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A Global Public Goods Perspective on the Legitimacy of the International Criminal Court

ALEXANDRE SKANDER GALAND*

ABSTRACT

The International Criminal Court (“ICC” or “Court”) is facing its worst crisis since its creation. At the end of 2016, three States decided to withdraw from the Rome Statute, which suggests there is a risk that the entire institution is falling apart. As early as 2014, the Court was in trouble, as a legitimacy debate arose in the wake of a compliance debacle with respect to the situations in Sudan, Libya and Kenya. In order to achieve effective prosecutions and trials, the Court needs States’ cooperation. This article will show that there are three interdependent legitimacy issues that have been raised for non-compliance with the ICC, which relate to the institutional design necessary to effectively provide a global public good. Moreover, it will demonstrate that the Court’s investigations and prosecution in these three States is affected by source, procedural and outcome legitimacy eroding factors. Due to the entanglement between source and procedural legitimacy, we may have to consider tying both together. On first glance, a compliance pull could be generated by, when source legitimacy is lacking, strictly sticking to the State’s interest in the exercise of prosecutorial discretion as to who to prosecute. This article will argue that the latter option would create a global public bad, as it entails negative externalities and excludes some victims from benefitting from the Court. Nonetheless, this article will show that such calculations

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are already made with regards to so-called self-referrals (i.e., where source legitimacy is not questioned). With respect to outcome legitimacy, this article will argue that the ICC is a victim of the Security Council's ("SC") inability to exercise the responsibility assigned to it by the United Nations Charter and the Rome Statute.

INTRODUCTION

The International Criminal Court ("ICC" or "Court") is facing its worst crisis since its creation. As of 2014, the Court qualified as being in trouble. Indeed, a legitimacy debate arose in the wake of a decision by the Prosecutor to drop its charges against the President of Kenya, Uhuru Kenyatta, the week after the Prosecutor decided to halt its investigations into international crimes committed in Darfur, Sudan. Both decisions of the Prosecutor were taken due to a lack of cooperation by the authorities of Kenya and Sudan. The poor record of the Court, including two convictions (now four) in more than ten years, and these two dismissals, raised the question as to whether the Court was "irrelevant or legitimate." Now that States are considering leaving the Court, there is a serious risk that the institution may fall apart entirely.¹ Its legitimacy needs to be "bootstrapped."²

1. South Africa and The Gambia have revoked their withdrawals. However, the African Union (AU) recently passed a resolution to collectively support a strategy to withdraw from the ICC. *e.g.* Assembly of the African Union, 28th Sess., Int'l Crim. Ct. Doc. EX.CL/1006(XXX) (Jan. 30-31, 2017) (containing the African Union's resolution to collectively support a strategy to withdraw from the ICC); South Africa Withdrawal to the Rome Statute of the International Criminal Court, S. Afr., Oct. 25, 2016, U.N. Doc. C.N.786.2016x.TREATIES-XVIII.10 (noting that South Africa deposited its instrument of withdrawal on 19 October 2016); South Africa Notification of Withdrawal to the Rome Statute of the International Criminal Court, S. Afr., March 7, 2017, U.N. Doc. C.N.121.2017.TREATIES-XVIII.10 (stating that on March 7, 2017, the Government of South Africa notified the Secretary-General of the revocation of its notification of withdrawal from the Rome Statute); Burundi Withdrawal to the Rome Statute of the International Criminal Court, Burundi, Oct. 27, 2016, U.N. Doc. C.N.805.2016.TREATIES-XVIII.10 (containing Burundi's instrument of withdrawal from the Rome Statute on 27 October 2016); Gambia Withdrawal to the Rome Statute of the International Criminal Court, Gam. Nov. 10, 2016, U.N. Doc. C.N.862.2016.TREATIES-XVIII.10 (containing Gambia's instrument of withdrawal deposited on 10 November 2016); Gambia Notification of Withdrawal to the Rome Statute of the International Criminal Court, Gam. Feb. 10, 2017, U.N. Doc. C.N.62.2017.TREATIES-XVIII.10 (containing the Government of The Gambia's notification to the Secretary-General of its decision to rescind its notification of withdrawal from the Rome Statute).

2. Larry May & Shannon Fyfe, *The Legitimacy of International Criminal Tribunals*, in THE LEGITIMACY OF INT'L CRIM. TRIBUNAL 25, 35-40 (Nobuo Hayashi et al. eds., 2017).

It is one of the main assumptions in the (sociological) literature that a court with which States comply is a legitimate court.³ The Rome Statute explicitly obliges its States Parties to execute requests for cooperation and assistance issued by the Court.⁴ And, indeed, in order to achieve effective prosecution and trials the Court needs States Parties and their cooperation.⁵ The Court has referred dozens of findings of non-cooperation in relation to the situations in Sudan and Libya to the Security Council (“SC”), and one finding of non-cooperation in relation to the situation in Kenya to the Assembly of States Parties (“ASP”).

This article will show that in the situations in Darfur, Kenya and Libya, there are three interdependent legitimacy issues that have been raised for non-compliance with the ICC which also relate to the institutional design necessary to effectively provide a global public good (“GPG”). The first section chronicles (1) how non-compliance occurred in Darfur, Sudan, Libya and Kenya.⁶ The second section details the legitimacy issues faced in these three situations by grouping legitimacy issues based on normative grounds, namely, source legitimacy, process legitimacy, and outcome legitimacy.⁷ The third and final section analyzes the concept of global public goods and demonstrates how the challenges against impunity can be considered such a good and also show that the ICC was created to provide this good. This final section then parallels each legitimacy ground with methods developed in the GPG literature to tackle such problems, namely non-consensualism, reciprocity, and distributive conflicts.⁸

I. CHRONICLES OF NON-COMPLIANCE

Antonio Cassese famously described the International Criminal Tribunal for the former Yugoslavia (“ICTY”) as “a giant without arms and legs [which] needs artificial limbs to walk and work” - the artificial limbs were obviously State authorities.⁹ Like the ICTY, the ICC depends on State authorities to fulfill its functions. Darfur (Sudan), Libya, and Kenya

3. See Başak Çalı, Anne Koch, & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 H.R.Q. 955, 959 (2013).

4. Rome Statute of the International Criminal Court, art. 86, U.N. Doc. A/CONF 183/9 (1998) [hereinafter “Rome Statute”].

5. Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. OF INT’L L. 2, 13 (1998).

6. See *infra* Sections I.A-C.

7. See *infra* Sections II.A-C.

8. See *infra* Sections III.A-C.

9. Cassese, *supra* note 5, at 13.

are situations where the ICC has not been able to effectively “walk and work.” These situations are not the only ones where a State failed to cooperate with the Court.¹⁰ They do, however, represent the apex of non-cooperation as they triggered the use of Article 87(7) of the Rome Statute to its fullest extent. Article 87(7), which regulates the procedure to make a finding of non-compliance, reads as follows:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.¹¹

The first part of Article 87(7) of the Rome Statute requires first, that there is a “fail[ure] to comply with a request to cooperate” and, second, this failure is of certain gravity in that it must prevent “the Court from exercising its functions and powers.”¹² The second part of the provision makes clear that the Court’s powers are discretionary ones, as it “may” make a finding of non-compliance and “may” refer the matter to the ASP or the SC.¹³ Thus, a finding of non-compliance does not necessarily follow an objective failure to comply. In the same vein, a finding of non-compliance will not always be followed by a referral to the ASP or SC. The latter measure is, in the Appeals Chamber’s view, one course of action “that *may* be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand.”¹⁴ Referrals to the ASP and/or the SC can be conceived in two ways: first as disciplinary measures, and second, as seeking assistance from external actors. As explained in the following sections, the circumstances and (il)legitimacy grounds, in which each situation develops until it reaches a climax shows how these two purposes can either easily be blurred or kept distinct.

10. See *ICC Official Documents-Arrest Warrants*, ICC FORUM, <http://iccforum.com/background/arrest> (last visited Nov. 3, 2017) (listing several public warrants that remain outstanding as of 2015: Côte d’Ivoire: Simone Gbagbo, since 2012; Democratic Republic of the Congo: Sylvestre Mudacumura, since 2012; Uganda: Joseph Kony, Vincent Otti and Okot Odhiambo, since 2005).

11. Rome Statute *supra* note 4, art. 87(7).

12. *Id.*

13. *Id.*; see also Prosecutor v. Kenyatta, ICC-01/09-02/11-1032, Judgment on the Prosecutor’s Appeal Against Trial Chamber V(B)’s “Decision on Prosecution’s Application for a Finding of Non-Compliance under Article 87(7) of the Statute”, ¶ 55 (Aug. 19, 2015).

14. *Id.* ¶ 51 (emphasis in original).

A. Sudan

The situation in the Darfur region of Sudan ended up before the ICC, as a result of Resolution 1593 adopted by the SC under Chapter VII on 31 March 2005.¹⁵ The first operative paragraph of SC Resolution 1593 “refer[s] the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”¹⁶ This referral clause is followed by a paragraph which “[d]ecides 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 pursuant to this resolution.”¹⁷ The same paragraph also recognizes that “States not party to the Rome Statute have no obligation under the Statute,” but still “urges all States and concerned regional and other international organizations to cooperate fully.”¹⁸

Apart from the subsequent deployment of a joint United Nations-African Union peacekeeping mission, the SC referral is among the only significant reactions of the international community to the crisis in Darfur.¹⁹ Since the SC referral, nine individuals have been warranted or summoned by the Court.²⁰ The most well-known ICC case is against Omar Hassan Al-Bashir, president of Sudan. Two arrest warrants were issued against Al-Bashir; the first arrest warrant for war crimes and crimes against humanity was issued on March 4, 2009,²¹ the second warrant for genocide was issued on July 12, 2010.²²

Only seven days after the Prosecutor had applied for Al-Bashir’s warrant, the African Union (AU) undertook to establish a high-level panel on Darfur.²³ The AU high level panel was tasked with recommending African solutions to effectively address, accountability, on the one hand, and

15. S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

16. *Id.* ¶ 1.

17. *Id.* ¶ 2.

18. *Id.*

19. *International Response to the Darfur Genocide*, GALE GROUP (2014), link.galegroup.com/apps/doc/GXQKOE926533637/SUIC?u=nysl_ce_cazehs&xid=b313f1ad.

20. *The Court Today*, THE INT’L CRIMINAL COURT (Oct. 27, 2017) <https://www.icc-cpi.int/ic-docs/PIDS/publications/TheCourtTodayEng.pdf>.

21. *Id.*

22. *ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan*, THE INT’L CRIMINAL COURT (Mar. 4, 2009) https://www.icc-cpi.int/legalAidConsultations?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir_+president+of+sudan; *Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide*, INTERNATIONAL CRIMINAL COURT (Jul. 12, 2010), <https://www.icc-cpi.int/legalAidConsultations?name=pr557>.

23. Peace and Security Council of the African Union, *Communique of the 142nd Meeting*, Doc. PSC/MIN/Comm(CXLII) (July 21, 2008).

peace, on the other.²⁴ By the same token, the AU made a request to the SC for the situation in Darfur to be deferred.²⁵ These measures were followed with a resolution binding on AU States not to enforce the arrest warrant against Al-Bashir.²⁶

The ICC arrest warrants against Al-Bashir were transmitted to the Sudanese authorities, all States party to the Rome Statute, and all SC members not party to the Rome Statute.²⁷ The warrants requested cooperation in arresting and surrendering Al-Bashir to the ICC.²⁸ But, only the Sudanese authorities and the States party to the Rome Statute were formally obliged to comply with the request of cooperation.²⁹ In principle, this would have meant that Al-Bashir was becoming isolated, as entering the territory of an ICC State party meant being surrendered to the ICC to face trial.³⁰ Nevertheless, the ICC Office of the Prosecutor (OTP) reported in 2016 that “Al Bashir has crossed international borders on 131 occasions since March 2009, on 14 occasions to State Parties, and on 117 occasions to non-State Parties.”³¹

The ICC Al-Bashir docket is excessively loaded with requests for his arrest and surrender to the ICC followed by findings of non-compliance.³² Importantly, the ICC decisions on the failure to comply with the

24. *Id.*; Peace and Security Council of the African Union, *Communique of the 207th Meeting*, Doc. PSC/AHG/COMM.2(CCVII) (Oct. 29, 2009).

25. *Communique of the 142nd Meeting*, *supra* note 23, at 19.

26. Assembly of the African Union, Thirteenth Ordinary Session, *Decision on the Meeting of African States Parties to the Statute of the International Criminal Court*, Doc. Assembly/AU/Dec.245(XIII) Rev.1, ¶ 10 (July 3, 2009).

27. Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333, 333-34 (2009).

28. *Id.* at 334.

29. Rome Statute, *supra* note 4, arts. 86, 89; S.C. Res. 1593, *supra* note 15, ¶ 1; Akande, *supra* note 27, at 334; *see* Rome Statute art. 87(5)(a).

30. *See* Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624 (2009).

31. ICC Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, ¶ 13 (Dec. 13, 2016).

32. *See e.g.* Prosecutor v. Al-Bashir, ICC-02/05-01/09-109, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to the Republic of Chad (Aug. 27, 2010); Prosecutor v. Al-Bashir, ICC-02/05-01/09-139, 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 (Dec. 12, 2011) [hereinafter Decision on Malawi's Non-Compliance]; Prosecutor v. Al-Bashir, ICC-02/05-01/09-140, 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 (Dec. 13, 2011); Prosecutor v. Al-Bashir, ICC-02/05-01/09, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (Mar. 26, 2013); Prosecutor v. Al-

request to arrest and surrender Al-Bashir do not only concern the failure of Sudan to cooperate, but also the failure of State parties to cooperate, allowing Al-Bashir to travel unimpeded.³³ Indeed, Pre-Trial Chamber (PTC) II has referred Malawi, Chad, the Democratic Republic of Congo (DRC), Djibouti, and Uganda for their failure to comply with the ICC request to arrest and surrender Al-Bashir to the Court.³⁴ On the other hand, the PTC declined to refer Nigeria and South Africa to the SC, as it believed that such referrals were not warranted due to the respective authorities' good faith.³⁵

Al-Bashir is not the only Sudanese accused of having committed crimes within the jurisdiction of the ICC. Abdel Raheem Hussein, Minister of National Defence (at the time of the issuance of his warrant), Ahmad Harun, Minister State for Humanitarian Affairs (at the time of the issuance of his warrant), and Ali Kushayb (Janjaweed leader associated with the Sudanese government) have been indicted for war crimes and crimes against humanity.³⁶ The Government of Sudan made clear in several public appearances that it does not intend to cooperate with any of these proceedings.³⁷ The failure of Sudan to arrest and surrender these

Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court (Apr. 9, 2014) [hereinafter Decision on DRC's Non-Compliance]; Prosecutor v. Al-Bashir, ICC-02/05-01/09-227, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (March 9 2015); Prosecutor v. Al-Bashir, ICC-02/05-01/09-266, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute (July 11, 2016) [hereinafter Decision on Djibouti's Non-Compliance]; Prosecutor v. Al-Bashir, ICC-02/05-01/09-267, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute (July 11, 2016) [hereinafter Decision on Uganda's Non-Compliance]; Prosecutor v. Al Bashir, ICC-02/05-01/09-302, 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 (July 6, 2017) [hereinafter Decision on South Africa's Non-Compliance].

33. *Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, supra* note 31, ¶ 10.

34. Decision on Malawi's Non-Compliance, *supra* note 32, ¶ 47; Decision on DRC's Non-Compliance, *supra* note 32, ¶ 34; Decision on Djibouti's Non-Compliance, *supra* note 32, ¶ 18; Al-Bashir, ICC-02/05-01/09-140, ¶ 14.

35. Prosecutor v Al-Bashir, ICC-02/05-01/09, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, ¶ 13 (Sept. 5, 2013); Decision South Africa's Non-Compliance, *supra* note 32, ¶¶ 127-134.

36. *Communique of the 142nd Meeting, supra* note 23, at 19.

37. Prosecutor v. Harun, ICC-02/05-01/07-48, Public Redacted Version of Prosecution Request for a Finding on the Non-Cooperation of the Government of the Sudan in the Case of The Prosecutor v. Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute (Apr. 19, 2010).

Sudanese individuals close to Al-Bashir have also been referred to the SC under Article 87 of the Rome Statute.³⁸

Like Al-Bashir, Abdel Raheem Hussein was found to have travelled to ICC States Parties, namely Chad and Central African Republic, without being arrested.³⁹ PTC II, however, found that it was not necessary to make findings of non-compliance for these two situations, as both States explained that they had been surprised by the presence of Hussein on their territory, and the pending order to arrest and surrender him to the ICC.⁴⁰ These two lenient decisions were however immediately followed by a decision to refer Sudan to the SC for its “long history of determined and consistent failure to comply with UNSC Resolution 1593.”⁴¹

The ICC also investigated crimes committed by groups fighting the Sudanese government.⁴² In mid-2009, the ICC issued summons to Abdallah Banda, Saleh Jerbo, and Bahar Idriss Abu Garda.⁴³ The three were accused of having committed war crimes during an attack carried out against the African Union Mission in Sudan.⁴⁴ No arrest warrant was issued as the PTC found that it was not necessary as these suspects were all ready to voluntarily appear before the Court.⁴⁵ On February 8, 2010, PTC I decided not to confirm the charges against Abu Garda.⁴⁶ While the charges against Banda and Jerbo were confirmed on March 7, 2011,⁴⁷ the

38. Prosecutor v. Harun, ICC-02/05-01/07-57, Decision Informing the United Nations Security Council About the Lack of Cooperation by the Republic of the Sudan (May 25, 2010).

39. Prosecutor v. Hussein, ICC-02/05-01/12-20, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein’s Arrest and Surrender to the Court (Nov. 13, 2013) [hereinafter Decision on Chad’s Failure to Arrest and Surrender Hussein]; Prosecutor v. Hussein, ICC-02/05-01/12-21, Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein’s Arrest and Surrender to the Court (Nov. 13, 2013) [hereinafter Decision on CAR’s Failure to Arrest and Surrender Hussein].

40. Decision on Chad’s Failure to Arrest and Surrender Hussein, *supra* note 39, ¶ 17; Decision on CAR’s Failure to Arrest and Surrender Hussein, *supra* note 39, ¶ 11.

41. Prosecutor v. Hussein, ICC-02/05-01/12-33, Decision on the Prosecutor’s Request for a Finding on Non-Compliance Against the Republic of the Sudan ¶ 7 (June 26, 2015) [hereinafter Decision on Sudan’s Failure to Arrest and Surrender Hussein].

42. Prosecutor v. Banda, ICC-02/05-03/09-636-Red, Prosecution’s Request for a Finding of Non-Compliance Against the Republic of the Sudan in the Case of The Prosecutor v Abdallah Banda Abakaer Nourain Pursuant to Article 87(7) of the Rome Statute (Oct. 16, 2015).

43. Prosecutor v. Banda, ICC-02/05-03/09-2, Summons to Appear for Saleh Mohammed Jerbo Jamus (Aug. 27, 2009); Prosecutor v. Banda, ICC-02/05-03/09-3, Summons to Appear for Abdallah Banda Abakaer Nourain (Aug. 27, 2009); Prosecutor v. Abu Garda, ICC-02/05-02/09-2, Summons to Appear for Bahr Idriss Abu Garda (May 7, 2009).

44. *Id.*

45. *Id.*

46. Prosecutor v. Abu Garda, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, (Feb. 8, 2010).

47. Prosecutor v. Banda, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the “Decision on the Confirmation of Charges” (Mar. 8, 2011).

proceedings against Jerbo were later terminated as he was declared dead.⁴⁸

Nonetheless, Banda still asserted his willingness to appear before the Court. However, in September 2014, it was found that, without the cooperation of Sudan in facilitating Banda's presence at trial, including providing him with travel documents and making all other necessary arrangements as may be appropriate, an arrest warrant would need to be issued.⁴⁹ On November 19, 2015, Trial Chamber IV found that Sudan failed to arrest and surrender Banda to the Court and, thus, issued a finding of non-compliance to be referred to the SC.⁵⁰ When the ICC registry attempted to send the request to arrest and surrender Banda, the Sudanese Embassy refused receipt of the *notes verbales*.⁵¹

The PTC has stressed several times that, because the situation in Darfur was triggered by the SC acting under Chapter VII, it constituted a threat to international peace and security.⁵² Thus, according to the PTC, the SC was expected to assume its primary responsibility of restoring international peace and security by taking further action to enforce cooperation.⁵³ Indeed, "[i]n the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of the United Nations Charter would become futile and incapable of achieving its ultimate goal of putting an end to impunity."⁵⁴ In *Decision on South Africa's Non-Compliance*, the PTC believed that it was unnecessary to refer South Africa to the SC, as all previous referrals "have not resulted in measures against State Parties that have failed to comply with their obligations to cooperate with the Court."⁵⁵ Despite some proposals, in particular those

48. Prosecutor v. Banda, ICC-02/05-03/09-512-Red, Public Redacted Decision Terminating the Proceedings Against Mr. Jerbo (Oct. 4, 2013).

49. Prosecutor v. Banda, ICC-02/05-03/09, Warrant of Arrest for Abdallah Banda Abakaer Nourain (Sept. 11, 2014).

50. Prosecutor v. Banda, ICC-02/05-03/09-641, Decision on the Prosecution's Request for a Finding of Non-Compliance (Nov. 19, 2015).

51. *Id.* ¶ 3. Similarly, the *note verbale* transmitting the "Decision informing the United Nations Security Council about the Lack of Cooperation by the Republic of Sudan" regarding Sudan's failure to surrender Hussein to the Sudanese authorities were left on the pavement before the Embassy of Sudan as the Ambassador refused to accept the notification and voiced his disapproval of the Court. See Prosecutor v. Harun, ICC-02/05-01/07-62, Report of the Registrar on the Notification of the Decision Informing the United Nations Security Council About the Lack of Cooperation by the Republic of Sudan to the Sudanese Authorities, ¶ 3, (July 26, 2010).

52. Prosecutor v. Harun, ICC-02/05-01/07-62, Report of the Registrar on the Notification of the Decision Informing the United Nations Security Council About the Lack of Cooperation by the Republic of Sudan to the Sudanese Authorities, ¶ 3, (July 26, 2010).

53. Decision on Sudan's Failure to Arrest and Surrender Hussein, *supra* note 41, ¶ 8.

54. Decision on Uganda's Non-Compliance, *supra* note 32, ¶ 16.

55. Decision on South Africa's Non-Compliance, *supra* note 32, ¶ 138.

from New Zealand, to adopt a structured practice on the SC's handling of non-cooperation referrals, no follow up has taken place to date.⁵⁶

B. Libya

In February 2011, during the so-called "Arab Spring," the SC referred the situation in Libya to the ICC through Resolution 1970.⁵⁷ This was the first and only SC referral to be adopted unanimously.⁵⁸ Even the Organizations of the Islamic Conference, the Arab League, and the African Union appealed for intervention.⁵⁹ A month later, the SC authorized NATO to enforce a "No-fly Zone" over Libya.⁶⁰ By that time, the situation spiraled into an armed conflict.

Less than six months after the SC referral, the ICC had already charged Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdulla Al-Senussi with crimes against humanity.⁶¹ While these arrest warrants were the quickest ever issued by ICC, the AU changed its position with regards to the appropriateness of referring the situation in Libya to the ICC.⁶² Indeed, the AU noted that "the warrant of arrest issued by the Pre-Trial Chamber concerning Colonel Qadhafi, seriously complicates the efforts aimed at finding a negotiated political solution to the crisis."⁶³

On October 20, 2011, after the AU decided that its Member States shall not cooperate in the execution of the arrest warrant against Muammar Gaddafi and, subsequently, requested the SC to defer the ICC process in Libya,⁶⁴ Gaddafi was killed by a group of rebel fighters.⁶⁵ A month later, Gaddafi's son, Saif, was captured trying to flee to Niger, and taken to Zintan, a city in northwest Libya, where he remained in the custody of

56. S.C. 7582nd mtg., Doc. S/PV.7582 (Dec. 15, 2015).

57. S.C. Res. 1970, ¶ 6 (Feb. 26, 2011).

58. MARK KERSTEN, JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE 116 (2016).

59. *Id.*

60. S.C. Res. 1973 (Mar. 17, 2011).

61. Prosecutor v. Gaddafi, ICC-01/11-01/11-1, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi (June 27, 2011).

62. *Id.*

63. Assembly of the African Union, 17th Sess., ¶ 6, Doc. Assembly/AU/Dec.366(XVII), (June 30, 2011 - July 1, 2011).

64. *Id.*; see also Anna Bishop, *Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge*, 22 MINN. J. OF INT'L L. 388, 402 (2013).

65. Prosecutor v. Gaddafi, ICC-01/11-01/11-22, Transmission of Muammar Mohammed Abu Minyar Gaddafi's Death Certificate (Nov. 9, 2011).

the Zintan Brigade.⁶⁶ On March 7, 2012, the first of several requests by the new Libyan authorities to postpone the surrender of Saif Gaddafi to the Court was rejected.⁶⁷ The Chamber affirmed that Article 94(1) of the Rome Statute, which relates to surrenders requests, did not mention any possibility of postponement.⁶⁸ A month later, the second Libyan postponement request was rejected on the grounds that there was no admissibility challenge before the Chamber at that time.⁶⁹ The Chamber also reiterated its request that Libya proceed immediately with the surrender. However, to abide by the request was, in practice, impossible as Gaddafi was in custody of the Zintan Brigade, an autonomous group acting independently of the government.⁷⁰

The Zintan Brigade also became responsible for another breach of Libya's obligation to the Court. When the ICC Office of the Public Counsel for the Defence visited Gaddafi in Zitan's prison, they were detained for almost a month and their documents were seized.⁷¹ The Pre-Trial Chamber, recognizing the inviolability of the seized documents, requested their return to Gaddafi's defence and the destruction of the copies; a request with which Libya would never abide.⁷²

In March 2012, Abdullah Al-Senussi was arrested in Mauritania, a State not party to the Rome Statute.⁷³ After being approached by the ICC, France and Libya, the Mauritanian authorities decided to extradite Al-Senussi to Libya some six months later.⁷⁴ On April 30, 2012, Libya challenged the admissibility of the Gaddafi and Al-Senussi case and requested the postponement of the surrender requests.⁷⁵ In particular, Libya argued that it was vigorously investigating and willing to prosecute the accused

66. Prosecutor v. Gaddafi, ICC-01/11-01/11, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 7, (Dec. 10, 2014).

67. *Id.*

68. *Id.*

69. Prosecutor v. Gaddafi, ICC-01/11-01/11-100, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi (Apr. 4, 2012).

70. *Libya: Surrender Saif al-Islam Gaddafi to ICC*, HUMAN RIGHTS WATCH, (June 15, 2017), <https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>; see also LIBYA: FROM REPRESSION TO REVOLUTION 698 (M. Cherif Bassiouni ed., 2013).

71. See Prosecutor v. Gaddafi, ICC-01/11-01/11, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 13 (Dec. 10, 2014) [hereinafter Decision on Libya's Non-Compliance].

72. See *id.* ¶¶ 13-19.

73. Bishop, *supra* note 64, at 404.

74. *Id.* at 404-405.

75. Prosecutor v. Gaddafi, ICC-01/11-01/11-130-Red, Application on behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute (Apr. 30, 2012).

and that under the principle of complementarity, the Court had an obligation to grant Libya's admissibility challenge.⁷⁶ The Pre-Trial Chamber redirected the challenge as only applicable to Gaddafi.⁷⁷ On June 1, 2012, the Pre-Trial Chamber granted the postponement of Gaddafi's surrender to the Court, pending the admissibility challenge.⁷⁸

On December 10, 2012, PTC I issued an order to the Libyan authorities that "[r]eiterate[d] to the Libyan authorities the request for arrest and surrender of Al-Senussi and remind[ed] them of their obligation to comply with the request."⁷⁹ On February 6, 2013, the Chamber issued a decision requesting Libya's cooperation in the arrangement of a privileged visit to Al-Senussi by his defence and ordering the immediate surrender of Al-Senussi to the Court.⁸⁰ Meanwhile, the admissibility challenge for Al-Senussi was initiated on April 2, 2013, almost a year after the Gaddafi case.⁸¹ For the only time in the history of the ICC, the OTP supported the admissibility challenges, believing that Libya was genuine in its investigation and prosecution of the ICC accused.⁸² On the other hand, the defendants opposed it, preferring rather to be judged in The Hague.⁸³ However, on June 14, 2013, the Pre-Trial Chamber ended Al-Senussi's hopes of a potential transfer to the ICC, as the surrender request was suspended pending determination of the Libyan admissibility challenge.⁸⁴

76. *Id.* ¶ 1.

77. Prosecutor v. Gaddafi, ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the Application on behalf of the Government of Libya Pursuant to Article 19 of the Statute, ¶ 8 (May 4, 2012); Gaddafi, ICC-01/11-01/11-130-Red, ¶ 73 (Apr. 30, 2012).

78. Prosecutor v. Gaddafi, ICC-01/11-01/11-163, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute (June 1, 2012) (stating the request was postponed in conformity with article 95 of the Statute).

79. Prosecutor v. Gaddafi, ICC-01/11-01/11-241, Order in Relation to the Request for Arrest and Surrender of Abdullah Al-Senussi, ¶ 10 (Dec. 10, 2013).

80. Prosecutor v. Gaddafi, ICC-01/11-01/11-269, Decision on the Urgent Application on Behalf of Abdullah Al-Senussi for Pre-Trial Chamber to Order the Libyan Authorities to Comply with their Obligations and the Orders of the ICC (Feb. 6, 2013).

81. Prosecutor v. Gaddafi, ICC-01/11-01/11-307-Red2, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Apr. 2, 2013); see also Payam Akhavan, *Complementarity Conundrums: The ICC Clock in Transitional Times*, 14 J. INT'L CRIM. JUST. 1043, 1052 (2016) (explaining how the different timing affected the outcome of the challenges) [hereinafter *Complementarity Conundrums*.]

82. Prosecutor v. Gaddafi, ICC-01/11-01/11-167-Red, Prosecution Response to Application on Behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (June 5, 2012).

83. Prosecutor v. Gaddafi, ICC-01/11-01/11-354, Decision on Libya's Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi Pursuant to Article 95 of the Rome Statute and Related Defence Request to Refer Libya to the UN Security Council ¶ 9 (June 14, 2013).

84. *Id.* ¶ 39.

The first decision on the Libyan admissibility challenges was issued with regards to Gaddafi on May 31, 2013.⁸⁵ In considering whether a case is inadmissible, the initial questions the Court determines are whether there are past or ongoing investigations or prosecutions against the person concerned for the same conduct as before the ICC.⁸⁶ Once these questions have been answered positively, the Court must examine the question of unwillingness and inability.⁸⁷ Libya provided documents demonstrating its ongoing investigation of Gaddafi, which covered crimes that were arguably broader than the ones contained in the ICC arrest warrant.⁸⁸ However, the Court stated that it was not persuaded that the evidence sufficiently demonstrated that the same case before the Court was also the same case being investigated by Libya.⁸⁹ Having found the case against Gaddafi to be admissible, the Pre-Trial Chamber recalled Libya's obligation to surrender him to the ICC.⁹⁰ A week later, the Libyan government appealed the admissibility decision and requested that the order for the surrender of Gaddafi be suspended pending the appeal judgment.⁹¹ The Appeals Chamber rejected the request for suspensive effect, as it deemed that Libya could continue its investigations irrespective of whether Gaddafi was transferred to The Hague.⁹²

Meanwhile, the Pre-Trial Chamber issued its decision on the admissibility of the case against Al-Senussi.⁹³ In contrast with Gaddafi, Al-Senussi was held in a state prison.⁹⁴ While the PTC considered whether the proceedings in Libya were covering the same case as before the Court, it expressed some reservations concerning the fact that Al-Senussi was not

85. Prosecutor v. Gaddafi, ICC-01/11-01/11-344-Red, Public Redacted Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 219 (May 31, 2013).

86. *Id.* ¶ 58.

87. Alexandre Skander Galand, *Security Council Referrals to the International Criminal Court as Quasi-Legislative Acts*, 19 MAX PLANCK Y.B. U.N. L. 142, 159 (2016).

88. Gaddafi, ICC-01/11-01/11-344-Red, ¶¶ 131-35.

89. *Id.* ¶ 219.

90. *Id.*

91. Prosecutor v. Gaddafi, ICC-01/11-01/11-350, The Government of Libya's Appeal against Pre-Trial Chamber I's "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi" (June 7, 2013).

92. Prosecutor v. Gaddafi, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related issues, Appeals Chamber, ¶¶ 23-26 (July 18, 2013).

93. Prosecutor v. Gaddafi, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Oct. 11, 2013) (explaining that the Chamber considered that this could render Libya unable to carry out judicial proceedings against Al Senussi as according to the Libyan national justice system, trial proceedings cannot be conducted in the absence of a lawyer for the suspect).

94. *Id.* ¶ 308. However, this fact should not affect the first limb of the inadmissibility test, namely, whether the case at the national level covers the same conduct as the proceedings before the ICC. See *Complementarity Conundrums*, *supra* note 81, at 1054.

provided any form of legal representation for his trial at the domestic level.⁹⁵ Nevertheless, the Libyan inadmissibility challenge became the first decision of the Court ruling in favor of a trial at the domestic level.⁹⁶ Al-Senussi appealed the decision.⁹⁷

While awaiting the appeals on both of the admissibility challenges, Gaddafi's defence lodged a further request for finding of non-compliance and referral to the Security Council.⁹⁸ The Libyan government objected that Gaddafi's non-surrender was not in bad faith and that they were negotiating with the Zintan Brigade for his transfer, without specifying whether this would be to The Hague or Tripoli.⁹⁹

While the Chamber did not seize the requests for a finding of non-compliance, the defence sought a leave to appeal the Pre-Trial Chamber's failure to issue a decision. The Pre-Trial Chamber rejected the defence application.¹⁰⁰ Around a year later, as objective compliance with the Court's request was not forthcoming, PTC I finally requested:

Libya to inform the Chamber, by Wednesday, 28 May 2014, as to the status of the implementation of: (i) its duty to immediately surrender Mr Gaddafi to the Court; (ii) its duty to return to the Defence of Mr Gaddafi the originals of the materials that were seized from the former Defence counsel for Mr Gaddafi by the Libyan authorities during her visit to Mr Gaddafi in Zintan, and destroy any copies thereof; and (iii) its duty to arrange a privileged legal visit to Mr Al-Senussi by his Defence.¹⁰¹

The possibility that the Chamber would refer Libya's failure to cooperate to the Security Council was indeed becoming more concrete.

On July 24, 2014, the Appeals Chamber dismissed the appeal brought by Al-Senussi and confirmed the Pre-Trial Chamber's decision

95. Gaddafi, ICC-01/11-01/11-466-Red, ¶¶ 305-08.

96. *Complementarity Conundrums*, *supra* note 81, at 1055.

97. Prosecutor v. Gaddafi, ICC-01/11-01/11 OA6, Scheduling Order for the Judgment on the Defence's Appeal Against the "Decision on the Admissibility of the Case Against Abdullah Al-Senussi" (July 22, 2014).

98. Prosecutor v. Gaddafi, ICC-01/11-01/11-388, Request for Finding of Non-Compliance and Referral to United Nations Security Council (July 23, 2013).

99. Prosecutor v. Gaddafi, ICC-01/11-01/11-402, Response to the Gaddafi Defence's Request for Finding of Non-Compliance and Referral to United Nations Security Council, ¶¶ 12-13 (Aug. 14, 2013).

100. Prosecutor v. Gaddafi, ICC-01/11-01/11-556, Decision on the "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision" filed by the Defence of Saif Al-Islam Gaddafi (June 10, 2014).

101. Prosecutor v. Gaddafi, ICC-01/11-01/11-545, Decision Requesting Libya to Provide Submissions on the Status of the Implementation of its Outstanding Duties to Cooperate with the Court (May 15, 2014).

to leave his case to be tried by the Libyan domestic court.¹⁰² The requests for cooperation in relation to the case against Al-Senussi were thus withdrawn.¹⁰³ Conversely, the Appeals Chamber had confirmed that the Gaddafi case was admissible to the Court.¹⁰⁴ However, Gaddafi's surrender, as well as the surrender of the privileged documents seized from his defense, did not soon follow.¹⁰⁵

Thus, on December 10, 2014, the Pre-Trial Chamber decided to tackle outright the outstanding issues for which Libya failed to cooperate.¹⁰⁶ The Chamber indicated that the power to refer the matter to the Security Council, according to Article 87(7) was discretionary in nature.¹⁰⁷ Prior to determining the appropriateness and usefulness of referring the matter to the SC, two conditions were spelled out by the Chamber. First, there must have been an objective failure to comply.¹⁰⁸ Second, the requested State must have had the chance to explain itself.¹⁰⁹ In this case, both conditions were deemed met. Despite recognizing "the genuine efforts made by Libya to maintain a constructive dialogue with the Court and . . . the difficulties in its territory," the Chamber considered it appropriate to make a finding of non-compliance and refer the matter to the SC.¹¹⁰ In the Chamber's view, the referral was not designed as a sanction, but as a tool to seek assistance from the SC on how to eliminate impediments to cooperation.¹¹¹

While no further non-compliance decision has been issued in the Libyan situation, the fate of Gaddafi still remains nebulous. On July 28, 2015, the Tripoli Court of Appeal sentenced Gaddafi to death along with several other co-accused, including Al-Senussi for their roles during Libya's 2011 uprising.¹¹² The OTP filed a request to the Court to order

102. Prosecutor v. Gaddafi, ICC-01/11-01/11-565, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on admissibility of the case against Abdullah Al-Senussi" (July 24, 2014).

103. Prosecutor v. Gaddafi, ICC-01/11-01/11-567, Decision Following the Declaration of Inadmissibility of the Case against Abdullah Al-Senussi before the Court (Aug. 7, 2014).

104. Gaddafi, ICC-01/11-01/11-344-Red, ¶ 219.

105. Decision on Libya's Non-Compliance, *supra* note 71, ¶ 25.

106. *Id.*

107. *Id.* ¶ 23.

108. *Id.* ¶ 24.

109. *Id.*

110. *Id.* ¶ 33.

111. *Id.* ¶¶ 33-34.

112. Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11-612, Response to Prosecution's "Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council," ¶1 (Aug. 20, 2015).

Libya to refrain from executing Gaddafi.¹¹³ For the first time in Gaddafi's case, the purported request did not concern acts of the Zintan Brigade, but those of the Libyan authorities.¹¹⁴ The State representative retorted that as the trial was in absentia – although Gaddafi attended two trial sessions via video link,¹¹⁵ Gaddafi would have, once (and if) he were transferred from Zintan, the right to a new trial in person.¹¹⁶ As of yet, no decision has been made on this issue. Conversely, the OTP requested the PTC to bypass the government of Libya and directly transmit the request for surrender to the commander of the Zintan Brigade.¹¹⁷ Whereas the Libyan authorities did not allow for this channel of communication, the Chamber rejected to direct its cooperation request to an entity that is not the *de jure* government.¹¹⁸ In June 2017, the OTP acknowledged that some media reported that the Zintan Brigade had released Saif Gaddafi and that it was trying to find his whereabouts.¹¹⁹

The OTP recently announced that a further arrest warrant for one of Gaddafi's allies, Al-Tuhamy Mohamed Khaled had been issued under seal on April 18, 2013.¹²⁰ Al-Tuhamy was apparently residing in Egypt – a State not party to the Rome Statute – but was not arrested and surrendered on the pretense that other criminals should be sought by the Court.¹²¹ On April 24, 2017, the ICC issued an arrest warrant against Al-Werfalli for war crimes committed in 2016-2017; the first warrant in the

113. Prosecutor v. Gaddafi, ICC-01/11-01/11-611, Prosecution Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council (July 30, 2015).

114. *Id.*

115. Nidal Nabil Jurdi, *The Complementarity Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya*, 30 LEID JOUR. INT'L L. 199, 211 (2017).

116. Prosecutor v. Gaddafi, ICC-01/11-01/11-612, Response to Prosecution's "Request for an Order to Libya to Refrain from Executing Saif Al Islam Gaddafi, States Representatives, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council" (Aug. 20, 2015).

117. Prosecutor v. Gaddafi, ICC-01/11-01/11-634-Red, 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," ¶¶ 15-16 (Nov. 21, 2016).

118. *Id.*

119. *ICC Prosecutor Calls for the Immediate Arrest and Surrender of the Suspects, Msrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court*, THE INT'L CRIMINAL COURT (June 14, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=170614-OTP-stat>.

120. See S.C. 7934th mtg. ¶5, U.N. Doc. S/PV.7934 (May 8, 2017).

121. *Id.*; Prosecutor v Al Tuhamy Mohamed Khaled, ICC-01/11-01/13, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte Annex (Apr. 18, 2013).

Libyan situation that did not concern a former official of the Gaddafi regime.¹²²

C. Kenya

The ICC intervention in Kenya was preceded at the national level by a few cases before Kenyan courts restricted to low-level perpetrators on charges limited to simple offences and the Waki Commission. The Waki Commission recommended that a hybrid Special Tribunal of domestic and international judges be set up to try high-level perpetrators of crimes committed during the 2007-2008 post-election violence.¹²³ One year after the request, no hybrid special tribunal was set up; thus, the OTP asked the Pre-Trial Chamber for the authorization to open an investigation in Kenya.¹²⁴ The Pre-Trial Chamber granted the OTP's request, with one dissenting opinion from Judge Kaul, arguing that the Court lacked jurisdiction, as the crimes committed in Kenya did not satisfy the threshold to be considered as crimes against humanity.¹²⁵

In March 2011, less than a year after having authorized the investigation, PTC II summoned six accused: William Samoei Ruto (minister of higher education, science, and technology), Henry Kiprono Kosgey (member of parliament), Joshua Arap Sang (head of operations of a radio station, Kass FM, allegedly affiliated with one of the two political camps),¹²⁶ Francis Kirimi Muthaura (head of the public service and secretary to the cabinet), Uhuru Muigai Kenyatta (deputy prime minister and minister of finance) and Mohammed Hussein Ali (chief executive and head of the national postal corporation and former chief of police) to appear before the Court, who became colloquially known as the Ocampo Six.¹²⁷

122. *Case Information Sheet, Situation in Libya, ICC-01/11-01/17*, ICC (Aug. 15, 2017), <https://www.icc-cpi.int/libya/al-werfalli/Documents/al-werfalliEng.pdf>.

123. *Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ¶ 183 (March 31, 2010) [hereinafter *Decision on the Authorization of an Investigation in Kenya*].

124. *Id.* ¶ 28.

125. *Id.* ¶ 72.

126. *Prosecutor v. Ruto, ICC-01/09-01/11-307, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,"* ¶ 2 (Aug. 30, 2011); *Prosecutor v. Ruto, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ¶ 72 (Mar. 8, 2011).

127. *Ruto, ICC-01/09-01/11-1*, ¶ 65; *Prosecutor v. Muthaura, ICC-01/09-02/11-1, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Mar. 8, 2011).

On the one hand, all the accused accepted to appear voluntarily before the Court; on the other hand, the Kenyan government immediately challenged the admissibility of the cases.¹²⁸ It argued that it was in a process of a comprehensive judicial reform and that it was preparing to investigate the same conduct as the ones investigated by the OTP.¹²⁹ Despite this pledge from the Kenyan authorities, the Pre-Trial Chamber and the Appeals Chamber confirmed that the cases were admissible, as there was no credible information suggesting that the conduct and the suspects were being investigated.¹³⁰

At the confirmation proceedings, the charges were confirmed against four of the six suspects, including now-President Kenyatta and now-Deputy President Ruto (who assumed their posts in March 2013).¹³¹ In March 2013, well over a year after the confirmation proceedings, the charges against Francis Muthaura were dropped.¹³² While the trial continued for the other accused suspects, the Government of Kenya started to rally at the AU for a mass withdrawal from the ICC, immunity for serving African heads of States, and to have the Kenyan proceedings deferred by the Security Council.¹³³ Also, though not formally challenging Article 27 of the Rome Statute on the irrelevance of official positions before the Court, Kenyatta and Ruto requested to be excused from trial on the ground of their high-ranking positions and accompanying responsibilities.¹³⁴ The Kenyan government then approached the ASP with a request

128. Prosecutor v. Ruto, ICC-01/09-01/11-19, Application on Behalf of the Government of The Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011).

129. Prosecutor v. Muthaura, ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶¶12-14 (May 30, 2011).

130. *Id.*; Prosecutor v. Ruto, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011); Prosecutor v. Muthaura, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” (Aug. 30, 2011); Ruto, ICC-01/09-01/11-307.

131. Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 26, 2012).

132. Prosecutor v. Muthaura, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013).

133. Assembly of the African Union, Decision on International Jurisdiction and the International Criminal Court, Doc. AU Doc. Assembly/AU/Dec.482(XXI) (May 26-27, 2013); Assembly of the African Union, 15th Sess., Decision on Africa’s Relationship with the International Criminal Court (ICC) (Oct. 12, 2013); S.C. 7060th mtg., U.N. Doc. S/PV.7060 (Nov. 15, 2013).

134. This was first suggested by the defense of Mr. Ruto. Prosecutor v. Ruto, ICC-01/09-01/11-777, Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 1 (June 18, 2013); Prosecutor v. Kenyatta, ICC-01/09-02/II-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ¶¶ 5, 66-67 (Oct. 18 2013); Prosecutor v. Ruto, ICC-

for amending Article 27 of the Rome Statute or the Rules of Procedure and Evidence concerning the accused's presence at trial.¹³⁵

Around the same time the ICC was hearing the excusal requests of Kenyatta and Ruto, the ICC issued an arrest warrant against Walter Barasa for trying to bribe witnesses in the Ruto case.¹³⁶ Additionally, while the ASP was considering Kenya's amendments, the OTP filed an application against the Government of Kenya for a finding of non-cooperation with regards to failure to provide documentary evidence related to the Kenyatta case.¹³⁷ The Pre-Trial Chamber found that the Kenyan government failed to obtain the requested material and that its approach "[f]ell short of the standard of good faith cooperation," which entailed that its "failure ha[d] reached the threshold of non-compliance required under Article 87(7) of the Statute."¹³⁸ The Pre-Trial Chamber also found that the Kenyan Government's non-compliance had affected the exercise of the Court's functions and powers under the Statute,¹³⁹ but declined to refer the matter, as it believed that the possibility of obtaining the evidence was speculative.¹⁴⁰

A year later, while the Trial Chamber's decision not to refer Kenya to the ASP despite its failure to cooperate was under appeal, the OTP dropped all charges against Kenyatta owing to a lack of evidence against him.¹⁴¹ This meant that proceedings continued for only two of the original Ocampo Six accused: Joshua Sang and Deputy President Ruto.

In March 2015, the ICC issued two more arrest warrants against Paul Gicheru and Philip Kipkoech Bett for the crime of corruptly influencing six witnesses for their withdrawal as prosecution witnesses or their

01/09-01/11-1066, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18 June 2013 Entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial," ¶ 6 (Oct. 25, 2013).

135. Rules 134 bis, ter, and quater, were amended at the 2013 Annual Meeting of the Assembly of States Party, *see* ICC Res. ICC-ASP/Iz/Res. 7, ¶ 134 (Nov. 27, 2013). Whereas Rule 134 bis regards the use of video technology, Rules 134 ter and quater both regulate situations where complete absence, including virtual participation, from trial can be excused. *See* Johanna Gohler, *Busy Defendants and Phantom Trials: Rethinking the Defendant's Attendance Requirements before the ICC*, 18 *NEW CRIM. L. REV.* 473, 497 (2016).

136. Prosecutor v. Barasa, ICC-01/09-01/13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa (Aug. 2, 2013).

137. Prosecutor v. Kenyatta, ICC-O 1/09-02/1 1-866-Conf-Exp, Prosecution Application for a Finding of Non-Compliance pursuant to Article 87(7) of the Statute against the Government of Kenya (Nov. 28, 2013).

138. Prosecutor v. Kenyatta, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute, ¶ 78 (Dec. 3, 2014).

139. *Id.* ¶ 79.

140. *Id.* ¶ 78.

141. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges against Mr. Kenyatta (Mar. 13, 2015).

recant of prior statements to the Prosecutor.¹⁴² A month later, the Prosecutor requested that the Trial Chamber in the Ruto case admit prior recorded testimony from witnesses who had recanted their prior statements.¹⁴³ Before the Appeals Chamber could state whether the Trial Chamber's decision partly granting the Prosecutor's decision should be reversed, the Kenyan government unsuccessfully tried to convince the 2015 Annual meeting of the ASP to ensure that Rule 68, on the admission of prior recorded testimony, would not be applied to Ruto's case.¹⁴⁴

On April 5, 2016, the last two accused of the Ocampo Six won their "no case to answer" motion and proceedings were terminated.¹⁴⁵ According to the Chamber's majority, this decision does not preclude new prosecution in the future either at the ICC or in a national jurisdiction.¹⁴⁶ Indeed, Judge Eboe-Osuji appended a concurring opinion in which he declared a mistrial in the case.¹⁴⁷ According to the Judge, it could not be discounted that the weaknesses in the Prosecution case might be explained by the demonstrated incidences of tainting of the trial process by way of witness interference and political meddling that was reasonably likely to intimidate witnesses.¹⁴⁸ Similarly, since the cases against Muthaura and Kenyatta were closed due to the withdrawal of charges, they can be reopened if the Prosecutor submits new evidence.¹⁴⁹

Finally, on September 19, 2016, Trial Chamber V(B) came back to its finding of non-compliance in the Kenyatta case and referred the matter to the Assembly of States Parties.¹⁵⁰ The Trial Chamber considered that taking into account the deadlock reached, only the ASP could take effective actions in order to provide an incentive for Kenya to cooperate with

142. Prosecutor v. Gicheru, ICC-01/09-01/15-1-Red, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute" (Sept. 10, 2015).

143. Prosecutor v. Ruto, ICC-01/09-01/11-1866-Conf, Prosecutor's Request to Admit Prior Recorded Testimony into Evidence (Apr. 29, 2015); Prosecutor v. Ruto, ICC-01/09-01/11-1938-Conf-Corr, Decision on Prosecution Request for Admission of Prior Recorded Testimony (Aug. 28, 2015) (granting request for admission of prior recorded testimony in part).

144. See generally Kenya: *State Parties Run Dangerously Close to Interfering with the ICC's Independence*, AMNESTY INT'L (Nov. 27, 2015, 3:46 PM), <https://www.amnesty.org/en/latest/news/2015/11/kenya-state-parties-run-dangerously-close-to-interfering-with-the-iccs-independence/>.

145. Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal (June 16, 2016).

146. *Id.* ¶ 148, n. 210.

147. *Id.* ¶ 140.

148. *Id.* ¶¶ 141-42.

149. Kenyatta, ICC-01/09-02/11-1005, ¶4.

150. Prosecutor v. Kenyatta, ICC-01/09-02/11, Second Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute, ¶¶ 37-38 (Sept. 19, 2016).

the Court, in relation to both the requested material specifically and more generally.¹⁵¹

As to the pending arrest warrants against Barasa, Gicheru and Kipkoech, Kenyan officials have indicated their unwillingness to hand them over to the ICC claiming that they have their own courts.¹⁵²

II. LEGITIMACY GROUNDS

One of the main assumptions of this article, which is mostly upheld in the sociological literature, is that compliance with the Court's requests is taken as an indicator of whether it is seen as legitimate.¹⁵³ Compliance is indeed associated with social legitimacy as the former signals whether the State believes that the institution has the right to rule.¹⁵⁴ Certainly, legitimacy's relationship with compliance is circular.¹⁵⁵ According to Franck, objective legitimacy would exert a "compliance pull."¹⁵⁶ And compliance, in turn, would provide legitimacy to international norms and courts.¹⁵⁷

The purpose of this study is not to classify the ICC as illegitimate because of failures to comply. Rather, it is to see which legitimacy grounds were at stake in these situations where States failed to comply with the Court's order.¹⁵⁸ In other words, justifications for non-compliance provide social legitimacy feedback on normative legitimacy grounds.¹⁵⁹ Thus, this study focuses on the classical normative legitimacy grounds: source, process, and outcome legitimacy.¹⁶⁰ Moreover, it adds

151. *Id.*

152. See Mark Kersten, *Referring Kenya to the ICC Assembly of States Parties, Part 3: Implications for the Ongoing Kenya Cases at the ICC*, JUST. IN CONFLICT (Oct. 6, 2016), <https://justiceinconflict.org/2016/10/06/referring-kenya-to-the-icc-assembly-of-states-parties-part-3-implications-for-the-ongoing-kenya-cases-at-the-icc/>.

153. See, e.g., Alexandra Huneeus, *Compliance with Judgments and Decision*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 440-41 (Cesare P. R. Romano et al. eds., 2013).

154. See Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 406 (2006).

155. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. J. INT'L L. 487, 493 (1997).

156. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG Nations 26 (1990).

157. See *id.*; see also Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 541 (Walter Carlsnaes et al. eds., 2002).

158. See generally Çalı et al., *supra* note 3, at 959-61.

159. See generally JUTTA BRUNNÉE & STEPHEN J TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW AN INTERACTIONAL ACCOUNT (2010).

160. RÜDIGER WOLFRUM AND VOLKER RÖBEN, LEGITIMACY IN INTERNATIONAL LAW 6-7 (2008).

to these normative (i.e., objective) legitimacy grounds the subjective perception of the non-complying States as to whether these grounds are justifying them for not cooperating with the ICC. As we will see in subsequent sections, the context of each situation influences the objective and subjective legitimacy of the Court and their decisions.

A. Source Legitimacy

A widely adhered to view of public international lawyers is the correlation between the legitimacy of international law and courts with state consent.¹⁶¹ This may be called the legitimacy of the source of the Court's jurisdiction or the constitutive dimension of the Court. As they were established without the consent of the concerned States,¹⁶² this was one of the most vocal contentions about the legitimacy of the *ad hoc* tribunals created by the Security Council to deal with the situations in the former Yugoslavia and Rwanda.¹⁶³

When examining source legitimacy, we must ascertain all links in the "chain of delegation."¹⁶⁴ The links in the chain of delegation leading to the issuance of an international court decision are as follows: "the international court itself, the mandate providers that established it, the individual states comprising the mandate providers, and the governments of those states claiming to express the wishes of their respective populations."¹⁶⁵ Whether governments speak on behalf of their citizens is also relevant to this inquiry. However, by taking compliance as a point of departure, the democratic consent to a State's behaviour is assumed. Here, we explore the various links in the chain of delegation from the non-complying State to the non-complied ICC request.

The ICC is the first treaty-based international criminal court; a feature that should provide it with high "legitimacy capital."¹⁶⁶ The Rome Statute provides for three triggering mechanisms for the ICC to exercise jurisdiction over a situation. The first is a state referral of a situation in which a crime has been committed in the territory or by a national of a State party.¹⁶⁷ The second is where the Prosecutor initiates an investigation *proprio motu* over a situation where a crime has been committed by

161. *Id.*

162. S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

163. Alfred P. Rubin, *An International Criminal Tribunal for Former Yugoslavia*, 6 PACE INT'L L. REV. 7 (1994).

164. YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 141-42 (2014).

165. *Id.* at 41.

166. *Id.* at 238.

167. Rome Statute, *supra* note 4, art. 13 (a).

a national or in the territory of a State party.¹⁶⁸ The third is where the Security Council, acting under Chapter VII of the UN Charter, refers a situation where a crime within the jurisdiction of the ICC appears to have been committed.¹⁶⁹ When the SC refers a situation to the ICC, the requirement of nationality or territoriality do not apply.¹⁷⁰ In other words, SC referrals provide the Court with a jurisdiction over the territory and nationals of States that have not ratified the Rome Statute, and therefore, do not consent to the ICC's exercise of jurisdiction. Obviously, the ICC has higher source legitimacy over its States Parties than over non-States Parties.

The situations in Darfur and Libya were both triggered by a SC referral. Sudan signed the Rome Statute, but never ratified it,¹⁷¹ while Libya neither signed nor ratified the Rome Statute.¹⁷² Thus, Sudan and Libya are clear examples of States not party to the Rome Statute, but still subject to the ICC's jurisdiction. Both SC referrals explicitly required that the authorities of the referred States "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution."¹⁷³ The SC referrals to the ICC are adopted under Chapter VII of the United Nations (UN) Charter.¹⁷⁴ The obligation of the referred State to accept the jurisdiction of the Court over its territory and nationals, despite the lack of explicit consent, derives from the Chapter VII nature of the SC referral.¹⁷⁵ Likewise, the obligation to comply with ICC requests emanates from the Chapter VII powers of the SC resolution obliging it to cooperate with the Court.¹⁷⁶ By being members of the UN Charter, Sudan and Libya have tacitly agreed that such obligations might emerge from

168. Rome Statute, *supra* note 4, art. 13 (c).

169. Rome Statute, *supra* note 4, art. 13 (b).

170. Rome Statute, *supra* note 4, art. 13.

171. During the Rome Conference, Sudan abstained from voting in favor of the Statute's adoption out of disagreement over the Court's jurisdiction over war crimes in international armed conflicts, SC referrals and the prohibition on reservations. See SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 247, 248 (2013).

172. HUMAN RIGHTS WATCH, *LIBYA AND THE INTERNATIONAL CRIMINAL COURT 1* (2013).

173. Nerina Boschiero, *The ICC Judicial Finding on Non-Cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593* 13 J. INT'L CRIM. JUST. 625, 646 (2015). SC Resolution 1593 also makes this obligation incumbent upon "all other parties to the conflict in Darfur," *id.*

174. U.N. Charter, ch. VII.

175. U.N. Charter, art. 25 (providing that members of the UN are obliged to accept and carry out the decisions of the SC to refer the situation to the ICC.) The clause within the SC resolution requesting full cooperation is also binding on the State targeted, *id.*

176. *Id.*

SC Chapter VII measures. This is as far as the objective version of the source legitimacy of the ICC jurisdiction over Libya and Sudan goes.

From the perspective of the concerned State, the view on whether the source legitimacy of the ICC is grounded may differ. During the SC meeting where Resolution 1593 was adopted, Sudan objected that “Sudan . . . is not party to the ICC. This makes the implementation of a resolution like this fraught.”¹⁷⁷ In fact, Sudan never officially responded to the ICC’s transmission of the arrest warrants against Al-Bashir; its embassy in The Hague even refuses the delivery of documents coming from the Court.¹⁷⁸ During a meeting held on December 11, 2013, Sudan’s Ambassador to the UN asserted before the SC: “I should like to say, for the purposes of the record of this meeting, that our participation today does not mean that we recognize the International Criminal Court (ICC) or that we are going to cooperate with it, since the Sudan is not a party to the Rome Statute.”¹⁷⁹ Indeed, the official position of Sudan is “[f]or us, the ICC doesn’t exist.”¹⁸⁰

The most striking point with regards to the non-compliance issue in the situation of Darfur is that it concerns Sudan, as well as other States party to the Rome Statute, which are predominantly AU Member States. However, the case of intended non-compliance only concerns Al-Bashir. As seen above, the State Parties that failed to arrest Hussein claimed that if they knew of his arrival in their territory in due time they would have arrested him. Thus, aside from Sudan, other States do not challenge the source legitimacy of the Court’s jurisdiction in Darfur, but the source legitimacy of the ICC’s personal jurisdiction over Al-Bashir. State Parties who were subject to referral proceedings under Article 87(7) of the Rome Statute for having not arrested Al-Bashir have argued that Article 98(1) of the Rome Statute precludes the Court from asking State Parties to arrest and surrender the head of a non-party State.¹⁸¹ Since Al-Bashir is the head of a State not party to the Rome Statute, the argument goes, he is entitled under customary international law to immunity *ratione personae*, which protects him from other States, as well as the ICC’s exercise of

177. S.C. 5158th mtg., at 13 U.N. Doc. S/PV.5158 (Mar. 31, 2005).

178. The Sudanese Embassy has always refused the delivery of letter form the ICC registry. *See, e.g.*, Prosecutor v. Al Bashir, ICC-02/05-01/09-237, Registrar’s Report on the Implementation of the Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan (Apr. 23, 2015).

179. S.C. 7080th mtg., U.N. Doc. S/PV.7080 (Dec. 11, 2013).

180. Randy James, *Sudanese President Omar Hassan al-Bashir*, TIME (Mar. 05, 2009), <http://content.time.com/time/world/article/0,8599,1883213,00.html>.

181. *See, e.g.*, Decision on Djibouti’s Non-Compliance, *supra* note 32, ¶ 6; Decision on Uganda’s Non-Compliance, *supra* note 32, ¶ 7.

jurisdiction.¹⁸² This is indeed the view of the African Union, which decided that “its Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.”¹⁸³ To put it simply, as long as Sudan does not consent to the ICC’s exercise of jurisdiction, and waives immunity, Sudan and other States where Al-Bashir has traveled will find a ground to argue that the ICC’s request for arrest and surrender of Al-Bashir lacks source legitimacy.

Conversely, the current Libyan authorities accept the Court’s jurisdiction. On the same day as Resolution 1970 was voted on, Libyan diplomats at the United Nations mission in New York broke with Gadhafi’s regime.¹⁸⁴ In this dubious capacity, Libya’s UN representative stated before the Council: “I am pleased that the Security Council will refer this matter to the International Criminal Court to investigate the crimes committed in Libya since 15 February.”¹⁸⁵ Immediately after, the Gaddafi Government wrote to the Secretary General declaring that the two diplomats could no longer represent Libya at the United Nations.¹⁸⁶ Gaddafi’s communication was abided with until September 16, 2011.¹⁸⁷ The rebels had then seized control over a large part of Libya. Shortly after, the new Libyan authorities appointed an official to act as its representative before the Court.¹⁸⁸ In a letter dated November 23, 2011, the Libyan National Transitional Council communicated to the ICC that it was committed to cooperate with the Court, but that “the Libyan judiciary has primary jurisdiction to try Saif-al-Islam and that the Libyan State is willing and able to try him in accordance with Libyan law.”¹⁸⁹ Overall, despite the fact that Libya is not a State party to the Rome Statute, the source legitimacy of Libya’s obligation to abide by the ICC requests has not been challenged. Indeed, the Libyan authorities appear to have engaged with the Court without raising the point that they are not bound by the ICC’s statutory

182. See Comm’n of the African Union, *Press Release No. 002/2012* (Jan. 8, 2012).

183. *Decision on the Meeting of African States Parties to the Statute of the International Criminal Court*, *supra* note 26, ¶ 10.

184. Colin Moynihan, *Libya’s U.N. Diplomats Break With Qaddafi*, N.Y. TIMES (Feb. 21, 2011), <http://www.nytimes.com/2011/02/22/world/africa/22nations.html>; see also ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 236 (2013).

185. S.C. 6491st mtg., U.N. Doc. S/PV.6491, 7 (Feb. 26, 2011).

186. See LORAINIE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 157 (2014).

187. See *id.*

188. See *id.*

189. Prosecutor v. Gaddafi et al., ICC-01/11-01/11-34-Anx, National Transition Council (Nov. 23, 2011).

framework. With regards to its failure to comply with the Court's requests, Libya has blamed the failure on Libya's volatile security situation currently prevailing in the country.¹⁹⁰ For instance, in its last communication to the Court, Libya affirmed that "there are currently on-going negotiations to establish a unified Government which will in due course facilitate the resumption of Libya's full cooperation with the Court."¹⁹¹ The Libyan situation shows that even if concerned with the territory and nationals of States not parties to the Rome Statute, the ICC jurisdiction over a situation triggered by SC referrals is not always contested for its lack of source legitimacy. A new regime may actually welcome such referrals if the OTP only investigates and prosecutes crimes committed by the regime in place at the time of the referrals. This consent may however be disavowed if the OTP prosecutes all suspected perpetrators, including members of the current regime.

Since Kenya is a State party to the Rome Statute, the source legitimacy of the situation in Kenya is harder to contest. Nonetheless, it may be asserted that situations triggered by the Prosecutor, without the State's endorsement, are also subject to a certain source legitimacy issue. *Proprio motu* investigations are not at the initiative of States, but rather provided in the Rome Statute to ensure that the Court could act in situations where, for political or other reasons, neither a State Party nor the Security Council were able or willing to initiate proceedings.¹⁹² There have been four situations where the prosecutor exercised its *proprio motu* power.¹⁹³ The situation in Kenya was the first of such situations. During national debates over the establishment of a special tribunal to counteract the ICC under the complementarity principle, a member of parliament argued:

Kenya should manage its own affairs and take charge of its sovereignty. We cannot surrender or cede it to any nation or agency. We must protect that treasured right . . . the moment we let people go to The Hague, we will cede our sovereignty and capability to think as a

190. Decision on Libya's Non-Compliance, *supra* note 32, ¶ 32.

191. Prosecutor v. Gaddafi, ICC-01/11-01/11-612, Response to Prosecution's "Request for an Order to Libya to Refrain from Executing Saif Al- Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council," ¶ 3 (Aug. 20, 2015).

192. Morten Bergsmo, Jelena Pejic & Dan Zhu, *Article 15, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 727 (Otto Triffterer et al. eds., 2016).

193. See S.C. 7080th mtg., *supra* note 179. The Prosecutor has also been authorized to open a situation proprio in Burundi on October 25, 2017.

nation and as a society. We will forever be slaves to forces that are larger than us.¹⁹⁴

The Kenyan authorities were opposed to the Prosecutor's opening of investigation *proprio motu*. Still, they remained courteous with the Court and on the surface appeared to collaborate with it.¹⁹⁵ It is the summons issued against the Ocampo Six that prompted the Kenyan parliament to pass a motion calling upon the government to withdraw from the Rome Statute.¹⁹⁶ The motion was then followed by an unsuccessful admissibility challenge and a request to the SC for a deferral, under Article 16 of the Rome Statute, that never managed to attract a sufficient majority of the SC's members.¹⁹⁷ In the courtroom, Kenyatta challenged the source legitimacy of the Court's exercise of jurisdiction over the situation in Kenya by relying on the dissenting opinion of Judge Kaul.¹⁹⁸ However, the Pre-Trial Chamber rejected this argument, and thus the Court's jurisdiction *ratione materiae* was firmly established.¹⁹⁹ Kenya's failure to submit the requested material in the Kenyatta case, which led to the referral under Article 87 to the ASP, was not contested for source legitimacy.²⁰⁰ It was simply not abided by because Kenya had no interest in cooperating with a Court that could put its head of State behind bars.²⁰¹ Overall, Kenya's expressed intent to withdraw, as well as its appeal to the SC for a deferral and its admissibility challenge show that fundamentally the accused, whom personified the State, opposed the ICC's prosecution.²⁰²

194. LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 143 (2015).

195. See Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators?: State Cooperation with the ICC*, 39 *HUM. R. QU'Y* 162, 180 (2017).

196. A withdrawal would have taken out the source legitimacy of the Court's exercise of jurisdiction over Kenya's territory and nationals. However, note that the Court would retain jurisdiction over conduct that occurred within the frame of the situation in Kenya. By the same token, Kenya would still be obliged to cooperate with respect to its obligation emerging from this situation. See Rome Statute, *supra* note 4, art. 127; see also Michael Onyiego, *Kenya's Politicians Look to Withdraw from ICC as Suspects Named*, VOA NEWS, (Dec. 15, 2010, 7:00 PM), <https://www.voanews.com/a/kenyas-politicians-look-to-withdraw-from-icc-as-suspects-named-111998579/157058.html>.

197. Ruto, ICC-01/09-01/11-19; Permanent Rep. of Kenya to the U.N., Identical letters dated Oct. 21, 2013 from the Permanent Rep. of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/624 (Oct. 22, 2013).

198. Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 26, 2012).

199. See *id.*

200. Prosecutor v. Muthaura, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013).

201. *Id.*

202. *Id.*

To sum up, in these three situations where non-compliance has been adjudicated, the Court's jurisdiction has been seized by another actor other than the concerned authorities. The exercise of jurisdiction without the concerned State's consent or approval raises the issue of source legitimacy. Obviously, the situation in Kenya has a higher constitutive credential as Kenya is a State party to the Rome Statute, and therefore Kenya accepted the possibility that an investigation *proprio motu* could be initiated over its territory and nationals. This is thus an example where the source legitimacy of the Court is perceived as low, while objectively it is firmly grounded. Conversely, the situation in Libya is a situation where the source legitimacy of the Court is objectively low, but not perceived as such by the current authorities since they are not the object of the ICC prosecutions. On the other hand, the situation in Sudan objectively has low source legitimacy and is also perceived to be at a nadir.

B. Process Legitimacy

Process legitimacy or procedural legitimacy relates to whether the Court's decisions were in accordance with regular and proper procedure.²⁰³ According to Franck, "[l]egitimacy is that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with 'right process.'"²⁰⁴ Hence, Franck stipulates four "objective indicators" that, according to him, can assist in the identification of legitimate norms.²⁰⁵ Among these factors, Franck includes the principles of coherence and consistency: "A rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system. Consistency requires that a rule, whatever its content, be applied uniformly in a 'similar' or 'applicable' instance."²⁰⁶ Altogether, Franck's "right process" and "objective indicator" aim to assess the fairness of the process. Not only is process legitimacy interlinked with source legitimacy in that it scrutinizes the legal process to gain source legitimacy, but it also examines the process in applying the law. In this sense, process legitimacy looks at whether the Court is treating like cases alike, whether it applies the law coherently and consistently, and whether it follows the prescribed procedure.²⁰⁷

203. See SHANY, *supra* note 164, at 142; see also WOLFRUM & ROBEN, *supra* note 160, at 6.

204. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1995).

205. *Id.* at 30.

206. *Id.* at 38.

207. See *id.* at 38; see also SHANY, *supra* note 164, at 142-43; see also WOLFRUM & ROBEN, *supra* note 160, at 6-7.

One way of assessing process legitimacy is to consider whether the OTP exercises its discretionary power in accordance with principles that were established beforehand.²⁰⁸ In this sense, if the OTP's practice is transparent, objective and consistent, it will have higher procedural legitimacy.²⁰⁹ While the OTP's practice has been the subject of several process legitimacy challenges, it remains governed by the ICC's statutory framework.²¹⁰ Indeed, many aspects related to the Court's jurisdictional and enforcement powers have resulted in a selective exercise of jurisdiction. Our case studies have been tainted with three types of selective enforcement of international criminal justice that erode the process legitimacy of the Court in these three situations, and more generally.

First, the Security Council's role in the ICC presents several process legitimacy concerns. Given that three out of the five permanent SC members (P-5) are not parties to the Rome Statute, its power to refer situations to the ICC is perceived by the Sudanese authorities, in particular, as illegitimate and unfair.²¹¹ Furthermore, the inequality of power enshrined in the veto system, and the partiality of the SC decision-making process,²¹² also shows that not all situations are treated alike (i.e., frail procedural legitimacy). If Sudan and Libya, then why not Syria and North Korea? In sum, the SC's role in the ICC's system raises the issues of free-riding, sovereign equality and process legitimacy.²¹³

Furthermore, both SC referrals have been tainted with exemption clauses discriminating on the ground of the nationality of the accused. SC Resolution 1593, which referred the situation in Darfur to the ICC was adopted by eleven votes in favor and four abstentions.²¹⁴ Brazil and Algeria abstained due to the following exemption clause:

Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions

208. See Allison M. Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 538 (2003); see also Margaret DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 290 (2012).

209. See Maria Varaki, *Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court*, 27 EUR. J. INT'L L. 769, 784 (2016).

210. See DeGuzman, *supra* note 207, at 269. See generally Danner, *supra* note 207.

211. S.C. 5158th mtg., at 13 U.N. Doc. S/PV.5158 (Mar. 31, 2005).

212. See LUKAS H. MEYER, LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW 9 (2009).

213. Frédéric Mégret, *What Sort of Global Justice is 'International Criminal Justice'?*, 13 J. INT'L CRIM. JUST. 77, 93 (2015).

214. S.C. Res. 1593, *supra* note 15, ¶ 1.

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 State.²¹⁵

This operative paragraph—inserted in the Resolution to assuage the United States—attempts to provide immunity from the ICC’s jurisdiction for any official that is not from the referred State or from a State party to the Rome Statute.²¹⁶ SC Resolution 1970 also contained an exemption clause for officials and personnel of non-party States other than Libya.²¹⁷ While the SC intended to immunize the nationals of powerful States not parties to the Rome Statute from the ICC’s jurisdiction, the ICC holds that SC Resolutions obligating a State to fully cooperate with the Court entails that the immunities of its high-ranking State officials are implicitly waived.²¹⁸ Thus, this implies that only States targeted by the SC lose the immunity they normally enjoy under customary international law. Clearly, this results in *de facto* inequality.

A second layer of selective enforcement is the OTP’s apparent reluctance to investigate certain situations despite clear evidence that crimes within the jurisdiction of the Court have been committed therein.²¹⁹ The averred dependence of the ICC on State’s cooperation has even emerged as a principle guiding the OTP in its selection of situations.²²⁰ If Kenya, why not Afghanistan and Palestine?²²¹ This is indeed one of the main claims of the AU against the ICC and its alleged African bias.²²² Sudan has also constantly made this argument. During a recent SC meeting on the situation in Darfur, the Sudanese representative stated: “The Court is ultimately political; it therefore is not qualified to achieve

215. S.C. Res. 1593, *supra* note 15, ¶ 6; S.C. Res. 1970 *supra* note 57, ¶ 6; S.C. 5158th mtg., *supra* note 177 at 5 (noting that Algeria had some reservations on two points: first, further efforts at peace and reconciliation should have been undertaken, and second, it regrets the double standards of the SC). See also Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEID. J. INT’L L. 195, 205 (2006).

216. *Id.*

217. S.C. Res. 1970 *supra* note 57, ¶ 6.

218. Decision on DRC’s Non-Compliance, *supra* note 32, at ¶ 6.

219. See Valentina Azarova & Triestino Mariniello, *Why the ICC Needs A ‘Palestine Situation’ (More Than Palestine Needs the ICC): On the Court’s Potential Role(s) in the Israeli-Palestinian Context*, DIRITTI UMANI E DIRITTO INTERNAZIONALE [D.U.D.I.] 115 (2017) (It.).

220. See Sarah M. Nouwen, *Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court*, 43 NETH. Y.B. INT’L L. 151, 170-71 (2012) [hereinafter *Legal Equality on Trial*]; see also Office of the Prosecutor, ICC, *Criteria for Selection of Situations and Cases* (June 2006).

221. See Azarova & Mariniello, *supra* note 219, at 3-6.

222. Many African heads of state have articulated these positions in African Union (AU) sessions. See, e.g., *ICC Targets Africans on Race Basis: African Union Chair*, DAILY NATION (May 27, 2013) <http://www.nation.co.ke/news/politics/ICC-targets-Africans-on-race-basis-African-Union-chair/1064-1864200-3quy5fz/index.html>.

any kind of justice. In the 14 years since its establishment it has ruled on four—just four—cases, all of them concerning African nationals, after rejecting more than 9,000 other complaints.²²³ He continued:

[T]he text of the Statute enshrines the inequality among those who are subject to its jurisdiction, because it differentiates among them according to their nationality and not by the evidence presented against them. Exceptions in the Statute are not implemented with regard to nationals of developing States.²²⁴

The prosecution of Kenyatta and Ruto galvanized this narrative, with the use of several forums by their political coalition to attack the ICC as a neocolonial court.²²⁵

Finally, a third layer of selectivity is the unequal application of the law in respective situations. A practice that is, to a certain extent, contingent upon the mechanism used to trigger the Court's jurisdiction, and in particular, to the expected cooperation from States.²²⁶ All situations triggered by self-referral have strictly targeted non-State armed groups opposed to the referring authorities.²²⁷ Conversely, the other triggering mechanisms led to more contrasted selection decisions, but were still predicated on powerful States' interests.²²⁸ On March 23, 2011, nearly one month after the SC referral, the Security Council authorized NATO forces to enforce a "No Fly Zone" over Libyan airspace to protect Libyan citizens.²²⁹ The OTP followed up swiftly and announced its request for arrest warrants for Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah Al-Senussi.²³⁰ In late June, the three arrest warrants were issued.²³¹

223. U.N. S.C., 7833 mtg. at 17, U.N. Doc. S/PV.7833 (Dec. 13, 2016).

224. *Id.* at 18.

225. See Geoffrey Lugano, *Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya*, 11 INT'L J. OF TRANSITIONAL JUST. 9 (2017).

226. See *Legal Equality on Trial*, *supra* note 220, at 168.

227. See KERSTEN, *supra* note 58, at 164-65.

228. See *Legal Equality on Trial*, *supra* note 220, at 168.

229. S.C. Res. 1973, *supra* note 60.

230. See Victor Peskin & Mieczyslaw P Bodusynski, *The Rise and Fall of the ICC in Libya and the Politics of International Surrogate Enforcership*, 10 INT'L J. TRANSITIONAL JUST. 272, 284 (2016); see also Luc Coté, *Independence and Impartiality*, in INTERNATIONAL PROSECUTORS 406 (Luc Reydams et al. eds., 2012) ("Libya . . . arguably seems more the result of political expediency in the wake of NATO intervention than a measure of justice.").

231. Prosecutor v. Gaddafi, ICC-01/11-01/11-1, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi (June 27, 2011).

As Stahn duly observed, the alignment of the ICC with the NATO operation conflated the judicial and military arms of powerful States.²³² Furthermore, despite allegations of crimes committed by NATO during its intervention, the OTP quickly eschewed investigations of crimes committed by the western alliance.²³³ The rebels' and then current governmental forces during and after the uprising have also been generally spared from the OTP.²³⁴ The recent arrest warrant against Al-Werfalli might on first glance appear to change this picture. However, despite having been in the rebel forces against Gaddafi during the Libyan revolution, Al-Werfalli then sided with the Libyan National Army (LNA) which fights against the UN-backed Government of National Accord for control of central and southern Libya.²³⁵ Hence, one may qualify the ICC's position over Libya as one-sided.²³⁶

The situations in Kenya and Darfur, Sudan, are the only ones where both sides, including the governmental authorities, have been prosecuted before the ICC. They are also the only situations where the ICC intervention was not at the behest of the current authorities.²³⁷ While from an external point of view, the prosecution of both sides to the violence appears

232. Carsen Stahn, *Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'*, 10 J. INT'L CRIM. JUST. 325, 329-332 (2012).

233. *Id.* at 332.

234. *Id.* at 335.

235. Mark Kersten, *Will the International Criminal Court's latest target in Libya be brought to justice?* THE WASH. POST, Aug. 31, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/31/will-the-international-criminal-courts-latest-target-in-libya-be-brought-to-justice/?utm_term=.7d7b19cc25a7.

236. Office of the Prosecutor, *Third Report of the Prosecutor of the International Criminal Court to the U.N. Security Council pursuant to UNSCR 1970 (2011)*, ¶ 54 (March 16, 2012) ("In its third report to the SC pursuant to Resolution 1970, the Office of the Prosecutor correctly affirmed [t]he Office does have a mandate . . . to investigate allegations of crimes by all actors.").

237. Côte d'Ivoire, not being a State party to the ICC, could only wait for the Prosecutor to use its *proprio motu* powers or for a referral from a State party. As no State referral was forthcoming, the OTP in concord with the new government of Côte d'Ivoire, requested the Pre-Trial Chamber to be authorized to open an investigation. See THE INT'L CRIMINAL COURT, SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE, CASE INFORMATION SHEET (Aug. 6, 2014) <https://www.icc-cpi.int/iccdocs/PIDS/publications/CharlesBleGoudeEng.pdf>. While Georgia cooperated with the Court until around six months before the OTP request for an authorization to investigate, its Justice Minister immediately after the Pre-Trial Chamber authorization, declared that it welcomed the fact that the ICC was stepping in, *id.* Indeed, it has been argued that Georgia implicitly preferred that the OTP takes the burden of bringing a major power such as Russia to the Court. See Aaron Matta & Anca Iordache, *The ICC is Not Shying Away from the Georgian Challenge*, OPINIO JURIS (Feb. 19, 2016), <http://opiniojuris.org/2016/02/19/the-icc-is-not-shying-away-from-the-georgian-challenge/>. Note that the admissibility of the situation in Uganda was also addressed *proprio motu* by the PTC. See THE INT'L CRIMINAL COURT, SITUATION IN UGANDA, CASE INFORMATION SHEET ICC-02/04-01/15, (JAN 2017) <https://www.icc-cpi.int/uganda/ongwen/documents/ongweneng.pdf>. No formal admissibility challenge was lodged by Uganda. In contrast, Côte d'Ivoire challenged the

as more legitimate, internally the concerned authorities decry that they are targeted because they lack support from Western States. Undeniably, the ICC's selectivity and perceived lack of independence from States from a rule of law perspective undermines its procedural legitimacy.

To sum up, the three situations explored raise various issues of selectivity and thus of process legitimacy. The situation in Sudan and Libya involve the controversial role of the SC. While Libya is not criticizing the SC for its selectivity in deciding which situation to refer to the Court, Sudan is labeling the SC, as well as the ICC, as neo-colonial institutions targeting only developing countries. Objectively, Libya could raise the same critique, but it omits to do so, presumably because the SC referral to the ICC serves the current authorities interest. In contrast to Libya and all other situations presently under investigation by the ICC, Sudan and Kenya are the only situations where the state authorities have also been the subject to arrest warrants and proceedings. While an equal application of the law to all parties may on a normative point increase the legitimacy of the Court, States subjected to a standard that is not applied to all situation will raise a critique of situation selectivity.

C. Outcome Legitimacy

Outcome legitimacy may be understood in two distinct ways. Both relate to the content of the outcome; one is determined on its legality; the other on its moral justification.²³⁸ The legality of a decision relates to its source and process legitimacy. In other words, the legal outcome legitimacy of a decision is predetermined by the other legitimacy grounds. The moral outcome legitimacy of the ICC or of one of its decision has to be distinguished from its legal validity (or process). The substantive value underlying it are at stakes. For our purpose, the substantive values questioned in an outcome moral legitimacy assessment pertains to the "goodness" of the ICC's intervention, its decision and policy. This conception of outcome moral legitimacy interacts with social legitimacy in that the outcome of the decision is dependent on whether it is reflective of society.²³⁹ Overall, outcome legitimacy charges can rely on one or two distinct grounds or transit from one to the other.

The order to arrest and surrender Al-Bashir has, for instance, been challenged as being in contradiction with the immunity heads of States

admissibility of the case against Simone Gbagbo. *See* Prosecutor v. Gbagbo, ICC-02/11-01/12, Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo.

238. *See* SHANY, *supra* note 164, at 143-44.

239. *See* Mikael Madsen, *Explaining the Power of International Courts in Their Context: From Legitimacy to Legitimation*, in RSCAS POLICY PAPERS 2012/07 7, 23 (2012).

are entitled to under customary international law (i.e., immunity *ratione personae*).²⁴⁰ The International Court of Justice (ICJ) in the *Arrest Warrant of 11 April 2000 Case* affirmed that high-ranking State officials entitled to immunity *ratione personae* enjoy full immunity from criminal jurisdiction and inviolability when travelling abroad, and that States violate their obligation under international law towards another State if they fail to respect the immunities of the latter State's officials.²⁴¹ While the ICJ referred in *obiter dicta* to the unavailability of immunities in proceedings before "certain international criminal courts," it did not address the issue of whether the same immunities are available when a State enforces an ICC arrest warrant.²⁴²

On the one hand, the Rome Statute provides in Article 27 (2) that the immunity *ratione personae*, to which heads of States are normally entitled under customary international law, does not bar the Court from exercising its jurisdiction.²⁴³ It is generally accepted that States party to the Rome Statute have waived their immunity in respect to the ICC and to other States Parties enforcing an ICC request for arrest and surrender.²⁴⁴ However, as a treaty it is contended that Article 27 is only waiving the immunity of officials from States parties to the Rome Statute.²⁴⁵ According to the law of treaties, the Statute cannot affect the rights of non-party States.²⁴⁶ Article 98 of the Rome Statute indeed recognizes that "[t]he Court may not proceed with a request for surrender . . . which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person . . . of a third State."²⁴⁷ Nevertheless, the ICC has constantly requested its States Parties to arrest Al-Bashir despite his position as head

240. See Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE J. INT'L L. 467 (2013).

241. Case Concerning the Arrest Warrant of 11 April 2000 (D.R.C. v. Bel.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14).

242. *Id.* at 22-23.

243. See Rome Statute, *supra* note 4, art. 27 (2).

244. See Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 328 (2009); see also Claus Kress and Kimberly Prost, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1612 (Otto Triffterer ed., 2008).

245. See Akande, *supra* note 27; see also Commission of the African Union, Press Release No. 002/2012 (Jan. 8, 2012).

246. See Vienna Convention on the Law of Treaties, art. 34, May 23 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties].

247. Rome Statute, *supra* note 4, art. 98

of State of a “third State” (i.e., a State not party to the Rome Statute).²⁴⁸ All the findings of non-compliance in the Al-Bashir case are indeed about such failure.

The yet unsettled legal question is the relationship between Article 27(2) and 98(1), particularly in situations referred to the Court by the SC under Chapter VII of the UN Charter. In its first string of decisions over the arrest and surrender of Al-Bashir, the Court eschewed the tension between the two Articles governing immunities by simply turning a blind eye towards Article 98(1)’s existence.²⁴⁹ The AU explicitly responded to these decisions on the ground of being legally incorrect, and thus reiterated its call for not cooperating with the Court on this matter.²⁵⁰ The ICC reacted a couple of years later by issuing a second string of decisions on the obligation to arrest and surrender Al-Bashir, which distanced itself from its previous reasoning on the relevance of Article 98.²⁵¹ In *Decision on DRC’s Non-Compliance*, the Chamber acknowledged that Article 98(1) forbids the Court from requesting States to act inconsistently with their international obligation, international law immunities included.²⁵² Nonetheless, it considered that the SC Resolution 1593, referring the situation in Darfur, had the effect of implicitly waiving the immunities of the head of State of Sudan.²⁵³ Although this new reasoning managed to convince some scholars and States,²⁵⁴ the AU position was too entrenched to be reversible. In 2017, the ICC took a new avenue with regards to the obligation of States to arrest and surrender Al-Bashir. In *Decision on*

248. See, e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-7, Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir (Mar. 6, 2009).

249. See Al-Bashir, ICC-02/05-01/09-140, *supra* note 32, ¶ 37; see also Dire Tladi, *The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98*, 11 J. INT’L CRIM. JUST. 199, 204-206 (2013).

250. See Akande, *supra* note 27, at 23.

251. See Tladi, *supra* note 249, at 204-06.

252. *Id.* at 211; see also *Decision on DRC’s Non-Compliance*, *supra* note 32, ¶ 24.

253. See Tladi, *supra* note 249, at 229; *Decision on DRC’s Non-Compliance*, *supra* note 32, ¶ 29.

254. See, e.g., Nerina Boschiero, *The ICC Judicial Finding on Non-Cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593*, 13 J. INT’L CRIM. JUST. 625 (2015); Erika De Wet, *The Implications of the Visit of Al Bashir to South Africa for International and Domestic Law*, 13 J. INT’L CRIM. JUST. 1049-1071 (2015); Manuel Ventura, *Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of Al-Jedda*, 13 J. INT’L CRIM. JUST. 1022-1026 (2015); Cf. Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law*, 13 J. INT’L CRIM. JUST. 1027, 1042-1044 (2015).

South Africa's Non-Compliance, Pre-Trial Chamber II decided not to uphold the waiver theory affirmed in its previous case law.²⁵⁵ Rather, the Chamber found that Sudan's obligation to fully cooperate with the Court, which is underpinned by the Chapter VII power character of SC Resolution 1593, puts it in a position analogous to those of States parties to the Rome Statute.²⁵⁶ Hence, like for the immunity of heads of States parties to the Rome Statute, Al-Bashir's immunity is irrelevant vis-à-vis the jurisdiction of State Parties seeking to enforce the ICC arrest warrant. By the same token, the Chamber found that Article 98(1) was not applicable to Al-Bashir, and thus South Africa failed to cooperate with the Court by not enforcing the arrest warrant.²⁵⁷

While the debate remained open on the effect of SC referrals on immunities, a second strand for not arresting Al-Bashir was added on the ground that peace and stability required that Al-Bashir not be impeded in his traveling. Indeed, States such as Djibouti, Uganda and South Africa started to claim that their commitment to international peace and security, friendly relations between States in the region, and engagement in peace process between Sudan and South Sudan, required that Al-Bashir be welcomed in their territory without the fear of being arrested and surrendered to the Court.²⁵⁸ In response, the ICC affirmed:

[W]hile sensitive to these political considerations . . . State Parties to the Statute must pursue any legitimate, or even desirable, political objectives within the boundaries of their legal obligations vis-à-vis the Court. Indeed, it is not in the nature of legal obligations that they can be put aside or qualified for political expediency.²⁵⁹

In October 2016, while proceedings concerning South Africa's failure to have arrested Al-Bashir were ongoing at domestic and ICC levels, South Africa surprised the world by filing in accordance with Article 127(1) of the Rome Statute, a notification of withdrawal from the ICC.²⁶⁰ In a rather exceptionally detailed manner, the South African withdrawal notice exposed the reasons for leaving the Court. Among these were included: the SC not having used Article 16 of the Rome Statute, the Court's African bias, the Court's standing on the immunity of heads of

255. Decision on South Africa's Non-Compliance, *supra* note 32, ¶ 96.

256. *Id.* ¶¶ 87-89.

257. *Id.* ¶¶ 93, 123.

258. *See, e.g.*, Decision on Djibouti's Non-Compliance, *supra* note 32, ¶ 6; Decision on Uganda's Non-Compliance, *supra* note 32, ¶ 7.

259. Decision on Uganda's Non-Compliance, *supra* note 32, ¶ 14.

260. *See* Daniel J. H. Wand, *South Africa's withdrawal from the International Criminal Court: A Time for Reflection*, EUROPEAN CENTRE FOR THE RESPONSIBILITY TO PROTECT (Oct. 27, 2016), <https://ecr2p.leeds.ac.uk/643/>.

States, and the need to balance peace and justice.²⁶¹ The letter accompanying the notice concluded by stating: “Under these circumstances South Africa is of the view that to continue to be a State Party to the Rome Statute will compromise its efforts to promote peace and security on the African Continent.”²⁶² By focusing on the peace versus justice dilemma, South Africa was contesting the politico-moral objective of the ICC. Overall, the legitimacy challenge with regards to the situation in Darfur had gradually shifted from the unlawful to the unjust.²⁶³

The Libyan admissibility challenges were not predicated on the legality of the ICC’s exercise of jurisdiction over Gaddafi and Al-Senussi. Rather, the Libyan authorities claimed that its people had a moral right to bring the former regime to justice with a trial in Libya by Libyan judges.²⁶⁴ The debate about who ought to try Gaddafi and Al-Senussi remained within the legal environment of an admissibility challenge and its limbs.²⁶⁵ Nevertheless, the ultimate point that Libya considered valid was its clear willingness to prosecute Gaddafi and Al-Senussi for conduct that was arguably broader in scope than the ICC cases,²⁶⁶ albeit Libya’s relative ability to do so.²⁶⁷ In other words, Libya was convinced that surrender of its high-profile cases to the Court was unjust.²⁶⁸

Kenya challenged the legitimacy of the Court over its head of State and deputy head of State on the grounds that such proceedings were destabilizing its internal affairs.²⁶⁹ The obligation for which a finding of non-compliance was issued should not be seen strictly in terms of non-compliance because of the nature of the obligation. Rather, the situation in Kenya stands as an example of how a whole caseload may collapse when there is direct involvement of the State in the situation, and the latter disagrees with the potential outcome of a successful prosecution. The accused’s challenges, for their part, were legal in that they relied on the dissenting opinion of Judge Kaul who opposed the investigation in the

261. South Africa Withdrawal to the Rome Statute of the International Criminal Court, *supra* note 1, at 2.

262. *Id.*

263. One of South Africa’s further reason for leaving the Court relied on the unjust treatment it received when it asked for a consultation under Article 97 of the Rome Statute. *Id.*

264. See KERSTEN, *supra* note 58, at 125.

265. *Id.* at 151.

266. See Kevin Jon Heller, *Radical Complementarity*, 14 J. INT’L CRIM. JUST. 637 (2016).

267. See Jurdi, *supra* note 115, at 219 (noting that the “unavailability” of Gaddafi to be tried in Tripoli also applies *mutates mutandi* to the ICC).

268. See Heller, *supra* note 266, at 663.

269. See Laurence R. Helfer & Anne E. Showalter, *Opposing International Justice: Kenya’s Integrated Backlash Strategy Against the ICC*, 17 INT’L CRIM. L. REV. 1, 22 (2017).

Kenyan situation.²⁷⁰ Indeed, Judge Kaul contended that one element was missing for the ICC having jurisdiction over the 2007 post-election violence, namely that they were not in furtherance of a State or State-like organizational policy, and thus could not be considered as crimes against humanity.²⁷¹ After repetitively arguing that Judge Kaul's interpretation of the Statute had to be retained as the correct one, the defence strategy changed with recurrent appeal to the Security Council for a deferral of the Kenyan proceedings.²⁷² Concomitantly, the counsels for Kenyatta and Ruto were also seeking to have special conditions attached to their positions as head of State and deputy president, respectively—a request partially accepted by the Court and the ASP.²⁷³ While the accused exchanges with the Court were done using legal tools, the ultimate purpose was with an emphasis on the unjust interference with the domestic affairs of the State. The most dramatic statement of this contention came from the AU, which adopted a decision right after the 2013 election “expressing concern at the threat that the indictment” of Kenyatta and Ruto “may pose to the on-going efforts in the promotion of peace, national healing and reconciliation” in Kenya and the entire region.²⁷⁴ The outcome legitimacy concern was thus not anymore legal but principled on the balance between peace and justice. The claim was indeed that the ICC's intervention in Kenya obfuscated the prospects for reconciliation, peace and security on the ground, which related to the delicate balance between law and moral.

III. ADDRESSING LEGITIMACY TALKS

The preceding sections show that the situations where there are traces of non-compliance are all affected by various illegitimacy grounds. The question is then: how to address these legitimacy deficits? Which legitimacy ground ought to be addressed? What needs to be changed in how the ICC is operating to increase its overall legitimacy? The method

270. See *id.* at 43-44; see also Prosecutor v. Ruto, ICC01/09-01/11 and ICC-01/09/02/11, Application on Behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute (Mar. 31, 2011).

271. Prosecutor v. Ruto, ICC-01/09-01/11-2, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's “Decision on the Prosecutor's Application for summons to appear for William Samoei Ruto, Henry Kiprono Kosgey and Joashua Arap Sang” (Mar. 15, 2011).

272. See Helfer & Showalter, *supra* note 268, at 42.

273. Prosecutor v. Kenyatta, ICC-01/09-02/11, Defence Request for Conditional Excusal from Continuous Presence at Trial (Sept. 23, 2013); Prosecutor v. Ruto, ICC-01/09-01/11, Defence Request Pursuant to Article 63(1) of the Rome Statute and Rule 134*quarter* of the Rules of Procedure and Evidence to Excuse Mr. William Samoei Ruto from Attendance at Trial (Dec. 16, 2013).

274. Assembly of the African Union, Decision on International Jurisdiction and the International Criminal Court, Doc. AU Doc. Assembly/A.U./Dec.482(XXI) (May 26-27, 2013).

of evaluation this article proposes is to consider the fight against impunity as a global public good (GPG).

The fight against impunity and, in particular, the idea underlying it, that is, accountability for international crimes, can be theoretically conceived as a GPG. GPGs present values in which every States has an interest.²⁷⁵ As Albin states, “[t]heir widespread benefits cross national boundaries, population groups and even generations, and can rarely be denied those who decide not to contribute to the supply of the goods themselves.”²⁷⁶ Indeed, in principle, all individuals and States benefit from the fight against impunity, and no one can be excluded from benefiting from it. It is the non-rivalrous and non-excludable features of the fight against impunity that make it a GPG. As States have little incentives not to free ride on the efforts of others, it “raises a problem of collective action.”²⁷⁷ In other words, to counter under provision or underuse (or the complete opposites) of a GPG, global governance has to come into play.

What type of GPG, and in particular what type of cooperation is required, in the fight against impunity? The literature reveals that GPGs can depend on the “single best effort” of one actor, or on the “aggregate effort” of the international community or on the actions of all the international community, including its “weakest link.”²⁷⁸ When a GPG can be provided by a single State or a small group of States, it is a “single best effort” GPG.²⁷⁹ This type of action is also called the “best shot”, in that it is conceived as “the best possible and most immediate contribution.”²⁸⁰ The *ad hoc* tribunals can be conceived as such, as they were quickly set up by a small group of States in reaction to a crisis.²⁸¹ However, a “best

275. See Fabrizio Cafaggi & David D. Caron, *Global Public Goods amidst a Plurality of Legal Orders: A Symposium*, 23 EUR. J. INT’L L. 643, 644 (2012); see also André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769, 776 (2012).

276. Cecilia Albin, *Negotiating International Cooperation: Global Public Goods and Fairness*, 29 REV. INT’L STUD. 365, 367 (2003).

277. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); Nollkaemper, *supra* note 275, at 776; see also Cafaggi & Caron, *supra* note 275, at 44.

278. SCOTT BARRETT, *WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS* 74 (2010); INGE KAUL, ISABELLE GRUNBERG, & MARC STERN, *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY* 486-488 (1999).

279. See Daniel Bodansky, *What’s in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT’L L. 651, 663 (2012) (“Examples of public goods that depend on a single-best-effort include scientific and medical discoveries, the deflection of an asteroid about to pulverize the earth, and the efforts of an individual champion in battle”); see also KAUL ET AL., *supra* note 278, at 487-88.

280. KAUL ET AL., *supra* note 278, at 487.

281. See *id.*

shot” cannot effectively tackle the fight against impunity, as commission of international crimes does neither stop at the borders of the former Yugoslavia and Rwanda nor the 1990’s.

An aggregate effort public good implies that we need a summation of equal contribution to effectively supply the GPG;²⁸² they are mostly typical for the protection of the environment.²⁸³ An aggregate effort does not mean that all States’ contributions are needed as “[t]he contribution of one actor can theoretically substitute for that of another, so it does not really matter who contributes.”²⁸⁴ However, “the degree to which the problem is solved depends on the overall efforts of the global community” and, in particular, on the “participation and compliance by the big players.”²⁸⁵ The inability of the international community to genuinely embark on a universal cooperative regime with regards to climate change shows that free riding poses a crucial challenge to aggregate effort GPGs.²⁸⁶

A “weakest-link” GPG poses similar problems, as they also require the cooperation of the international community. In contrast with aggregate effort GPGs, cooperation by all is required, as “a single weak link will undo” the work of others.²⁸⁷ Scott Barrett eloquently showed that the eradication of diseases such as the smallpox required the participation of every country; otherwise the virus would have continued to spread.²⁸⁸ To the “weakest link” type, Bodansky adds securing nuclear materials, securing maritime transport and accountability for international crimes.²⁸⁹ Indeed, accountability for international crimes “can be undermined . . . by a single country that gives criminals impunity.”²⁹⁰

Having identified what type of GPG the fight against impunity is, the type of cooperation to provide it becomes clearer. Weakest-link GPGs, as well as aggregate effort public goods require centralized institutions to produce them.²⁹¹ The ICC, the first permanent international criminal court, comes in as the centralized institution to facilitate the fight against impunity. The Rome Statute drafters’ aspiration clearly reflects

282. *See id.*

283. *See* BARRETT, *supra* note 278, at 74.

284. KAUL ET AL., *supra* note 278, at 487.

285. Bodansky, *supra* note 279, at 659.

286. *See* William D. Nordhaus, *Paul Samuelson and Global Public Goods* (2005), in SAMUELSONIAN ECONOMICS AND THE TWENTY-FIRST CENTURY 8 (2005).

287. Bodansky, *supra* note 279, at 661.

288. *See* BARRETT, *supra* note 278, at 47.

289. *See* Bodansky, *supra* note 279, at 661.

290. *Id.*

291. *See* Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT’L L. 669, 679 (2012).

the normative attributes of GPGs. As the preamble of the Rome Statute affirms it, the crimes within the jurisdiction of the ICC are said to “threaten the peace, security and well-being of the world.”²⁹² Hence, they are referred to as “the most serious crimes of concern to the international community as a whole” for which “effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”²⁹³ Although the Court has been established to contribute to the provision of the fight against impunity, it can also be considered as an intermediate GPG.²⁹⁴

If one accepts that the fight against impunity and the ICC are GPGs, then a GPG perspective can be used to provide a political-normative choice on which of the legitimacy talks is important. What needs to be changed to increase the legitimacy of the Court: non-consensualism, selectivity, or the balance between peace and justice? The three situations we have analyzed are ones where non-compliance has been deemed grave enough to refer the matter to an external actor, the ASP or the SC. As pointed out at the beginning of this article, compliance with an institution is taken as an expression of social legitimacy. Conversely, source, process and outcome legitimacy are three normative standards of legitimacy.²⁹⁵ While social legitimacy expresses the perceived legitimacy of an institution, normative legitimacy offers “objective metric[s] for gauging ‘actual legitimacy.’”²⁹⁶ This article posited a circular relationship between these two approaches to legitimacy.²⁹⁷ That is, normative legitimacy standards are objective grounds for “testing the correctness of perceptions.”²⁹⁸ Indeed, legitimacy should not be calculated exclusively on the basis of perceptions. And, it should neither be evaluated strictly from the yardstick of normative legitimacy without taking into account the views of its main stakeholders. We thus have a legitimacy account that somewhat intermingles the normative and the social. By using a GPG perspective on the legitimacy talks affecting the ICC, this article aims to assess

292. Rome Statute, *supra* note 4, pmb1.

293. *Id.*

294. See KAUL ET AL., *supra* note 278, at 13–14; see also Mégret, *supra* note 213, at 93; see also Nollkaemper, *supra* note 275, at 783.

295. See Silje Aambø Langvatn & Theresa Squatrito, *Conceptualising and Measuring the Legitimacy of International Criminal Tribunals*, in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 51 (Nubuo Hayashi et al. eds., 2017).

296. Sergey Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 80 (Nubuo Hayashi et al. eds., 2017).

297. For other authors who agree that such relationship is important, see *id.* at 80; see also Çali et al., *supra* note 3, at 3.

298. Vasiliev, *supra* note 296, at 80.

institutional changes, that on the one hand respond to the normative and legitimacy deficits affecting the ICC, and on the other hand may also enable the ICC to become more effective in its provision of the fight against impunity.

A. *The Effective Supply of a GPG and Non-consensualism*

The situations in Sudan and Libya emerged from SC referrals, and the situation in Kenya has been initiated *proprio motu* by the ICC Prosecutor. These three situations are all showing evidences that the source legitimacy of the ICC is contestable on the ground of non-consensualism.

The SC referrals are the epitome of what has been called the switch to non-consensualism.²⁹⁹ Surely, the legal authority of the SC to establish an international criminal tribunal that may exercise jurisdiction without the explicit consent of the concerned States has been confirmed in *Tadic*.³⁰⁰ Nonetheless, the ICC's exercise of jurisdiction without the State's consent, thanks to a SC referral, has been repeatedly decried as illegitimate by the Sudanese authorities; the new Libyan authorities have not raised this point yet.³⁰¹ During the Rome Conference, "a small but vocal minority" opposed the triggering of the ICC's jurisdiction by the Security Council, without the State with primary jurisdiction consent.³⁰² Still, it was clear that allowing the SC to refer a situation to the Court "was necessary in order to enable the Council to make use of the court as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind."³⁰³ That being said, the German proposal of establishing a permanent international criminal court with universal jurisdiction was certainly much more sensible to the type of GPG the fight against impunity is.³⁰⁴ However, to obtain a greater support

299. See Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014).

300. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

301. See Dapo Akande, *The African Union's Response to the ICC's Decision on Bashir's Immunity: Will the ICJ Get Another Immunity Case?*, EJIL TALK! (Feb. 8, 2012) <https://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/>.

302. Charles Chernor Jalloh, *The African Union, the Security Council, and the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT AND AFRICA 181, 189 (Charles Chernor Jalloh et al. eds., 1st. ed. 2017).

303. Int'l Law Comm'n, Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/49/10, at 44 (1994).

304. See Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 584 (Antonio Cassese et al. eds., 2002).

in favor of the Statute, the drafters decided to leave the “inherent universal jurisdiction” proposal aside.³⁰⁵ Instead, the Court was established with a dormant universal jurisdiction;³⁰⁶ it can exercise jurisdiction over a situation, where territoriality and active nationality are lacking, if the SC refers it to the Prosecutor under Chapter VII of the UN Charter.³⁰⁷

Non-consensualism may be seen as necessary for the effective supply of GPGs.³⁰⁸ As William Nordhaus, an influential economist, observed:

[T]he Westphalian system leads to severe problems for global public goods. The requirement for unanimity is in reality a recipe for inaction . . . To the extent that global public goods may become more important in the decades ahead, one of our major challenges is to devise mechanisms that overcome the bias toward the status quo and the voluntary nature of current international law in life-threatening issues.³⁰⁹

The fight against impunity is the type of GPG that requires action by all, in particular those least willing or able to do so. Accordingly, the SC referrals are necessary even if they lead to contentions about the source legitimacy of the Court.

Nonetheless, under a GPG perspective, the ICC remains an imperfect institution. Accountability for international crimes is a weakest link GPG.³¹⁰ While a weakest-link GPG depends on the cooperation of all States, the Rome Statute failed to attract ratification by many of the most powerful and warring States. As not all States are realistically subject to its jurisdiction, it cannot effectively supply a fully weakest link. Its current structure is not even fit for an aggregate effort GPG as this requires the cooperation of at least the most influential States. Since key actors are absent from its cooperation framework, an institution like the ICC cannot

305. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 280 (2010) (listing all the following as examples of States supporting Germany’s proposal: UN Doc. A/CONF.183/SR.2, par. 54 (Sweden); UN Doc. A/CONF.183/SR.3, par. 21 (Czech Republic); par. 42 (Latvia); par. 76 (Costa Rica); UN Doc. A/CONF.183/SR.4/, par. 12 (Albania); par. 38 (Ghana); par. 57 (Namibia); UN Doc. A/CONF.183/SR.5 (Italy); par. 21 (Hungary); par. 32 (Azerbaijan); UN Doc. A/CONF.183/SR.6, par. 4 (Belgium); par. 16 (Ireland); par. 51-52 (Netherlands); par. 69 (Luxembourg); UN Doc. A/CONF.183/SR.8, par. 18; Bosnia and Herzegovina); par. 62 (Ecuador).) To read Germany’s defense of its proposal, see U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *4th Plenary Meeting*, ¶¶20-21, U.N. Doc. A/CONF.183/SR.4 (June 16, 1998);

306. See HECTOR OLASOLO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 14 (2005).

307. See Rome Statute, *supra* note 4, art. 13 (b).

308. See Nordhaus, *supra* note 286 (arguing in favor of non-consensualism). *But see* Krisch, *supra* note 299 (criticizing this movement).

309. Nordhaus, *supra* note 286, at 8.

310. See Bodansky, *supra* note 279, at 651–61.

be entirely effective, even with the type of non-consensualism it currently embodies.³¹¹ What the Rome Statute drafters managed to establish is an (intermediate) aggregate effort GPG, with some weakest link to States neither party to the Rome Statute nor with a veto right at the Security Council. The consent of certain States is thus foregone;³¹² otherwise, the GPG cannot be minimally supplied. This means that the fight against impunity is not fully supplied by the ICC: a jurisdictional gap remains for crimes committed by P-5 nationals (or nationals of States that have the support of a P-5 member) in territories of States not party to the Rome Statute.

Obviously, this result might be unsatisfactory to many. Nico Krisch, for one, has argued that the shift to non-consensualism exacerbates the inequality between powerful and weak states.³¹³ And, indeed, the ICC's inability to fight impunity indiscriminately has significant impacts on the Court's process legitimacy.

B. Processing Self-Interest?

Three types of selectivity issue arise in our case studies: one within a situation, one inter-situational, and one within the world at large. The last one involves the SC, the two others are results of the OTP's prosecutorial discretion. That the Prosecutor select her situations and cases according to the best chances to bring suspects to trial and secure convictions is not surprising. As Robert Cryer observed, it is "essentially impossible" that selective prosecution does not occur.³¹⁴ It may even be called in some instances a wise prosecutorial strategy.³¹⁵ Surely, performance is one of the factors to be taken into account when designing a prosecutorial policy.³¹⁶ And, selective prosecution is certainly linked to expected cooperation.³¹⁷

311. See Krisch, *supra* note 299, at 9.

312. See *id.*

313. See generally Krisch, *supra* note 298.

314. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 192 (2005).

315. See Annalisa Ciampi, *Legal Rules, Policy Choice and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court*, in COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE, NOTTINGHAM STUDIES ON HUMAN RIGHTS 47 (Olympia Bekou et al. eds., 2016).

316. See Birju Kotecha, *The ICC's Office of the Prosecutor and the Limits of Performance Indicators*, 15 J. INT'L CRIM. JUST. 543 (2017).

317. See CRYER, *supra* note 314, at 219-20 (discussing the ICTY not prosecuting crimes committed by NATO as it was dependent on its cooperation, or ICTR not prosecuting crimes committed by RPF because of its dependence on Rwanda).

Our case studies permit us to observe that where the Prosecutor selectively prosecutes a group that is fighting against the State (as in Libya), the State authorities are willing to cooperate—if non-cooperation occurs it is essentially due to inability. And, that when both sides to the conflict or violence are prosecuted, including the ruling authorities (as in Sudan and Kenya), non-cooperation is mainly due to the unwillingness to submit itself to a prosecution that goes against self-interest.

The literature on GPGs distinguishes compliance problems (in weakest-link GPGs) under the unable or unwilling categories.³¹⁸ In cases where the State lacks capacity, assistance from other actors to enable the weak State to contribute to the GPG seems to be in good order.³¹⁹ This is indeed the line of action the ICC took with regards to Libya's failure to surrender Gaddafi. The Pre-Trial Chamber considered its referral of the matter to the SC as not designed to sanction Libya but to seek assistance to eliminate impediments to cooperation.³²⁰

It is acknowledged that “unwillingness” poses a greater challenge than “inability.”³²¹ It seems that to compel an unwilling State to cooperate, only two options are on the table: either buying-off or coercing the State.³²² Coercion, whether it is economic or military, is generally seen as too costly to be efficient.³²³ Thus, buying-off is the favored way to induce cooperation from an unwilling State. For instance, the OTP has adopted a strategy where it encourages States to self-refer situations happening in their territories.³²⁴ In exchange for self-referrals, the OTP leaves out the referring authorities' crimes from its investigation, thus ensuring cooperation with the Court.³²⁵ While self-referrals were initially conceived to cure the inability of States to exercise their responsibility, the OTP targeting of rebel movements or insurgent groups manages to also stave off any unwillingness to cooperate.³²⁶ Accordingly, Schabas observes “prosecutions of only one side in the conflict seem to be the price of the self-

318. See Barrett, *supra* note 278, at 47; see also Bodansky, *supra* note 279, at 661-62.

319. See Bodansky, *supra* note 279, at 661.

320. See Decision on Libya's Non-compliance, *supra* note 32, ¶ 33. (“The Chamber concurs that this provision makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation.”)

321. Bodansky, *supra* note 279, at 662.

322. See *id.*

323. See generally ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1998).

324. OFFICE OF THE PROSECUTOR IN THE ICC, *Report on the Activities Performed During the First Three Years (June 2003 – June 2006)*, at 7 (Sept. 12, 2006).

325. See Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 Int'l J. Hum. Rts. 444 (2014); see also William Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 Crim. L. F. 5 (2008) [hereinafter *Complementarity in Practice*].

326. See Tiemessen, *supra* note 325; see also *Complementarity in Practice*, *supra* note 325.

referral strategy.³²⁷ Should the same strategy be adopted with regards to States where source legitimacy is a concern? After all, going against the self-interest of a State that has grounds to denounce the source legitimacy of the Court's jurisdiction is riskier than situations where a State took "the sovereign decision to relinquish its jurisdiction in favor of the Court."³²⁸ Cooperation with the ICC comes at a certain cost. The daunting question is: what are the benefits for States in cooperating with the ICC? At first glance, a compliance pull could be generated by, when source legitimacy is lacking, strictly sticking to the State's interest in the prosecutorial discretion as to who to prosecute. Though focused on cooperation, a GPG perspective would go against such policy.

Classifying the ICC as an intermediate GPG aims to foster cooperation with the Court in its provision of the fight against impunity. However, "[c]ooperation is not an end in itself—it is a means to an end."³²⁹ Accountability for international crimes is the end for which the Court has been established. Furthermore, it is crucial to recall that it is the non-rivalrous and non-excludable character of the fight against impunity's benefits that make it a final global public good.³³⁰ Non-rivalry means that if the good is used by one, it does not reduce its availability to others.³³¹ Non-excludability means that no one can practically be let off from consuming the good.³³² In theory, everyone can benefit from the fight against impunity and no one can be excluded from benefiting from it. However, in a process of selective justice, one group is indeed excluded from the benefits of the fight against impunity; the fight against impunity is only used against rebel groups; the State agents' victims are denied accountability.

The Court's effects are externalities writ large.³³³ As Nouwen and Werner demonstrated, those targeted by the ICC are identified as "enemies of mankind," whereas those who enforce the ICC arrest warrant are

327. William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 753 (2008).

328. Prosecutor v. Katanga, ICC-01/04-01/07-1497 Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 85 (Sept. 25, 2009).

329. KAUL ET AL., *supra* note 278.

330. See Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954); see also OLSON, *supra* note 277; see also KAUL ET AL., *supra* note 278, at 2-3.

331. See KAUL ET AL., *supra* note 278; see also Tyler Cowen, *Public Goods*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/PublicGoods.html>

332. See KAUL ET AL., *supra* note 278; see also Cowen, *supra* note 331.

333. Bodansky, *supra* note 279, at 658.

distinguished as friends of humanity.³³⁴ Chazal demonstrated that the OTP allowed States to use the Court as a tool to eliminate their political opponents as it also increased its own visibility and relevance.³³⁵ According to Chazal, by letting States use the Court as a weapon in political struggles, the ICC creates “negative externalities” as it perpetuates violence, conflict and harm in the local jurisdiction.³³⁶ Hence, she concludes that “the Court does not prevent international crimes but legitimizes particular types of violence and causes social harms through its superficial response to violence.”³³⁷ While selective prosecution as a strategy makes the Court seem more effective, as it ensures cooperation, it produces a “global public bad” rather than a “global public good.” The overproduction of “global public bads” is indeed a recognized phenomenon in economic theory, as it is implied that the provider ignores the costs.³³⁸ However, the purpose of cooperation in the fight against impunity, and of the ICC as an intermediate GPG, is to provide for global public goods that benefit all.

As buying-off State cooperation with *de facto* immunity from prosecutions is antithetical to the fight against impunity as a GPG, the OTP would be well advised to dump this policy; irrespective of whether the Court’s jurisdiction is triggered by self-referrals, SC referrals or investigation *proprio motu*. Instead of internalizing selective prosecutions, what the ICC needs is strong responses from the ASP and/or the SC when non-compliance occurs. As buying-off state cooperation with selective prosecution leads to a “global public bad,” the threat to use the sticks in cases of non-cooperation needs to be credible. PTC II has alerted the ASP and

334. Sarah Nouwen & Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941 (2010).

335. See Nerida Chazal, *THE INTERNATIONAL CRIMINAL COURT AND GLOBAL SOCIAL CONTROL: INTERNATIONAL CRIMINAL JUSTICE IN LATE MODERNITY* 106-108 (2016).

336. *Id.* at 120-119.

337. *Id.* at 120.

338. See Todd Sandler, *Assessing the Optimal Provision of Public Goods: In Search of the Holy Grail*, in *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* 138 (Inge Kaul et al. eds., 2003); see also Bodansky, *supra* note 279, at 658, 664.

the SC of the failure of several states to cooperate with the court by enforcing arrest warrants for Al-Bashir.³³⁹ Nothing has followed at the SC level.³⁴⁰

The ASP, on the other hand, is contemplating developing procedures for the implementation of Article 97 Rome Statute.³⁴¹ Article 97 contemplates the possibility for States to consult with the Court when they face a problem in the execution of cooperation request.³⁴² While PTC II in *Decision on South Africa's Non-Compliance* stressed that there was nothing to consult upon regarding States parties' obligation to arrest Al-Bashir, putting in place a process where States would be provided with information on how cooperation makes them better off is one of the primary functions of international organizations.³⁴³ In providing information about other States' similar problems, preferences, behaviors and intentions, the ICC may change the State strategy in deciding whether or not to cooperate with the Court.³⁴⁴

States cannot be expected to contribute in the fight against impunity if this is not equally met by the ICC and other States.³⁴⁵ The politics underpinning inter-situational selectivity mean that some States are expected to do more than others. However, the effective production of aggregate global public goods relies on strategies of reciprocal cooperation.³⁴⁶ Otherwise, each State has an incentive not to contribute. In this light, compliance is helped when States can verify whether other

339. See, e.g. Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016); Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016).

340. See *ICC Prosecutor Asks Security Council to Act on Outstanding Arrest Warrants*, U.N. NEWS, (Dec. 12, 2017), <https://news.un.org/en/story/2017/12/639172-icc-prosecutor-asks-security-council-act-outstanding-arrest-warrants>.

341. Official Records of the 14th Session of the Assembly of States Parties, Doc. ICC-ASP/14/20/Vol.I, ¶ 59. (Nov. 18-26, 2015).

342. See Rome Statute, *supra* note 4, art. 97

343. See Lisa L. Martin, *The Political Economy of International Cooperation*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 55 (Inge Kaul et al. eds., 1999).

344. See *id.* at 55.

345. See *id.*

346. See *id.*

States are abiding with their obligations to exercise their jurisdiction over those responsible for having committed international crimes.³⁴⁷

While information, transparency and reciprocity might incentivize States to cooperate with the ICC, the controversial role of the SC in the ICC's system and how it attempted to tailor the Court's jurisdiction poses significant process legitimacy concerns that do not solely rest with the Court.³⁴⁸ From a GPG perspective, the few SC permanent members who are not party to the Rome Statute, de facto immune from a SC referral, and involved in commission of international crimes are the weakest link in the international community. If national prosecutions do not take place at the domestic level, under the "heads" of either territorial, active or passive nationality, protective, or universal jurisdiction, the fight against impunity is spoiled by an important jurisdictional gap. That the ICC is able to fill this jurisdictional gap, thanks to the territorial jurisdiction it has over the 123 States parties to the Rome Statute,³⁴⁹ is important. The situations in Georgia and Afghanistan, which involve crimes committed by Russian and U.S. troops, respectively, have the potential to partly close these impunities and process legitimacy gaps. However, such prosecution will probably be followed by non-cooperation from Russia and the U.S., which will most likely justify their defects as source legitimacy issues. Nonetheless, this source legitimacy deficit would be compensated for by a strong process legitimacy, which by the same token, would mean that the ICC is closer to becoming a weakest link GPG.

According to its current structure, the ICC is an aggregate effort GPG with some weak links when the SC refers a situation to it. However, the SC has failed to respond to the role entrusted to it in the fight against impunity. The SC has not only never adopted a Chapter VII referral against its self-interest it has never followed up with measures against

347. The issuance of annual report on preliminary examination by the OTP – although not formally provided by the Statute - is thus welcome for such purpose. For a discussion of the preliminary examination, see Carsten Stahn, *Damned If You Do, Damned If You Don't Challenges and Critiques of Preliminary Examinations at the ICC*, 5 J. INT'L CRIM. JUST. 413 (2017).

348. See e.g. Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on Defence Challenge to the Jurisdiction of the Court, n. 41 (Oct. 26, 2011) ("the referring party (the Security Council in [the situation of Darfur]) when referring a situation to the Court submits that situation to the entire legal framework of the Court, not to its own interests."). See also Alexandre Skander Galand, *The Situation Concerning the Islamic State: Carte Blanche for the ICC if the Security Council Refers?*, EJIL TALK! (May 27, 2015), <https://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/>.

349. See *Status of Treaties, Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last updated Feb. 24, 2018).

States that failed to comply with its referrals and their ensuing obligations.³⁵⁰ It has also neglected to take seriously the repetitive calls from African States to use Article 16 of the Rome Statute, which is the crux of an outcome legitimacy concern the Court has to confront.³⁵¹

C. Distributive Cost to be Assumed Out of the Outcomes of the Court's Action

Although legal arguments have been used to challenge the outcome legitimacy of the Court's decisions, the crux of the disagreements over the ICC involvement in our case studies rest on moral justifications. Failures to cooperate with the Court in the situations in Sudan, Libya and Kenya appear to lie mostly on the destabilizing effect of the Court's intervention within their domestic jurisdiction. In Sudan and Kenya—not in Libya, despite the ongoing civil war that followed the ICC's and NATO's interventions—it has been questioned whether the ICC jurisdiction is positively affecting another GPG, which is also arguably enshrined in the Rome Statute, but disregarded by the ICC Prosecutor,³⁵² that is peace.

It is often claimed that one of the goals of the ICC is the promotion of peace and security.³⁵³ In addition to their determination to put an end to impunity for perpetrators of crimes that shock the conscience of the international community, the Statute's drafters recognized in the preamble, "that such grave crimes threaten the peace, security and well-being of the world."³⁵⁴ The crucial role given to the SC to refer situations or defer proceedings when international peace and security demands it, emphasize that the Court actions were envisaged as tools to promote peace. Accordingly, the Rome Statute would postulate peace and justice as two of the ICC goals.³⁵⁵ These two GPGs can be conceived as complementary but also rival; if attaining justice comes at the price of sacrificing peace, it raises the issues of outcome legitimacy and of distributive conflicts.

350. See *UN Security Council: Address Inconsistency in ICC Referrals*, HUMAN RIGHTS WATCH (Oct. 16, 2012), <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>.

351. See Manisuli Ssenyonjo, *The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders*, 13 INT'L CRIM. L. REV. 385, 390-391 (2013).

352. See OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON THE INTERESTS OF JUSTICE, 9 (Sept. 2007) (Prosecutor Ocampo opined that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.")

353. See SHANY, *supra* note 164, at 230.

354. Rome Statute, *supra* note 4, pmb1.

355. See SHANY, *supra* note 164, at 230.

Distributive problems can arise in decisions over the provisions of GPGs when the pursuit of different GPGs conflict with each other.³⁵⁶ Competing GPGs, when they lead to clashing results, require institutional choices as to which GPGs need to be traded-off.

According to Akhavan, the ICC may contribute to peace by preventing hostilities; isolating the individual or group responsible for atrocities and stigmatizing the criminal conduct or the group responsible for atrocities.³⁵⁷ Using empirical evidence, Akhavan argues that the issuance of arrest warrants and convictions of certain individuals may stigmatize their criminal conduct, discredit them, and contain destabilizing political forces.³⁵⁸ In addition to actual prosecutions, the threat of ICC investigation and prosecution may contribute, Akhavan argues, to preventing escalation of conflicts.³⁵⁹ If these results can be achieved through international criminal justice, the interventions of the ICC in certain situations can be said to be effective. However, a leading criticism of international criminal tribunals and courts is that they impede peace settlements and thus prolong atrocities.³⁶⁰ It has often been observed that “arrest warrants that are difficult to enforce may make conflict more intractable, and thus may make the resolution of conflict, necessary for the ending of crime, more difficult.”³⁶¹ This dialectic reflects the recurrent debate about “peace versus justice.”³⁶² If these two competing results can be achieved through international criminal justice, the interventions of the ICC in certain situations can be said to be legitimate. If, on the contrary, the fight against impunity appears to seriously unsettle a peaceful settlement, the international community is called to calculate the distributive cost of opting for justice instead of peace or vice versa.

The Rome Statute provides for one mechanism to defer to peace and two loopholes where peace could be favored over criminal accountability. Firstly, the Prosecutor can decline to prosecute on the ground that it

356. See Shaffer, *supra* note 291, at 681-83; see also MARK A. POLLACK, & GREGORY C. SHAFFER, *WHEN COOPERATION FAILS* 113-133 (2009).

357. See Akhavan, *supra* note 30, at 628; see also Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. JOUR. INT'L L. 403 (2005) [hereinafter *Lord's Resistance Army Case*].

358. See *Lord's Resistance Army Case*, *supra* note 357; see also Philipp Kastner, *Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations*, 12 J. INT'L CRIM. JUST. 479 (2014).

359. See *Lord's Resistance Army Case*, *supra* note 357.

360. See Line Engbo Gissel, *Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes*, 9 INT'L J. TRANSITIONAL JUST. 428, 429 (2015).

361. Sarah Nouwen & Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157, 169 (2015).

362. See Mirjan Damaska, *What Is the Point of International Criminal Justice*, 83 CHIC. KENT. L. REV. 329, 331-332 (2008).

would not serve “the interests of justice.”³⁶³ The concept of the “interests of justice” has been generally conceived as broader than simply entailing retributive criminal justice.³⁶⁴ Matthew Brubacher argued that “the term ‘in the interests of justice’ also requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of investigation on the political environment of the state over which he is exercising jurisdiction.”³⁶⁵ But, the Prosecutor has opined that “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”³⁶⁶ In other words, the OTP considers that peace legally falls under the primary responsibility of the SC.³⁶⁷

Secondly, if an alternative mechanism, such as a truth and reconciliation commission, is used in a manner that would meet the purpose of accountability, it may be considered as a “genuine” proceeding under the admissibility test.³⁶⁸ The possibility that truth and reconciliation commissions could fit within the complementarity regime of the ICC was indeed proposed by South Africa and other delegations during the Rome Statute’s negotiations.³⁶⁹ The controversial character underlying this issue was sidestepped by not explicitly recognizing it in Article 17.³⁷⁰ Still, Robinson argues that a “narrow doorway” was left for the Court to consider whether such a procedure was indeed a “genuine” effort to do justice.³⁷¹ It is still unclear whether the Court will accept that amnesties issued within the framework of a truth and reconciliation commission are acceptable, and in particular, are not issued with an intent to shield perpetrators from justice.³⁷²

363. Rome Statute, *supra* note 4, art. 53(2)(c).

364. See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 488 (2003); see also Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 81 (2004); see also Luc Côté, *International Justice: Tightening Up the Rules of the Game*, 81 INT’L REV. RED CROSS 133, 142 (2006).

365. Brubacher, *supra* note 364, at 81.

366. OFFICE OF THE PROSECUTOR OF THE ICC, *supra* note 352, ¶ 9.

367. See U.N. Charter, art. 24; see also Danielle E. Goldstone, *Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International Criminal Court*, 22 EMORY INT’L L. REV. 761, 777 n. 130 (2008) (describing that, in the situation in Uganda, the OTP inferred that he might consider pulling out if “a solution to end violence [is found] and if the prosecution is not serving the interest of justice”).

368. See Rome Statute, *supra* note 4, art. 17.

369. See Robinson, *supra* note 364, at 489-99.

370. See Rome Statute, *supra* note 4, art. 17.

371. See Robinson, *supra* note 364, at 499.

372. See WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 199 (4th ed. 2011); see also Robinson, *supra* note 364, at 500-01.

Thirdly, if the SC determines that ICC investigation or prosecution is a threat to international peace and security, it can suspend the Court action for a renewable one-year period.³⁷³ A SC deferral of the proceedings under Article 16 of the Rome Statute depends on a consensus from the P-5 members that Chapter VII of the UN Charter should be activated.³⁷⁴ This would require that the SC determines that the ICC proceedings constitute a threat to international peace and security, a claim that might indeed look paradoxical; in particular, in a situation initially referred by the SC under Article 13(b).³⁷⁵

While the two first options—integrating peace concerns within the Prosecutor’s discretion and availing truth and reconciliation within the inadmissibility test—put pressure on the Court’s fulfillment of its mandate, the last option—having requests for deferral taken seriously—puts the burden on the SC to fulfill its role. When requesting the SC to defer the ICC proceedings against Al-Bashir, the AU emphasized that the SC had to “ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of the victims and justice.”³⁷⁶ The SC’s lack of express response to the AU’s request elicited the latter to decide that its member states “shall not cooperate” with the ICC for the arrest and surrender of Al-Bashir.³⁷⁷ As Helfer and Showalter put it, “feelings of disrespect [were] aroused by the UNSC’s non-responsiveness.”³⁷⁸ The AU reaction to the arrest warrant against Gaddafi did not even test the SC’s ears towards its argument in favor of peace; but rather, asked for a deferral while simultaneously requesting that member states do not cooperate in the execution of the arrest warrant.³⁷⁹ Once again the SC failed to act upon, either in a positive or negative way, the AU’s request for deferral. In contrast, the SC response to Kenya’s request endorsed by the AU³⁸⁰ for a

373. See Rome Statute, *supra* note 4, art. 16.

374. See *id.* art 16; see also UN Charter, art. 27.

375. See Rome Statute, *supra* note 4, arts. 13(b) & 16; see also UN Charter, Ch. VII.

376. Peace and Security Council of the African Union, *Communique of the 142nd Meeting*, *supra* note 23, ¶ 11, Doc. PSC/MIN/Comm (CXLII) (July 21, 2008).

377. Assembly of the African Union, Thirteenth Ordinary Session, *Decision on the Meeting of African States Parties to the Statute of the International Criminal Court*, ¶ 10, Doc. Assembly/AU/Dec.245(XIII) Rev.1, (July 3, 2009). See also Manisuli Ssenyonjo, *The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders*, 13 INT’L CRIM. L. REV. 385, 388 (2013).

378. Helfer & Showalter, *supra* note 269, at 46.

379. See Assembly of the African Union, 17th Sess., *supra* note 63, ¶ 6.

380. See *id.*; see also Assembly of the African Union, *Decision on the Implementation of the Decisions on the International Criminal Court*, ¶ 4, A.U. Doc. Assembly/AU/Dec.419 (XIX) (Jan. 31, 2011); see also Assembly of the African Union, *Decision on Africa’s Relationship with the*

deferral of the proceedings against Kenyatta and Ruto was received with seven States in favor and eight abstentions.³⁸¹

While the SC has been ready to exercise its referral powers in certain situations, its use of the deferral power as provided in the Rome Statute, has been lacking. Less than two weeks after the Statute's entry into force, the SC, through Resolutions 1422 and 1487, requested that the ICC not investigate or prosecute any peacekeeper from States not party to the Rome Statute, and expressed its "intention to renew . . . the request[s] under the same conditions each 1 July for further 12-month periods."³⁸² The resolutions were met with great criticism and even deemed illegal by many since they did not invoke any specific threat to international peace and security justifying the use of Chapter VII and Article 16 Rome Statute.³⁸³ It is indeed the discriminatory use of Article 16 Rome Statute by the SC that poses a significant challenge to the legitimacy of the ICC. Not only is this unequal practice raising process legitimacy concerns but it also shows that there is a lack of agreed global governance policies over the distributive conflicts stemming from the fight against impunity. The outcome legitimacy of the ICC is thus criticized due to the SC's inability to speak with one voice about the distributive choice between peace and justice it faces.

There are certainly legal considerations in the Rome Statute over which the OTP must show political sensitivities; especially it should try to avoid obstructing peaceful resolution to an ongoing conflict.³⁸⁴ While the ICC has become imperative in peaceful resolutions of conflicts, deferring to peace instead of immediate justice is also an issue that must be considered in the peacemaking process.³⁸⁵ However, the primary institutional mandate of the ICC is indeed to contribute to the fight against impunity for the most serious crimes of concern to the international community as a whole.³⁸⁶ If the fight against impunity as a GPG interferes with the pursuit of peace, another GPG, it should be the institution that

International Criminal Court (ICC), Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1 (Oct. 12, 2013).

381. Hence, it only lacked two additional affirmative votes needed for such resolution, *see* S.C. 7060th mtg., U.N. Doc. S/PV.7060 (Nov. 15, 2013).

382. S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); SC Resolution 1487, UN Doc. S/RES/1487 (June 12, 2003).

383. *See* Carsten Stahn, *The Ambiguities of Security Council Resolution 1422*, 14 EUR. J. INT'L L. 85, 89 (2003); *see also* Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT'L AFF. 693, 708 (2002).

384. *See* Brubacher, *supra* note 364, at 81; *see also* Côté, *supra* note 364, at 142–43; *see also* Goldstone, *supra* note 367, at 790; *see also* Kastner, *supra* note 357, at 479.

385. *See* Kastner, *supra* note 358, at 484–485.

386. *See id.* at 480.

has the mandate to balance both which should intervene: the SC. To sum up, the outcome legitimacy issue facing the Court is mostly due to the SC's failure to assume its responsibility as a provider of the fight against impunity and peace.

CONCLUSION

This article showed that the ICC's situation in Darfur, Libya and Kenya appear to suffer from three legitimacy deficits: source, process, and outcome legitimacy. This article argued that the source and process legitimacy issues are due to the inadequacy of creating an aggregate effort (intermediate) GPG for a weakest link GPG. Due to the entanglement between source and process legitimacy, this article considered tying both to enhance cooperation with the Court. At first glance, a compliance pull could be generated by, when source legitimacy is lacking, strictly sticking to the State's interest in the prosecutorial discretion as to who to prosecute. The article showed that such calculations are already made with regards to so-called self-referrals (i.e., where source legitimacy is not questioned). However, the article argued that the latter option would create a global public bad, as it entails negative externalities and excludes some victims from benefitting from the Court.

While assessing the outcome legitimacy of the Court's intervention in the situations under scrutiny, it became clear that the peace versus justice theorem was at the crux of non-compliance issues. The ICC cannot secure peace, but it may contribute to it as one of the many tools that might be used to come closer to peace in the long term.³⁸⁷ Deciding whether the distributive costs of the fight against impunity requires a trade-off in favor of peace is, according to the Rome Statute as well as the UN Charter, lying on the SC. It is plausible that the SC must start using its power to defer investigations and prosecutions under Article 16 of the Rome Statute in situations where the ICC's source, process, and outcome legitimacy are weak. In 2009, before the beginning of the situations in Kenya and Libya, but right after the SC's silence regarding the request to defer the proceedings against Al-Bashir, South Africa had submitted—on behalf of the AU—a proposal for amending Article 16 of the Rome Statute.³⁸⁸ South Africa's proposal provided that where the SC would fail to decide on a request for deferral, the UN General Assembly

387. *See id.* at 482-84.

388. South Africa: Proposal of Amendment, UN Doc. C.N.851.2009.TREATIES-10 (Nov. 30, 2009).

would be allowed to assume the responsibility of the SC under Article 16 and defer proceedings before the ICC.³⁸⁹

Overall, the legitimacy talks over the ICC ultimately point out that the crux of the problem is the SC. Its participation in ICC's business is necessary for the effective supply of the fight against impunity as a GPG. However, the SC is also responsible for the lack of a consistent and universal fight against impunity and a coherent policy when this GPG must be traded off with peace.

389. *See id.* at 6.