Criminal Court**, ed. by Sarah B. Sewall, Carl Kaysen, Maryland: Rowman & Littlefield Publishers Inc., 2000, pp. 213–36; Robert Cryer et al., **An Introduction to International Criminal Law and Procedure**, 2nd ed Cambridge [UK] ; New York: Cambridge University Press, 2010, pp. 140–41.
[205] *See* Richard H. Steinberg (ed.), **The International Criminal Court: Contemporary Challenges and Reform Proposals**, Leiden; Boston: Brill Nijhoff, 2020.

stated that it was Luis Moreno Ocampo, the former Prosecutor of the ICC, who approached him about making a film.[206]

Handmaker considers the international criminal justice system as a reflection of the "savages, victims and saviours" paradigm. Based upon the accounts and depictions presented in "The Reckoning: The Battle for the International Criminal Court (2009)" documentary film, he observed that the filmmakers, the OTP and most probably the general population perceive the Court as a (Western-based) "saviour" who is shielding the helpless "victims" against barbaric and crude African "savages". He contends that the Court or the Prosecutors should not solely focus onto the horrors of the crimes, but they should also comprehend the reasons and circumstances behind them and possible efforts of reparations with the intent of having a durable peace.[207]

On his analysis of four documentaries on the ICC, (*The Reckoning*, *The Court*, *The Prosecutor*, and *Watchers of the Sky*) Werner found certain overlaps and shortcomings in terms of how the ICC is depicted popularly. Werner observed that these documentaries went beyond the classical "educative" role of documentary films, by incorporating elements of entertainment, thrill, and epic movie. He commented that this entanglement compromised the fundamental claim of the documentary films: "the claims to truth and authenticity". This compromise was due to the fact that all these documentaries only presented the perspective of the ICC, and the Prosecutor in particular. In that sense, Werner criticised delivering "*messages that hardly do justice to its limited capabilities as well as the politics that comes with prosecuting international crimes.*" Accordingly, "*portraying ICC interventions as epic moments not only creates naive expectations about the powers of the Court (…).*"[208]

The documentaries related to the ICC may also mislead the international community in terms of the legitimacy source of the ICC. For example, in the marketing of *The Court (2012),* the former ICC Prosecutor Ocampo was described as "*a*

[206] https://marcus-vetter.com/the-court/# (Accessed 28.06.2021).
[207] Jeff Handmaker, 'The Legitimacy Crisis Within International Criminal Justice and the Importance of Critical, Reflexive Learning', **The Pedagogy of Economic, Political and Social Crises: Dynamics, Construals and Lessons**, ed. by Bob Jessop, Karim Knio, London: Routledge, 2019, pp. 193–99.
[208] Wouter G. Werner, 'Justice on Screen - A Study of Four Documentary Films on the International Criminal Court', **Leiden Journal of International Law**, vol. 29, no. 4, 2016, pp. 1043–60.

charismatic, hard-driving prosecutor for a lead (…)."[209] In the advertisement of *The Prosecutor*, Ocampo was presented as: "*flawed yet charismatic champion of human rights*" which is considered by victims of atrocities as "a hero". In this advertisement, the issuance of arrest warrant for al-Bashir was described as "boldly".[210] Similarly, *Watchers of Sky* described the stories included in the film, which included Ocampo as well, as: "*four stories of remarkable courage, compassion, and determination*".[211] Lastly, *The Reckoning* also focused on the Prosecutor personally: "*The Reckoning: The Battle for the International Criminal Court follows dynamic ICC Prosecutor Luis Moreno Ocampo and his team (…)*".[212]

As explained above, the ICC is a formal-rational and substantive-rational authority. However, the portrayal of the ICC prosecutors as heroic characters creates a sense of "charismatic authority" based upon the courage, dedication, determination, sacrifice, and historicalness of these "exceptional" individuals. Adopting subjective criteria instead of objective criteria would undermine the constituent basis of legitimacy and create a personalized and unstable sense of legitimacy.

2. Criticisms Against the Personnel of the Court

a. Criticisms Against the Prosecutor

After the issuance of the second arrest warrant against former President Al-Bashir for the crime of genocide, the former Prosecutor of the ICC Luis Moreno Ocampo wrote an article with respect to the genocide charges against Al Bashir.[213] However, the manner he adopted in this article has drawn criticisms. Schabas criticised the article as "misleading", "ugly" and "unfair".[214] First of all, the Prosecutor disregarded the principle of presumption of innocence as a Prosecutor and made public accusations against Al Bashir to the effect that he has committed and was still committing genocide as if the Chamber tried and convicted Al Bashir of crime of genocide. Moreover, the Prosecutor accused Ahmad Harun, who had functioned in

[209] https://marcus-vetter.com/the-court/ (Accessed 28.06.2021).
[210] http://icarusfilms.com/if-pros (Accessed 28.06.2021).
[211] Werner, 'Justice on Screen - A Study of Four Documentary Films on the International Criminal Court', p. 1057.
[212] https://skylight.is/blog/films/the-reckoning/ (Accessed 28.06.2021).
[213] Luis Moreno-Ocampo, 'Now End This Darfur Denial'.
[214] William A. Schabas, 'Inappropriate Comments from the Prosecutor of the International Criminal Court', **PhD Studies in Human Rights**, 16/07/2010.

different positions within the State of Sudan, with carrying out crimes of genocide. However, the OTP has never charged Harun with genocide officially.[215] Lastly, Schabas criticized the "denial" discourse adopted by the former Prosecutor as if the PTC when rejected to issue arrest warrant for crime of genocide in the first attempt was denying the factual ground.[216] After this article, Keller proposed the removal of Ocampo from his office by the ASP.[217] The AU criticised the former Prosecutor as "*egregiously unacceptable, rude and condescending*".[218] Lastly, the first Prosecutor was also criticised for his leadership style for being "autocratic", "micro-manager", angry and threatening.[219]

b. Criticisms Against the Judges

The Court has also been criticised for "*uneven quality of judges*".[220] William Pace from the Coalition for the International Criminal Court stated that "*there are a number of judges who really shouldn't be there*". The election process of judges has been criticised as being non-transparent, obscure, and open to political interference through "vote trading".[221] Besides these general criticisms, there were also specific criticisms against certain judges such as against Judge Kuniko Ozaki who was appointed as a judge without a law degree and was allowed by the Court to serve, though she resigned subsequently, as an ambassador while performing his judicial duties in the *Ntaganda* case.[222] A second example could be the litigation of the President of the Court Chile Eboe-Osuji, alongside 5 other judges of the Court, against the Court itself for the raise claim for salaries of the judges. The claim has been criticized based on the grounds that the salaries of the judges are quite sufficient, close

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[215] https://www.icc-cpi.int/darfur/harunkushayb. (Accessed 08 December 2021)
[216] Schabas, 'Inappropriate Comments from the Prosecutor of the International Criminal Court'.
[217] Kevin Jon Heller, 'The Remarkable Arrogance of the ICC Prosecutor', **OpinioJuris**, 20/07/2010.
[218] African Union, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV)", Assembly/AU/Dec.296(XV)', 27/07/2010, para. 9.
[219] External Experts Review, 'ICC OTP Kenya Cases: Review and Recommendations Executive Summary of the Report of the External Independent Experts'.
[220] Emma Nyland, 'Internal Relations of the ICC', **The International Criminal Court: Confronting Challenges on the Path to Justice**, University of Washington, 2013, p. 145.
[221] Afua Hirsch, 'System for Appointing Judges "Undermining International Courts"', **The Guardian**, (08/09/2010).
[222] Internal memorandum to Judge Ozaki, ICC-01/04-02/06-2326-Anx1 (International Criminal Court 19 March 2019); Kevin Jon Heller, 'Judge Ozaki Must Resign — Or Be Removed', **OpinioJuris**, 29/03/2019; Wairagala Wakabi, 'Judge Ozaki Resigns Ambassadorial Post to Stay on Ntaganda Trial', **International Justice Monitor**, 06/05/2019.

to $200.000 annually and tax-free, the insufficiency of the budget for other parts of the Court such as the OTP for pursuing more and efficient investigations or the Trust Fund for reparation awards, and not being overly occupied with the cases due to lack of cases at the trial, and the reluctance of the SPs to increase the budget.[223]

3. State-Oriented Nature of the Rome Statute

a. Exclusive Emphasis on State Cooperation

As a court of last resort, the ICC is built upon the principle of complementarity. Accordingly, the ICC may engage with situations and cases only when the national authorities are either unable or unwilling to investigate and prosecute international crimes genuinely and effectively.[224]

The RS provided an investigative procedure that would allow the PTC to authorise the Prosecutor to take specific investigative steps when facing a "clearly unable State".[225] However, the exact way of enforcement of this procedure is unclear.[226] Furthermore, the structure of the RS is not capable to produce substantial results when the Court face with an unwilling state, which is in fact the very reason of the establishment of the Court.[227] This is the case, especially considering the nature of genocide, crime of aggression and crimes against humanity which normally would be committed by or "*with the help, assistance, or the connivance or acquiescence, of national authorities*".[228] The risk of the complementarity principle to be used to shield perpetrators is significant especially considering that the principle is also applicable to non-SPs. In other words, any non-SP may claim jurisdiction over a case and oblige the Prosecutor to defer the proceedings.[229]

Emphasis on "state cooperation" can be best observed in the situations where a non-State actor exerts a *de facto* control over a portion of the territory of a state. The

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[223] Marlise Simons, 'In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay', **The New York Times**, (20/01/2019).
[224] Rome Statute, arts. 17(1)(a, b, c); 17(2, 3); 53(1)(b); 53(2)(b).
[225] Rome Statute, art. 57(3)(d).
[226] Rod Rastan, 'Can the ICC Function Without State Compliance?', **The Elgar Companion to the International Criminal Court**, ed. by Margaret deGuzman, Valerie Oosterveld, Cheltenham: Edward Elgar Publishing Limited, 2020, pp. 154–55.
[227] cited, p. 147.
[228] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', p. 159.
[229] ibid.

PTC did not allow the Prosecutor to seek cooperation from the Abu-Bakr al-Siddiq Battalion who were believed to be holding Saif Al-Islam Gaddafi. The PTC ruled that the cooperation channels are limited to those which were determined by the *de jure* government.[230] Unless another PTC adopts a broad interpretation in terms of the entities whose cooperation might be requested by the Prosecutor, the current jurisprudence creates a deadlock when these non-state entities are not determined as a cooperation channel by *de jure* governments.[231] Considering the political, and possibly armed, conflict underlying the existence of these non-state entities, it is hard to anticipate *de jure* governments to determine them as a cooperation channel.

b. Liberty to Decide Between Surrender and Extradition

According to article 90(6) of the RS, when an SP receives an extradition request from a non-SP, which the SP has an international obligation to extradite towards, and a surrender request from the Court, the SP will choose which request to be followed according to the criteria listed in this article.[232] This discretion is also applicable when a SP is requested to extradite a person by either an SP or a non-SP for another conduct which constitutes the basis of the surrender request of the Court.[233] This discretion is applicable for UNSC-referred situations, as well.[234] Cassese raised three criticisms for this provision. First, the article disregards "*the possibility that under its national legislation the requested state may be obliged to waive its jurisdiction without even triggering the extradition process*"; secondly, it disregards the possibility that the requested state to be a state which accepted *ad hoc* jurisdiction of the Court; and finally, the RS does not require the requested state to prioritise the surrender request.[235] This is especially problematic considering the fact that extradition agreements already

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[230] Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya", ICC-01/11-01/11 (ICC Pre-Trial Chamber I 21 November 2016).
[231] Rastan, 'Can the ICC Function Without State Compliance?', pp. 157–58.
[232] Rome Statute, Art. 90(6). *See* for a detailed analysis of the article Chimene Keitner, 'Comment, Crafting the International Criminal Court Trials and Tribulations in Article 98(2)', **UCLA Journal of International Law & Foreign Affairs**, vol. 6, 2001, pp. 229–30.
[233] Rome Statute, Art. 90(7). Oktawian Kuc, 'The Rome Statute and Legal Limitations to the International Surrender Regime', **New England Journal of International and Comparative Law**, vol. 18, no. 1, 2012, p. 269; Claus Kreß, Kimberly Prost, 'Article 90: Competing Interests', **The Rome Statute of the International Criminal Court: A Commentary**, ed. by Triffterer, Ambos, C.H.BECK-Hart-Nomos, 2016, pp. 2065–66.
[234] Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court', **The American Journal of International Law**, vol. 93, no. 1, 1999, p. 28.
[235] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', pp. 161, 166.

make room for concurring extradition requests.[236] Lastly, the lack of a judicial oversight on the discretion of SPs might also be considered as a deficiency.

c. National Security Exception to the Disclosure of Information to the Court

During the Nuremberg trials, the Tribunal had direct access to the state archives due to the unconditional surrender of Germany and military occupation of the Allied Powers. However, contemporary armed conflicts do not present such opportunities to the ICC. The Court has to rely on states to gather and present evidence, which generally continues to experience the crime generating environment.[237] According to article 72 of the RS, a state may refuse to disclose any information or evidence if the State is of the opinion that such disclosure would prejudice its national security interests. Paragraph 2 extends this exception to witnesses as well.[238] Upon refusal, the Court may go through a complicated mechanism which involves modification and clarification of the request, determination of the relevance of the information by the Court, seeking the possibility to obtain the evidence through a different source or disclosure with limitations. If the Court or the Prosecutor fails to induce the State to disclose the evidence, the only procedures the Court may follow are to refer the situation to the ASP or the UNSC and make inferences as to the existence or non-existence of such evidence in the trial of the accused.[239] In any way, the Court is deprived of the power to order, even only legally, the disclosure of these evidence.

Crawford considered the determination and invocation of this exception as "*subjective to the state*".[240] Additionally, Cassese stated that the complicated mechanism envisaged in article 72 would be "*cumbersome and time-consuming*." Cassese criticised the regulation as being against the precedent, which the provision supposedly based upon[241], *Blaskic* decision of the ICTY Appeals Chamber, which was

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[236] Goran Sluiter, 'The Surrender of War Criminals to the International Criminal Court', **Loy. L.A. Int'l & Comp. L. Rev.**, vol. 25, 2003, p. 630.
[237] Ruth Wedgwood, 'Case Analysis: International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic', **Leiden Journal of International Law**, vol. 11, no. 3, 1998, pp. 636–37.
[238] Rome Statute, art. 93/4: "*In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security*."
[239] Rome Statute, art. 72(7)(a)(ii-iii).
[240] Pieter H. F. Bekker, David Stoelting, 'The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court', **Pepperdine Dispute Resolution Law Journal**, vol. 2, no. 1, 2001, p. 47.
[241] Jacob Katz Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts', **Human Rights Quarterly**, vol. 22, 2000, p. 424.

originally focussing on the obligation of the states to disclose information to the Court while seeking to prevent undue disclosure outside of the Court."[242] On the contrary, article 72 makes a SP the sole and final judge in terms of the disclosure of evidence on the ground that it would prejudice its national security.[243] Considering that RS crimes are very closely linked with politics and reputation of states, it is plausible to expect states to invoke this provision loosely. This exception is particularly problematic as the evidence covered behind this exception might be exculpatory as well as inculpatory. Considering that this state-lenient exception was the US position against the majority of states during the Rome Conference[244], it must be questioned whether the current formulation serves to the aspirations of the SPs.[245]

d. Immunity Agreements Under Article 98(2) of the Rome Statute

According to article 98(2) of the RS, the inclusion of which was "successfully negotiated" by the US delegation[246], the Court cannot proceed with a request for surrender if the requested SP would be acting inconsistently with its obligations under international agreements which requires the consent of the "sending state".[247]

i. The scope of article 98(2) of the Rome Statute

Article 98 addresses to the Court itself in terms of the non-performance of a certain act. Both the OTP and the PTC concluded that these agreements "do not impact on the exercise of jurisdiction by the Court". However, there have been heated debates on the exact scope of "international agreements" under article 98(2) of the RS. With respect to the *ratione personae* limits of article 98, it has been maintained that relying on the term "sending state", article 98 covers only persons that have been sent to

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[242] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', pp. 166–67; Bekker, Stoelting, 'The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court', p. 36. See for the shortcomings of the *Blaskic* decision. Wedgwood, 'Case Analysis: International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic', pp. 648–52.
[243] Wedgwood, 'Case Analysis: International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic', p. 647.
[244] Lohr, Lietzau, 'One Road Away from Rome: Concerns Regarding the International Criminal Court', pp. 36–37.
[245] Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts', p. 426.
[246] David J. Scheffer, 'A Negotiator's Perspective on the International Criminal Court', **Military Law Review**, vol. 167, 2001, p. 17.
[247] Rome Statute, art. 98(2).

another state in an official capacity[248]; or those agreements which use the similar language of "sending state" [249]. Moreover, based on the drafting process, it was maintained that the original motive was to resolve disputes emanating from Status of Forces Agreements ("SOFA").[250] However, lacking conclusive evidence to assert that article 98 were limited to SOFAs, it has also been contended that it covers other agreements, as well. In any way, private visitors to a state, such as tourist and businessperson, were considered to be outside of the scope of article 98(2) of the RS.[251] Lastly, in terms of the *ratione temporis* scope of the BIAs, it was concluded that there is no requirement for a treaty to be concluded prior to the entry into force of the RS in order to be considered under article 98(2).[252] However, Amnesty International argued that article 98(2) applies only to pre-existing SOFAs.[253]

ii. The application of article 98 in terms of the US bilateral immunity agreements

On 31 December 2000, Clinton administration had signed the RS, however on 6 May 2002 Bush administration withdrew the signature of the US from the RS.[254] One of the main objections of the US against the RS was the possibility of prosecution of nationals of non-SPs.[255] As a non-SP to the RS, the US found several ways (application of article 16 of the Statute in resolutions 1422 and 1487; personal exemptions from the jurisdiction of the Court with resolutions 1497, 1593 and 1970[256])

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[248] James Crawford, Philippe Sands, Ralph Wilde, 'Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute', 05/06/2003, paras 40–45.

[249] Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, ICC-02/05-01/09 (ICC (Pre-Trial Chamber II) 11 December 2017). para. 32.

[250] Eric M. Meyer, 'International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers Protection Act', **Oklahoma Law Review**, vol. 58, no. 1, 2005, p. 125.

[251] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 273–74.

[252] cited, pp. 275–76; Crawford, Sands, Wilde, 'Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute', para. 38; Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 145.

[253] 'International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes against Humanity and War Crimes', Amnesty International, 08/2002, p. 5.

[254] John R. Bolton, 'International Criminal Court: Letter to UN Secretary General Kofi Annan', 06/05/2002.

[255] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 266; Human Rights Watch, 'The United States and the International Criminal Court', https://www.hrw.org/legacy/campaigns/icc/us.htm.

[256] *See infra* II.B.2.a-b.

to escape from the jurisdiction of the ICC for its nationals including through the conclusion of bilateral immunity agreements ("BIA"). The US concluded over 100 BIAs which protect its nationals to be surrendered to the ICC, or for some of these BIAs to any international tribunal. While some of them cover the US nationals unilaterally, others apply reciprocally.[257] The US defended these agreements as preventing politically motivated proceedings to be conducted against its nationals.[258]

Contrary to the objectives of SOFAs and conventional extradition agreements, BIAs are exclusively aimed at ensuring the non-surrender of nationals of parties of the BIAs to the ICC.[259] These agreements cover an extremely wide range of "persons": "*For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party*."[260] To be able to conclude these agreements, the US capitalised on diplomatic, financial and economic means, as provided in the American Servicemembers' Protection Act, which "*authorizes the use of 'all means necessary, including military force' to release persons arrested by the ICC*", and with the threat of withdrawal of military assistance to states, except NATO members or certain other allied states, who are unwilling to sign these agreements.[261] The US BIAs were generally considered to be contrary to article 98(2) of the RS.[262]

[257] 'Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020', United States Department of State, 01/01/2020.
[258] Human Rights Watch, 'The United States and the International Criminal Court'.
[259] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 267–68, 276–77.
[260] 'Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court', 20/09/2002.
[261] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 268; Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 142; 'Bilateral Immunity Agreements', Human Rights Watch, 20/06/2003; Clare M. Ribando, 'Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America', CRS Report for Congress, 30/03/2006.
[262] Silal Khan, 'Status of the U.S. Bilateral Immunity Agreements under the Rome Statute', **Cambridge International Law Journal**, 09/12/2020; Hugh King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute', **New Zealand Journal of Public and International Law**, vol. 4, 2006, pp. 269–310.

iii. African Union's encouragement to conclude bilateral immunity agreements

After several fruitless efforts to achieve the deferral of the investigations of the situations of Sudan (for Al Bashir), Kenya and Libya (the AU has revoked that commitment after 2012), the AU considered a possible alternative: concluding bilateral agreements on the immunities of senior state officials of non-SPs between African non-SPs and African SPs to the RS.[263]

e. Lack of Specific Remedies for Non-Compliance of State Parties

When the non-compliance of a state prevents the Court from exercising its functions, article 87(7) of the RS authorises the Court to make a finding of the situation and refer the matter to the ASP, or to the UNSC for UNSC-referred situations.[264] Aside from this vague and loose "sanction", there is no other remedy to be employed by the ICC. Cassese proposed that in cases of non-compliance, the RS could have been elaborating what decisions and actions the ASP might take.[265] At present, the referral to the ASP or the UNSC of a state seems to produce no effective result.

B. Criticisms and Legitimacy Challenges of States

1. The Relationship of the ICC with the United Nations Security Council

The ICC is not a UN body. It is an independent, self-standing organisation with an international legal personality which was established outside the sphere of the UN. However, there are a few references to the UNSC in the RS. Also, as being deprived of a law enforcement agency, the Court requires the assistance of States and UN bodies for its effective performance. Accordingly, on 4 October 2004, the relationship agreement was concluded between the ICC and the UN to regulate the inter-organizational relations.[266] Furthermore, to elaborate that relationship, specific agreements were concluded between the ICC and UN peacekeeping missions, which

[263] African Union, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI), Assembly/AU/Dec.419(XIX)', 15/07/2012, para. 7.
[264] Rome Statute, art. 87(7).
[265] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', p. 166.
[266] Judge Silvia Fernández de Gurmendi, 'Lectio Magistralis at the Conference: "New Models of Peacekeeping: Security and Protection of Human Rights. The Role of the UN and Regional Organizations"', p. 7.

requires explicit consent of the Host State to realize the assistance of the UN forces regarding, for example, collecting evidence, search, and seizure operations.[267]

However, the relationship between an international judicial organisation and an international political organisation has been approached with a fair degree of suspicion. South Africa stated that the credibility of the ICC will always be at risk "*so long as the three of the five permanent members of the Security Council are not State Parties to the Statute*."[268] Similarly, Bassiouni criticised the RS attaching the ICC to the UNSC, which is a political body that has not been reformed in terms of its fundamental flaws for many decades. Bassiouni evaluated that "*this type of bureaucracy is capable of sinking any judicial institution even when built on the highest expectations of so many states and peoples all over the world*."[269]

There are two provisions in the RS which establish direct links between the ICC and the UNSC: 1) article 13(b), vesting the UNSC with the power to refer situations to the ICC, especially those which would not normally be within the jurisdiction of the Court; 2) article 16, vesting the UNSC with the power to defer investigations or prosecutions for 12 months, if the UNSC considers that they are prejudicial to international peace and security.[270]

a. Referral of Situations to the ICC by the UNSC Under Article 13(b) of the RS

In the RS, the power to refer situations to the ICC was given to the UNSC so that the Council would not need to establish new *ad hoc* tribunals when it is so required, and instead would refer them to the ICC as the permanent ICT.[271] However, the referral powers of the UNSC were widely criticised by States. The challenge of the AU was that the Court enables the powerful states, i.e., P-5, to interfere in and influence its decisions frequently.[272] India's refusal to sign the RS was based on,

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[267] cited, pp. 8–9.
[268] Government of South Africa, 'Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court'.
[269] Bassiouni, 'Concerning the ICC Withdrawal Problem', p. 117.
[270] Rome Statute, arts. 13(b), 16.
[271] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', **Leiden Journal of International Law**, vol. 19, 2006, pp. 200, 215.
[272] Julie Butters, 'External Factors Affecting Situation Selection: Political Influences', p. 30.

among other reasons, the powers of the UNSC to refer and block cases to the ICC, hence making the ICC as "subordinate" to the UNSC and providing the UNSC the power to bind a non-SP with the RS.[273] Beside India; Pakistan, Yemen, Libya and Nigeria were also against the UNSC to be given referral powers.[274]

Schuerch made a distinction between "*de facto* immunity" and "*de jure* immunity" in terms of the referral power of the UNSC. While the former connotes to the non-referral of nationals of permanent members of the UNSC or their allies to the ICC, the latter connotes to the *ratione personae* limitations inserted to the referral resolutions so as to exclude the nationals of non-SPs from the jurisdiction of the ICC except the state which is the target of the referral.[275]

i. Sudan

On 31 March 2005 with Resolution 1593, without making any explicit reference to article 13(b) of the RS, the UNSC referred the situation in Darfur/Sudan to the ICC with 11 affirmative and 4 abstention votes.[276] In June 2005, the ICC opened an investigation into the Sudan situation. The most high-profile case within this investigation was against the then Sudanese President Omar Hassan Ahmad Al Bashir, whom the ICC issued two arrest warrants for on 4 March 2009 and on 12 July 2010. This investigation and this case, especially the arrest warrant, were underlying a major rift between African countries and the ICC.[277]

Russia, China, the Arab League and the AU opposed to the arrest warrant.[278] On 21 July 2008, the AU Peace and Security Council issued a communiqué with respect to the application of the Prosecutor for an arrest warrant. In that communiqué,

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[273] Dilip Lahiri, 'Should India Continue to Stay out of ICC?', **ORF**, 24/11/2010. The author was the leader of the Indian delegation to the Rome Conference. Devasheesh Bais, 'India and the International Criminal Court', vol. 54, FICHL Policy Brief Series, 2016.
[274] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 180.
[275] cited, pp. 171–72.
[276] UNSC, 'Resolution 1593, S/RES/1593 (2005)', 31/03/2005. Abstention votes: Algeria, Brazil, China, United States of America.
[277] African Union, 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan"', Assembly/AU/Dec.221(XII), 01/02/2009; African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev.1, 01/07/2009.
[278] 'Sudanese President Expels Aid Agencies', **The Guardian**, (05/03/2009).

the AU requested the UNSC to defer the proceedings according to article 16 of the RS in order not to jeopardize the ongoing peace process.[279] However, the UNSC did not act on this request. Furthermore, the Organization of Islamic Conference explicitly criticised the "*selectivity and double standards in the application of the principles of criminal justice*" which would "*undermine vitality and will negatively affect the credibility of the ICC*" and called for respect for "*the sovereignty, independence, territorial integrity and non-interference in the internal affairs of the Sudan*".[280]

Following the first arrest warrant, Al Bashir labelled the ICC as being "*a part of a neo-colonist plot against a sovereign African and Muslim State*" that they are ready to fight against.[281] In 2008, the Sudanese Minister of Justice accused the indictment against Al Bashir as establishing "*new tyrant legal supremacy under the guise of lofty objectives*"; and contended that Sudan was not the only target of that neo-imperialism, but that "*all African, Arab and other third-world countries are equally targeted.*"[282]

Other African states associated the ICC with colonialism and imperialism and stated that "*ICC is made for Africans and poor countries*."[283] Some African leaders, as conveyed by Kofi Annan, expressed their views as "*international justice as represented by the I.C.C. is an imposition, if not a plot, by the industrialized West*."[284] As a scholar, Mahmood Mamdani pointed out to the fact that the parties of the civil war in Darfur in 1987-1980 had described themselves as "Arab" and "Zurga", which the very racialization has its roots back to the British colonial period in the late 1920s. He criticised the ICC investigation and the OTP for disregarding the early and recent history of the conflict and the complexity of it. He also observed that all the ongoing investigations, as of 2008, had been against countries that the US didn't oppose to investigations and targeted to governments which are the adversaries of the US.[285]

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[279] AU Peace and Security Council, 'Communiqué', PSC/Min/Comm (CXLII), 21/07/2008.
[280] The Organization of Islamic Conference, 'Final Communique of the Annual Coordination Meeting of Ministers of Foreign Affairs of the OIC Member States', 26/09/2008, paras. 88–92.
[281] 'Bashir Defies War Crimes Arrest Order', **The New York Times**, (05/03/2009).
[282] Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law', **South African Yearbook of International Law**, vol. 34, 2009, p. 64.
[283] 'Kagame Tells Why He Is against ICC Charging Bashir', **Daily Nation**, (03/08/2008); Martin Chulov, 'Libyan Government Asks Why ICC Isn't Also Seeking to Prosecute Syria', **The Guardian**, (16/05/2011).
[284] Kofi Annan, 'Africa and the International Criminal Court', **The New York Times**, (29/06/2009).
[285] Mahmood Mamdani, 'Darfur, ICC and the New Humanitarian Order', **Pambazuka News**, (17/09/2008).

ii. Libya

On 26 February 2011 with Resolution 1970, without making any explicit reference to article 13(b) of the RS, the UNSC referred the situation in Libya to the ICC unanimously. The situation has been referred after the Gaddafi regime used massive violence against peaceful demonstrations. Alongside with the referral, the UNSC has also taken other measures within the same resolution such as freezing the assets of certain Libyan nationals, issuing travel ban for them, and arms embargo in Libya.[286] On 17 March 2011, the UNSC established a ban on all flights in the airspace of Libya in order to attain the protection of civilians, safety of the delivery of humanitarian assistance and cessation of hostilities. Lastly, the UNSC authorised the Member States to take all necessary measures to protect civilians.[287] On 19 March 2011, a multinational coalition led by the US and including France and the UK started military operations, named Operation Odyssey Dawn, against Gaddafi regime.[288] Afterwards, a NATO operation called "Operation Unified Protector" was established to carry out the enforcement of the UNSC measures in Libya, which carried out 26.000 sorties until 31 October 2011. The decision to terminate the Operation was taken after the capture of Sirte, the last stronghold of the Gaddafi regime, and the death of Gaddafi on 20 October 2011.[289]

ICC opened the Libya investigation in March 2011 and, in quite a short period of time, issued arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi on 27 June 2011.[290] Later on, ICC issued arrest warrants for two other suspects in April 2013.[291] The timeframe of the Gaddafi case was exceedingly shorter compared to the previous cases. This phenomenon was explained with the simplicity of the case which the ICC was involved during its early period, the quantity

[286] UNSC, 'Resolution 1970, S/RES/1970', 26/02/2011.
[287] UNSC, 'Resolution 1973, S/RES/1973', 17/03/2011.
[288] 'Libya: US, UK and France Attack Gaddafi Forces', **BBC**, (20/03/2011).
[289] NATO, 'NATO and Libya (Archived)', 09/11/2015, https://www.nato.int/cps/en/natohq/topics_71652.htm.
[290] https://www.icc-cpi.int/libya/gaddafi (Accessed 08 December 2021) Currently in the Gaddafi Case, the case was terminated for Muammar Gaddafi upon his death and was declared inadmissible for Abdullah Al-Senussi due to national proceedings.
[291] https://www.icc-cpi.int/libya/al-werfalli, https://www.icc-cpi.int/libya/khaled. (Accessed 08 December 2021).

of evidence obtained[292], the desire to issue arrest warrant for Gaddafi before he goes to exile or killed by coalition forces, and the wish to attain the symbolic nature of the arrest warrant even he dies afterwards.[293] Moreover, there was also the risk that the UNSC member states might lose their interest for trials.[294] In line with that, after a few months, the rebel forces and NATO governments started to suggest that Gaddafi might not be prosecuted before the ICC in the Hague.[295] There have also been suggestions to the effect that the Gaddafi case might or should be seen in Libya.[296]

In that sense, it has been put forward that the UNSC capitalised on the ICC to isolate Gaddafi so the political aims of certain states could be materialised via ousting him. It has been contended that the UNSC left the ICC alone and provided no support to the case as a result of the prioritisation of post-Gaddafi era political and economic interests over the prosecution of international criminals before the ICC.[297] Furthermore, the limiting of the temporal jurisdiction of the ICC to crimes committed since 15 February 2011[298] has also been criticised as covering up the political responsibilities of the Western states who provided large amount of arms to Gaddafi prior to civil war.[299] Additionally, during the talks after the rejection of draft resolution concerning the referral of situation in Syria to the ICC, Russia stated that referral of the situation in Libya to the ICC "had resulted only in throwing oil on the fire". Russia also criticised the Court for evading the issue of NATO bombardment against civilians.[300]

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[292] Julian Borger, 'International Criminal Court to Name Libyan War Crimes Suspects', **The Guardian**, (15/05/2011).
[293] Mark Kersten, 'The ICC and the Tripoli Three: Time, It's on Our Side', **Justice in Conflict**, 22/05/2011; 'Why UN Acted over Libya and Ivory Coast – but Not Syria', **BBC**, (16/05/2011).
[294] Mark Kersten, 'In the ICC's Interest: Between "Pragmatism" and "Idealism"?', **Justice in Conflict**, 16/07/2013.
[295] Nicholas Watt, Richard Norton-Taylor, 'Muammar Gaddafi Could Stay in Libya, William Hague Concedes', **The Guardian**, (25/07/2011).
[296] 'Libyan Activists Refuse to Hand Over Saif Al-Islam Gaddafi to ICC', **Asharq Al-Awsat**, (14/11/2019); Stewart M. Partick, 'Getting Qaddafi to the Hague: The Case for ICC Prosecution', **Council on Foreign Relations**, 24/08/2011.
[297] Mark Kersten, 'Used and Abandoned: Libya the Security Council and the ICC', **Justice in Conflict**, 31/08/2011; Rupert Cornwell, 'World Powers Scramble for a Stake in Future of the New Libya', **Independent**, (23/08/2011).
[298] UNSC, 'Resolution 1970, S/RES/1970', 26/02/2011, para. 4.
[299] Stephen Glover, 'Shabby Politics and the Appeasing of a Monster', **Daily Mail**, (24/02/2011).
[300] 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, 7180th Meeting', United Nations Security Council, 22/05/2014.

iii. Common Challenges against Sudan and Libya Referrals

During the Sudan referral, the US was an unequivocal critic of the ICC. Hence, it did not want to provide legitimacy through referrals. In order to induce the US, certain compromises had to be made: 1) no fund to be allocated to the ICC from the UN budget, 2) the resolution to refer to BIAs concluded under art. 98(2) of the RS, 3) nationals of non-SPs are to be exempted from the jurisdiction of the ICC.[301]

All these compromises had received various criticisms. The lack of allocation of funds by the UN has been commented as redirecting "the costs of the activities of its organs" to the ICC. In that sense, this was against the UN Charter, the Negotiated Agreement between the ICC and the UN, and the RS.[302] While the legality of BIAs were dealt with above, the exemption provisions received the most vocal criticisms. The exemption provisions have been used three times by the UNSC in a very similar way in Resolution 1497 for Liberia, Resolution 1593 for Sudan and Resolution 1970 for Libya. However, these provisions were different from the previous article 16 deferrals in several ways: 1) there were not any reference to article 16, 2) there were not any temporal limitation, 3) the scope of the exemption from jurisdiction was not limited to the ICC, but also covering the territorial and any other state except the state of nationality, and 4) they were limited geographically. These differences, which are indicating a permanent exemption, have led the commentators to consider the relevant provisions as not deferrals under article 16 of the RS.[303]

The exemption from the jurisdiction of the ICC of the nationals of other non-SPs to the RS has been interpreted as an example of double standard. The inclusion of such provisions was criticised by states such as Brazil who was a member of the UNSC at the time of the enactments of the Resolutions 1593[304] and 1970[305]; and Germany, France, Mexico and Chile when a similar provision had been included to the

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[301] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', pp. 204–5.
[302] UN Charter, art. 17; Rome Statute, art. 115; William Schabas, **An Introduction to the International Criminal Court**, Fourth Edition New York: Cambridge University Press, 2011, p. 174; Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', pp. 206–7; UNSC, 'Records of 5158th Meeting, UN. Doc. S/PV.5158', 31/03/2005, pp. 3–4.
[303] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 242.
[304] UNSC, 'Records of 5158th Meeting, UN. Doc. S/PV.5158', p. 11.
[305] UNSC, 'Records of 6491st Meeting, UN Doc. S/PV.6491', 26/02/2011.

Resolution 1497 related to Liberia[306] and by commentators.[307] Accordingly, considering the referral resolutions as simply a "political trigger" mechanisms, these paragraphs were described as "illegitimate"[308] and "irrelevant".[309]

Contrary to the situation in Sudan, the personal exemption of non-SPs from the jurisdiction of the ICC in the Libya situation was highly relevant as the multinational coalition and the NATO forces took active part in the conflict. In response to the alleged crimes of NATO or NTC-related forces, the former Prosecutor expressed his wish to examine these allegations impartially and independently.[310] Accordingly, the statement has been observed as setting a precedent concerning the non-imposition of *ratione personae* limitations to referrals by the UNSC.[311] However, the OTP has not indicted anyone for the alleged crimes of NATO or NTC-related forces.[312]

What makes the legitimacy of the ICC to get impaired has been shown as the acceptance, by the Court, of the power politics of the UNSC with respect to referrals. Accordingly, it has been proposed that the ICC to make a stand against further UNSC referrals that would implicate that the ICC as a subsidiary to the UNSC, thereby positioning itself as an independent and impartial judicial institution.[313] However, this seems a hard job considering the depiction of the ICC as a "tool" which is "at the disposal" of the UNSC by the ICC AC.[314] Moreover, these referrals should not be allowed to appear as if the duty to uphold international peace and security has been outsourced to the ICC, which clearly is not its mandate.[315] Yet, the second Prosecutor considered the ICC as an "*independent and permanent justice component to the*

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[306] UNSC, 'Records of 4803rd Meeting, UN Doc. S/PV.4803', 01/08/2003.
[307] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 214; Mark Kersten, 'Libya Referred to the ICC – Initial Thoughts', **Justice in Conflict**, 27/02/2011.
[308] Kevin Jon Heller, 'Can the Security Council Define the Limits of a "Situation"?', **OpinioJuris**, 27/02/2011.
[309] Dov Jacobs, 'Libya and the ICC: On the Legality of Any Security Council Referral to the ICC', **Spreading the Jam**, 28/02/2011.
[310] Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)', 02/11/2011.
[311] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 203.
[312] Situation in Libya, https://www.icc-cpi.int/libya (Accessed 06.12.2021).
[313] Mark Kersten, 'The ICC in Syria: Three Red Lines', **Justice in Conflict**, 09/05/2014.
[314] Judgement in the Jordan Referral re Al-Bashir, ICC-02/05-01/09 OA2 (ICC Appeals Chamber 6 May 2019).
[315] Mark Kersten, 'Did the UN Security Council Just Outsource Peace in Libya to the ICC?', **Justice in Conflict**, 28/02/2011; Stephen Toope, 'Louise Arbour on the ICC, Peace and Justice', **Open Canada**, 09/05/2012.

world's efforts to achieve peace and security". She considered justice and peace to be sought simultaneously, not sequentially.[316] Overall, it has been indicated that the UNSC referrals have done more harm than good.[317]

iv. Non-Referral of Similar Situations

Besides the situations referred to the ICC, there are also other situations which have warranted a similar response: "*e.g. Afghanistan, Iraq, North Korea, Palestine, Sri Lanka, Syria, Ukraine and the US with respect to methods used in interrogations and detentions since 9/11*"[318], or Gaza with respect to Operation Cast Lead.[319] When the Libya case was referred to the ICC, the Gaddafi regime and human rights organisations complained that there is a double standard and the situation in Syria should have also been referred to the ICC.[320] However, this option was considered to be impossible due to the patron-client relations between states. This patron-client relationship in terms of the protection of client states by patrons in the decision-making procedure has been epitomised in the examples of Russia-Syria, China-North Korea and USA-Israel.[321] With regard to the immunity of the nationals of these states from the jurisdiction of the ICC, article 13(b) of the RS has been evaluated as serving to the "*production of an ab initio inequality*" because of other states' lack of power to prevent a referral decision.[322] Accordingly, it has been commented that the situations in Libya and Sudan were referred by the UNSC because they were not important enough for the P-5 states.[323] In conclusion, *de facto* immunity provided to the powerful states within the international criminal law system has been considered as promoting legal neo-colonialism by commentators as well.[324]

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[316] Fatou Bensouda, 'The International Criminal Court: A New Approach to International Relations', **Council on Foreign Relations**, 21/09/2012.
[317] Mark Kersten, 'Yes, the ICC Is in Crisis. It Always Has Been.', **Justice in Conflict**, 24/02/2015.
[318] Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', p. 75.
[319] William A. Schabas, 'Libya Referred to International Criminal Court by Security Council', **PhD Studies in Human Rights**, 27/02/2011.
[320] Mark Kersten, 'Gaddafi Regime Decries Uneven Justice – And They're Right', **Justice in Conflict**, 17/05/2011; Chulov, 'Libyan Government Asks Why ICC Isn't Also Seeking to Prosecute Syria'; Toope, 'Louise Arbour on the ICC, Peace and Justice'.
[321] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 210.
[322] cited, pp. 207–8.
[323] cited, p. 211.
[324] cited, p. 213.

As a specific example, the situation in Syria might be mentioned. As the Syrian Government used lethal force against civilians, international community asked for the UN involvement.[325] In February 2013, the Commission of Inquiry pointed to the ICC as the appropriate venue to pursue the fight against impunity in Syria.[326] In 2014, it was mentioned that the Obama Administration was preparing a draft resolution to refer the situation in Syria with the condition that the ICC won't have jurisdiction with regards to Golan Heights which have been under Israel occupation for many years.[327] The draft was almost identical in terms of the exclusion of the nationals of non-SP from the Court's jurisdiction and non-contribution to the expenses.[328] On 22 May 2014, the draft resolution was rejected with the vetoes of Russia and China against 13 affirmative votes. Upon its veto, Russia stated that if the US and the UK refer the situation in Iraq to the ICC then "they would demonstrate their opposition to impunity". China, on the other hand, justified its veto as the referral would not have served to the efforts of political solution between the parties.[329] France refused the argument that involvement of international justice would undermine the peace process as there is neither a peace process or a prospect of it.[330] The US argued that the vetoes of Russia and China prevented the prosecution of not only Al-Assad but also terrorist groups in the country.[331] The UN Secretary General and Rwandan representative conceded that if the UNSC cannot bring accountability to the crimes committed in Syria "*the credibility of this body and of the entire Organization* (UN) *will continue to suffer*".[332]

Nonetheless it has been stated that the ICC cannot be held responsible for the practice of the UNSC which the Court is not able to participate.[333] Moreover, non-referral or non-intervention of the UNSC to certain situations is not only about referrals

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[325] William Harris, 'Weekly Standard: Syrian Crimes Against Humanity', **Npr**, 26/04/2011; Mark Kersten, 'Syria and the International Criminal Court: Taking Justice Seriously', **Justice in Conflict**, 26/04/2011.
[326] UNSC, 'Records of 7180th Meeting, UN Doc. S/PV.7180', 22/05/2014.
[327] Mark Kersten, 'US Throws Support Behind Referral of Syria to the ICC', **Justice in Conflict**, 07/05/2014; Colum Lynch, 'Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria', **Foreign Policy**, 07/05/2014.
[328] UNSC, 'Draft Resolution S/2014/348', 22/05/2014, paras. 2–4.
[329] 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, 7180th Meeting'.
[330] UNSC, 'Records of 7180th Meeting, UN Doc. S/PV.7180'.
[331] cited, p. 5.
[332] cited, pp. 2, 6.
[333] Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', p. 73.

to the ICC; there is a more general problem relating to the decision-making procedures of the UNSC. Yet, article 13(b) of the RS might be interpreted as the permanent extension and institutionalisation of this disparity into the RS.

b. Deferral Powers of the UNSC under Article 16 of the RS

According to article 16 of the RS, the UNSC may defer the commencement or continuation of an investigation or prosecution before the Court up to 12 months.[334] With respect to the scope of the deferral power, it has been interpreted that in terms of "investigations", both situations in general and persons in specific; in terms of "prosecutions" only individuals might be included in the resolution.[335] This provision may be criticised as implying the interference of a political organ to the functioning of a judicial organ. However, Cassese stated that the authority given to the UNSC is not unfettered considering the "the whole context of the Statute" and the reference to Chapter VII suggesting the UNSC must expressly show that the continuation of the proceedings may amount to a threat to the peace.[336]

The provision in the initial ILC draft coinciding with article 16 was requiring the UNSC to take an affirmative resolution to permit the ICC to commence prosecution concerning a situation which was being dealt with by the UNSC.[337] However, that approach was clearly against the judicial independence of the ICC, hence some states were completely against such a provision while many others were seeking safeguards for political intervention of the UNSC. Hence, an original provision was proposed by the Singaporean delegation in such a way that turned the hierarchical order upside down. The achievement of the new proposal was attained with the change of policy of the UK and France with regard to the absolute primacy given to the UNSC concerning issues dealt under Chapter VII. While the USA and Russia were against the temporal limitation of the deferral power, which they considered to be an interference to the powers of the UNSC under Chapter VII; 18 states, mostly consisted of Asian and

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[334] Rome Statute, art. 16.
[335] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 233–34.
[336] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', p. 163.
[337] International Law Commission, 'Draft Statute for an International Criminal Court with Commentaries', 1994, art. 23(3).

African states, expressed their opposition to any such provision completely.[338] Later, South Africa proposed, and the AU supported an amendment proposal to article 16 of the RS that would allow the UNGA to defer cases for one year in cases where the UNSC failed to take a decision within six months.[339]

i. Resolutions 1422 and 1487

The UNSC used article 16 of the RS explicitly twice, with Resolutions 1422 and 1487, in a precarious way so as to exclude all "*officials and personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation*" from the jurisdiction of the ICC. The resolutions, which the first of them was decided 11 days after the entry into force of the RS, were including a paragraph expressing the intention of the UNSC to renew the deferral for another 12 months.[340] These two resolutions were considered to be the result of the threat of the USA to withhold its military support to UN peacekeeping missions. After these two resolutions, the UNSC has never made an explicit reference to article 16 of the RS.[341]

Resolutions 1422 (2002) and 1487 (2003) were questioned on two grounds: 1) whether a simple reference to Chapter VII were sufficient, 2) whether such a general immunity was legal under article 16.[342] As to the first ground, it has been stated that such a reference was not sufficient, because there has to be a specific and concrete situation to be examined. Moreover, it was not identified how the investigation or prosecution of UN personnel constituted a threat to international peace and security. In the UNSC meetings, the Canadian representative stated that such determination in

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[338] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 223–28.
[339] African Union, 'Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)", Doc. Assembly/AU/8(XIV), Assembly/AU/Dec.270(XIV)', 31/02/2010, para. 5; African Union, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV)", Assembly/AU/Dec.296(XV)', para. 7; Clarke, 'African Withdrawals and Structural Inequities', pp. 120–24.
[340] UNSC, 'Resolution 1422, S/RES/1422', 12/07/2002; UNSC, 'Resolution 1487, S/RES/1487', 12/06/2003.
[341] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 221, 237.
[342] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 143.

the absence of a threat to international peace and security was "unnecessary", "counterproductive" and incompatible with the Council's mandate.[343]

As to the second ground, it has been stated that a determination of threat to peace and security had to be determined geographically under article 16; in that sense it must not be exempting a certain group of states from the jurisdiction of the Court completely. Accordingly, Resolutions 1422 and 1487 have been found in contradiction with both Chapter VII of the UN Charter and article 16 of the RS. Also, based on the prescribed intention of the UNSC to defer any investigation for an additional 12 months, the effect of immunising certain groups from the ICC jurisdiction appears contrary to the purpose of article 16.[344] Additionally, by making reference to article 98(1) of the RS, Iverson stated that article 98 does not incorporate immunities of international organisations or institutions, therefore the attempt to extend immunity to UN peacekeepers was *ultra vires*.[345] If the ICC were to give effect to such invalid "blanket immunities" it would be attributable to the ICC itself, as well. Due to their implicit favouritism, Resolutions 1422 and 1487 have been accepted as examples of legal neo-colonialism.[346]

ii. Al Bashir

The request of the Prosecutor for an arrest warrant for the then President Al Bashir invited criticism from various international organisations including the AU. On 31 July 2008, the AU Peace and Security Council, requested the UNSC to decide to defer investigations under article 16 of the RS. The AU Peace and Security Council based this request upon the possible deterioration of the ongoing peace and reconciliation process in Sudan. South Africa, as a supporter of the Court at the time, stated that the deferral of the investigation should be made before the issuance of arrest warrants "*so as to avoid interference with the judicial process*". Accordingly, the very purpose of the enactment of article 16 was for circumstances similar to the present one

[343] UNSC, 'Records of 4772nd Meeting, UN. Doc. S/PV.4772', 12/06/2003, p. 3.
[344] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 238–41.
[345] Jens Iverson, 'Head of State Immunity Is Not the Same as State Immunity: A Response to the African Union's Position on Article 98 of the ICC Statute', **EJIL: Talk!**, 13/02/2012.
[346] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, pp. 255, 261.

so as to strike a balance between peace and justice.[347] Alongside with the AU; Non-Aligned Movement, the Organisation of the Islamic Conference, and the League of Arab States also asked for the deferral of proceedings against Al-Bashir., which, arguably, constituted the two thirds of the international community.[348]

During the UNSC meeting on the issue of the extension of the mandate of the AU-UN Hybrid Operation in Darfur (UNAMID), Libya, South Africa and Burkina Faso's initiative to amend the draft resolution so as to include a deferral provision proved unsuccessful. The representative of the Russia warned concerning the possibility that if the proceedings not to be deferred "*rebel groups hampering progress in the Darfur political process will take advantage of the situation in order to step up their campaign against the Government of Sudan in this region*."[349] The representative of China also criticised the indictment of Al-Bashir as "*an inappropriate decision taken at an inappropriate time*" by making reference to the ongoing peace process in the country and the potential impact of the indictment as fuelling "*the arrogance of the rebel groups not willing in the political process and harm the fragile and turbulent security situation in Darfur*."[350] On the other hand, Croatia, by making reference to their experiences in the 1990s, stated that "*the best foundation for real and sustainable peace based on reconciliation is justice and justice alone.*"[351]

c. Support of the UNSC to UNSC-referred Situations

In 2010, the PTC I informed the UNSC of the lack of cooperation of Sudan with respect to the investigations in the situation in Darfur.[352] In late 2014, due to lack of support from the UNSC, the Prosecutor decided to "hibernate" investigation activities in Darfur in order to channelise the resources to other urgent cases.[353] In her next statement to the Council, the Prosecutor stated that the investigation was being

[347] UNSC, 'Records of 6028th Meeting, UN Doc. S/PV.6028', 03/12/2008, p. 16.
[348] UNSC, 'Records of 5947th Meeting, UN Doc. S/PV.5947', 31/07/2008, p. 3,6.
[349] cited, p. 3.
[350] cited, p. 6.
[351] cited, p. 5.
[352] The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07 (ICC Pre-Trial Chamber I 25 May 2010). *See* for the criticism of the decision: William A. Schabas, '"Inherent" Powers of the International Criminal Court', **PhD Studies in Human Rights**, 26/05/2010; Dov Jacobs, 'Scoop: The ICC Informs the Security Council of Sudan's Lack of Cooperation', **Spreading the Jam**, 27/05/2010.
[353] Fatou Bensouda, Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)', 12/12/2014.

carried out in a limited manner.[354] The hopes of cooperation by Sudan revitalised after the change of government following the military intervention.[355] In her December 2019 Report to the UNSC, the Prosecutor mentioned of the possibility of suspects being prosecuted in Sudan.[356] In her last report to the UNSC in June 2021, the Prosecutor stated that: "*This is the first time since 2007 that the OTP was able to conduct investigative activities, including the taking of witness testimony, in the territory of Sudan*."[357]

Moreover, the UNSC also did not take any concrete action, such as travel bans or freezing assets, to support the UNSC-referred investigations.[358] PTC stated that while non-SPs were under no obligation stemming from the RS to cooperate with the Court, the UNSC could have acted under Chapter VII of the UN Charter to impose such obligations in a way that would stem directly from the UN Charter.[359] However, without the support of the States and the UNSC, Al Bashir continued to travel through several countries despite two arrests warrants issued by the ICC for war crimes, crimes against humanity and genocide. (Including SPs to the RS: Malawi, Chad, Democratic Republic of the Congo, Kenya, Uganda, Djibouti, South Africa; and non-SPs: Saudi Arabia, Ethiopia, Mauritania, Turkey, Russia, China, Equatorial Guinea, Egypt, South Sudan).[360]

Lastly, the non-allocation of any fund or support by the UN for these UNSC-referred situations not only impaired their effective investigations; but also, these investigations drained the physical, mental and legitimacy resources of the ICC. In conclusion, by overly engaging in these UNSC-referred situations, the ICC overburdened itself, was left alone with the perceived failure of these investigations,

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[354] Fatou Bensouda, Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)', 29/06/2015, para. 25.
[355] ICC, Office of the Prosecutor, 'Twenty-Ninth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)', 19/06/2019, para. 38.
[356] ICC, Office of the Prosecutor, 'Thirtieth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)', 18/12/2019, para. para. 30.
[357] ICC, Office of the Prosecutor, 'Thirty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSC 1593 (2005)', 09/06/2021, para. 37.
[358] Rastan, 'Can the ICC Function Without State Compliance?', pp. 173–74.
[359] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, ICC-02/05-01/09 (ICC Pre-Trial Chamber II 29 April 2014). para. 12.
[360] ICC, Office of the Prosecutor, 'Twenty-Eighth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)', 14/12/2018, para. 20.

which led to the perception of the ineffectiveness of the ICC and had to deal with the hard task of explaining and enforcing an arrest warrant against a non-SP head of state.

2. Inadequateness and Inconsistency of Legal Reasoning: Head of State Immunity

There are several ICC judgements that merit criticisms in terms of legal reasoning.[361] Some of these recent judgements will be dealt with in the last Chapter in detail. This title will focus on the challenges against the ICC pertaining to the inadequateness and inconsistency of legal reasoning of the Court in the *Al-Bashir* case concerning the status of head of state immunity in international law and the RS.

a. The proceedings and the reasoning of the ICC

i. Initial years without reasoning

Following the UNSC referral of the Sudan/Darfur situation in 2005, on 4 March 2009[362] and 12 July 2010[363], PTC I issued two arrest warrants for the former Sudanese President Omar Al Bashir. In the decision on the warrant of arrest, PTC I concluded that the fact that Omar Al Bashir was the Head of a State had "*no effect on the Court's jurisdiction over the present case*". The Court based its conclusion on four considerations: 1) one of the core goals of the RS is to put an end to impunity, 2) for the achievement of this goal article 27 of the RS nullified immunities of all sorts, 3) legal sources in article 21(1)(b) and (c) can only be resorted to when there is a *lacuna* in the legal framework of the ICC and this *lacuna* cannot be filled through interpretation, 4) by referring the Darfur situation, the UNSC accepted any ensuing investigation and prosecution to be conducted in accordance with the statutory framework of the ICC.[364] However, this reasoning was insufficient in several ways.

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[361] *See* for further observations: Jacobs, 'Scoop: The ICC Informs the Security Council of Sudan's Lack of Cooperation'; Schabas, '"Inherent" Powers of the International Criminal Court'; Dov Jacobs, 'Bashir and Genocide in Sudan: Second Time Lucky for the OTP', **Spreading the Jam**, 13/07/2010; Dov Jacobs, 'ICC PTC Authorises Investigation in Bangladesh/Myanmar: Some Thoughts', **Spreading the Jam**, 15/11/2019.

[362] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (ICC (Pre-Trial Chamber I) 4 March 2009). The first warrant of arrest included 7 counts of war crimes and crimes against humanity.

[363] Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95 (ICC (Pre-Trial Chamber I) 12 July 2010). The second warrant of arrest included 3 counts of genocide.

[364] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3 (ICC (Pre-Trial Chamber I) 4 March 2009). paras. 41-45.

First of all, PTC I did not elaborate on any of these considerations no more than one single paragraph. Secondly, all the references of PTC I were only to the RS. In that sense, the Court practically disregarded general international law. Moreover, the reason of doing so was also found in the RS itself. Lastly, the Court did not inquire the scope of powers of the UNSC or the text of the referring UNSC resolution in terms of the implications of the referral of a situation in a non-SP.

In 2010 and 2011, PTC I informed the UNSC and the ASP of Al Bashir's visits to the Republic of Chad, the Republic of Kenya and Djibouti. With respect to the obligation to arrest Al Bashir, PTC I indicated two different sources. As SPs to the RS, PTC I referred to article 87 of the RS which regulates the general obligation of SPs to cooperate. In addition to this apparent source of obligation, PTC I referred to the UNSC Resolution 1593, which referred the Sudan situation to the ICC in 2005. The Chamber quoted this part of the Resolution to establish the "obligations" of these States: "*urge[d] all States and concerned regional and other international organizations to cooperate fully*".[365]

In the Namibia Advisory Opinion, the ICJ stated that: "*The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect*."[366] Accordingly, the term "urge" cannot be understood as establishing a legal obligation for all States.[367] It would only indicate the desire of the UNSC to expedite the proceedings. The only legal obligation created by this Resolution was for Sudan and other parties of the conflict: "*Decides that* ***the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance*** *to the Court and the Prosecutor*

[365] Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107 (ICC (Pre-Trial Chamber I) 27 August 2010); Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109 (ICC (Pre-Trial Chamber I) 27 August 2010); Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09-129 (ICC (Pre-Trial Chamber I) 13 May 2011).

[366] Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), (International Court of Justice 21 June 1971). para. 116.

[367] Von Michiel Blommestijn, Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir', **Zeitschrift Für Internationale Strafrechtsdogmatik**, vol. 5, 2010, pp. 442–43; Alexandre Skander Galand, 'Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third "Security Council Route"', **EJIL: Talk!**, 23/10/2018.

pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".[368] (Emphasis added) Though it might not appear material for SPs, this interpretation of the ICC creates a significant effect for non-SPs.

ii. The first reasoning: international court exception to immunities

The first detailed decision addressing the issue of head of state immunity was decided in December 2011, after Malawi justified its non-compliance to the arrest warrant with the head of state immunity of Al Bashir in customary international law.[369] The decision was criticised for being late, as the first arrest warrant had been issued nearly three years ago. Accordingly, the ICC sought for the arrest and surrender of Al Bashir from March 2009 to December 2011 without issuing a detailed reasoned decision on customary international law status of immunities. By doing so, the ICC disregarded the arguments of the AU pertaining to the customary international law status of immunities and the interplay between articles 27 and 98 of the RS.[370] In addition to that, this decision was also criticised for being "entirely one-sided", due to the lack of representations of the defence and absence of reference to the prominent scholars in the field.[371]

In Malawi non-compliance decision, PTC I concluded that head of state immunity was not applicable before ICTs. The Chamber presented several precedents to support this conclusion. The first reference was to the Report of the 1919 Commission on Responsibility of the Authors of the War and on Enforcement of Penalties. This Report was recommending the constitution of a tribunal that would

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[368] UNSC, 'Resolution 1593, S/RES/1593 (2005)'.

[369] Corrigendum to the 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, ICC-02/05-01/09 (ICC (Pre-Trial Chamber I) 13 December 2011); Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (ICC (Pre-Trial Chamber I) 13 December 2011).

[370] Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At Long Last . . .) But Gets the Law Wrong', **EJIL: Talk!**, 15/12/2011.

[371] William A. Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes', **PhD Studies in Human Rights**, 15/12/2011.

ignore immunities of all sorts, including head of state immunity.[372] However, the Chamber disregarded certain aspects of this precedent. First of all, the position adopted in the Report was not adopted in the Paris Conference or Treaty of Versailles. Moreover, the proposal to prosecute German emperor was conditioned upon the consent of Germany.[373] Lastly, the actual prosecution of the German emperor has never taken place.[374]

Secondly, PTC I referred to the Nuremberg and Tokyo Tribunals. The Statutes of these international military tribunals denied the official capacity of accused as an excuse. Yet, it should be reminded that Germany and Japan were surrendered unconditionally. Accordingly, the Allies were "*in the position of national legislators*" hence "*could legislate away immunity before the Tokyo and Nuremberg trials*."[375] Furthermore, following the complete occupation by the Allies, the Governments of Germany and Japan had completely lost their international representative capability that would merit international legal protection. Additionally, the Chamber referred to the UN documents which confirmed the principles that were adopted by the Nuremberg Tribunal[376], the ICTY and ICTR Statutes and their case law.[377]

However, the classification of international immunities should be elaborated. There are two kinds of international legal protection accorded to state officials from the jurisdiction of foreign states. For that end, the differentiation between *ratione materiae* immunity (functional immunity) and *ratione personae* immunity (personal immunity) should be clarified.[378] This distinction is also adopted in article 27 of the

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[372] Corrigendum to the 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.

[373] Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes'.

[374] Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part*, p. 3.

[375] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 438.

[376] United Nations General Assembly, 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', 1950. Principle 3: "*The fact that a person who committed an act which constitutes a crime under international law* ***acted as Head of State or responsible Government official*** *does not relieve him from responsibility under international law*." (Emphasis added); 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries', Yearbook of the International Law Commission, 1996, vol. II, Part Two, 1996. art. 7: "*The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment*."

[377] Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part*, pp. 407–10.

[378] Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 423–24.

RS as well. While paragraph 27(1) proscribes the "defence of official capacity", paragraph 27(2) deals with "immunities or special procedural rules which may attach to the official capacity of a person."[379]

Accordingly, "the permanent exemption" from foreign criminal proceedings for "some acts" that are deemed as the act of State itself constitutes *ratione materiae* immunity. For these acts, no official of a State could be faced a criminal proceeding except by their own national courts. On the other hand, "the temporary exemption" from foreign criminal proceedings for "any act" of a "certain group of officials" described as *ratione personae* immunity. For these officials, immunity performs as a purely practical tool, so their functions as representatives and administrators of their States are not hindered. As both these immunities stem from State itself, they can be waived by States.[380]

The novelty introduced by the Nuremberg and Tokyo Tribunals was the accountability of perpetrators irrespective of their official capacities for certain international crimes. In that regard, what had been regarded as non-justiciable previously were considered as within the realm of international law as international crimes.[381] In other words, these prosecutions narrowed the scope of *ratione materiae* immunity, as these criminal conducts were removed from the protection of international law for being regarded as official acts of states.[382]

However, *ratione personae* immunity is, by its definition, temporary and limited. *Ratione personae* immunity is entitled only to a limited number of state officials while they are in office. The reason behind this immunity is not that international law qualifies these persons above the law or justify every one of their actions before the law. Instead, the reason is to give the organs of a State the continuing opportunity to carry out their functions without external hindrances. Without the extension of the organs of a State beyond its borders is guaranteed under international

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[379] Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes'; Dov Jacobs, 'A Sad Hommage to Antonio Cassese: The ICC's Confused Pronouncements on State Compliance and Head of State Immunity', 15/12/2011.
[380] Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part*, p. 407.
[381] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 428.
[382] Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At Long Last . . .) But Gets the Law Wrong'.

law, all the premises of international law, including good neighbourliness, friendly cooperation, and peaceful settlement of international disputes would collapse alongside *ratione personae* immunity.[383] Furthermore, in the cases of Head of State or Government, arrest of this individuals in foreign jurisdictions would be tantamount to an international overthrow.

There were also references to the cases of *Milosevic* (President of Serbia at the time of indictment) of the ICTY and *Charles Taylor* (President of Liberia at the time of indictment) of the Special Court for Sierra Leone.[384] The difference between Nuremberg, Tokyo, ICTY and ICTR proceedings and the ICC was that with respect to the former group "*the instruments in question, to the extent that they can be construed as removing immunity, were binding on the relevant States.*"[385] With respect to the ICTY and the ICTR the legal force was deriving from the UNSC Resolutions which were binding upon member States by virtue of the UN Charter.[386]

Along the same line, AC and PTC cited to the *Arrest Warrant* judgement of the ICJ[387], which was also relied on by the SCSL in *Charles Taylor*.[388] However, the references to *Arrest Warrant* omits a nuance in the judgement. As it appears, both the ICC and the SCSL construed the *Arrest Warrant* as if the ICJ concluded that immunities would be inapplicable before *any* international criminal tribunal. Yet, the relevant part of the ICJ judgement was only an exemplary enumeration which the ICJ presented to demonstrate that jurisdictional immunities do not equate with impunity due to their relative, functional, and temporary status.[389]

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[383] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3 (International Court of Justice 24 May 1980), para. 91; Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 426, 433; Sompong Sucharitkul, 'The Principles of Good-Neighborliness in International Law', **Publications**, vol. 559, 1996.
[384] Judgement in the Jordan Referral re Al-Bashir paragraphs 107–109. paras. 107-109.
[385] Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At Long Last . . .) But Gets the Law Wrong'.
[386] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 439.
[387] Corrigendum to the 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 paragraphs 32–33. paras. 32-33.
[388] Judgement in the Jordan Referral re Al-Bashir paragraphs 102, 109–110. See for the criticism of *Arrest Warrant,* Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 436–38.
[389] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 437.

In *Arrest Warrant*, the ICJ stated that "*an incumbent or former Minister for Foreign Affairs **may be** subject to criminal proceedings before **certain international criminal courts**, where they have jurisdiction*".[390] When read in its given context, the judgement did not state that *any and all international criminal court* shall have the authority to set aside international immunities for everyone. In that regard, "*the ICJ was simply acknowledging the fact that certain international institutions did not provide for head of State immunity*."[391] Schabas commented that this sentence was implying that "*(…) immunity would remain before 'certain international criminal courts'.*"[392] The proper interpretation of the relevant part of the judgement justifies and explains the prosecution of heads of states of SPs to the RS due to their commitment to the ICC. However, this paragraph does not justify the prosecution of heads of states of non-SPs *simply because the ICC is an international criminal court*.[393]

As a last point, international courts are creations of States. As the legal principle *nemo dat non quod habet* dictates[394], no State can endow the rights and powers, which the State does not possess originally, to another international law person. Overall, this perspective omits that adopting this international court exception creates the risk which only two states could establish an ICT[395] to prosecute foreign officials which they would not have prosecuted individually.[396] After all, the alleged independence and impartiality of an ICT would only be a "motivation" for a State to waive its immunities before this ICT. The very existence of an ICT and its assertion

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[390] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002 (International Court of Justice 14 February 2002). (emphasis added)

[391] Dov Jacobs, 'Immunities and the ICC: My Two-Cents on Three Points', **Spreading the Jam**, 10/09/2018.

[392] Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes'.

[393] Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At Long Last . . .) But Gets the Law Wrong'; Prosecutor v Radislav Krstic, Decision on Application for Supboenas, Dissenting Opinion of Judge Shahabuddeen, IT-98-33-A (ICTY Appeals Chamber 1 July 2003). paras. 11-12: "*Second, it may be said that the Appeals Chamber in Blaskic would have appreciated that any functional immunity of State officials automatically disappeared with the establishment of international criminal courts. In my view, however, there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts*."

[394] Aaron X. Fellmeth, Maurice Horwitz, **Guide to Latin in International Law**, New York: Oxford University Press, 2009, p. 194.

[395] "*An 'international court' (…) is an adjudicatory body that exercises jurisdiction at the behest of two or more states*." Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1 (ICC, Appeals Chamber 6 May 2019). para. 56.

[396] Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 443–44; Dov Jacobs, 'You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case', **Spreading the Jam**, 06/05/2019; Schabas, 'Obama, Medvedev and Hu Jintao May Be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes'.

of independence and impartiality would not explain "*the legal basis or origin for the alleged exception*".[397] Accordingly, article 27 of the RS should be interpreted as an *a priori* waiver of immunity of SPs limited to the ICC.

iii. A more limited reasoning: implicit waiver of immunity by the UNSC

During an international event, DRC failed to arrest Al Bashir. Upon this failure, DRC justified its incompliance with reference to the AU decision on the preservation of head of state immunity of Al Bashir. On 09 April 2014, PTC II issued a decision concluding that Al Bashir did not have head of state immunity before the ICC because UNSC Resolution 1593 "implicitly waived" the immunity of Al Bashir horizontally, i.e., between Sudan and SPs to the RS.[398] This decision might be considered as a more limited reasoning compared to other immunity decisions given in the *Al Bashir* case. First of all, PTC II accepted that head of states have immunity before "national courts of foreign States". Yet, the Chamber did not argue, as it had argued in the *Malawi* decision, that these immunities were inapplicable before international courts. Secondly, it openly engaged in the interplay between articles 27(2) and 98(1) of the RS. The Chamber conceded that, in principle, the exception to immunities in article 27(2) of the RS applies only to SPs. Lastly, the Chamber concluded that the conflicting obligations of DRC does not solely emanate from an AU-ICC conflict. On the contrary, the conflict is between the AU-UN obligations, which the latter waived the immunity of Al Bashir and overrides the obligations of DRC stemming from the AU by virtue of article 103 of the UN Charter.

Though this reasoning appears as more nuanced and limited than other alternatives, there are still certain fundamental shortcomings. Firstly, PTC II did not confront with the *Malawi* decision. In that sense, it did not take a position whether international immunities were inapplicable before "international courts" due to their very nature. However, it appears that PTC II abandoned this argument implicitly. Secondly, in order to defeat the arguments of the DRC that the AU had taken decisions to retain the head of state immunity of Al Bashir, PTC II put forward articles 25 and 103 of the UN Charter. However, Resolution 1593 did not impose an obligation to any

[397] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 442.
[398] Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (ICC (Pre-Trial Chamber II) 9 April 2014). para. 29.

State but Sudan. In that sense, the DRC did not have an obligation stemming from Resolution 1593 that would fall under articles 25 and 103. Nonetheless, PTC II held the DRC accountable for "disregarding" UNSC Resolution 1593.[399]

The core of the issue is whether the argument that the UNSC implicitly waived the immunity of Al Bashir can be sustained. PTC II assumed that by obliging Sudan to comply with the ICC, the UNSC waived the head of state immunity of Al Bashir. The shortcomings of this conclusion are multi-layered. First of all, PTC II assumed that the UNSC had the legal power to waive a right of a State, which is essential for being an independent and sovereign State. This assumption purports an essential shift of perspective concerning the powers of the UNSC. This assumption claims that the UNSC can "act on behalf of a State". Apparently, acting on behalf of a State is different than imposing an obligation upon a State as an international organisation. In that sense, while some argued that the UNSC has such powers[400], others claimed the opposite[401]. Overall, the PTC ignored the difference between an actual waiver of immunity and an obligation to waive immunity. Furthermore, it might even be contested whether Sudan had an obligation to waive immunity internationally, or only an obligation to arrest Al Bashir nationally.

The second issue is, if the UNSC has this power, whether it should be used explicitly. One point of view asserted that due to not being a fundamental human right, waiver of head of state immunity does not require to be explicit.[402] Other view argued that as Vienna Convention on Diplomatic Relations prescribed, waiver of immunity from jurisdiction, must be explicit (express) and interpreted strictly.[403] Moreover,

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[399] cited, para. 32.
[400] Cryer et al., *An Introduction to International Criminal Law and Procedure*, p. 441; Talita de Souza Dias, 'The "Security Council Route" to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit Must Security Council Resolutions Be?', **EJIL: Talk!**, 19/09/2018; Galand, 'Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third "Security Council Route"'.
[401] Balingene Kahombo, 'The Theory of Implicit Waiver of Personal Immunity: Commentary on the Decision on the Obligation for South Africa to Arrest and Surrender President Omar al-Bashir of Sudan to the International Criminal Court', **Recht in Afrika – Law in Africa – Droit En Afrique**, vol. 18, 2015, pp. 195–96; Jacobs, 'Immunities and the ICC: My Two-Cents on Three Points'.
[402] Dias, 'The "Security Council Route" to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit Must Security Council Resolutions Be?'
[403] 'Vienna Convention on Diplomatic Relations', United Nations, Treaty Series, vol. 500, p. 95. (1961), art. 32. *"(2) Waiver must always be express.*"

Resolution 1593 required waivers of exclusive jurisdiction to be express.[404] Apparently, a UNSC which requires waivers from exclusive jurisdictions to be express, which is not prejudicial for states *per se*, cannot be deemed to have only implied a waiver of head of state immunity, which is of vital importance for state sovereignty.

The last issue is whether the UNSC had actually contemplated to waive immunities of Sudanese officials. In that sense, the UNSC had not taken any additional step to clarify Resolution 1593, or to support the ICC investigations. It has been stated that, with respect to this question, the ICC might have actually asked for the intentions of the then UNSC member states.[405] Nonetheless, some of the UNSC member states such as Russia and China, African and Arab states generally, made contrary public statements.[406] With respect to the ICTY, Judge Shahabuddeen stated that "*there is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities.*"[407] Similarly, Resolution 1593's legal effect is nothing but a bare trigger mechanism for the ICC jurisdiction.[408]

Overall, the comparison between *Al Bashir* and *Milosevic* cases omits another important detail. The UNSC Resolutions establishing the ICTY and the ICTR had expressly decided that "*all States shall cooperate fully with the International Tribunal and its organs (…)*".[409] Accordingly, the UNSC did not "waive" immunities of state officials of former Yugoslavia or Rwanda. It only contemplated a higher international obligation of cooperation, due to article 103 of the UN Charter, upon all states, which would also be above the obligation to respect personal immunities of other states' officials. In that sense, these Resolutions were not abstract waivers of immunities decided on behalf of a state. On the contrary, they were obligations of states decided

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[404] "*(…) shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State*." UNSC, 'Resolution 1593, S/RES/1593 (2005)', para. 6.
[405] Jacobs, 'Immunities and the ICC: My Two-Cents on Three Points'.
[406] UNSC, 'Records of 7963rd Meeting, UN. Doc. S/PV.7963', 08/06/2017.
[407] Prosecutor v Radislav Krstic, Decision on Application for Supboenas, Dissenting Opinion of Judge Shahabuddeen paragraph 12.
[408] Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', **Journal of International Criminal Justice**, vol. 7, no. 2, 2009, p. 324.
[409] UNSC, 'Resolution 827, S/RES/827 (1993)', 25/05/1993, para. para. 4; UNSC, 'Resolution 955, S/RES/955 (1994)', 08/11/1994, para. 2.

and imposed by an international organisation to cooperate with the Tribunals, even if that meant violating another treaty or customary international law obligation.[410] Considering that Sudan was the only State under obligation due to Resolution 1593, it appears unconceivable for other states to claim a higher obligation which is opposable to Sudan.

iv. The latest reasoning: assimilating Sudan to a State Party

Following the failure to arrest Al Bashir during the AU Summit in 2015, South Africa provided PTC with justification for its incompliance. South Africa challenged the proposition that the obligation to arrest Al Bashir was clear and certain. On 6 July 2017, PTC II concluded that South Africa violated its obligation to arrest Al Bashir. Based on the summarisation of the Court, South Africa objected PTC I's Malawi and Chad decisions for "*conflat(ing) the presence of jurisdiction of an international court with the absence of immunity from national jurisdiction*", PTC II's lack of reasoning in the DRC decision concerning the Resolution 1593's effect of waiver of immunity, and the argument that the UNSC has the authority to waive immunities of heads of states.[411] South Africa asserted that the obligation to waive immunity of Al Bashir was the responsibility of Sudan towards the UNSC. Accordingly, as Sudan has not waived head of state immunity of Al Bashir, customary international law prevents South Africa to arrest Al Bashir. "*To hold otherwise is, in the words of South Africa, "to thrust the responsibility of the Council for acting against noncompliance with duties on Sudan onto individual states".*"[412] In other words, it was UNSC's mandate to act upon the incompliance of Sudan with the ICC. If it had wished so, the UNSC could have compelled all member states to carry out Al Bashir arrest warrants.

South Africa's arguments were neatly delineating the source, basis and target of these international obligations, which have never been done by the ICC. South

[410] See for the application of article 103 of the UN Charter with respect to customary international law rules. Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', 13/04/2006, para. para. 345; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', **Journal of International Criminal Justice**, vol. 7, no. 2, 2009, p. 348.
[411] Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09 (ICC (Pre-Trial Chamber II) 6 July 2017).
[412] cited, para. 34.

Africa also requested the Court to ask an authoritative interpretation of Resolution 1593 from the UNSC, including by calling upon the UNSC to request the ICJ for an advisory opinion.[413] Accepting that Resolution 1593 created an obligation to waive immunities for Sudan was the outermost, yet an acceptable, conclusion. However, the more prudent approach would limit the cumulative effect of Resolution 1593 and Al Bashir arrest warrants to an obligation upon Sudan to arrest Al Bashir directly. Considering that Al Bashir had no international immunity before Sudan, it was redundant and cumbersome to deem Sudan under an obligation to waive head of state immunity of Al Bashir in order to allow foreign states to arrest its head of state, while Sudan itself could carry out the arrest warrants internally without a waiver.

Following these challenges, instead of engaging, PTC II renounced its previous reasonings. Firstly, PTC II openly renounced the argument that international immunities were inapplicable before international courts without admitting the fact that this was once the position of the ICC: "*The Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court.*"[414] Secondly, PTC II found it unnecessary to determine whether the UNSC had actually waived the immunity of Al Bashir: "*The majority of the Chamber clarifies that, indeed, it sees no such "waiver" in the Security Council resolution, and that, in any case, no such waiver – whether "explicit" or "implicit" – would be necessary.*"[415]

The new reasoning was treating Sudan as, if it was, a SP to the RS: "*The Chamber finds, by majority, that the necessary effect of the Security Council resolution triggering the Court's jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute.*"[416] According to this reasoning, which was decided by only two judges, Sudan's being analogous to a SP would mean the applicability of article 27(2) and inapplicability of 98(1) of the RS to Sudan.[417] This was certainly an unprecedented

[413] cited, para. 41.
[414] cited, para. 68.
[415] cited, para. 96.
[416] cited, para. 88.
[417] cited, paras 90–106.

approach, which would have required extensive and skilful legal reasoning. However, PTC II confined itself to reason this assumption with two self-evident and inconclusive sentences: "*It is acknowledged that this is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such. Nonetheless, the finding of the majority of the Chamber in this respect is in line with the Charter of the United Nations, which permits the Security Council to impose obligations on States.*"[418] This approach was criticised for accepting that the UNSC had the power to deem a State akin to a party to an international treaty involuntarily against the "*general rules of international law, such as relative effects of treaties*", and not referring to any legal authority on that effect or presenting "*counter arguments to its position on such a fundamental issue."* [419]

The PTC reached this conclusion in the simplest way: As Sudan has a duty to cooperate with the Court and the Court have jurisdiction over the situation in Darfur, the RS applies in its entirety, except for certain SP specific articles, to the situation. The overall confusion in the ICC reasoning stems from the fact that the ICC has meshed several different concepts into one and treated the RS as a simple monolithic legal instrument. First of all, the ICC brought three distinct concepts together recklessly: 1) jurisdiction of the ICC; 2) duty of cooperation of SPs; 3) waiver of immunities of state officials.[420] The presence or absence of one of these concepts do not necessarily require the presence or absence of another one. Firstly, the Court claims that when it has jurisdiction, no immunity stands. However, this reasoning disregards a well-established differentiation, as ICJ stated in *Arrest Warrant*: "*It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.*"[421] Accordingly, it is paradoxical to exclude immunity due to jurisdiction, because

[418] cited, para. 89.
[419] Yudan Tan, 'The ICC South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation', **Amsterdam Law Forum**, vol. 10, no. 2, 2018, pp. 72–77; Dov Jacobs, 'The ICC and Immunities, Round 326: ICC Finds That South Africa Had an Obligation to Arrest Bashir but No Referral to the UNSC', **Spreading the Jam**, 06/07/2017; Abel Knottnerus, 'The Immunity of Al-Bashir: The Latest Turn in the Jurisprudence of the ICC', **EJIL: Talk!**, 15/11/2017.
[420] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa paragraph 450. para. 448. "*That is to say, a claim of immunity will not bar the Court from the exercise of the jurisdiction that it has*."
[421] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002 (The International Court of Justice 14 Şubat 2002) para. 59.

immunity is by definition "immunity from jurisdiction". In that sense, immunity would only apply when there is a basis of jurisdiction. Moreover, equating jurisdiction and duty to cooperate is also misleading, as there might be cases where the ICC has jurisdiction, yet the territorial state does not have an obligation to cooperate, e.g., Burundi and Philippines due to their withdrawals from the RS.

The second issue is that the ICC substantially disregarded the different features of the RS provisions. In broad terms, the RS provisions may be divided into two categories: 1) objective provisions, and 2) subjective or state-sensitive provisions. The first category relates to provisions which their form and content do not depend on the party status of a particular state: definitions of crimes (arts. 5-8); powers, obligations and composition of ICC organs (arts. 15, 34-52), procedures of the Court (arts. 17-19, 53-85); status and rights of individuals i.e., suspects, defendants, witnesses, victims (arts. 20-26). On the other hand, state-sensitive provisions are those provisions which their application depends upon the party status of a particular state to the RS: budgetary issues (arts. 113-118); ASP rights and obligations (arts. 112); duty to cooperate (arts. 86-111); waiver of immunity (arts. 27(2)); and determination of jurisdiction (arts. 12). The Chamber adopted this differentiation, yet only partially. PTC II admitted that the RS provisions relating to right to vote in the ASP and pay contributions for ICC expenses would not apply to Sudan.[422] However, the Chamber reached this conclusion with sheer intuition without providing a theoretical framework of this differentiation.

v. All-inclusive reasoning: Appeals Chamber's approach

On 11 December 2017, PTC II concluded that Jordan violated its obligation to arrest Al Bashir when he was in Jordan on 29 March 2017 for the 28th Summit of the Arab League in Amman. Jordan had asserted two grounds for international immunity of Al Bashir from arrest in Jordan: 1) customary international law, 2) the 1953 Convention on the Privileges and Immunities of the Arab League.[423] One major mistake in this proceeding was PTC II's inability to determine whether Sudan was a

[422] Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir paragraph 90.
[423] Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir paragraph 15.

SP to the 1953 Convention.[424] This mistake was due to a translation error and was admitted by PTC II in its decision granting Jordan leave to appeal.[425] The level of misconduct on deciding such an important issue without conclusively determining such a crucial yet simple fact speaks for itself. However, PTC II attempted to disregard the importance of the neglect on the ground that this would not change the decision due to the application of article 27(2) of the RS for Sudan.[426]

As the last judgement on this issue, on 6 May 2019, AC upheld the PTC II *Jordan* judgement.[427] There were positive developments in the ICC reasoning in terms of including different *amicus curia* observations. However, the reasoning was considered to be "*so confused and unsatisfactory*"[428] which is considered as "*likely to stiffen opposition to the Court by non-parties*."[429] As to the bizarre method used in the reasoning, AC relied considerably on the reasoning in the *Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa*.[430] Taking cognizance of the fact that this joint opinion consisted of the opinions of four out of five judges of AC, by referring to this opinion, AC appeared to have outsourced its obligation to reason its judgement to the individual opinions of judges presented jointly.[431] Another bothersome aspect of this reasoning was the features of the citations. In the discussion concerning the inapplicability of *ratione materiae* and *ratione personae* immunity distinction, the judges cited to 'Alexander Hamilton', 'Vattel', 'President Truman' and 'Lord Chief Justice Coke's address to King James'.[432] Though might be slightly relevant, solely relying on these distant, inconclusive and nonrepresentative sources to attain the desired goal on such a modern and complicated legal matter appears as cherry-picking and poor legal reasoning.

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[424] "*Therefore, the Chamber is unable to conclude that it has been established before it that Sudan is a party to the 1953 Convention*." cited, para. 30.
[425] Decision on Jordan's request for leave to appeal, ICC-02/05-01/09 (ICC (Pre-Trial Chamber II) 21 February 2018). para. 8.
[426] cited, para. 10.
[427] Judgement in the Jordan Referral re Al-Bashir.
[428] Jacobs, 'A Sad Hommage to Antonio Cassese: The ICC's Confused Pronouncements on State Compliance and Head of State Immunity'.
[429] Dapo Akande, 'ICC Appeals Chamber Holds That Heads of State Have No Immunity under Customary International Law Before International Tribunals', **EJIL: Talk!**, 06/05/2019.
[430] Judgement in the Jordan Referral re Al-Bashir paragraphs 113, 114, 116, 139. "*As shown in more detail in the Joint Concurring Opinion*"; "*As further explained in the Joint Concurring Opinion (…)*"; "*As fully explained in the Joint Concurring Opinion (…)*".
[431] Jacobs, 'You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case'.
[432] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa paragraphs 239–252.

The AC concluded that there was more than one reason for the absence of head of state immunity of Al Bashir before the ICC. Except the implicit waiver of immunity by the UNSC argument, the AC endorsed the other two PTC reasonings.[433] The above criticisms for these reasonings are, *mutatis mutandis*, applicable for the AC. Yet, a few new points can be mentioned. The AC concluded that "*there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court.*"[434] As it appears, the AC blatantly ignored the African and Arab states, which consistently claimed the head of state immunity of Al Bashir before the ICC. Aside from all of the reasoning adopted by the ICC, this attitude might be the real "legal neo-colonialism", which disregards the practice and opinions of certain states in the formation of CIL.

The AC definition of "international court" which, according to the AC, is capable to remove immunities automatically, can be established only by two states, and these courts do not have to apply public international law to be regarded as an international court. In other words, the AC claims that two states can establish an "international court", endowed it with universal jurisdiction, adopt the national law of one of these states as its substantive law, yet still allow it to prosecute anyone without any limitation. Apparently, such an attempt would constitute a *fraus legis facta*[435], to the effect that states would establish "front international courts" to prosecute foreign state officials, which they could not have done through their national courts. In line with that, the Chamber's findings that such international courts would "*exercise jurisdiction at the behest of two or more states*" and that they would still have a universal character are fundamentally contradictory.[436] According to the AC, all it matters is a discourse of "universality" adopted by the constituting states.

Additionally, the AC adopted another reasoning contending that due to its adherence to the Genocide Convention, Sudan cannot invoke head of state immunity before the ICC for the accusation of genocide. This reasoning was previously adopted by Judge Marc Perrin de Brichambaut in his minority opinions to PTC II *South Africa*

[433] Judgement in the Jordan Referral re Al-Bashir paragraphs 1–7.
[434] cited, para. 113.
[435] Fellmeth, Horwitz, *Guide to Latin in International Law*, p. 113.
[436] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa paragraphs 56–57.

and *Jordan* decisions. The problem of this reasoning is its stark contradiction with the *Arrest Warrant* judgement of the ICJ in terms of the effect of having an obligation to prevent and punish international core crimes, such as genocide, upon the immunities. According to the AC, as a party to the Convention against Genocide, Jordan was under an obligation to cooperate with the ICC due to the allegation of crime of genocide against Al Bashir.[437] The only problem here is not the disparity between the jurisprudence of these two international courts. The problem is that when it considered it to its benefit, the ICC made use of the *Arrest Warrant* in a manner that fitted to its purpose. However, for other parts of the same judgement, the ICC did not embark on a legal reasoning so as to explain why it has diverged from it.[438] Even though *Arrest Warrant* only referred to foreign national courts, the ICJ stated that simply being a party to the Convention against Genocide does not endow a state the right to ignore diplomatic immunities or head of state immunity of other states. It has been stated that "*ius cogens concerns the prohibition on committing the act, not the manner or timing of prosecution.*"[439] Nonetheless, it appears that the Appeals Chamber found it unnecessary to reason that conclusion further.[440]

b. The responses of the African States

The ICC has been criticised by scholars and African States[441] concerning the legal reasoning given to the arrest warrant of Al Bashir and the ensuing non-compliance decisions issued for SPs. The issue of the immunity of serving heads of non-SPs to the RS before the ICC has been the main challenge voiced by African States.[442] The AU consistently requested the UNSC to use its power under article 16 of the RS to defer certain cases in the situations of Sudan, Kenya, and Libya. Yet, none of these requests were answered affirmatively. In this respect, the AU has decided to call on its members to not comply with the ICC arrest warrants for al-Bashir, Kaddafi,

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[437] Judgement in the Jordan Referral re Al-Bashir paragraph 161.
[438] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) paragraph 59.
[439] Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 427–28.
[440] Jacobs, 'You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case'.
[441] As an African country, Botswana took the opposite position with respect to the AU decision of non-compliance. Peter Clottey, 'Botswana Supports International Criminal Court', **VOA**, (07/10/2013); Botswana Government, 'Statement on the Withdrawal of South Africa from the Rome Statute of the International Criminal Court (ICC)', 25/10/2016, https://www.facebook.com/Botswana.Government/posts/1120005841415406.
[442] African Union, 'Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1(Oct.2013),' 12/10/2013, para. 9.

and Kenyatta.[443] However, the AU did not maintain that position for Libya and Kenya, also no such appeal was made with regards to the entire Sudan situation.[444] Accordingly, the AU defended the actions of Chad, Kenya, Djibouti and Malawi[445] of receiving former President al-Bashir as in accordance with their obligations under "*Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions*".[446]

Also, the AU sought for the clarification of the relationship between articles 27 and 98 of the RS concerning the immunities of officials of non-SPs to the RS.[447] The AU claimed that by referring the situation to the ICC, the UNSC intended that the RS would be applicable, including article 98, which interpreted as reaffirming the immunity of the officials of non-SPs.[448] Upon the decisions of *Chad* and *Malawi*, the AU Commission issued a press release criticising the decisions as "*(i) purporting to change customary international law in relation to immunity ratione personae; (ii) rendering Article 98 of the Rome Statute redundant, non-operational and meaningless (…)*". In that sense, the AU expressed that head of state immunities of non-SPs cannot be removed by a treaty which they are not a party of. Moreover, the AU declined the argument that the UNSC had removed the immunities implicitly by referring the situation, saying that such removal had to be explicit.[449]

In 2009, the AU sought the empowerment of the African Court of Justice and Human and Peoples' Rights to try serious international crimes committed on Africa in order Africa's interests to be fully defended and protected in the international judicial

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[443] The legal nature of the AU decision has also been debated from the perspective of the AU Constitutive Act. Dapo Akande, 'The African Union Takes on the ICC Again: Are African States Really Turning From the ICC?', 26/07/2011.
[444] Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?', 08/02/2012.
[445] African Union, 'Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', Doc. EX.CL/710(XX), Assembly/AU/Dec.397(XVIII), 29/01/2012, para. 7.
[446] African Union, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)', Doc. EX.CL/670(XIX), Assembly/AU/Dec.366(XVII), 2010, para. 5.
[447] Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?'
[448] African Union, 'Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', para. 6.
[449] Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?'

system.[450] In line with that, in June 2014, the AU adopted the Malabo Protocol to realise this project. Though not in force, the Protocol contemplated complete immunity for serving senior state officials.[451]

In 2012, the AU considered the option of requesting an advisory opinion from the ICJ concerning the immunities of state officials under international law.[452] Moreover, after the 2019 AC *Jordan* decision, it was expected the AU to ask for an advisory opinion, as the AU have nothing to lose at the moment[453], through the UNGA if it can gather sufficient support.[454] However, it was stated that, as having a discretion to give an advisory opinion, the ICJ might refuse to give an advisory opinion out of judicial comity.[455] Differently, Gevers also argued that Sudan might bring this issue to the ICJ as a contentious case by filing a case against one of the "*countries subject to PTC decisions such as Kenya and Malawi*" with the risk of being bound by an adverse judgement.[456] The advantage of the ICJ to address the issue is that it would be able to decide from the perspective of customary international law contrary to the ICC which is specifically tied to the RS.[457] The last proposed approach is the AU to refer the matter of relationship between articles 27 and 98 of the RS to the ASP through article 119 of the RS. However, in order for that option to be workable it must be decided that the issue is not pertaining to the judicial functions of the Court.[458]

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[450] African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', para. 5.
[451] 'The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol)', art. 46A bis. "*No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*" *See* for the criticism of the AU's approach to immunities Clarke, 'African Withdrawals and Structural Inequities', pp. 120–24.
[452] African Union, 'Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', para. 10; African Union, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)', 15/07/2012, para. 3.
[453] Akande, 'ICC Appeals Chamber Holds That Heads of State Have No Immunity under Customary International Law Before International Tribunals'; Jacobs, 'You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case'.
[454] Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?'
[455] ibid.
[456] Christopher Gevers, 'Updated: Africa's ICC Gripes Heading to the ICJ?', **War and Law**, 02/02/2012.
[457] Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?'
[458] Gevers, 'Updated: Africa's ICC Gripes Heading to the ICJ?'

On the flip side, Scheffer criticised African SPs for not availing themselves of their referral powers under the RS for situations outside of Africa. Such referrals would eliminate the need of an authorisation from the PTC, hence expediate the initiation of investigations. Moreover, such referral powers could have also been used for situations which were already under preliminary examination. The referrals and the insistence of SPs to initiate investigations for different situations around the world would both compel and facilitate the decisions of the Prosecutor.[459] Though appearing as a valid way for ensuring equality before the ICC, African SPs might not have resorted to this way due to two possible reasons: 1) not to provide legitimacy to the ICC by referring situations, or 2) not to start a diplomatic problem with the state hosting the situation.

c. Overview of the ICC reasoning

A review of the reasoning adventure of the ICC on head of state immunity reveals that the dominant method used by the ICC was "trial and error". The first arrest warrant was released without paying due regard to this most vital issue, and all the following reasoning adopted a different approach, too often at the expense of renouncing a previous one. It is understandable for a court to change its reasoning on a matter based on reasonable grounds. However, the Court has seldom explicitly adopted changing its approach, and never provided a clear explanation for changing its approach multiple times. This "*may undermine the predictability of its law*".[460] From a wider perspective, it seems that as if the ICC was highly committed to capture Al Bashir but was not able to decide on what grounds. Accordingly, these changes in the reasoning have never taken the form of an admission of immunity of Al Bashir. Although the ICC has always been committed to the conclusion, it has been highly indecisive in terms of reasoning, which makes one to question whether the ICC reaches legal conclusions through legal reasoning, or legal reasonings through *a* legal conclusion. It seems the latter.

For example, this can be embodied through an individual judge. In the 2011 *Malawi* decision, Judge Tarfusser adopted the customary status of the absence of

[459] David Scheffer, 'Three Realities about the Africa Situation at the ICC', **The International Criminal Court: Contemporary Challenges and Reform Proposals**, ed. by Richard H. Steinberg, Leiden; Boston: Brill Nijhoff, 2020, pp. 128–30.
[460] Tan, 'The ICC South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation', p. 77.

immunities before international courts; in the 2014 *DRC* decision, the argument of implicit waiver of immunities due to referral resolution of the UNSC; in the 2017 *South Africa* decision, Sudan as akin to a SP to the RS by virtue of the UNSC resolution.[461] Overall, these constant changes in the reasoning of the ICC raises another important issue. While the ICC repeatedly ordered African states to arrest Al Bashir by asking them to trust the Court's judgement and reasoning, the ICC constantly changed its reasoning when faced with a well-defended position to one of its previous reasoning. Every change in the reasoning was a reversal of the previous one. However, it was not predetermined that the ICC would reach the same conclusion despite the change in the reasoning. Accordingly, the Court was acknowledging in every reasoning that any State to arrest Al Bashir would have done so based on a "wrong" legal basis, hence would have left the arresting state alone with the legal and political consequences.

[461] Jacobs, 'The ICC and Immunities, Round 326: ICC Finds That South Africa Had an Obligation to Arrest Bashir but No Referral to the UNSC'.

III. EVALUATION OF CERTAIN RECENT DEVELOPMENTS IN THE ICC

"*One eye the blind wanted, two eyes the God granted.*"

Turkish Proverb

Under the RS, SPs did not delegate universal jurisdiction to the ICC, despite the fact that it was discussed during the Rome Conference.[462] Instead, SPs delegated a limited jurisdiction to the ICC based on the principles of territoriality and active personality. In this Chapter, legal and policy approaches of the ICC towards two recent investigations into the situations of Afghanistan and Myanmar/Bangladesh will be critically analysed in terms of their compatibility to general international law, the RS, other constituent instruments of the ICC and the requirements of legal reasoning. These analyses will be carried out in an attempt to discover whether the Court has been trying to expand its jurisdiction through judicial activism[463] in order to defend itself from two prominent legitimacy challenges posed against the Court: "African bias" and "neo-imperialism".

Both situations will be analysed in accordance with the same scheme. First of all, the factual basis of the situations will be summarised, which will be followed by the procedural histories of these investigations before the ICC. Later, the controversial argumentations of the organs of the ICC will be presented in the form of lines of argumentation. Lastly, critical analyses of these argumentations will be conducted so as to assess their compatibility with various legitimacy related elements explained in the first chapter. The italicised sentences in the review parts will amount to the summaries of the ICC arguments.

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[462] Rome Statute, art. 12(2); Cryer et al., *An Introduction to International Criminal Law and Procedure*, pp. 40–42; Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 118.

[463] Fuad Zarbiyev, 'Judicial Activism in International Law--A Conceptual Framework for Analysis', **Journal of International Dispute Settlement**, vol. 3, no. 2, 2012, pp. 247–78.

A. The Situation in Afghanistan

The situation in Afghanistan is concerned with the NIAC between the Afghan forces, US forces and international armed forces on the one hand, and Taliban, Al-Qaida, and other anti-governmental armed forces on the other hand.[464] The present situation has started after the US invasion of Afghanistan following the 11 September 2001 attacks in the US territory which were suspected to be carried out by Al-Qaida operating in Afghanistan under the protection of the then Taliban Government of Afghanistan.[465] After ousting the Taliban Government; the US and the international armed forces, authorised by the UNSC, continued to support the new Afghan Government.[466]

In this situation, the OTP identified four groups of culprits: 1) Taliban and other anti-governmental armed organizations, 2) Afghan Forces, 3) US Forces and the CIA, 4) Members of international armed forces. However, the OTP did not find reasonable basis to proceed with an investigation for the alleged acts of members of international armed forces.[467] In this situation, the ICC has revised its prosecutorial strategy by including different parties of an armed conflict in the investigation.

1. Procedural History

In 2003, Afghanistan became a party to the RS. In 2006, the OTP initiated a preliminary examination with respect to the situation in Afghanistan which was ongoing since 2001. On 20 November 2017, the OTP south for an authorisation for initiating an investigation. On 12 April 2019, PTC II rejected the Request. However, on 5 March 2020, the AC overruled the PTC decision, and authorised the investigation.[468]

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[464] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 (ICC, Office of the Prosecutor 20 November 2017) paras. 1-6.
[465] cited, para. 15.
[466] cited, para. 17.
[467] cited, para. 253.
[468] Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4 (ICC, The Appeals Chamber 5 March 2020).

2. Outline of the Argumentation of the ICC

a. The Office of the Prosecutor

A. The OTP can investigate war crimes which were committed in a SP other than Afghanistan, so long as the victim is captured in association with the armed conflict in Afghanistan, even though the capture had taken place outside Afghanistan.

1. The application of rules of international humanitarian law is not limited to the territory of the State in which the armed conflict takes place.

2. The ICC can investigate war crimes that are committed within the context of *or* in association with an armed conflict which the Court has jurisdiction over.

3. War crimes of torture that were committed by the CIA in Romania, Latvia, and Poland (SPs to the RS) can be investigated by the ICC even though the victims were captured outside Afghanistan yet in association with the armed conflict in Afghanistan.

b. The Pre-Trial Chamber II

B. An investigation into a situation can only cover those incidents which were specifically identified by the Prosecution in the Request for Authorisation.

1. An investigation cannot include the incidents which are only "sufficiently" linked to those specified in the Request.

2. An investigation cannot include the incidents which take place after the Request is made.

C. The investigations which are not in the interests of justice cannot be authorised.

1. PTC has the authority to inquire whether an investigation is in the interests of justice.

2. There is no definition of the concept "interests of justice" in the constituent instruments.

3. There is no guidance in the constituent instruments concerning the meaning of the concept "interests of justice".

4. The concept must be interpreted based on the underlying objectives of the RS.

5. These are the underlying objectives of the RS: effective prosecution of the most serious international crimes, fight against impunity and prevention of mass atrocities.

6. Accordingly, in order for an investigation to be in the interests of justice, the investigation must, at the minimum, has the prospect of being effective and concluded in a reasonable time. (feasibility of the investigation)

7. According to the RS, the Court was not meant, or equipped, to investigate every and all serious international crimes which falls into its jurisdiction.

8. Opening investigations which are doomed to fail would damage the reliability and legitimacy of the Court, cause frustration and lead to hostility towards the Court.

D. An investigation into the situation in Afghanistan has no prospect of success, therefore would not be in the interests of justice, hence cannot be authorised.

1. The preliminary examination into the situation in Afghanistan has taken particularly long time.

2. Due to the elapsed time between the time of the crimes and a possible investigation, it is highly unlikely to collect and secure the required evidence for prosecution and conviction.

3. It cannot be expected the related States to cooperate meaningfully.

4. Without additional resources, the significant resources this investigation will require would force the OTP to divert its financial and human resources from investigations and cases that have a better prospect of success.

5. In conclusion, though the situation is in conformity with the requirements of jurisdiction and admissibility, an investigation into the situation in Afghanistan cannot be authorised due to not being in the interests of justice because of its prospect of failure.

c. The Appeals Chamber

E. With respect to the authorisation of an investigation *proprio motu*, PTC is not entitled to take into consideration of factors listed in article 53(1)(a) to (c) of the RS.

1. According to article 15(1) of the RS, the OTP has discretionary power to decide whether to initiate an investigation *proprio motu.*

2. Article 53(1) of the RS exclusively deals with the initiation of investigations following SP or UNSC referrals.

3. Regarding the authorisation of *proprio motu* investigations, PTC is not entitled to consider the factors set out in article 53(1)(a) to (c) of the RS.

3. Review of the Legal Reasoning of the ICC

a. The Office of the Prosecutor

A. The OTP can investigate war crimes which were committed in a SP other than Afghanistan, so long as the victim is captured in association with the armed conflict in Afghanistan, even though the capture had taken place outside Afghanistan.

This part of the Request aimed to investigate allegations of war crimes committed by the CIA against individuals suspected of having connection to al-Qaeda "core" or "central"[469] which were captured in Pakistan, or in other countries other than Afghanistan, and subjected to "torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence" in certain SPs other than Afghanistan, namely Romania, Latvia, and Poland.[470] In essence, the fundamental legal issue was related to the quality of nexus of the crimes with the armed conflict in order to qualify as a war crime. The OTP established this nexus with the following sentence: "*Thus, the capture of persons suspected of belonging to or being associated with the Al Qaeda leadership or with the Taliban in the neighbouring region of Pakistan or on the territory of other third States,* ***undertaken in the context of or associated with the ongoing armed conflict in Afghanistan****, and the later alleged mistreatment of such persons on the territory of a State Party, combine to provide the requisite nexus and jurisdictional base for the exercise of ICC jurisdiction.*"[471]

1. The application of rules of international humanitarian law is not limited to the territory of the State which the armed conflict takes place.

The OTP stated that "*(…) the transfer of a detainee outside of a theatre of armed conflict does not render the protections to which he/she is entitled under international humanitarian law inapplicable. Indeed, there is no territorial limitation on the application of common article 3 of the Geneva Conventions provided that the acts in*

[469] "*The terms Al Qaeda 'core' or Al Qaeda 'central' are used to differentiate between the historic group (and its eventual replacement) operating from Afghanistan and later from the Federally Administered Tribal Areas region in Pakistan, as distinct from other 'franchise' groups such as Al-Qaeda in the Arabian Peninsula or others claiming to act on behalf of Al-Qaeda or its ideology.*" Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan paragraph 61.
[470] cited, paras 189, 249.
[471] cited, para. 250. (emphasis added)

question take place in the context of an armed conflict."[472] There are three problems with this reasoning.

First of all, the present legal issue is not related to the legal classification of POWs (or detainees for NIACs) which were captured in the context of an armed conflict and transferred outside of the concerned territory. On the contrary, the legal issue is the legal classification of those who were captured completely outside of the armed conflict and the territory in question, yet whose capture was motivated by the armed conflict in question. In that sense, the proposition given by the OTP is mostly irrelevant to the present situation.

Secondly, it is not argued that the second sentence is incorrect. On the contrary, there are both treaty and case law in support of this proposition. The case of a detainee who was captured within the theatre of an armed conflict but transferred outside the territory/region to be subjected to torture, maybe to another state, is continued to be covered by international humanitarian law. The treaty law basis of this proposition is CA 3: "*To this end, the following acts are and shall remain prohibited* ***at any time and in any place whatsoever*** *with respect to the above-mentioned persons.*"[473]

Yet, the issue in the present situation is that those who were captured outside Afghanistan cannot be regarded as one of "the above-mentioned persons" *ab initio*, because their capture cannot be asserted to took place "in the context of an armed conflict". Moreover, the protection of detainees beyond armed conflict also resonates with two explicit rules of Additional Protocols which prescribe the continuing application of IHL for detainees after the end of the armed conflict.[474] Even without these explicit provisions, the protection of IHL to detainees who are captured in the context of an armed conflict yet are being detained extra-territorially would continue to apply in order to prevent belligerents to exploit this kind of a possible shortfall of IHL. As to the case law, *Hamdan* can be mentioned as the most relevant example of

[472] cited, para. 251.
[473] The Geneva Conventions of 1949, common article 3(1). (emphasis added)
[474] International Committee of the Red Cross (ICRC), 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)', 1125 UNTS 3 (1977), art. 3(b); International Committee of the Red Cross (ICRC), 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)', 1125 UNTS 609 (1977), art. 2(2).

this situation. This case was related to a Yemeni citizen who was captured during the armed conflict in Afghanistan yet transferred to Guantanamo Bay for detention. US Supreme Court ruled that the CA 3 was applicable to the detainee.[475]

Lastly, the problem of this paragraph is that it is implying the absence of a territorial limit for the entire IHL through arguing the limitless application of CA 3. In that sense, the last issue is concerned with whether the proposition that there is no territorial limitation to the application of IHL is well-founded, and if it is, what it means. The fundamentals of IHL requires the existence of a war, or with the contemporary usage, an armed conflict for the term "war crimes" to be meaningful. In that sense, the issue is how far this armed conflict can be from a crime so that the crime is to be considered as committed within the context of or during the armed conflict. Two possible answers can be provided for this question. The narrower answer is to apply IHL only to the theatre of armed conflict or its immediate vicinity. On the other hand, the broader answer was to apply IHL to "*the entire territory under the control of the warring parties*". In *Kunarac*, the ICTY Appeals Chamber adopted the latter. The purpose of this broader interpretation was to extend the protection of IHL. While the application of IHL to the entire territory of the warring parties was the broadest possibility; the argument that IHL has no territorial limit for war crimes is certainly unprecedented as it neglects the very foundation of IHL with respect to war crimes.[476]

The OTP mentions that "*after the fall of Taliban Government, Al Qaeda "core" fled to the Federally Administered Tribal Areas in Pakistan, where it continued its operations, including with respect to the ongoing armed conflict in Afghanistan*".[477] However, even though this fact establishes a relationship between Al Qaeda members in Pakistan and the armed conflict in Afghanistan, it does not assert that there was an armed conflict in this part of Pakistan, which is required for the application of IHL with respect to war crimes. Accordingly, unless it is substantiated that there was another armed conflict in the Federally Administered Tribal Areas in Pakistan, or that the NIAC in Afghanistan was spread to Pakistan, IHL would not be applicable to those

[475] Salim Ahmed Hamdan v. Donald H. Rumsfeld et al., 548 U.S. 557 (2006) (United States Supreme Court 29 June 2006).
[476] Prosecutor v. Kunarac et al., Judgement, IT-96-23 & 23/1 (ICTY Appeals Chamber 12 June 2002). para. 55-65.
[477] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan at 250.

who were captured in Pakistan by the CIA. *A fortiori*, this proposition applies to the detainees who were captured in other third countries, namely Iraq and the United Arab Emirates.[478]

2. The ICC can investigate war crimes that are committed within the context of or *in association with an armed conflict which the Court has jurisdiction over.*

This issue is related to the "contextual circumstances" of war crimes which were prescribed in the EOC expressly. According to article 8(2)(c)(i)-4 of the EOC, one of the contextual circumstances of the war crime of torture, which is identical for other war crimes, is that "*the conduct took place in the context of* ***and*** *was associated with an armed conflict not of an international character*."[479] Accordingly, these two circumstances must be sought for cumulatively.[480] However, throughout the Request, the OTP has used the conjunctions "or" and "and" haphazardly and inconsistently.[481]

The cumulativeness of these requirements, in fact, define and separate "war crimes" from "ordinary" or "common" crimes.[482] Using these two requirements as alternatives to each other has the effect of expanding the jurisdiction of the ICC and disturbing the fundamentals of international criminal law significantly. Their alternativeness allows these two sets of crimes to be considered as a "war crime" inaccurately: 1) Relying on only the requirement of "in the context of an armed conflict" would render every crime committed within the vicinity of an armed conflict a "war crime". For example, the murder of a civilian by another civilian based on a non-conflict related matter would be a war crime when it is committed within the territory of a State hosting an armed conflict. 2) Relying on only the requirement of "in association with an armed conflict" would render any crime, which were committed in conflict free territories, a war crime, so long as the perpetrator motivated

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[478] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan.
[479] Elements of Crimes, art. 8(2)(c)(i)-4, para. 5. (emphasis added)
[480] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 (ICC Pre-Trial Chamber II 12 April 2019).
[481] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan paragraph 124. "*The contextual elements for article 8(2)(c) and 8(2)(e) require,* inter alia*, that the conduct took place in the context of* ***or*** *was associated with an armed conflict not of an international character*." (emphasis added).
[482] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 63; Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 69; Triffterer, Ambos (eds.), **The Rome Statute of the International Criminal Court: A Commentary**, Third Edition C.H.BECK-Hart-Nomos, 2016, p. 314.

by an armed conflict ongoing on the far end of the world. To illustrate, the murder of an Afghan citizen by a US law enforcement officer within the territory of the US would be a war crime when the perpetrator thought that the murder of the victim would contribute to the efforts of the US Government to fight against terrorism in Afghanistan.

The importance of this cumulativeness and the meaning of "in the context of" for the drafters were expressed as follows: "*Some delegations had considered that the wording 'in the context of' alone would be too vague as it might be read as not requiring a specific, but only a temporal and geographical link to the armed conflict*."[483] Dictionary meaning of the phrase "in context" also verify this interpretation: "*While thinking about the group of conditions that exist where and when something happens*".[484] Accordingly, while this phrase points to the temporal and geographical link, the phrase "in association with" amounts to the functional and purposeful link of the crime to the armed conflict.

The AC quoted two paragraphs from the *Kunarac* decision of the ICTY Appeals Chamber concerning the nexus of certain crimes to an armed conflict. However, as stated by Judge Shahabuddeen, "*Caution needs to be exercised in extending the meaning of a judicial dictum to a field which was not in contemplation*".[485] Accordingly, precedents must be analysed in due consideration of the relevant facts and central legal issues. In *Kunarac*, the ICTY defined the limits of an armed conflict as: "*The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties*".[486] In this case, the legal issue in the two paragraphs cited by the AC was not related to whether the conducts of the perpetrators were "in the context of the armed conflict". On the contrary, this was resolved as the criminal conducts had been carried out in Foča which the armed conflict was considered to be present.[487] In this vein, the criminal conducts had taken place both at the time and location of the armed conflict.

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[483] Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, p. 316.
[484] 'In Context', **Merriam Webster's Dictionary**, https://www.merriam-webster.com/dictionary/in%20context.
[485] Dissenting Opinion of Judge Shahabuddeen, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (The International Court of Justice 8 July 1996).
[486] Prosecutor v. Kunarac et al., Judgement paragraph 64.
[487] ibid.

This sentence of the ICTY further supports this understanding: "*What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon* ***the environment – the armed conflict – in which it is committed***."[488] However, the legal issue in these cited excerpts of *Kunarac* was whether these conducts were "in association with the armed conflict." For that end, the ICTY listed some factors that might be helpful for establishing this "association": "*In determining whether or not the act in question is sufficiently* ***related to the armed conflict*** *(…)*".[489] (emphasis added)

However, in the Afghanistan situation, the legal issue was not related to whether the alleged war crimes of the CIA personnel were "in association with the armed conflict". On the contrary, the legal issue was whether they were "in the context of the armed conflict". All in all, the central legal problem in the Afghanistan situation was the meanings of these phrases: "the conduct which take place in the context of an armed conflict" and "the conduct which was associated with an armed conflict". The organs of the ICC could have reinterpreted these phrases within the context of the Afghanistan situation. Yet, none of the organs of the ICC (OTP, PTC, and AC) dealt with their meanings thoroughly. Instead, they preferred to change the wording of provisions of constitutive instruments or focus on secondary issues.

3. War crimes of torture that were committed by the CIA in Romania, Latvia, and Poland (State Parties to the Rome Statute) can be investigated by the ICC even though the victims were captured outside Afghanistan yet in association with the armed conflict in Afghanistan.

PTC II argued that the ICC would have jurisdiction only when the victims were captured in Afghanistan within the context of the armed conflict therein.[490] This understanding has merit in terms of two aspects of the Court's jurisdiction: *ratione loci* jurisdiction and *ratione materiae* jurisdiction. First of all, the *ratione loci* jurisdiction of the ICC requires that the criminal conduct of the perpetrator to be conducted within the territory of a SP. As Romania, Latvia and Poland are SPs to the RS, and as the OTP excluded the crimes committed within the territory of a non-SP, there is no legal

[488] cited, para. 58. (emphasis added).
[489] cited, para. 59.
[490] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 54.

problem in terms of the *ratione loci* jurisdiction of the Court. However, *ratione materiae* jurisdiction requires that the ICC investigate and prosecute only those crimes that are covered in article 5 of the RS. Accordingly, crimes that are not included in articles 6, 7 and 8 cannot be investigated by the OTP due to *ratione materiae* jurisdiction of the Court. As expressed above, when the legal elements of a crime in these articles, as provided in the EOC, is not found in a particular case, the ICC lacks *ratione materiae* jurisdiction. In conclusion, when the victims are captured in a conflict-free territory, the motivation of the capturers would not be sufficient to trigger the application of international humanitarian law.[491] Accordingly, in these cases, the ICC is lacking *ratione materiae* jurisdiction. However, the AC confined itself to mention of this important aspect only in a footnote.[492]

All in all, the fundamental problem with respect to the legitimacy of the ICC is not whether the alleged crimes of the CIA personnel can be considered as a war crime under the RS. As stated by AC, it might be reasonable to assess each particular case specifically in terms of their nexus to the armed conflict in Afghanistan.[493] The real problem is that the OTP rephrasing clear provisions of the constituent instruments in deliberately, and AC turning a blind eye to this practice instead of ensuring accountability and legality. This practice certainly goes against the precedent of AC, which was self-cited in this decision: "*The Appeals Chamber considers that any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement*."[494]

b. The Pre-Trial Chamber II

i. The scope of an authorised investigation

B. An investigation into a situation can only cover those incidents which were specifically identified by the Prosecution in the Request for Authorisation.

[491] cited, para. 55.
[492] Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan. fn. 103.
[493] cited, para. 76.
[494] Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", (ICC Appeals Chamber 15 June 2017).

As a fundamental issue, PTC II considered the process of authorisation as a "*filtering and restrictive function*".[495] However, there is no indication in the RS that PTC should act on with a restrictive mentality. On the contrary, the jurisprudence of the PTC reveals that the function of the PTC is to "*prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility*".[496]

1. An investigation cannot include the incidents which are only "sufficiently" linked to those specified in the Request.

Relying on the "*filtering and restrictive function of the proceedings under article 15"* and its rationale, PTC II stated that a possible authorisation could only cover the events and categories of event that have been specifically identified by the Prosecution. Accordingly, "*the authorization sets the framework of the probe*", hence those incidents not closely related with those identified and authorised would be subject to a new authorisation request. In this regard, the Chamber declined the request of the Prosecution to authorise an investigation that would be expanded or modified to those cases that are *sufficiently linked* to the authorised situation as that would be similar to a "blank cheque". According to the PTC what is required for a case to be considered within the scope of the authorised situation to have a "close link" with those specifically determined.[497]

The analogy of blank cheque implies a total arbitrariness in the interest of the person possessing the cheque. In that sense, the analogy is particularly problematic in terms of the perspective of the PTC towards the OTP. This approach has also been criticised by the LRV as deeming the investigations unduly cumbersome with unnecessary filings of repeated requests for authorisation, detrimental to judicial economy and as a cause of delay to delivery of justice. Moreover, the presumption that the Prosecutor could identify every incident during the preliminary examination disregards the realities of these situations. Lastly, limiting the scope of an investigation

[495] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraphs 32, 42.
[496] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09 (ICC Pre-Trial Chamber II 31 March 2010).
[497] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraphs 39–42.

would hinder the obligation of the Prosecutor to establish the truth.[498] Overall, close and constant monitoring of the Prosecutor by PTC for every single incident might jeopardise the independence of the Prosecutor.[499]

2. An investigation cannot include the incidents which take place after the Request is made.

The LRV and the Prosecutor stated that the exclusion of crimes that were to be committed after the date of the Request diminishes the deterrence effect of the Court which is one of "*the fundamental objectives of the Court*".[500]

ii. The concept of "the interests of justice"

C. Investigations which are not in the interests of justice cannot be authorised.

1. PTC has the authority to inquire whether a requested investigation would be in the interests of justice.

The PTC stated that the scope of the scrutiny of PTC is not limited to whether there is reasonable basis to believe such crimes have been committed, but beyond that, includes "*a positive determination to the effect that investigations would be in the interests of justice*".[501] The Government of Afghanistan concurred that the PTC is authorised to conduct an "unrestricted" supervision on request for investigations.[502] However, according to the jurisprudence of the Court, the PTCs have determined that there is no need, not even for the Prosecutor, to affirmatively determine that an investigation would serve the interests of justice.[503] In the Kenya authorisation decision PTC II concluded "(…) *that a review of this requirement is unwarranted in the present decision taking into consideration that the Prosecutor has not determined that an investigation "would not serve the interests of justice"(…)*".[504] In the same vein,

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[498] Rome Statute, art. 54(1)(a); Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 60.
[499] cited, para. 63.
[500] Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims, ICC-02/17 (ICC, The Appeals Chamber 22 October 2019).
[501] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 35.
[502] Written Submissions of the Government of the Islamic Republic of Afghanistan, ICC-02/17 (ICC, The Appeals Chamber 2 December 2019).
[503] Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC-02/11 (ICC Pre-Trial Chamber III 15 November 2011). paras. 207-208.
[504] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya paragraph 63. para. 63.

the LRVs stated that the PTC acted *ultra vires* by making its own interests of justice assessment *de novo*, contrary to the fact that the OTP found no substantial reasons to believe that the investigation would not serve the interests of justice.[505]

This issue is concerned with article 53 of the RS which prescribes the procedure of initiation of an investigation. According to this article, initiation and non-initiation of an investigation can only be based on specific grounds listed in this article. Article 53(1)(c) prescribes as follows: "*In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (c) 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.*"[506] Apparently, this provision addresses to the Prosecutor. The following sentence provides the next step of this process: "*If the Prosecutor determines that there is* ***no reasonable basis to proceed*** *and his or her* ***determination is based solely on subparagraph (c) above****, he or she shall inform the Pre-Trial Chamber*."[507] Accordingly, PTC comes into play only when the Prosecutor decides *not to* initiate an investigation. This proposition is further confirmed by article 53(3)(b) of the RS: "*In addition, the Pre-Trial Chamber may, on its own initiative, review* ***a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c)****. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber*."[508] According to the explicit wording of the RS, PTC is not entitled to determine whether an investigation *would be* in the interests of justice when the Prosecutor decides to proceed with an investigation.

2. There is no definition of the concept "interests of justice" in the constituent instruments.

PTC II was right about the lack of a definition of the concept "interests of justice" in the constituent instruments.[509] As constituting a key concept in terms of deciding not to initiate an investigation, the RS could have framed its contours. As it appears, the lack of a definition has created and will create legal problems. Despite the lack of a definition, the AC decided not to probe the definition of this concept.

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[505] Legal Representatives of Victims, Victims' Joint Response and Request for Reply in the Situation in Afghanistan, ICC-02/17 (ICC, The Appeals Chamber 22 October 2019).
[506] Rome Statute, art. 53(1)(c).
[507] Rome Statute, art. 53(1), last sentence. (emphasis added)
[508] Rome Statute, art. 53(3)(b). (emphasis added)
[509] ICC, Office of the Prosecutor, 'Policy Paper on the Interests of Justice', 09/2007, p. 2.

The AC confined itself to sharing some observations: 1) "interests of justice" is formulated in a negative way, therefore there was no requirement to search for it affirmatively, 2) the reasoning of PTC II was "*cursory, speculative and did not refer to information capable of supporting it*", 3) PTC II did not take into consideration of "gravity of crimes" and "interests of victims" while assessing the interests of justice. However, the AC did not embark on a detailed assessment of the concept of interests of justice on the ground that it had already upheld the first ground of appeal.[510] Considering that this concept constituted the focal point of the present dispute, the concept was deserving much more in-depth examination. This examination could have shed enormous light upon future investigations for both OTP and PTC. In that sense, defining a fundamental concept of the RS should be a more pressing concern than considerations of judicial economy.

That necessity appears to be even more striking considering the conflicting interpretations of the concept of interests of justice.[511] In addition to the interpretation of the PTC, there are other interpretations, as well. For example, Human Rights Watch and Amnesty International espoused a narrow interpretation of the concept.[512] Similarly, Koubaras argued that the VCLT interpretation of the concept does not allow national amnesties to prevent an ICC investigation.[513] On the other hand, there were

[510] Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraphs 48–50.

[511] "*We believe that the existence of regulations on the application of Article 53 could: ensure fairness and consistency in the way different cases are handled; help the prosecutor in the face of enormous pressure from the general public, the press, some NGOs and some victims to help maintain the impartiality of the OTP; and help in demonstrating that the ICC is a judicial institution and not prone to political manipulation.*" Human Rights Watch Policy Paper, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute', **Human Rights Watch**, 01/06/2005.

[512] ibid.; Amnesty International, 'Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice, AI Index: IOR 40/023/2005', 17/06/2005. Human Rights Watch's comment on the legitimacy of the ICC is of particular importance: "*Additionally, if one party to a conflict wanted to undermine the OTP's work, it could simply launch a new initiative purportedly aimed at achieving peace or announce that it will be carrying out destabilizing activities or preclude peace talks. The prosecutor should always attempt to steer clear of such politicization of his role, and should certainly not adopt a construction of "the interests of justice" that would favor such politicization. This type of politicization could in turn undermine the legitimacy of the Court if the OTP were to be perceived as a body responsive to political pressure.*"

[513] Michael Kourabas, 'A Vienna Convention Interpretation of the Interests of Justice Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A Great Qualitative Step Forward, or a Normative Retreat', **U.C. Davis Journal of International Law & Policy**, vol. 14, no. 1, 2007, pp. 59–94.

also broad interpretations of the concept.[514] For instance, Robinson stated that persons most responsible for international crimes who were subjected to democratically adopted, good faith national amnesties might not be prosecuted in the interests of justice by the ICC. Robinson interpreted the concept on the grounds of a broader understanding of the term "justice" than "retributive criminal justice".[515] Moreover, similar to the PTC, Heller argued that lack of resources would also lead an investigation to not be in the interests of justice.[516] The AU, taking into account of the ongoing peace efforts, interpreted the concept, in terms of the referral of the situation in Sudan to the ICC, as "*in the current circumstances, a prosecution may not be in the interest of the victims and justice*".[517]

3. There is no guidance in the constituent instruments concerning the meaning of the concept of "interests of justice".[518]

Contrary to the previous proposition, PTC II was erroneous with respect to this proposition.[519] The constituent instruments do contain guidance.[520] Besides the points made above, article 53(1)(c) provides two (the gravity of the crime and the interests of victims), and article 53(2)(c) provides four (gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the

[514] See Thomas Hethe Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance', **Washington University Global Studies Law Review**, vol. 4, no. 2, 2005, pp. 389–414; Benson Chinedu Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa', **African Journal of Legal Studies**, vol. 7, no. 3, 2014, pp. 351–79, doi:10.1163/17087384-12342051; Robert H. Mnookin, 'Rethinking the Tension Between Peace and Justice: The International Criminal Prosecutor as Diplomat', **Harvard Negotiation Law Review**, vol. 18, 2013, pp. 145–74; Farid Mohammed Rashid, '"The Interests of Justice" under the ICC Prosecutor Power: Escaping Forward', **Crossing Conceptual Boundaries V**, ed. by Esin Cigdem et al., London: University of East London, School of Law and Social Sciences, 2013, pp. 53–69; Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', **Leiden Journal of International Law**, vol. 22, no. 1, 2009, pp. 99–126; Solon Solomon, 'Broadening International Criminal Jurisdiction', **International Human Rights Law Review**, vol. 4, no. 1, 2015, pp. 53–80.

[515] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', **European Journal of International Law**, vol. 14, no. 3, 2003, pp. 481–505; Tim Murithi, 'Pan-Africanism and the Politicization of the International Criminal Court', **Journal of African Union Studies**, vol. 3, no. 1, 2014, pp. 61–82.

[516] Kevin Jon Heller, 'A Few Thoughts on a Syria Referral', **OpinioJuris**, 14/01/2013.

[517] 'African Union Peace and Security Council Decision (PSC/MIN/Comm (CXLII))', 21/07/2008, para. para. 11.

[518] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 89.

[519] Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/17 (ICC, The Appeals Chamber 15 November 2019). para. 4.

[520] Moreover, though cannot be considered as constituent instruments, the OTP also have two policy papers addressing the concept: Policy Paper on Preliminary Examinations dated November 2013 and Policy Paper on the Interests of Justice dated September 2007.

alleged crime) illustrative factors regarding the evaluation of the concept. Moreover, the RS requires the demonstration of "substantial reasons" for a negative determination concerning the interests of justice. In addition to these determinations, the PTC could have also conducted a systematic interpretation of the RS by analysing different provisions containing the concept.[521]

4. The meaning of the concept must be determined based on the underlying objectives of the RS.

With this proposition, PTC II completely ignored the rule of interpretation of treaties. As an international treaty, the RS must be interpreted in accordance with article 31 of the Vienna Convention on the Law of Treaties which is deemed to be codifying the customary international law rule of treaty interpretation.[522] According to this rule, object and purpose of a treaty is always a primary consideration in terms of interpretation of treaties. In that sense, objectives of a treaty do not constitute a separate part of treaty interpretation that will come into play only when there is an ambiguity.

Moreover, the VCLT also provides guidance in terms of clarifying ambiguities in a treaty. Article 32 of the VCLT provides the supplementary means of interpretation: "*the preparatory work of the treaty and the circumstances of its conclusion*".[523] Accordingly, when PTC II determined that the meaning of the concept interests of justice was ambiguous, it should have had recourse to the supplementary means of interpretation. However, PTC II did not investigate the preparatory works or any other supplementary means of interpretation to reveal the meaning of this concept.

5. These are the underlying objectives of the Rome Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities[524]

An apparent contradiction is that PTC II relied on these objectives of the RS in order to substantiate the rejection of authorising a criminal investigation into a

[521] Rome Statute, arts. 55(2)(c); 61(2); 65(4); 67(1)(d).
[522] Kourabas, 'A Vienna Convention Interpretation of the Interests of Justice Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A Great Qualitative Step Forward, or a Normative Retreat', p. 69.
[523] United Nations, 'Vienna Convention on the Law of Treaties', United Nations, Treaty Series, vol. 1155, p. 331 (1969), art. 32.
[524] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 89.

situation which contains the text-book examples of most serious international crimes. With this rejection, PTC II was, in fact, defeating the very objectives of the RS.[525]

> *6. Accordingly, in order for an investigation to be in the interests of justice, the investigation must, at the minimum, has the prospect of being effective and concluded in a reasonable time. (feasibility of the investigation)*[526]

The PTC argued that "*Article 53 of the Statute makes* ***the investigation's consistency*** *with the interests of justice a statutory legal parameter governing the exercise of the prosecutorial discretion.*"[527] According to the PTC, the feasibility and prospect of an investigation were essential considerations for both the OTP and the PTC evaluations.[528] However, article 53 of the RS did not prescribe a legal parameter as "investigation's consistency". Moreover, feasibility and prospect of an investigation were not included as statutory considerations for the ICC organs. In that sense, PTC II attempted to create additional and highly controversial statutory conditions. Another important deficit in this reasoning was the lack of a principled guidance concerning how to determine the feasibility of an investigation on such complicated situations generally.

Furthermore, the OTP contradicted with its own policy paper. Considering that the RS was created to fight against impunity and therefore foresaw such obstacles, the LRV argued that the feasibility of an investigation would never be a consideration in terms of initiating an investigation.[529] Additionally, the general obligation to conduct an effective investigation for human rights violations was "*a matter of means not results.*" Accordingly, not initiating an investigation would be *ipso facto* contrary to international human rights law.[530] On the other hand, the OTP defended that feasibility constituted a factor to be evaluated, though the evaluation of the PTC was erroneous.[531] However, in its Policy Paper on Preliminary Examinations the OTP had stated that: *"In*

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[525] Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 6; Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation', **OpinioJuris**, 03/10/2020.
[526] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 90.
[527] cited, para. 88.
[528] cited, para. 44.
[529] Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief, ICC-02/17 OA OA2 OA3 OA4 (ICC, The Appeals Chamber 2 October 2019). para. 105.
[530] Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 7.
[531] Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims paragraph 77.

terms of whether effective investigations are operationally feasible, the Office notes that feasibility is not a separate factor under the Statute as such when determining whether to open an investigation. Weighing feasibility as a separate self-standing factor, moreover, could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention."[532]

7. According to the RS, the Court was not meant, or equipped, to investigate every and all serious international crimes which falls into its jurisdiction.

The PTC was correct in limiting the function and role of the ICC in the international criminal justice endeavour. However, determining the content of these prosecutorial choices was beyond the authority of the PTC, which was entrusted to apply the statutory legal considerations upon the prosecutorial discretion of the OTP.

8. Opening investigations which are doomed to fail would damage the reliability and legitimacy of the Court, cause frustration and lead to hostility towards the Court.

Although there is some merit to this proposition, it is still flawed due to conflating the concepts of effectiveness and independence as legitimacy related elements. Accordingly, *not conducting and completing* investigations in an effective manner would harm the legitimacy and credibility of the Court as a matter of effectiveness. On the other hand, *not initiating* investigations on the ground that they are "doomed to fail", when especially taking such decisions based on the political unwillingness of states, would harm the legitimacy and credibility of the Court by posing the Court as an institution prone to political manipulation, hence damage the ICC's independence, impartiality and equality.

The Chamber projects that such fruitless investigations, "*far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very*

[532] ICC, Office of the Prosecutor, 'Policy Paper on Preliminary Examination', 11/2013, para. para. 70.The OTP explains the disclosure of this policy paper as: "*The Office has made this policy paper public in the interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute*." para. 21. *See* for preventing state obstructionism, Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 11.

ability to pursue credibly the objectives it was created to serve."[533] That contention was criticised as both speculative and counterintuitive as there were victims at present that could have been asked to be informed of their view and moreover "*victims could have been far more frustrated by having the investigation dismissed* ab initio".[534] Moreover, defending the interests of the ICC under the guise of "interests of victims" was also a problematic.[535]

iii. The prospect of an investigation into the situation in Afghanistan

D. An investigation into the situation in Afghanistan has no prospect of success, therefore would not be in the interests of justice, hence cannot be authorised.

1. The preliminary examination into the situation in Afghanistan has taken particularly long time.

PTC's determination was correct. The OTP started the preliminary examination into the situation of Afghanistan in 2006 for crimes that had been committed since 2003. The Afghan Parliament passed an amnesty law for all of the belligerent parties of the armed conflict in 2007, which entered into force in 2009.[536] Majority of the crimes the OTP relied on in the 2017 Request were committed in the earlier years of the preliminary examination. All these suggests that the OTP had every chance to initiate an investigation in terms of jurisdiction and admissibility (gravity, complementarity) during the earlier years of the preliminary examination. The OTP attempted to justify this extreme delay with reference to the lack of cooperation on the part of the relevant states in the preliminary examination stage and the inability of the OTP to determine the attributability of the relevant crimes to specific armed groups.[537]

However, the issue of attributability was not expected to be resolved in the preliminary examination stage.[538] In fact, the OTP explicitly admitted this point in the Request: "*In any event, the question of the attribution of specific conduct to specific*

[533] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 96.
[534] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation'; Rome Statute, preamble.
[535] Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 8.
[536] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan paragraph 272.
[537] cited, paras 3, 24, 30.
[538] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 57.

suspects in the context of charges brought forward for prosecution can only be determined after an investigation into the situation and therefore remains speculative at this stage."[539] Accordingly, one of the main reasons, at least formally, for the OTP to not initiate the investigation was due to a "speculative" factor.

2. Due to the elapsed time between the time of the crimes and a possible investigation, it is highly unlikely to collect and secure the required evidence for prosecution and conviction.

This proposition rests on a speculative determination while disregarding the current state of evidence in the situation of Afghanistan. The LRV stated that there was no problem with collecting and securing evidence – which were stored digitally and can be preserved indefinitely – and witnesses, which were available to participate in investigations and prosecutions. Additionally, the LRV contented that the presumption of the Chamber concerning the evidence was baseless as there were different examples in international criminal justice history that many historical incidents have gone through investigations after many years compared to the relatively recent history of Afghanistan situation which crimes continues to be committed.[540]

3. It cannot be expected the related States to cooperate meaningfully.

According to the PTC, "*subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute)"*, leaves no reasonable basis for an expectation of cooperation from authorities. Accordingly, the hardship that has been endured throughout the preliminary examination, as acknowledged by the Prosecution, will worsen with the initiation of the investigation which requires substantial evidence to be obtained.[541]

First of all, in this paragraph, the Chamber does not identify "substantial reasons" based on specific evidence.[542] One example of this elusiveness is not explaining the "key States" transparently and specifically. By leaving it within the cloud of

[539] Request for Authorisation of an Investigation Pursuant to Article 15 into the Situation in the Islamic Republic of Afghanistan paragraph 48.
[540] Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraphs 137–143.
[541] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 94.
[542] Professor Dr. Dr. h.c. Kai Ambos, Dr. Alexander Heinze, Written Submissions, ICC-02/17 (ICC, The Appeals Chamber 14 November 2019).

ambiguity, the Chamber contravenes with its obligation to clearly justify its decision. Moreover, the Chamber did not investigate whether there were "specific incidents of non-cooperation". In that sense, the Chamber "*made a pre-emptive and speculative assessment.*"[543] Secondly, article 86 of the RS prescribes that the obligation of cooperation of SPs starts with investigations.[544] Accordingly, it was not possible to determine the level of cooperation of SPs as the investigation has not been initiated. Thirdly, the reasoning of the PTC rewards those SPs that are noncooperative towards the Court.[545] If this understanding were to be endorsed, any SP which is under obligation to cooperate with the Court would prevent the initiation of any investigation, by simply dismissing requests of cooperation of the OTP at the preliminary examination stage.[546] Lastly, the Chamber ignored article 87(7) of the RS which prescribes the legal remedy in case of non-cooperation of a liable SP, and framed a new remedy which is not to investigate at all.[547] In conclusion, with this reasoning, the PTC ignored the principle of rule of law by giving disproportionate legal implications to the political powers and interests of certain "key States".

> *4. Without additional resources, the significant resources this investigation will require would force the OTP to divert its financial and human resources from investigations and cases that have a better prospect of success.*[548]

With this proposition, PTC II clearly excessed its judicial authority to scrutinise the prosecutorial discretion of the OTP. Firstly, the PTC was not the organ of the ICC to make budgetary decisions.[549] According to article 42(2) of the RS, "*the Prosecutor shall have full authority over the management and administration of the Office,*

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[543] Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraphs 118, 121; Professor Dr. Dr. h.c. Kai Ambos, Dr. Alexander Heinze, Written Submissions paragraph 7.
[544] Legal Representatives of Victims, Victims' Joint Response and Request for Reply in the Situation in Afghanistan at 119–20.
[545] Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraphs 105, 131; Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims at 76; Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 11.
[546] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation'.
[547] Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraphs 123–125; Amicus Curiae Observations of Queen's University Belfast Human Rights Centre, ICC-02/17 (ICC, The Appeals Chamber 15 November 2019), para. 10.
[548] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 95.
[549] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation'; Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraphs 168–171.

including the staff, facilities and other resources thereof."[550] Moreover, according to article 112(2)(d) of the RS, the ASP is responsible for the general budget of the Court.[551] All in all, PTC was the last organ of the ICC to take into account of "organisational and financial sustainability"[552] of the Court.

> *5. In conclusion, though the situation is in conformity with the requirements of jurisdiction and admissibility, an investigation into the situation in Afghanistan cannot be authorised due to not being in the interests of justice because of its prospect of failure.*

As demonstrated, the PTC did not have the right to refuse authorising an investigation into a situation based on these considerations. The judgement was criticised for making its own assessment *de novo* without asking the opinions of the victims or reviewing the determination of the Prosecution and, not reviewing the jurisprudence of the Court or the preparatory work of the Statute.[553] This approach attempted to turn a very exceptional circumstance[554], not initiating an investigation based on the lack of interests of justice, into a general norm. On the other hand, endorsing such a controversial approach concerning the judicial oversight of the prosecutorial discretion when the possibility of investigation of the nationals of the USA appears, which is the strictest opponent of the ICC, could have been another legitimacy diminishing factor for the ICC if the AC had not amended it subsequently.

Overall, the judgement might be considered as a confession of the problems that have been experienced by the Court. The Court mentions of serious problems such as the legitimacy, credibility, organisational and financial stability of the Court, frustration on the side of victims, hostility towards the Court, lack of sufficient budget, and inconclusiveness of investigations. [555] Moreover, all these considerations point to

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[550] Rome Statute, art. 42(2).
[551] Rome Statute, art. 112(2)(d); Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims paragraph 79.
[552] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 88.
[553] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation'; Legal Representatives of Victims, Corrigendum of Updated Victims' Appeal Brief paragraph 113; Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims paragraphs 58, 62, 65–66.
[554] Amnesty International, Amicus curiae observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence paragraph 4; Amicus Curiae Observations of Queen's University Belfast Human Rights Centre paragraphs 5–11.
[555] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 88.

the distrust of the PTC towards the OTP to carry out and conclude effective investigations. The PTC was summarising its overtly restrictive approach to the prosecutorial discretion with this sentence: "*The importance to preserve the scrutiny of the Pre-Trial Chamber under article 15 is apparent when considering that what is at stake is much more than the Court's credibility; it is its very function and legitimacy*."[556] This excerpt demonstrates that not only the OTP, but also the Chambers were concerned with enhancing the legitimacy and credibility of the ICC. Overall, the anxiety of PTC II concerning the sustainability of the ICC implies the fear of the judges of repercussions towards the Court, which presents an obstacle to the independence of the Court.

c. The Appeals Chamber

E. With respect to authorisation of an investigation proprio motu*, the PTC is not entitled to take into consideration of factors listed in article 53(1)(a) to (c) of the RS.*

1. According to article 15(1) of the RS, the OTP has discretionary power to decide whether to initiate an investigation proprio motu.

Article 15(1) of the RS prescribes as follows: "*The Prosecutor **may** initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.*"[557] Based on the usage of "may", the AC concluded that the initiation of investigations *proprio motu* by the OTP was solely discretionary, and the Prosecutor was not obliged to initiate an investigation absence of a State Party or UNSC referral.[558] However, the AC contradicted with itself when it concluded this sentence a few pages later: "*The Appeals Chamber recalls that article 15(2) and (3) require the Prosecutor to analyse the seriousness of information received on crimes within the jurisdiction of the Court and to submit a request for authorisation of an investigation to the pre-trial chamber if she concludes that there is a reasonable basis to proceed*."[559]

Along these lines, the purpose of paragraph 15(1) is simply to identify a third way of initiation of an investigation as listed in article 13(c) of the RS. In that sense,

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[556] cited, para. 34.
[557] Rome Statute, art. 15(1). (emphasis added)
[558] Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 30.
[559] cited, para. 59.

article 15(1) serves only the purpose of authorisation. Whether the Prosecutor is obliged to carry out this function is clarified in paragraphs 15(2) and 15(3). As paragraph 15(2) demonstrates, the OTP is obliged to consider the information provided: "*The Prosecutor **shall** analyse the seriousness of the information received.*"[560] Moreover, the next paragraph clearly envisages the obligation of the Prosecutor to request for authorisation provided that article 53(1) requirements are met: "*If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she **shall** submit to the Pre-Trial Chamber a request for authorization of an investigation (…).*"[561] The AC established the obligation of the Prosecutor to initiate investigations following SP or UNSC referrals by referring article 53(1) of the RS and emphasising the word "shall".[562] However, the AC neglected to reach the same conclusion based on the same formulation adopted in paragraphs 15(2) and 15(3) of the RS.

2. Article 53(1) of the RS exclusively deals with the initiation of investigations following State Party or UNSC referrals.

Firstly, the AC, rightly, determined that article 15 of the RS exclusively deals with *proprio motu* investigations.[563] Moreover, the AC also concluded that article 53(1) is only applicable to SP or UNSC referred investigations.[564] However, article 53 of the RS is located under "Part 5: Investigation and Prosecution" and titled with "Initiation of an investigation". As these titles suggest, there is no explicit formulation that would imply to the limited coverage of article 53. On the contrary, these titles suggest that article 53 is of general application to any and all investigation and prosecution conducted by the ICC.

3. For the authorisation of proprio motu *investigations, the PTC is not entitled to consider the factors set out in article 53(1)(a) to (c) of the Statute.*

The AC claimed that, while the Prosecutor was required to consider the factors listed in article 53(1), the PTC was only required to consider the factors listed in article

[560] Rome Statute, art. 15(2). (emphasis added)
[561] Rome Statute, art. 15(3). (emphasis added) Muratcan Gökdemir, **Uluslararası Ceza Mahkemesi'nde Soruşturma Usulü**, 1. Edition İstanbul: On İki Levha Yayıncılık, 2018, pp. 174–75.
[562] Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 28.
[563] cited, para. 30.
[564] cited, para. 33.

15(4) of the Statute. In other words, according to the AC, the PTC was only required to assess the issues of factual basis and jurisdiction.[565] Yet, there is no meaningful reason for the reviewing authority to be limited in terms of the factors to be assessed regarding the conformity of an investigation to the RS, especially considering that these factors will continue to be reviewed throughout investigation and prosecution. Moreover, concluding that the PTC review powers are more limited for the initiation of investigations *proprio motu* compared to SP and UNSC referrals is an absurdity.

The AC decided that with respect to the initiation of an investigation *proprio motu*, "the interests of justice" was only a part of the evaluation of the Prosecutor, and not of the PTC's review. Moreover, the Chamber concluded that judicial assessment of admissibility is not within the mandate of the PTC to be made at this stage as that would be limited. In this regard, the AC argued that "*the pre-trial chamber would have to rely on the Prosecutor, who considers that the case(s) would be admissible*".[566] However, this interpretation was dramatically beyond the interpretation of the OTP itself regarding the review powers of PTC: "*The interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre Trial Chamber*."[567]

The interpretation that article 53(1) applies to any investigation is further supported by Rule 48 of the Rules of Procedure and Evidence of the ICC titled "Determination of reasonable basis to proceed with an investigation under article 15, paragraph 3": "*In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).*"[568] This Rule should be read as establishing the relationship between articles 15 and 53 of the RS. Accordingly, article 53(1) serves the purpose of clarifying the meaning and content of the phrase "*a reasonable basis to proceed with an investigation*". The meaning and content of this phrase is of utmost importance as paragraphs 15(3) and (4) use it in an identical way. Accordingly, these identical usages signify that both the Prosecutor and the PTC are required to consider

[565] cited, para. 45.
[566] cited, para. 40.
[567] ICC, Office of the Prosecutor, 'Policy Paper on the Interests of Justice', p. 3.
[568] International Criminal Court, **Rules of Procedure and Evidence**, Second edition The Hague, 2013, rule. 48.

the factors in article 53(1) when determining whether there is a reasonable basis to proceed with an investigation in a given situation.[569]

Moreover, rule 50(5) of the Rules of Procedure and Evidence prescribes as follows: "*The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4,* ***with respect to all or any part of the request by the Prosecutor***."[570] While this rule clearly provides for the overarching review authority of the PTC, rule 50(4) also confirms that the PTC does not have confine itself with the evaluations and determinations of the OTP.: "*The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing*."[571] Surprisingly, the AC completely ignored rule 50 in its decision.

Lastly, the AC also attempted to support its conclusions by reframing the words of the constituent instruments subtly, as deemed appropriate. For example, instead of the general, inclusive, and correct wording "*reasonable basis to proceed with an investigation*"[572], the AC fabricated the self-serving phrase of "*reasonable* ***factual*** *basis to proceed with an investigation*",[573] so as to limit the scope of PTC supervision. Contrary to the limited understanding of the AC, this requirement was already articulated as *one* of the factors which were required to guide the OTP regarding the initiation of an investigation in article 53(1)(a): "*The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed*".[574]

An overall analysis of the initiation process of the Afghanistan investigation suggests that the ICC has gone from one extreme to the other. While the PTC's

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[569] Professor Dr. Dr. h.c. Kai Ambos, Dr. Alexander Heinze, Written Submissions paragraph 19. para. 19.
[570] International Criminal Court, *Rules of Procedure and Evidence*, rule. 50(5). (emphasis added.)
[571] cited, rule. 50(4).
[572] Rome Statute, arts. 15(3), 15(4), 15(6), 15*bis*(6), 18(1) and 53(1); Rules of Procedure and Evidence, rule 48.
[573] The AC started the reasoning with this distorted version of the phrase without providing any justification: "*Article 15(4) of the Statute requires a pre-trial chamber to determine whether there is a reasonable* ***factual*** *basis for the Prosecutor to proceed with an investigation (…)*". (emphasis added) Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraphs 1, 34, 39, 45, 46 and 54.
[574] Rome Statute, art. 53(1)(a).

approach with respect to its review powers was unduly restrictive, the AC's approach was also unduly permissive. Additionally, both the Chambers reached their conclusions by partly ignoring the provisions of constituent instruments. What is more, the AC has provided the OTP a liberty which was not even asked or contemplated by the OTP itself.

B. The Situation in Myanmar/Bangladesh

According to the reliable sources of the OTP, the situation under scrutiny is concerned with the deportation of more than 700.000 Rohingya, who was residing in Myanmar legally, within the context of 2017 wave of violence, starting at least in 2012 and escalating in 2016 and 2017, by coercive acts of Myanmar security forces and non-Rohingya civilians without an international legal justification. The ICC found that there were reasonable grounds to believe that three crimes against humanity committed in this situation: "deportation or forcible transfer of population" under article 7(1)(d); "other inhumane acts" under article 7(1)(k) and "persecution on grounds of ethnicity and/or religion" under article 7(1)(h) of the Rome Statute.[575]

1. Procedural History

On 9 April 2018, the Prosecutor requested the Court, a ruling on whether the deportation of Rohingya from Myanmar (a non-SP to the RS) to Bangladesh (a SP to the RS) was within the jurisdiction of the ICC.[576] PTC I concluded[577] and PTC III confirmed[578] that as at least one element of the crime of deportation was occurred within the territory of a SP, hence the Court had territorial jurisdiction. However, the Chambers did not confine this interpretation only with the crime of deportation. Accordingly, in a general way, any crime that is to be established that a part of which

[575] ICC, Office of the Prosecutor, Request for authorisation of an investigation pursuant to article 15, ICC-01/19 (ICC, Pre-Trial Chamber III 4 July 2019).
[576] ICC, Office of the Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 09/04/2018.
[577] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18 (ICC Pre-Trial Chamber I 6 September 2018).
[578] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19 (ICC Pre-Trial Chamber III 14 November 2019).

was occurred on the territory of a SP would be within the jurisdiction of the ICC.[579] Following, on 4 July 2019 the OTP requested and on 14 November 2019 PTC III authorized the Prosecutor to open an investigation.[580] In accordance with this authorisation, on 22 November 2019, the OTP announced commencing an investigation into the Bangladesh/Myanmar situation.[581]

2. Outline of the Argumentation of the ICC

With regard to the jurisdiction of the ICC for the deportation of Rohingya from Myanmar to Bangladesh, the overall argumentation of the OTP, PTC I and PTC III can be outlined as follows:

A. The scope of territorial jurisdiction of the ICC (in the form of accumulation of territorial jurisdictions of the SPs) is identical to the scope of territorial jurisdiction which international law grants to States.

1. Article 12(2)(a) of the RS provides territorial jurisdiction to the ICC.
2. International law allows states to prosecute crimes which are committed only partially in their territory.
3. The principle of territoriality does not require all the elements of a crime to be committed in the territory of a single state.[582]
4. There is no reason to interpret the territorial jurisdiction of the ICC narrower than the scope of territorial jurisdiction which is granted to States under international law.[583]
5. Accordingly, under article 12(2)(a) of the RS, the ICC can investigate and prosecute crimes which are only partially committed in the territory of a SP.[584]

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[579] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" paragraphs 50–73; Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar paragraphs 42–62.

[580] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar.

[581] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar, 22 November 2019, https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar.

[582] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" paragraph 70.

[583] ICC, Office of the Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', para. 49.

[584] ibid. "*Crucially, the object and purpose of article 12(2)(a) further confirms that this provision **must** be read to require **only one** legal element of an article 5 crime to have occurred on the territory of a State Party."* (emphasis added by the OTP)

B. Crossing an international border is a necessary legal element of the crime of deportation, hence constitutes a "*part of the "conduct in question"*".

1. Under the RS, "deportation" and "forcible transfer" constitutes two distinct crimes.[585]

2. Due to being different crimes, they also consist of different legal elements.

3. The distinctive legal element, or the "legally required element" of the crime of deportation is "the occurrence on the territory of the second State".[586]

4. Crossing an international border is not a "*remote effect*" of the crime of deportation.

5. As being a legally required element of the crime, crossing an international border constitutes a "*part of the "conduct in question"*".

6. The ICC has territorial jurisdiction over the deportation of Rohingya from Myanmar to Bangladesh.

C. Article 12(2)(a) of the RS allows the Court to invoke territorial jurisdiction when only a part of a crime takes place within the territory of a SP. Accordingly, the ICC can prosecute, not only the crime against humanity of deportation, but any crime in the RS if a part of the crime takes place within the territory of a SP.[587]

3. Review of the Legal Reasoning of the ICC

a. The scope of territorial jurisdiction of the ICC

A. The scope of the territorial jurisdiction of the ICC (in the form of accumulation of territorial jurisdictions of the SPs) is identical to the scope of territorial jurisdiction which international law grants to states.

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[585] cited, paras 15–27.

[586] "*In both scenarios, the occurrence on the territory of the second State is not, in legal terms, the mere remote effect of a completed criminal conduct on the territory of the first State—rather, it is a* ***legally required element*** *of the crime, and thus part of the "conduct in question" for the purpose of article 12(2)(a).*" (emphasis added by the OTP) cited, para. 27.

[587] "*If it were established that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute.*" Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" paragraph 74. "*In these circumstances, the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute might be fulfilled as well. This is because an element or part of this crime (i.e. unlawfully compelling the victims to remain outside their own country) takes place on the territory of Bangladesh, a State Party, provided that the allegations are established to the required threshold.*" cited, para. 78.

As a general point, this proposition omits to give due weight to the intention of the drafters of the RS. Though both the OTP and the PTC cites to the rule of interpretation of treaties codified in the VCLT[588], they did not apply these rules genuinely and elaborately. The present critical analyses will not be depending upon the rule *contra proferentem*, restrictive interpretation or sovereignty. Application of these approaches to jurisdiction conferring instruments have generally been rejected.[589] The analysis will be based on the interpretation of the RS in accordance with the rule of interpretation of treaties so as to reveal the intention of its drafters.

1. Article 12(2)(a) of the RS provides territorial jurisdiction to the ICC.

It is true that article 12(2)(a) establishes that the ICC can invoke jurisdiction when a criminal conduct is committed within the territory of a SP. However, the problem of this proposition is that the ICC presents this sort of jurisdiction of the ICC with a generic term, "territorial jurisdiction", by ignoring different considerations in terms of its scope.

2. International law allows states to prosecute crimes which are committed only partially in their territory.

A comparative law survey would support this proposition. However, for national laws, there are more than what international law permits to a particular State. Though permitted under international law, States might prefer to a narrower, or a specified formulation of territorial jurisdiction. Accordingly, the scope of territorial jurisdiction of a particular state should be determined based on its national law. In that sense, there are two limitations to the usage of jurisdiction of States in law: the outer limitations drawn by the general international law, and the inner limitations drawn by national law. As stated in *Lotus*[590], non-adherence to the inner limitations would not lead to an *ipso facto* violation of international law so long as the use of jurisdiction stays within the outer limitations of international law. In that sense, the adherence to the inner limitations is a matter of national law. However, this is different for the ICC. Both the outer and inner limitations of jurisdiction of the ICC are drawn by

[588] 'Vienna Convention on the Law of Treaties', United Nations, Treaty Series, vol. 1155, p. 331 (1969), arts. 31–32.
[589] Chittharanjan Felix Amerasinghe, **Jurisdiction of International Tribunals**, The Hague: Kluwer Law International, 2003, pp. 101–20.
[590] The Case of the S.S. "Lotus" (France v. Turkey), Series A. No. 10 (The Permanent Court of International Justice 07 Eylül 1927), p. 15.

international law. In that sense, as opposed to states, non-adherence to the inner limitations of the jurisdiction of the ICC would constitute an infringement of international law.

As a second point, the term "partially" seems to oversimplify the well-developed literature of criminal law on the subject matter. Accordingly, there is a "conduct" or "act" of the perpetrator and a "consequence" or "result" of the conduct. For most crimes, both of these concepts are required simultaneously. For culpability, criminal laws require a "causality" between the conduct and its consequence.

3. The principle of territoriality does not require all the elements of a crime to be committed in the territory of a particular State.

This proposition exemplifies the strawman fallacy. The OTP responds as if there is a proposition suggesting that States can use their territorial jurisdiction only when all of the elements of a crime is committed and observed in the territory of a single State. However, no one suggests that. It is not contested that international law provides States the right to invoke their territorial jurisdiction when only a part of a crime is committed in their territory.

4. There is no reason to interpret the territorial jurisdiction of the ICC narrower than the scope of territorial jurisdiction which is bestowed to States under international law.

This proposition suggests that the scope of "territorial jurisdiction" for the ICC and States are identical. However, there is evidence suggesting otherwise. Article 12(2) prescribes as follows:

"*In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*

(a) ***The State on the territory of which the conduct in question occurred*** *or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*

(b) The State of which the person accused of the crime is a national."[591]

[591] Rome Statute, art. 12(2). (emphasis added)

Several conclusions can be drawn based on this provision. Firstly, though the very foundation of the concept of "universal jurisdiction" has been developed for the international crimes which constitutes the *ratione materiae* jurisdiction of the ICC, universal jurisdiction was not delegated to the ICC. This omission speaks for itself: SPs did not prefer to vest the ICC with the equivalent jurisdiction scope which states have under international law for these international crimes. Accordingly, though it was possible to grant the ICC with the most extensive jurisdiction, the drafters preferred to a narrower jurisdiction.[592]

Secondly, the formulation of article 12(2)(a) of the RS also suggests a narrower territorial jurisdiction. As stated above, international law permits States to claim territorial jurisdiction when either the conduct or its consequence occurs in their territories. However, this is not something taken for granted. The basis of this right is based on customary international law. Accordingly, as states claim jurisdiction for crimes when they are committed or resulted in their territory, or somehow connected to their territory, international law permits them to do so generally. In that sense, the right of states to invoke territorial jurisdiction when there is sufficient territorial connection between the State and the crime is attained inductively, not deductively.

Moreover, the extent of territorial jurisdiction of a particular state is based upon its national law formulation. In that sense, different theories of territorial jurisdiction should be mentioned, which were not discussed either by the OTP or PTC I yet was only mentioned by PTC III when authorising the investigation. Accordingly, as was also explained by the PTC III, there are five theories of territorial jurisdiction: 1) conduct-based, or "subjective territoriality", 2) result-based, or "objective territoriality", 3) the principle of ubiquity, 4) the constitutive element theory, 5) the effects doctrine. The first theory deems a crime committed in the territory of a state if the "conduct" or "act" is committed within the territory of the state, alternatively, if the crime is initiated in the territory. For the result-based theory, the crime is deemed to be committed in the territory when the "result" or "consequence" of the conduct is produced within the territory. Thirdly, the principle of ubiquity allows to invoke territorial jurisdiction when "*the crime took place in whole or in part on the territory*

[592] Bekker, Stoelting, 'The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court', p. 45.

of the State irrespective of whether the part occurring on the territory is a constitutive element of the crime".[593] Fourthly, PTC III defined the distinctive feature of the constitutive element theory as "*at least one constitutive element of the crime occurred on the territory of the State*".[594] Lastly, the term "mixed theory" might be used for national law formulations of territorial jurisdiction that incorporates subjective and objective territoriality, explicitly and simultaneously.[595] As the effects doctrine was developed for the fields of antitrust and competition law, and the OTP did not rely on this doctrine, there is no need to discuss it any further.

National legislations pertaining to territorial jurisdiction would point to the diversity of formulations found in the international community. Article 8(1) of the Turkish Criminal Code can be given as an example of the reification of the mixed theory: "*Turkish laws are applied for* ***the offenses which are committed in Turkey***. *Where* ***the act constituting an offense*** *is* ***partially or entirely*** *committed in Turkey,* ***or the result is obtained in Turkey****, the offense is assumed to have been committed in Turkey*."[596] As can be seen, in order to consider both the act/conduct and result/consequence as a way of establishing territorial jurisdiction, the Turkish Criminal Code envisages both of them explicitly. Comparative law presents diverse examples from different legal systems.

As to the formulations of subjective territoriality:

- **Armenia**: *"****The time of committal of crime is the time when socially dangerous action (inaction) was committed, regardless when the consequences started to take effect****."*[597]; *"****The crime is considered committed in the territory of the Republic of Armenia*** *when: 1) it started, continued or*

[593] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar paragraph 56.
[594] ibid.
[595] Cedric Ryngaert, **Jurisdiction in International Law**, Second edition Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015, pp. 78–79; Tezcan, Erdem, Önok, *Uluslararası Ceza Hukuku*, pp. 98–101; Türkan Yalçın Sancar, Timuçin Köprülü, **Ceza Hukuku Genel Hükümler Uygulamalı Çalışmaları**, 2. Edition Ankara: Savaş Yayınevi, 2015, pp. 90–91.
[596] **Turkish Criminal Code, Law Nr. 5237, 26 September 2004,** art. 8(1). (emphasis added)
[597] Criminal Code of the Republic of **Armenia**, 2003, art. 12(2). (emphasis added)

finished in the territory of the Republic of Armenia; 2) it was committed in complicity with the persons who committed crimes in other countries."[598]

- **Nigeria***: "Where by the provisions of any law of a State the doing of any act or the making of any omission is constituted an offence, those provisions shall apply to every person who is in the State at the time of his doing the act or making the omission."*[599]

Below, given formulation of objective territoriality is an additional basis of territorial jurisdiction for the respective national law. However, if conceived in isolation, it might be useful to picture a possible formulation of objective territoriality:

- **Denmark**: "*Where **the punishable nature of an act depends on or is influenced by** an **actual or intended consequence**, the act shall **also** be deemed to have been committed where the consequence has taken effect or has been intended to take effect*."[600]

As to the mixed approaches that incorporate subjective and objective territoriality explicitly and simultaneously[601]:

- **Australia:** *"If this section applies to a particular offence, a person does not commit the offence unless: (a) **the conduct constituting the alleged offence occurs**: (i) wholly or partly in Australia; or (ii) wholly or partly on board an Australian aircraft or an Australian ship; or (b) **the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs**: (i) wholly or partly in Australia; or (ii) wholly or partly on board an Australian aircraft or an Australian ship; (…)"*[602]

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[598] ibid. art. 14(2). (emphasis added) For similar formulations see Criminal Code of the **Russian Federation**, 1996, amended in 2012, arts. 9(2) and 11(1); Criminal Code of **Ukraine**, 1 September 2001, art. 6(2-3); Criminal Code of the Republic of Azerbaijan, 30 December 1999, art. 11(1); Criminal Code of **Georgia**, 1999, amended in 2019, art. 4(2); Penal Code of the Republic of **Kazakhstan**, 3 July 2014, art. 7(2); Criminal Code of Lithuania, 26 September 2000, amended in 2017, art. 4(3).

[599] Criminal Code of the Federation of **Nigeria**, 1916, sect. 12A.

[600] Criminal Code of the Kingdom of Denmark, 27 September 2005, amended in 2005, art. 9. (emphasis added) For a similar formulation *see* Penal Code of the Kingdom of **Norway**, 1902, amended in 2020, sect. 7.

[601] For similar approaches see Criminal Code of the Republic **Poland**, 1997, art. 6(2); Criminal Code of the Republic of **Slovenia**, 2008, art. 19; Criminal Code of the **Swiss** Confederation, 1937, art. 8(1); Criminal Code of the Kingdom of **Sweden**, 1962, amended in 2020, chapter. 2, sect. 4; Criminal Code of **Bosnia and Herzegovina**, 2003, art. 23(1); Criminal Code of the Republic of **Serbia**, 2005, amended in 2012, art. 17(1).

[602] Criminal Code Act of **Australia**, 1995, art. 14(1)(2). (emphasis added)

- **Germany**: "*An offence is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, **or in which the result if it is element of the offence** occurs or should have occurred according to the intention of the offender.*"[603]
- **China**: "*When **either the act or consequence** of a crime takes place within PRC territory, a crime is deemed to have been committed within PRC territory.*"[604]
- **Iran**: "*When part of an offense or its result occurred inside Iranian territory, the offense shall be deemed as having been committed inside the Islamic Republic of Iran.*"[605]
- **Portugal:** "*An act is considered as committed, as well in the place where, totally or partially, **under whatever form of complicity**, the agent has acted, or, in case of omission, should have acted, as **in the place where the typical result**, or **the result not included in the type of the crime**, has been produced.*"[606]
- **Uzbekistan:** "*A crime committed on the territory of Uzbekistan shall be **an act**: 1) commenced, completed, or interrupted on the territory of Uzbekistan; 2) committed outside Uzbekistan with the **effect** thereof being available on the territory of Uzbekistan; 3) committed on the territory of Uzbekistan with the **effect** thereof being available outside the borders of Uzbekistan; 4) belonging to a cumulative crime with a part thereof committed on the territory of Uzbekistan*."[607]

As to the principle of ubiquity:

- **Republic of Cameroon:** *"The criminal law of the Republic shall apply:*

  *a) to any offence of which **any ingredient** has taken place within its territory."*[608]

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[603] Criminal Code of the Federal Republic of **Germany**, 1971, amended in 2013, Section 9(1). (emphasis added)
[604] Criminal Law of the People's Republic of **China**, 1 July 1979, amended in 1997, art.6(3). (emphasis added)
[605] Islamic Penal Code of the Islamic Republic of **Iran**, 21 April 2013, Art. 4. (emphasis added)
[606] Criminal Code of **Portugal**, 2006, art. 7(1). (emphasis added)
[607] Criminal Code of the Republic of **Uzbekistan**, 1994, amended in 2002, art. 11(2). (emphasis added) For a similar formulation see Criminal Code of the Republic of **Tajikistan**, 1998, amended in 2020, art. 14(2).
[608] Criminal Code of the Republic of **Cameroon**, 12 July 2016, art. 8. Emphasis added.

As to the constitutive element theory:

- **France**: "*An offence is deemed to have been committed within the territory of the French Republic where* ***one of its constituent elements*** *was committed within that territory.*"[609]

Similar to national laws, the exact scope of territorial jurisdiction of the ICC is also based upon its constituent instrument, i.e., the Rome Statute. As comparative law demonstrates, when States wished to have territorial jurisdiction for crimes which only "partially" committed in their territory, they prescribed this choice with clear words. For that end, they included both types of concepts: on the one hand, "conduct" or "act"; and on the other hand, "consequence" or "result" in order to give wider effect to the principle of territoriality. However, that is not the case for the RS. The RS only speaks of "*the territory of which the conduct in question occurred"* and does not mention of anything similar to concepts such as consequence or result. This omission cannot be explained by a simple mistake. On the contrary, it appears to be the result of a preference. It is hard to believe that while the vast majority of states legislate their territorial jurisdiction with clear words, including the consequences of criminal conducts on a basis of territorial jurisdiction, they do not do the same for the RS while envisaging the same scope of jurisdiction. In conclusion, this omission suggests that the drafters delimited the territorial jurisdiction of the Court only with the territory which the conduct occurred. Given national law formulations of territorial jurisdiction suggest that the formulations of territorial jurisdiction of states are not identical. Accordingly, the ICC cannot rely on a particular understanding of territorial jurisdiction by arguing its exclusivity, and that the explicit preference of drafters to the use of "conduct" points to a conduct-based, or subjective territoriality.

This reading of article 12(2)(a) is further substantiated by the "ordinary meaning" of the concept of "conduct" found in legal and general dictionaries. While Black's Law Dictionary defines conduct as: "*personal behavior, whether by action or inaction; the manner in which a person behaves*"[610]; Merriam Webster's Legal

[609] Criminal Code of the **French** Republic, 1994, art. 113-2(2). (emphasis added) For the constitutive element theory, the PTC III also gave the examples of Algeria, Belgium, Benin, Cambodia, Cameroon, Chad, Central African Republic, Côte d'Ivoire, Djibouti, Guinea, Jordan, Luxembourg, Madagascar, Mali, Mauritania, Niger, Republic of the Congo, Rwanda and Vanuatu.[609]
[610] Garner, *Black's Law Dictionary*, p. 326.

Dictionary defines the term as: "*an act or omission to act*".[611] Similarly, general dictionaries define the concept with similar meanings: "*personal behavior; way of acting*"[612], "*the manner in which a person behaves; behaviour*"[613]. More specifically, criminal law literature uses the concept to amount to the behaviour of the perpetrator, as well.[614] The adjectives used for the term confirms this meaning: "criminal conduct", "harmful", "harm-causing", "culpable", "purposeful", "forbidden", "reckless", "negligent", "result-threatening", "habitual, impulsive, and compulsive", "dangerous", "risky", "harmless", "preparatory", "soliciting or aiding", "justifiable", "immoral", "offensive", "illegal" and "criminalized conduct".[615]

As a result of the so-called contextual interpretation of article 12(2)(a) of the RS, the ICC argued that the use of "crime" in the second part of the sentence denotes that the "conduct" used in the first half of the sentence was also used to meant "crime".[616] However, aside from being an unsupported proposition, there are substantial evidence against it. First of all, as demonstrated above, "conduct" has a well-established meaning in the literature. Therefore, its explicit usage cannot be overlooked by calling it an erroneous formulation, especially considering that the OTP stated in the Request that "*The drafters of article 12(2)(a) were careful to frame the provision (…)*".[617] Secondly, the opposite of the ICC interpretation might also be true. In that sense, the usage of "crime" in the second part of the sentence might be to denote to "criminal conduct" in short. As a third point, the usage of "occurred" indicates a factual concept. Lastly, the usage of the concept "conduct" throughout the RS and EOC reveals the cherry picking done by the ICC:

- These sentences demonstrate that the RS was formulated in line with the criminal law terminology so as to differentiate the concepts of conduct and consequence: "*For the purposes of this article, a person has intent where: (a)*

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611 'Conduct', **Merriam Webster's Legal Dictionary**, https://www.merriam-webster.com/dictionary/conduct#legalDictionary.
612 'Conduct', **Dictionary.Com**, https://www.dictionary.com/browse/conduct.
613 'Conduct', **Collinsdictionary.Com**, https://www.collinsdictionary.com/dictionary/english/conduct.
614 *See* Roger Geary, **Understanding Criminal Law**, London: Cavendish, 2002, pp. 7–12.
615 *See* Larry Alexander, Kimberly Kessler Ferzan, Stephen J Morse, **Crime and Culpability: A Theory of Criminal Law.**, Leiden: Cambridge University Press, 2009.
616 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar at 23; M. Vagias, **The Territorial Jurisdiction of the International Criminal Court**, Cambridge, United Kingdom: Cambridge University Press, 2014, p. 82.
617 ICC, Office of the Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', para. 14.

*In relation to **conduct**, that person means to engage in the conduct; (b) In relation to a **consequence**, that person means to cause that consequence or is aware that it will occur in the ordinary course of events*."[618], "*As the elements of crimes focus on the **conduct, consequences and circumstances** associated with each crime, they are generally listed in that order (…)*".[619]

- These sentences give the conduct the meaning of behaviour or act of a person: "*"Attack directed against any civilian population" means a course of **conduct** involving the multiple commission of acts (…)*"[620], "*No person shall be criminally responsible under this Statute for **conduct** prior to the entry into force of the Statute*."[621] "*(…) a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her **conduct**, or capacity to control his or her **conduct** to conform to the requirements of law (…)*"[622]
- These sentences confirm that the concept of crime is conceived as the legally qualified form of the concept of conduct: "*A person shall not be criminally responsible under this Statute unless the **conduct** in question constitutes, at the time it takes place, **a crime** within the jurisdiction of the Court*."[623], "*This article shall not affect **the characterization of any conduct as criminal** under international law independently of this Statute*."[624], "***The conduct which is alleged to constitute a crime** within the jurisdiction of the Court (…)*"[625], "*A mistake of law as to **whether a particular type of conduct is a crime** within the jurisdiction of the Court (…)*"[626], "***A particular conduct may constitute one or more crimes.***"[627].

Finally, there is also a practical and motivational explanation of the preference of drafters to narrow the scope of territorial jurisdiction to the territory where the perpetrator committed the criminal conduct. Firstly, the ICC does not have its own police or military force. In that sense, the ICC relies on the support of the law

[618] Rome Statute, art. 30(2). (emphasis added)
[619] Elements of Crimes, para. 7(a). (emphasis added)
[620] Rome Statute, art. 7(2)(a). (emphasis added)
[621] Rome Statute, art. 24(1). (emphasis added)
[622] Rome Statute, art. 31(1)(a). (emphasis added)
[623] Rome Statute, art. 22(1). (emphasis added)
[624] Rome Statute, art. 22(3). (emphasis added)
[625] Rome Statute, art. 31(1)(d). (emphasis added)
[626] Rome Statute, art. 32(2). (emphasis added)
[627] Elements of Crimes, para. 9. (emphasis added)

enforcement agencies of SPs. According to public international law, States can use their law enforcement power only over their own territories. They cannot trespass other States' territories in order to investigate crimes or pursue criminals without the consent of the forum State. When the crime is committed in the territory of a SP, the state is able to collect evidence and pursue criminals when the ICC requests. However, when a criminal conduct is committed in the territory of a non-SP and its results spread to a SP, the SP would not be able to conduct an effective investigation. In this scenario, most, if not all, of the perpetrators and evidence would be within the territory of the non-SP. As the SP, which the results of the crime have been observed, cannot conduct an investigation in the territory of another state without its consent, the ICC would be compelled to seek the consent of the forum state, which is not legally required to grant such consent. As the ICC cannot be cooperated by SPs, the ICC investigations would come to an impasse. Accordingly, in order to prevent such scenarios, the drafters of the RS opted to narrow the scope of territorial jurisdiction of the ICC. In this way, the ICC could be able to focus on those situations which have prospects of successful investigations based on the international law obligations of cooperation of SPs under the RS. As can be anticipated from the characteristics of the present situation, it is highly unlikely for the OTP to conduct an effective investigation in terms of collecting evidence and apprehending suspects in Myanmar.

> *5. Accordingly, under article 12(2)(a) of the Rome Statute, the ICC can investigate and prosecute crimes which are only partially committed in the territory of a State Party.*

In conclusion, the scope of territorial jurisdiction the states have under international law is only relevant to the ICC in terms of the maximum scope of territorial jurisdiction SPs *might have possibly* delegated to the ICC. However, the scope of actual delegation of territorial jurisdiction from SPs to the ICC must be determined according to the RS. As explained, the drafters of the RS did not want the ICC to invoke territorial jurisdiction when a random part of a crime took place within the territory of a SP. Accordingly, the ICC would have territorial jurisdiction only when the criminal "conduct" takes place within the territory of a SP. In that sense, the ICC cannot assert territorial jurisdiction when *only* the "consequence" of a criminal conduct takes place within an SP territory. The correct scope of territorial jurisdiction of the ICC that concentrate on "conduct" was stated in an *obiter dictum* as: "*The Court*

has jurisdiction if the ***conduct was either completed*** *in the territory of a State Party or* ***if it was initiated*** *in the territory of a State Party and* ***continued*** *in the territory of a non-State Party* ***or vice versa***.”[628]

b. The crime of “deportation”

B. Crossing an international border is a necessary legal element of the crime of deportation hence constitutes a “*part of the ‘‘conduct in question’’*”.

To begin with, it has become unnecessary to argue that there are two distinct crimes in article 7(1)(d) when the PTC generalised the proposition of the OTP so as to include any crime which a part of it has been committed within the territory of a SP was sufficient to trigger territorial jurisdiction of the ICC. With this decision, the PTC replaced the “extra-territoriality due to the legal definition of a crime” to “extra-territoriality due to the factual circumstances of a case”. The extensive efforts of the OTP to prove the duality of crimes in article 7(1)(d) went to waste when the PTC decided that any crime can be used to extend the territorial jurisdiction of the Court. When conceived in this general manner, it becomes redundant to discuss whether there actually is a separate crime called “deportation” which has a “distinctive” legal element that makes it an extra-territorial crime by definition. On the other hand, contrary to the unwavering conviction of the OTP, there are ample evidence suggesting that there is only one crime in article 7(1)(d). These explanations will be provided so as to identify the shortcomings and contradictions of the ICC reasoning.

1. Under the RS, ‘‘deportation’’ and ‘‘forcible transfer’’ constitutes two distinct crimes.

According to the Explanatory Note of the Elements of Crimes, “*Some paragraphs of those articles* (articles 6, 7, 8) *of the Rome Statute list multiple crimes. In those instances, the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements*.” However, when the EOC deals with article 7(1)(d) of the RS, it provides the elements of this crime under one heading: “*Crime against humanity of deportation or forcible transfer of population*”. *A contrario* of the explanatory note, article 7(1)(d) prescribes a single crime. Moreover, article 7(2)(d) of the Rome Statute defines the

[628] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan paragraph 50. (emphasis added)

terms used in the previous paragraph as: "*"Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law*."[629] In addition to that paragraph, footnote 13 attached to the first element of "crime against humanity of deportation or forcible transfer of population" in the EOC prescribes as follows: "*"Deported or forcibly transferred" is interchangeable with "forcibly displaced"*".[630] Both of these authoritative explanations suggest that the drafters did not make an explicit distinction between these two concepts.[631]

In the reasoning, the PTC has explicitly disregarded the footnote 13 of the Elements of Crimes while interpreting article 7(1)(d) of the RS, on the grounds that "*the Elements of Crimes must, in general, be "consistent with" the Statute*."[632] However, with this explicit disregard, the Court conflated the targets of two provisions of the RS. According to article 9(1) of the RS, "*Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.*"[633] Clearly, this provision refers to the Court itself. On the other hand, the provision relied upon by the PTC to disregard footnote 13 was directed to the ASP[634], the ICC organ which consists of SPs to the RS that adopts and amends the EOC by a two-thirds majority. Accordingly, by disregarding footnote 13, PTC I implied the "inconsistency" and "inapplicability" of an authoritative interpretative instrument contrary to the explicit rule of the RS[635] and the general rule of interpretation of treaties codified in the VCLT[636].

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[629] Rome Statute, art. 7(2)(d).
[630] Elements of Crimes, footnote 13.
[631] Christopher K. Hall, Kai Ambos, 'Article 7: Crimes Against Humanity', **The Rome Statute of the International Criminal Court: A Commentary**, ed. by Triffterer, Ambos, C.H.BECK-Hart-Nomos, 2016, p. 196.
[632] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" paragraph 56.
[633] Rome Statute, art. 9(1).
[634] Rome Statute, art. 9(3).
[635] "*Applicable Law: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*" Rome Statute, art. 21(1)(a).
[636] "*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."
"*3. There shall be taken into account, together with the context:*
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" United Nations, Vienna Convention on the Law of Treaties. art. 31(3)(a).

Both the ICC and the authorities cited by the ICC mentioned of the "customary meanings" of these concepts. However, none of these authorities referred to any valid source. In that sense, these so-called customary meanings must be critically analysed. These concepts can be historically analysed both as a war crime and as a crime against humanity. Furthermore, it might even be interpreted as a method of genocide. Nonetheless, the identical usages of the concepts in international treaties for both war crimes and crimes against humanity require a coordinated analysis.[637]

The concept of crimes against humanity was first used in 1915 in a diplomatic correspondence. In May 1915, British, French, and Russian joint declaration announced that the killings of Armenians by Turkish and Kurdish population in Eastern Turkey was constituting "crimes against humanity and civilisation".[638] With respect to the deportation of Armenian citizens by the Ottoman Government from eastern part of the country to the southern part of the then Ottoman territory, northern Syria,[639] the Allied Powers wished to conduct prosecutions for the responsible Turkish officials.[640] Accordingly, the 1919 Commission on Responsibilities included the "deportation of civilians" as among the possible charges that can be brought for the officials of the defeated states.[641] The legal basis of this international crime was the result of expanding the concept of war crimes through the Martens Clause, based on the notion of "laws of humanity".[642] This insertion can be considered to be related to the Armenian deportations, as there was no mention of this concept in any of the IHL instruments concluded before 1919.[643] In this direction, a provision was inserted to the

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[637] Guido Acquaviva, 'Forced Displacement and International Crimes', **Legal and Protection Policy Research Series**, PPLA/2011/05, 2011, p. 5.
[638] cited, p. 11.
[639] 'The Events of 1915 and the Turkish-Armenian Controversy over History: An Overview', https://www.mfa.gov.tr/the-events-of-1915-and-the-turkish-armenian-controversy-over-history_-an-overview.en.mfa; Rouben Paul Adalian, 'Armenian Genocide (1915-1923)', https://www.armenian-genocide.org/genocide.html.
[640] Garibian Sévane, 'From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress', **Armenian Review**, no. 1–2, 2010, pp. 87–102.
[641] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', Report Presented to the Preliminary Peace Conference, 29/03/1919, p. 114.
[642] M. Cherif Bassiouni, 'Commission on Responsibilities', **Encyclopedia.Com**, https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/commission-responsibilities.
[643] Before the Commission's Report, on 26 February 1919, the Armenian politican Boghos Nubar Pasha was using the concept "deportation" for the forced displacement of Armenians by the Ottoman Government. 'Secretary's Notes of a Conversation Held in M. Pichon's Room at the Quai d'Orsay', Paris, 26/02/1919, https://history.state.gov/historicaldocuments/frus1919Parisv04/d8.

unratified Treaty of Sevres which used the word deportation for this situation: "*The arbitral commissions will have power to order: (2) The removal of any person who, after enquiry, shall be recognised as having taken an active part in massacres or deportations or as having provoked them (…)*".[644] Historical facts suggest that as the forced destination of the Armenian population was within the territory of the then Ottoman State, the usage of the concept deportation in these documents did not mean forced displacement across international borders. The usage of the concept in the Treaty of Versailles also did not hint at the destination of the civilian population.[645] Later, the concept deportation resurfaced in the legal texts of 1945 as a crime against humanity with the Control Council Law No. 10[646], the Charter of the International Military Tribunal[647], and the Charter of the International Military Tribunal for the Far East[648] without making a reference to the forced destination of victims. The Draft Code of Offences against the Peace and Security of Mankind of 1954 also did not mention the destination of the victims.[649]

[644] 'Treaty of Sèvres', 10/08/1920, art. 144(4)(2).

[645] "*Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation (…)*". 'Treaty of Versailles', 28/06/1919, Annex I (2).

[646] "*Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population (…)*". 'Control Council Law No. 10', Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette Control Council for Germany 50-55 (1946), 20/12/1945, art. II(1)(c).

[647] *Crimes against humanity. namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war (…)*". 'Charter of the International Military Tribunal', Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement'), 08/08/1945, art. 6(c).

[648] See for the identical definition, 'International Military Tribunal for the Far East Charter', Tokyo, 19/01/1946, art. 5(c).

[649] "*Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*." 'Draft Code of Offences against the Peace and Security of Mankind', International Law Commission, 1954, art. 2(11). The commentary of the Draft Code was not limiting the concept in terms of the destination of victims either. 'Draft Code of Offences against the Peace and Security of Mankind with Commentaries', Yearbook of the International Law Commission, 1951, Vol. II, 1954.

Most recently, in addition to the RS, deportation was included in the Statutes of the ICTY[650], the ICTR[651] and the SCSL[652] as a crime against humanity. In all of these examples, the Statutes refer to the crime with a single word: "deportation". Accordingly, in contrast to the formulation adopted in the RS, these three Statutes did not qualify the concept, or include "transfer" or "forcible transfer" within the formulation. The first international text to include "forcible transfer" as a crime against humanity was the 1996 Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC. The relevant paragraph was formulated slightly different than the formulation in the RS: "*arbitrary deportation or forcible transfer of population*".[653] The more important part of this document is its commentary with respect to this paragraph, which establishes the basis of the OTP proposition relating to the duality of crimes in article 7(1)(d).

The commentary stated that: "*Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State. The term "arbitrary" is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law.*"[654] First of all, the first sentence did not assert that these definitions were historical or customary. Secondly, even if that was implied, there was no explanation or reference to support that. Though it was used by the OTP in order to attain a desired legal result, the commentary, probably, only intended to clarify that these crimes could be committed both within and outside of the national territory.

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[650] 'Statute of the International Criminal Tribunal for Former Yugoslavia', International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Security Council, 25/05/1993, art. 5(d).

[651] 'Statute of the International Criminal Tribunal for Rwanda', Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, UN Security Council, 08/11/1994, art. 3(d).

[652] 'Statute of the Special Court for Sierra Leone', UN Security Council, 16/01/2002, art. 2.

[653] 'Draft Code of Crimes against the Peace and Security of Mankind', International Law Commission, 1996, art. 18(g).

[654] 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries', Yearbook of the International Law Commission, 1996, vol. II, Part Two, p. 49, para. 13. Similarly, the 1991 ILC Report also stated, without any reference or explanation, that "*Deportation, already included in the 1954 draft Code, implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State.*" 'Report of the International Law Commission on the Work of Its Forty-Third Session, 29 April - 19 July 1991', UN Doc. A/46/10, 1991, p. 104.

The ICTY have also dealt with the definitions of these concepts in different cases. In *Blaskic,* the Trial Chamber used the concepts of deportation and forcible transfer interchangeably, and the Appeals Chamber stated that "*deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5*".[655] In *Krnojelac,* the Prosecution charged the defendant with "persecution by way of deportation and expulsion" and stated that deportation could occur within a State's national boundaries, as well. As the Prosecution did not rely on the crime against humanity of "deportation" under article 5(d) of the ICTY Statute *per se,* the Appeals Chamber concluded that the main issue in this case was not relating to the definitions of these concepts.[656] Nonetheless, the Appeals Chamber concluded that "*displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law*".[657] With respect to the criminal nature of the forced displacement, it stated that "*the forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent*."[658]

In *Krstić,* the ICTY Trial Chamber stated that, under customary international law, deportation and forcible transfer had different meanings. However, the only reference to support this proposition was to the commentary of the ILC Draft Code, which was discussed above.[659] Surprisingly, the Trial Chamber added that "*this distinction has no bearing on the condemnation of such practices in international humanitarian law*", as both the concepts were criminalised under international law.[660] This understanding was applicable to the ICTY Statute as well, because even interpreted differently, the ICTY was considering forcible transfer as among "other inhumane acts" under article 5(i) of the ICTY Statute.[661]

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[655] Prosecutor v. Tihomir Blaskic, Judgement, IT-95-14-A (ICTY Appeals Chamber 29 July 2004). paras. 150-153.
[656] Prosecutor v. Milorad Krnojelac, Judgement, IT-97-25-A (ICTY Appeals Chamber 17 September 2003). paras. 210, 224.
[657] cited, para. 222.
[658] cited, para. 218.
[659] Prosecutor v Radislav Krstic, Judgement, IT-98-33-T (ICTY Trial Chamber 2 August 2001), paras. 521, 531-532.
[660] cited, para. 522.
[661] cited, para. 523.

Contrary to the *Krstić* Trial Chamber, Trial Chamber in *Stakić* concluded that the rationale behind the criminalization of deportation is "*the actus reus of forcibly removing*" and "*not the destination resulting from such a removal*". Moreover, due to the possible impracticability of the definition, the Trial Chamber stated that, "*a fixed destination requirement might consequently strip the prohibition against deportation of its force.*" The Trial Chamber added that this would also go against the rationale behind the mandate of the ICTY and the protected interests with the crime of deportation. With reference to article 7(1)(d) of the RS, the Trial Chamber concluded that "*what has in the jurisprudence been considered two separate crimes is in reality one and the same crime*".[662] However, in *Stakić* and *Krajišnik,* the ICTY Appeals Chamber concluded that deportation would not include those acts of forcible displacement that occurred wholly within the national borders.[663] This interpretation was, however, understandable in terms of the principle of *nullum crimen sine lege,* which requires narrow interpretation of criminal law rules that would otherwise expand the criminal responsibility of the defendant.[664]

In his partly dissenting opinion, Judge Shahabuddeen stated that there was "*no binding pronouncement by any body of authority to the effect*" that deportation require crossing a border.[665] Additionally, Judge Shahabuddeen determined that the 1991 ILC Report which was taken as a basis by the Appeals Chamber cited "*no supporting authority for the distinction which it makes*".[666] Judge Shahabuddeen also stated that the ILC Report did not intend to limit the meaning of "deportation" *per se,* but to define the words it used in the Draft. Accordingly, this verbal context was different than that of ICTY Statute, which only used the concept deportation.[667] In terms of determining the customary international law definitions of concepts, Judge Shahabuddeen stated that "*hints and allusions must be separated from a categorical proposition to the effect that the term cannot be so used.*" and "*to say that "deportation" has been used in several cases in relation to the crossing of a border is not the same as saying that it*

[662] Prosecutor v. Milomir Stakić, Judgement, IT-97-24-T (ICTY Trial Chamber 31 July 2003)., paras. 677-680.
[663] Prosecutor v. Milomir Stakić, Judgement, IT-97-24-A (ICTY Appeals Chamber 22 March 2006)., paras. 288-303 ICTY Appeals Chamber, *Krajisnik* para. 304.
[664] cited, para. 302.
[665] Partly Dissenting Opinion of Judge Shahabuddeen, Prosecutor v. Milomir Stakić, Judgement, IT-97-24-A (ICTY Appeals Chamber 22 March 2006).
[666] cited, para. 24.
[667] cited, para. 25.

can only be so used."[668] Lastly, Judge Shahabuddeen concluded that excluding forcible displacements within national borders from the definition of deportation, and accepting that conduct to fall into the definition of "other inhumane acts" looks *roundabout.*[669]

Moreover, the ICC disregarded the fact that both concepts, (unlawful) deportation and (forcible) transfer, were also criminalized as a war crime in IHL.[670] The identical usages of these two concepts for war crimes necessitates an inquiry into the historical employment of the concepts in IHL instruments. A difference to be bear in mind that deportation or forcible transfer as a war crime can only be committed against enemy protected persons. In that sense, this crime cannot be committed against fellow citizens of the perpetrator. These situations would be constituting crimes against humanity.[671]

The first use of deportation as a war crime in international law instruments was the 1919 Commission of Responsibilities. However, the list was not completely specified for either war crimes or crimes against humanity, in that sense, the definitions were blurred. Moreover, there was certain amount of conflation between these concepts at the time. This sentence illustrates the extent of the legal basis of condemnations: "*In spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage.*"[672] Explicit mentions of deportation as a war crime were found after the Second World War with the Control Council Law No. 10[673] and the Charter of the Nuremberg Tribunal.[674] In addition to the lack of a hint at the final destination of the

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[668] cited, para. 32.
[669] cited, para. 42.
[670] "*Unlawful deportation or transfer or unlawful confinement*", Rome Statute, art. 8(2)(a)(vii); "*The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;*" Rome Statute, art. 8(2)(b)(viii).
[671] Acquaviva, 'Forced Displacement and International Crimes', p. 20.
[672] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', p. 113.
[673] "*War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment* ***or deportation to slave labour or for any other purpose, of civilian population from occupied territory*** *(…)*", 'Control Council Law No. 10', art. II(1)(b). (emphasis added)
[674] "*War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or* ***deportation to slave labour or for any other purpose of civilian population of or in occupied territory***". 'Charter of the International Military Tribunal', art. 6(b). (emphasis added)

deported victims, there were other clues suggesting the general applicability of the concept deportation in terms of the destination. First of all, "deportation to slave labour" implies that the forcibly displaced people were not ejected from the territory, hence outside of the control of the perpetrators, on the contrary, they were displaced to another location within the control of the perpetrators. The phrase "*deportation (...) of civilian population from occupied territory*" used in C.C. Law 10 denotes that the only criterion was the original location of the population, not the deported destination. In that sense, the civilian population might have been deported to the unoccupied territory or another occupied territory of their own State, to the territory of the occupying State, or to the territory of a third State. Apparently, not all of these scenarios require crossing an international border. Moreover, the phrase "*deportation (...) of civilian population of or in occupied territory*" used in the Charter of the IMT suggests that deportation of civilian population "in occupied territory" was also covered by the definition.

IHL texts also provide ample evidence for a better understanding of the concepts as they start to include the concept "transfer". Article 147 of the 1949 Geneva Convention IV deems "unlawful deportation and transfer" as a war crime.[675] Article 49(1) of the Convention prescribes: "*Individual or mass* ***forcible transfers****,* ***as well as deportations*** *of protected persons* ***from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not****, are prohibited, regardless of their motive.*"[676] (emphasis added). This article invalidates the proposition that these concepts differ based on the final destination. On the contrary, while article 49 limits the scope, it does not differentiate these concepts based on the destination. Furthermore, it treats both of the concepts equally to encompass only the situations of forcible displacement from occupied territory to another country.

The same treatment can be observed in article 49(6) of the Convention: "*The Occupying Power shall not deport or transfer parts of its own civilian population into*

[675] "*Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: (...) unlawful deportation or transfer or unlawful confinement of a protected person, (...)*" 'Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War', 12/08/1949, art. 147.
[676] "Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War", 12.08.1949, art. 49.

the territory it occupies."[677] Similarly, the Convention used both of the concepts equally for an intrinsically transnational conduct. In addition to the other grave breaches in the Protocol and the Conventions, article 85(4)(a) of the Additional Protocol I to the Geneva Conventions, which is almost identical to article 8(2)(b)(viii) of the RS, considers these conducts as grave breaches of the Protocol: "*a) the* ***transfer*** *by the Occupying Power of parts of its own civilian population* ***into the territory it occupies****, or* ***the deportation or transfer of*** *all or parts of* ***the population of the occupied territory within or outside this territory****, in violation of Article 49 of the Fourth Convention*".[678] Lastly, article 17 of the Additional Protocol II also prohibits "forced movement of civilians" during internal armed conflicts.[679] These IHL rules further support that IHL did not establish a rigid connection with these two concepts and the destination of forcible displacements. ICRC's customary IHL work also did not imply a definite destination for the definition of these concepts either.[680]

If in any case these concepts are to be defined differently, another distinctive line might be drawn. Accordingly, the difference might be based on the nature of the acts of the perpetrator and not related to the destination of the victims. In that sense, while deportation is carried out by expulsion or other coercive means that aims the victims to leave a certain place by themselves under coercion; forcible transfer might indicate direct transportation of victims under the control of the perpetrator against their will. This understanding would also seem reasonable in terms of the adjectives used for these two concepts. Generally, while "deportation" is qualified with the

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[677] It must be noted that deportations and transfers in this paragraph were relating to the civilian population of the Occupying Power. 'Commentary of 1958 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War', Geneva: International Committee of the Red Cross, 12/08/1949, https://ihl-databases.icrc.org/ihl/INTRO/380, commentary of art. 49(6).

[678] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(4)(a). (emphasis added).

[679] "*Prohibition of forced movement of civilians: 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.*" International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 17.

[680] Jean-Marie Henckaerts, Louise Doswald-Beck, **Customary International Humanitarian Law Volume I: Rules**, Cambridge: Cambridge University Press, 2009, p. 462. Rule 130: "*States may not deport or transfer parts of their own civilian population into a territory they occupy.*" The ICRC used both the concepts for an intrinsically transnational displacement or relocation. In the Note to Rule 129, the ICRC, with respect to Rule 130, states: "*The only exception to this is Rule 130, which covers both forcible and non-forcible transfer of populations into occupied territory.*" cited, p. 457.

adjective “unlawful”; “transfer” is qualified with the adjective “forcible”. Accordingly, the innate forcible nature of deportation renders the usage of adjective “forcible” redundant. Based on this qualification, it can be deduced that there could be “lawful deportations” and “voluntary or uncoerced transfers”[681]. While deportations in accordance with international law would explain the former, such as deportation of an illegal immigrant in accordance with international human rights law; voluntary transfer would be exemplified by people requesting the Government to be evacuated from a region due to the fear of a natural disaster. It can be asserted that article 7(1)(d) of the RS does not qualify deportation with the adjective unlawful. However, this is due to the fact that article 7(2)(d) of the RS attaches a legal element to the crime in a general way with the phrase “without grounds permitted under international law”. The *travaux préparatoires* of the RS also support this understanding.[682]

With respect to the legitimacy of the ICC, the material problem is not the exact definitions of these concepts. The problem is that the OTP interpreted these concepts by overlooking counter evidence and without promising any legal benefit, in order to build a convoluted argumentation as required for its agenda. The interpretations of the OTP and the PTC were unnecessary because the RS and the EOC explicitly criminalise both “internal and external forcible displacements”[683]. It would have been sensible to discuss the exact meanings of these two concepts, if only one of them was criminalised in the RS. With respect to the present situation, the legal problem is not whether the crimes committed against the Rohingya constitutes the crime of deportation. There is no question about it. The issue is the OTP to made up artificial and redundant definitions, in order to expand the jurisdiction of the Court.

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[681] ‘Commentary of 1958 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War’, commentary of art. 49(1).

[682] ‘United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’, Official Records, Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, Rome, 15/07/1998. “*Some qualifier was needed for "deportation" to indicate that it did not refer, for example, to transfers of populations in such situations as large-scale natural disasters.*” Representative of Japan, p. 156; “*With respect to the enumeration of the acts constituting crimes against humanity, the word "unlawful" should precede "deportation" in paragraph 1 (d) because there might be deportations that were lawful under the fourth Geneva Convention of 1949*.” Representative of Israel, p. 156; “*With regard to (f), the wording "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" was acceptable as being consistent with the fourth Geneva Convention, although ideally his delegation would like to see an extension of that principle, encompassing some kind of prohibition against deportation, which might have an ethnic cleansing dimension*.” Representative of Jordan, p. 158.

[683] Partly Dissenting Opinion of Judge Shahabuddeen, Prosecutor v. Milomir Stakić, Judgement paragraph 24.

2. As they are different crimes, they consist of different legal elements.

As demonstrated, deportation and forcible transfer do not constitute two distinct crimes under the RS or CIL. The purpose of article 7(1)(d) is to criminalize forced displacement irrespective of its destination and the means used for the realization of the intended consequence.

3. The distinctive legal element, or the "legally required element" of the crime of deportation is "the occurrence on the territory of the second State".

Legal elements of crimes have primary significance in terms of substantive criminal law. Firstly, a distinctive legal element of a crime would make sense in terms of prosecuting a defendant with a particular offense. At this stage, the prosecutor and the defence would argue whether the required legal elements of a crime have been committed or occurred. This would make the difference between "guilty" and "not guilty" verdict. Secondly, had the RS envisaged two different crimes namely deportation and forcible transfer and attached them two different penalties, it would have also made sense to discuss the distinctive legal elements of these two crimes in order to determine the penalty accordingly. However, neither of these scenarios are at present. In that sense, legal elements of crime of deportation are relevant in terms of prosecuting and sentencing the defendants, not for interpreting, and especially extending, the jurisdiction of the Court.

At footnote 32 of the Request for a Ruling on Jurisdiction, the OTP states: "*As a matter of law, however, it is not necessary to prove entry to another State, but merely that the victim has been ejected from the originating State—as such, a victim may potentially be deported to the high seas. What is crucial is that the international border, de jure or de facto, of the originating State is crossed*."[684] After several pages, footnote 51 states that: "*As a matter of fact, this will most usually be directly into another State, but also could take place without entering another State (for example, on to the high seas).*"[685] Though forming the crux of the issue, the OTP preferred to state these sentences in the footnotes. According to the own sentences of the OTP, *as*

[684] ICC, Office of the Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', p. 32.
[685] cited, p. 51.

a matter of law, crossing into another state is not a legally required element of the crime. Entering into another state is only a *factual* consequence of the crime. Accordingly, extending the jurisdiction of the ICC based on the destination country is relying upon the factual consequence of the crime, not its legal corollaries.

4. Crossing an international border is not "the mere remote effect" of the crime of deportation.

To support its position, the OTP used an analogy: "*In this manner, the crime of deportation is analogous to a cross-border shooting: the crime, for example murder, is not completed until the bullet (fired in one State) strikes and kills the victim (standing in another State). In both scenarios, the occurrence on the territory of the second State is not, in legal terms, the mere remote effect of a completed criminal conduct on the territory of the first State—rather, it is a legally required element of the crime, and thus part of the "conduct in question" for the purpose of article 12(2)(a).*"[686] Although it seems a convenient analogy at first glance, certain differences can be observed: firstly, regarding the cross-border shooting, the victim is already at the territory of this State when the crime committed. On the other hand, victims of deportation are forced to leave the territory of the originating State, where they suffered the illegal coercion. In that sense, while the "thing" that goes across border, for cross-border shooting, is the bullet, the instrument which the crime is committed with, for deportation, what goes across border is the victims, whom the crime is committed against. Secondly, for cross-border shooting, the crime of murder being committed across an international border is not a required element of the crime. On the contrary, that is only an incidental feature of certain cases. Accordingly, the term "cross-border shooting" is not a crime *per se*, but a certain form of occurrence of the crime of murder. Lastly, with respect to the cross-border shooting, the issue whether both States would invoke territorial jurisdiction is a matter of national criminal law policy, which needs to be determined based on national legislations of the respective States.

Moreover, the term "mere remote effect" requires an explanation. The Request of the OTP did not provide a definition of the concept. However, the criminal law literature has concepts such as: "consequence" or "result". These concepts refer to the observable changes which the criminal conduct of the perpetrator causes. For result-

[686] cited, para. 27.

crimes, these observable changes are required to be proven for the conviction of the perpetrator. As it appears, the usage of "the mere remote effect" serves the purpose of downplaying the criminal law terminology of conduct/consequence conceptualisation. Alternatively, with the phrase "mere remote effect", the OTP might be referring to "effects doctrine". As this doctrine is grounded on the effects that are observed in the territory of a State, though not being a direct result /consequence of a crime, effects and consequences of a crime might be conceived as different concepts. However, the forced displacement of the victims is not argued to be the "effect" of the coercive acts, in the sense it is used in the effects doctrine, but their (direct) "consequence".

5. As being a legally required element of the crime, crossing an international border constitutes a "part of the "conduct in question"".

A previous decision of the ICC, which the OTP cited in the Request yet, surprisingly, did not interpret in this way, is sufficient to challenge this proposition:

> "*(244) A literal interpretation of the wording used by the Elements of Crimes to define the actus reus of the crime leads to the conclusion that deportation or forcible transfer of population is* ***an open-conduct crime****. In other words, the perpetrator may commit* ***several different conducts*** *which can amount to "expulsion or other coercive acts", so as to force the victim to leave the area where he or she is lawfully present, as required by article 7(2)(d) of the Statute and the Elements of Crimes. (245) Accordingly, in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that* ***one or more acts*** *that the perpetrator has performed* ***produced the effect*** *to deport or forcibly transfer the victim. Absent such* ***a link between the conduct and the resulting effect*** *of forcing the victim to leave the area to another State or location, the Chamber may not establish that deportation or forcible transfer of population pursuant to article 7(2) (d) of the Statute has been committed*."[687] (emphasis added)

As this paragraph aptly put it, according to the criminal law terminology, for the crime against humanity of deportation, while the coercive acts constitute conduct; the

[687] Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11 (ICC, Pre-Trial Chamber II 23 January 2012).

resulting effect of forcible displacement constitutes result or consequence. In that sense, they are not "*different facets of the "conduct in question"*"[688], as argued by the OTP.

6. The ICC has territorial jurisdiction over the deportation of Rohingya from Myanmar to Bangladesh.

As the coercive acts, i.e., the conduct, took place in a non-SP, Myanmar, the ICC cannot assert territorial jurisdiction over the deportation of Rohingya from Myanmar to Bangladesh.

c. *De facto* universal jurisdiction of the ICC

C. As article 12(2)(a) of the Statute allows the Court to invoke territorial jurisdiction when only a part of a crime takes place within the territory of a State Party, the ICC can prosecute, not only the crime against humanity of deportation, but any crime in the Rome Statute if a part of the crime takes place within the territory of a State Party.

Interesting point about this proposition is that it was not proposed by the Prosecutor, yet it was proposed and adopted by the PTC unilaterally. With this proposition, the PTC demonstrated that the hesitation of the OTP when requesting a ruling on jurisdiction was redundant. The OTP, arguably, in order to make the Request more acceptable, attached a two-fold restriction to it. Firstly, the OTP only asked for the scope of territorial jurisdiction of the ICC for the crime against humanity of deportation. Accordingly, territorial jurisdiction would be based on the "constituent element of crossing a border" of the crime of deportation. Secondly, in order not to widen the jurisdiction of the Court limitlessly, the OTP formulated the question based on the facts of the present situation. For that end, the OTP argued that the ICC would have territorial jurisdiction only when the deported victims *directly* cross into an SP. However, both PTC I and PTC III eliminated these restrictions. In this manner, the ICC has acquired almost *de facto* universal jurisdiction. This would make the crimes that led the victims of which fled to one of the SPs, even indirectly, possible to be investigated and prosecuted by the ICC, irrespective of the nationality of the perpetrators and the territory such criminal conduct was committed in the first place.

[688] ICC, Office of the Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', para. 28.

IV. CONCLUSION

While the First Chapter presented a legitimacy conceptualisation and its related elements for the ICC, the Second Chapter illustrated some of the important legitimacy challenges and criticisms against the ICC. Finally, the Third Chapter critically analysed two recent investigations of the ICC. The main argument of this thesis is that after these two investigations, the ICC will be in a deeper legitimacy crisis.

The First Chapter conceptualised the concept of legitimacy as a subjective belief into the appropriateness of an order or an authority, which is established through a dynamic and complex process. Beholders establish their legitimacy beliefs based on the facts which they are aware of, and legitimacy elements they value the most. In that sense, the establishment of this belief is shaped by the characteristics of the beholder, the authority and the relationship between them. This thesis found a non-exhaustive list of a dozen of legitimacy elements pertaining to the ICC, by conceptualising the ICC as both a legal and political institution: legality, legal reasoning, coherence, independence, impartiality, due process (fair trial), consent, effectiveness, transparency, accountability, composition, and equality.

The First Chapter concluded that the basis of legitimacy of the ICC is twofold: formal-rational authority and substantive-rational authority. While there are over a dozen of legitimacy related elements, legality and legal reasoning have the biggest effect on the legitimacy of the ICC as an international criminal court. Whereas legality assesses how legally constrained the ICC is as a formal-rational authority; legal reasoning assesses how competent the ICC is as a substantive-rational authority. Accordingly, a perception of deliberate, systematic and fundamental infringement of law based on poor, inaccurate, insufficient, one-sided and goal-driven legal reasoning is capable to create illegitimacy for the ICC. Shortcomings in these elements also motivates constituencies to question other legitimacy elements such as composition, independence, impartiality, equality, due process, transparency, and accountability. In

turn, illegitimacy beliefs towards the ICC would engender incompliance, hence negatively impact the effectiveness of the ICC. Finally, the ensued illegitimacy beliefs would induce State Parties to withdraw their consent, hence entail wide illegitimacy to transform into invalidity.

The Second Chapter observed that there is a great variety of challenges against the ICC. While some criticised the ICC for depicting itself as a heroic and exceptional institution without paying due regard to the realities and limitations of the Court; others criticised for its overtly state-lenient foundations in the Rome Statute. While on the one hand the ICC Prosecutors and Judges received criticism for their personal attitudes, they also received criticism for their professional performances concerning situation and case selection, concluding investigations, and relationships with colleagues. While some states criticised the ICC for its distorted relationship with the UNSC, others criticised it for disproportionately targeting African states and leaders.

The Second Chapter found that the ICC is prone to political manipulation due to the formation of the Rome Statute system. First of all, the overtly state-lenient constitution of the ICC cooperation regime under the Statute enables State Parties to evade their legal commitment through various legally permissible routes. Secondly, the inclusion of the UNSC into the Rome Statute by endowing referral and deferral powers has created many problems. In the initial years of the ICC mandate, the UNSC used its deferral powers for immunisation. Moreover, the UNSC's use of the referral powers have only contributed to the overburdening of the ICC, due to the lack of concrete support by the UNSC. As independent of their situational and temporal positions and powers, the power of the P-5 within the UN is considered as "structural power" due to its permanent character which is embedded in international law. Accordingly, this power dynamic has been considered to be "comparable to colonial and neo-colonial relationships".[689] In that sense, extending this skewed power dynamic into the Rome Statute meant the ICC to inherit the UNSC baggage.

There have been observed various state responses to the illegitimacy of the ICC: 1) not acceding to the RS, 2) withdrawing from the RS, 3) reducing or not

[689] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p. 165.

increasing the budget of the ICC, 4) not contributing to the budget of the ICC, 5) not referring situations to the ICC, 6) incompliance to the judgements of the ICC, 7) open criticism towards the ICC, 8) stealing the Court's jurisdiction by contemplating alternative courts or methods, 9) imposing sanctions against the ICC personnel. While most of these responses were illustrated throughout the thesis, the first half of the list will be demonstrated below. The first two of these responses can be observed in the below graphic which pictures that the accession to the RS has almost stopped and two withdrawals have already taken place.

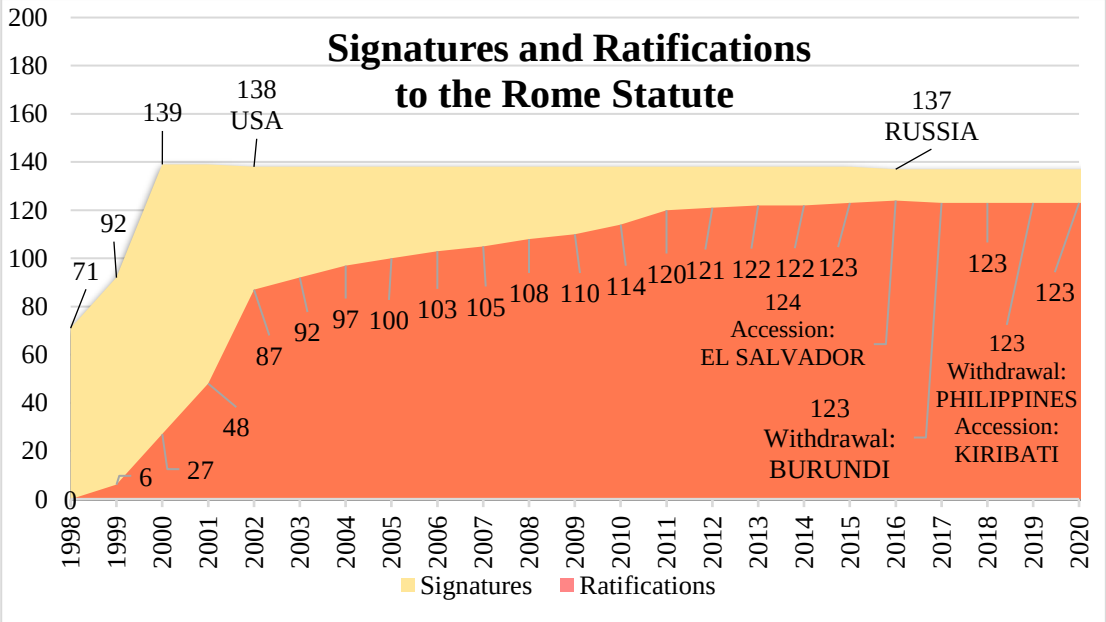

Figure IV.1 Signatures and Ratifications to the Rome Statute[690]

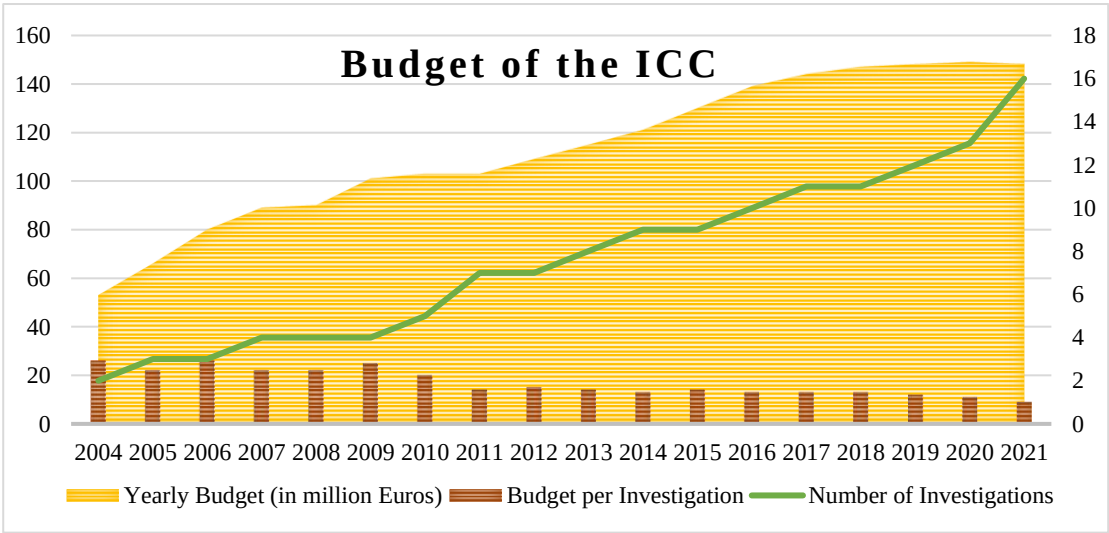

Figure IV.2 Budget of the ICC[691]

[690] Composed by the Author based on the data found at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/states%20parties%20_%20chronological%20list.aspx (Accessed 15.11.2021)

[691] Composed by the Author based on the data found in the ICC budget resolutions at https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx (Accessed 15.11.2021)

As to the third response, the above graphic presents that the Court's budget has not been increased in the last years, and due to the drastic increase in the number of investigations opened recently, the budget per investigation has shrunk considerably.

Table IV.1 Investigations of the ICC

Countries	Trigger Mechanism	Year of the Investigation[•]	Scope of the Investigation
Uganda	Self-Referral	2004	Non-State Act.
Congo	Self-Referral	2004	Non-State Act.
Sudan	UNSC Referral	2005	State Actors
Central African Rep.	Self-Referral	2007 (refer.: 2004)	Non-State Act.
Kenya	*Proprio motu*	2010	State Actors
Libya	UNSC Referral	2011	State Actors
Cote d'Ivoire[*]	*Proprio motu*	2011	State Actors
Mali	Self-Referral	2013 (refer.: 2012)	Non-State Act.
CAR II	Self-Referral	2014	Non-State Act.
Georgia	*Proprio motu*	2016	No charge yet.
Burundi	*Proprio motu*	2017	No charge yet.
Bangladesh/Myanmar	*Proprio motu*	2019	No charge yet.
Afghanistan	*Proprio motu*	2020	No charge yet
State of Palestine	(Self-)Referral	2021 (refer.: 2018)	No charge yet
Philippines	*Proprio motu*	2021	No charge yet
Venezuela	State Parties' Referral	2021 (refer.: 2018)	No charge yet

As can be observed in the above table, the UNSC has never referred another situation to the ICC after the Libya referral. In line with that, the UNSC has never provided a concrete support to the ICC for the UNSC-referred situations. The State Party referrals also decreased in number, except with the recent Palestine and Venezuela situations. Moreover, an examination of the recent investigations of the ICC

[•] Unless stated otherwise, the year of referrals and investigations are the same.
[*] Accepted the *ad hoc* jurisdiction of the Court in 2003 and ratified the Rome Statute in 2013.

suggests that the ICC will experience an over-increasing non-cooperation of states. First of all, Myanmar has never been a State Party to the Rome Statute. The withdrawals of Burundi and Philippines from the Rome Statute also revoked their international obligations to cooperate with the Court. Accordingly, three of these investigations rely primarily on the cooperation of states which are not legally obliged to do so, and politically opposed to the Court. Secondly, the situation in the State of Palestine also lacks a prospective due to the lack of a sovereign Palestinian government, and lack of a legal obligation of cooperation of Israel. Lastly, the cooperation of the Taliban government of Afghanistan does not appear as realistic considering the content of the Afghanistan investigation.

With respect to the legitimacy challenges against the ICC, this thesis suggests that the ICC misinterpreted the underlying basis of its legitimacy crisis. As the overall discourse into the ICC legitimacy problem has revolved around "African bias", "African selectivity", "neo-colonialism", and "neo-imperialism"; the ICC has developed the impression that simply the profile of its caseload was the main issue. Although this perceived African selectivity was the visible aspect of the legitimacy challenges against the ICC, the background of this crisis was lying on the approach of the ICC to legal constraints imposed upon it, and legal reasoning and transparent case and situation selection policy expected of it. In that sense, the ICC failed to be an active listener in the legitimacy dialogue with its constituency.

According to the analyses of this thesis, the African selectivity challenge was stemming from the fact that the ICC did not adopt a transparent and coherent situation and case selection policy. This early African exclusivity was explainable to a certain extent. As not established democracies, the African states had ratified the Rome Statute widely in order to show their commitment to the rule of law.[692] During the early years of the ICC mandate, the African states referred situations concerning the rebel groups in their territories.[693] However, despite certain African governments' political use of the ICC, the other major factor contributed to this early exclusivity was the ICC's reluctance to initiate investigations against high-reputation states such as UK in Iraq

[692] Beth A. Simmons, Allison Danner, 'Credible Commitments and the International Criminal Court', **International Organization**, vol. 64, no. 2, 2010, pp. 225–56.
[693] Schabas, *An Introduction to the International Criminal Court*, p. 38.

situation, and US in Afghanistan situation.[694] Inability to explain the non-initiation of these investigations might have more contributed to this legitimacy challenges than the initiation of African investigations.

Another aspect of the legitimacy crisis of the ICC was that it failed to appear legally constrained, and to provide accurate, coherent and understandable legal reasoning. Although unable to provide a consistent legal reasoning over different decisions, the over-insistent approach of the ICC to the issue of head of state immunity of Al Bashir was one of the greatest contributions to the legitimacy crisis of the ICC. While on the one hand ignoring the political realities by ordering a State Party to arrest the head of state of a non-State Party, the ICC also failed to explain the international law basis of its different arguments' fundamental propositions.

The Third Chapter critically evaluated the initiation of Afghanistan and Myanmar/Bangladesh investigations. An overall legality evaluation of the ICC in these investigations and in the Al Bashir case suggests that the ICC misapplied the basic premises of multiple fields of law in different occasions: public international law (head of state immunity in *Al Bashir* case); international criminal law (war crime-armed conflict nexus in *Afghanistan* investigation); criminal law (definition of the concept "conduct" in *Myanmar/Bangladesh* investigation); and the Rome Statute (scope of territorial jurisdiction of the ICC in the Rome Statute in *Myanmar/Bangladesh* investigation). All these examples of misapplication of law have led to a single conclusion: an omnipotent ICC with almost no legal constraint.

A similar overall evaluation of legal reasoning presents that the ICC frustrated several requirements of legal reasoning such as: disregarding counter evidence (legal cherry-picking); disregarding counter opinions; using inappropriate analogies; intentional changing of the wordings of constituent instruments; intentional changing of the meanings of fundamental legal concepts; explicit disregard of the authoritative interpretative sources; not prioritising and focusing the critical legal issues; not providing reasons for diverting from a previous ruling on the same issue; not establishing a coherent and foreseeable jurisprudence.

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[694] *See* for the theoretical explanation. Dothan, 'How International Courts Enhance Their Legitimacy', p. 460.

This thesis proposes that there might be three possible scenarios that would be able to explain these inaccurate decisions and insufficient reasonings:

1- The Court reached these conclusions with good faith and without an unstated goal.
2- The Court reached these conclusions with the intent of pursuing an internal-ultimate-unstated goal: to intervene in every major international situation involving international core crimes, which an international accountability procedure has been called forth extensively, without paying due regard to general international law and the provisions of the Rome Statute. In short, to become the saviour of the international community.
3- The Court reached these conclusions with the intent of pursuing an internal-strategic-unstated goal: to assuage the legitimacy challenges against itself, especially those pertaining to the African selectivity and neo-imperialism, by expanding and diversifying its caseload. In other words, to ensure its legitimate existence and continuity in order the ICC to continue to carry out its mandate.

All of these scenarios are capable to give the ICC a pejorative name. For the first scenario, due to the deficiencies in the legitimacy related elements of legality, legal reasoning and coherence, the Court might be called as “the incompetent court”. However, when we observe the intricate, yet inconsistent and inaccurate, legal reasoning provided to justify the decisions, it is neither possible nor fair to call the Court incompetent. All these intricate reasoning points to the capability of the ICC to contemplate on various legal problems. Therefore, these decisions suggest that the ICC has been acting in pursuit of a specific agenda. It can be speculated that the ICC has used its authority to achieve certain internal-unstated goals.

As to the second scenario, due to the heavy reliance on the desire of becoming a heroic saviour while ignoring the law, the Court might be called “the vigilante court”. This naming would indicate the illegitimacy of the Court due to its oxymoron nature. By definition, a court is supposed to respect and uphold the law. By disregarding the law, a court would be invalidating itself, even if the court does that for “the greater good”. Lastly, due to the efforts to protect itself from the legitimacy challenges against it without paying due regard to the law, the Court might be called “the self-legitimating

court". This scenario, firstly, presumes that the ICC decided on these cases as a response to the legitimacy challenges posed against it. Accordingly, these decisions were parts of a legitimation strategy of the ICC. However, forming and implementing a policy with the intent of fostering legitimacy does not render an international court illegitimate *ipso facto*. The illegitimate aspect of the ICC legitimation strategy was that it was in contradiction with the law.

This thesis argues that, through these investigations, the ICC intended to respond to the two major legitimacy challenges posed against it at the expense of legality and legal reasoning. Firstly, by initiating these investigations, the ICC intended to counteract the "African selectivity" and "African bias" challenges by expanding and diversifying its caseload. Although the Myanmar/Bangladesh situation was beyond the territorial jurisdiction of the ICC as defined in the Rome Statute, the ICC resorted to an overly expansive interpretation of its territorial jurisdiction and concluded that the ICC would have territorial jurisdiction even only a part of a crime takes place in the territory of a State Party.

Secondly, by explicitly and exceedingly targeting the USA and the CIA, the ICC intended to counteract the "neo-colonialism" and "neo-imperialism" challenges. The jurisdictional basis of the Afghanistan situation was always solid, yet due to the fear of US repercussions, the Prosecutor stalled the initiation of an investigation for 11 years. Convinced that the US will never be an ICC supporter, the second Prosecutor decided to initiate the investigation. Nonetheless, the ICC went beyond simply holding accountable US military personnel for crimes committed in Afghanistan. In addition to that, the ICC targeted CIA personnel for crimes committed outside Afghanistan over those victims who were also captured outside Afghanistan. The ICC attempted to establish the crime-armed conflict nexus by transforming the customary and statutory cumulative conditions into alternative conditions.

Potential situations and cases to be investigated by the ICC were already limitless even before these decisions. This thesis argues that after the Afghanistan and Myanmar/Bangladesh jurisprudence, the ICC's legitimacy problems will worsen. These problems will likely reveal themselves in different forms across different ICC constituencies. For example, lawyers will likely focus on the inadequacy and

insufficiency of legality and legal reasoning in these decisions. States, especially non-State Parties, will be more interested in the incursion of the ICC authority into their sovereignty. Lastly, public will likely develop unrealistic expectations concerning the jurisdictional and investigative capabilities of the ICC, which will be frustrated due to the real limitations of the ICC. In turn, this frustration is likely to develop into a perception of ineffectiveness of the ICC for the general constituency.

There have been various suggestions concerning the course of action the ICC should adopt. In that sense, de Hoon suggested the Court to establish an open dialogue with its constituency and to set its goals realistically:

> "*The Court (together with its states parties) and the wider international criminal justice field should take critical signals more seriously and engage in dialogue with a more open attitude to avoid that this battle between the Court and (particularly) African states intensifies further, victims get more disillusioned, and the support for the Court deteriorates further. As part of this conversation, rather than denying its politics, the Court should recognize and explain its politics and choices, acknowledge the simple fact that, with its financial and jurisdictional limitations, this one court in The Hague can only be a symbolic court that can only prosecute a fraction of what occurs in a world so full of atrocities, and engage in an open dialogue with victims and stakeholders on the choices it thus needs to make*."[695]

Over the last years, though certain efforts have been made, the ICC did not engage in an open dialogue with its constituency fully. The recent two independent expert reviews on the OTP and the ICC gives a hope, although limited.[696] In that sense, though mostly admitting and addressing certain shortcomings of the ICC, the defensiveness of the ICC and inconsistency of the responses with the practice, especially of the judiciary, should be noted.[697] Moreover, the appointment of a new

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[695] Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy', p. 611.

[696] Office of the Prosecutor, 'Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation'.

[697] International Criminal Court, 'Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report": Preliminary Analysis of the Recommendations and Information on Relevant Activities Undertaken by the Court'.

Prosecutor is also promising in terms of the application of the suggestions in these reports. However, these reports had a limited mandate in terms of the subjects which they could analyse. Commissioned by the OTP and the ASP, these reports were unable to critically analyse the substance of the judicial decisions of the ICC. Therefore, an overall evaluation of the ICC legality and legal reasoning could only be done by outsiders who do not wield any power to jeopardise the independence and impartiality of the ICC.

This thesis argues that, in general, the Court identified its legitimacy problems based on the popular discourse and attempted to cure them based on its own perspective without paying attention to the legal limitations and openly discussing its goals and policies with its constituency. Accordingly, instead of assuaging these challenges, the approach of the ICC meant repeating and even exacerbating the original legitimacy problems by ignoring legality and legal reasoning. Based upon the theoretical, empirical and legal analyses conducted so far, this thesis suggests a legitimation strategy for the ICC. Overall, the ICC should adopt a holistic legitimacy discourse which takes into consideration the legitimacy elements of legality, legal reasoning, transparency, and effectiveness.

First of all, it must be acknowledged that, the *sine qua non* requirement of ICC legitimacy, especially in the long-term, is legality and legal reasoning. In that sense, the ICC needs to appreciate the fact that it is a unique institution in the history of international law. Its jurisprudence may establish the foundational pillars of the modern international criminal law, which will continue to develop throughout the 21. century. However, for that to realise, the ICC should not consider legitimacy challenges and criticisms against it as personal attacks that needs to be countered. In line with that, the ICC should realise that its legitimacy problems will never end. Its very existence is a new concept in the world, and therefore will always ensue heated debates. In conclusion, instead of hastily responding to its challenges and criticisms, the ICC should firstly focus on defining key concepts, establishing basic principles, and ensuring coherence within the jurisprudence. In line with that, the ICC Chambers should always ensure the accountability of the OTP based on legal and reasonable standards.

On the flip side, the Court is not a purely legal institution. Its structure requires it to make important choices. And, where there is choice, there is politics. This politics does not equate with "non-legal" or "illegal". On the contrary, politics for the ICC is about making informed choices among legally permissible options. Accordingly, after establishing its legal and realistic limitations, the ICC should focus on forming an investigation policy within these parameters. However, in order to establish this policy, the ICC needs to determine its goals concretely, which would enable a goal-based effectiveness analysis possible. These goals should be more specific than general aspirations such as "fight against impunity". In line with that, the ICC should determine its goals and investigation strategy in collaboration with its constituency in a transparent manner.

In addition to these suggestions which do not require an amendment to the Rome Statute, two other courses of action can be considered in order to increase the effectiveness and accountability of the ICC. As demonstrated in the Second Chapter, the Rome Statute is overtly state-oriented. By the very constitution of the international community, the ICC is bound to rely on state cooperation for enforcement. However, the Rome Statute goes further than this necessity in a way that states are provided with wide discretion to cooperate with the Court in certain conditions. In that sense, without resorting to an illegitimacy discourse, any State Party may find a legal route to weaken its cooperation obligation, either by the invocation of "national security exception", or by concluding immunity or extradition agreements, especially with non-State Parties, which may take precedence over their cooperation obligations towards the ICC.

Furthermore, these exceptional provisions were generally the results of the US negotiation strategy during the Rome Conference.[698] In that sense, certain fundamental aspects of the ICC cooperation regime were heavily influenced by a non-State Party and especially an opponent of the Court. Accordingly, State Parties and the ICC need to consider whether the current cooperation regime is understandable, clear, proportionate and objective. If the current Statute fails these tests, the ICC and State Parties should consider amending the Statute for a more principled and balanced cooperation regime. However, considering the legitimacy crisis of the ICC, this does

[698] Keitner, 'Comment, Crafting the International Criminal Court Trials and Tribulations in Article 98(2)', p. 215; Lohr, Lietzau, 'One Road Away from Rome: Concerns Regarding the International Criminal Court', pp. 36–37.

not seem to be a realistic expectation as State Parties would be unwilling to assign more discretion to the Court on these highly sensitive issues in terms of sovereignty. In that sense, legitimacy and credibility of the ICC presents its importance once more.

The second suggestion which requires an amendment to the Statute is the reformation of the OTP. Currently, the OTP is led by a single Chief Prosecutor, who is elected for a nine-year term. Although supported by many experts and prosecutors, it is the Prosecutor who takes crucial decisions concerning all the proceedings. Hence, this one person can be expected to be very influential in terms of the ICC investigation policies, and legitimacy and credibility of the ICC generally. Moreover, Prosecutor also has a certain degree of representativeness. This thesis suggests that in order to minimise the risk which can be associated to being an individualistic organ, the OTP might be transformed into a collegial body which consists of three Prosecutors. Electing these Prosecutors in every three years for a nine-year term would firstly ensure consistency within the administration of the OTP. Moreover, this collegiality would also promote horizontal accountability by requiring certain fundamental prosecutorial decisions to be taken collectively within the OTP. A collegial OTP would also allow the ICC to be represented more diversly. Lastly, electing a new Prosecutor for every three years would allow the OTP to review and freshen its policies frequently by inserting a new perspective.

In conclusion, the ICC is one of the most promising accomplishments of the international community. The problems which the ICC is facing would cause pain to any person who believes in rule of law, international criminal justice and international peace. As this Author, those who believe in these ideals would wish the ICC to be an effective institution. However, for that to realise, the ICC must be widely perceived as a legitimate authority. Consequently, in order to establish its legitimacy, the ICC needs to be an active listener in its legitimacy dialogue with its constituency. On the other hand, this dialogue also requires its constituency to be aware of the limitations of the ICC and make constructive criticisms for improving the working of the ICC. It should be acknowledged by both sides that the ICC legitimacy dialogue is a cyclical process, which requires constant interaction of all stakeholders.

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