The International Criminal Court, Ten Years Later: Appraisal and Prospects

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ARTICLES

THE INTERNATIONAL CRIMINAL COURT TEN YEARS LATER: APPRAISAL AND PROSPECTS

Joseph M. Isanga*

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I. INTRODUCTION

On March 14, 2012, ten years after the International Criminal Court (ICC) became operational, and with around $900 million
spent, the ICC delivered its first judgment.\textsuperscript{1} It has issued only thirteen arrest warrants.\textsuperscript{2} Is the ICC too slow and too expensive?\textsuperscript{3} The Kampala Review Conference held in 2010, seven years after the Rome Statute of the International Criminal Court (Rome Statute) entered into force,\textsuperscript{4} could have probed a plethora of questions. Instead, it was a limited stocktaking exercise,\textsuperscript{5} leaving many issues unresolved. In 2012, the ICC marked ten years since the Rome Statute entered into force. Seizing upon this milestone, this Article is a contribution to the continuing assessment of the Rome Statute and the ICC. This Article asks: ten years later, is the ICC working effectively, and if not, in what respects can the Rome Statute and the ICC be improved?

Specifically, the outstanding issues that were not fully resolved in the Rome Statute and at The Kampala Review Conference include the following: Can the ICC, unlike the \textit{ad hoc} tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)—deal with situations of ongoing conflict, or, while pursuing justice, is the ICC just an obstacle to peace? Does the ICC, being a creature of a treaty, have enough checks and balances? Does the Rome Statute inappropriately expose nationals of non-State parties, such as the United States, to the jurisdiction of the ICC? In light of the fact that only one indictee has been convicted in ten years, has the ICC fundamentally failed in its objectives? In light of the fact that the ICC has failed to elicit the cooperation of states without which it cannot accomplish

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\textsuperscript{1} Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment of Trial Chamber I (Mar. 14, 2012) (convicting Congolese warlord Thomas Lubanga Dyilo of recruiting child soldiers).


\textsuperscript{3} Jon Silverman, \textit{Ten Years, $900M, One Verdict: Does the ICC Cost Too Much?}, BBC NEWS (Mar. 14, 2012), http://www.bbc.co.uk/news/magazine-17351946 (noting, however, this expenditure is comparable to those of the \textit{ad hoc} tribunals—the International Criminal Tribunal for the Former Yugoslavia [ICRY] and International Criminal Tribunal for Rwanda [ICTR]).


\textsuperscript{5} The focal points of the review were complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, peace, and justice.
anything, has the Rome Statute created a toothless ICC? In light of the fact that only African conflicts are being investigated, is the ICC fundamentally a political and European institution bent on imposing its ideological view of the world on developing (African) nations? Did the Rome Statute overreach in its provisions regarding the indictment of sitting heads of state? Did the Rome Statute, in providing for the complementarity principle, overly defer to state sovereignty, allowing state parties to stall the work of the ICC? Does the Rome Statute’s provisions relating to the Office of the Tribunal’s Prosecutor (ICC Prosecutor) essentially create a political institution incapable of impartiality? Should justice and peace be seen as irreconcilable objectives in the context of the ICC’s investigation of ongoing conflicts? Can the ICC operate effectively without the support of the United States, the only world super power? Is the victim’s participation scheme unduly complicating the work of the ICC?

To these ends, Part I presents the ICC’s outstanding achievements; Part II presents the ICC and Rome Statute’s outstanding issues; Part III presents the ICC’s relationship with the United Nations over the last ten years and recommendations regarding how that relationship can be improved; Part IV critically examines how the relationships of the ICC and the United States and other non-party states have evolved over the last ten years; Part V reviews the extent to which the ICC has been able to forge ties with regional organizations and what promises such ties hold for the future ICC; Part VI details the Kampala Review Conference; and Part VII presents recommendations and a conclusion.

First, a historical backdrop is necessary to appreciate the overarching significance of the ICC. The ICC arose out of the need to guarantee, with more certainty, that impunity would never

6 Some commentators argue that the ICC will “never be employed” because of the principle of complementarity or unwarranted deference to state sovereignty. See John T. Holmes, Complementarity: National Courts versus the ICC, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 667 (Antonio Cassese et al. eds., 2002).

7 The ICC Prosecutor, with the approval of a three-judge pretrial panel, can initiate an investigation. Some countries, especially the United States, argue that this process is not sufficiently depoliticized, as it does not provide sufficient checks and balances because the office answers to no executive authority. Lauren Fielder Redman, United States Implementation of the International Criminal Court: Toward the Federalism of Free Nations, 17 J. TRANSNAT’L L. & POL’Y 35, 47 (2007).
be tolerated at the international level. Previous international criminal tribunals were *ad hoc*. The more recent tribunals—ICTR and ICTY—were subject to the vicissitudes and uncertainties of political whim that characterize the operations of the United Nations Security Council (Security Council). *Ad hoc* tribunals also suffered problems stemming from their lack of permanence. At inception, the ICC made sense because it would be unnecessary to "build courts every time an atrocity occurred anywhere in the world." Additionally, *ad hoc* tribunals are limited to specific geographic locations. A permanent institution was thought to be a more effective deterrent.

8 "[I]t is precisely when the most serious crimes were committed that national courts were least willing or able to act because of widespread or systematic violence or because of involvement of agents of the State in the commission of crimes." Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT’L L. REV. 539, 540 (2007).

9 Interest in establishing an international criminal court has a long pedigree, stretching back to the aftermath of the Nuremberg trials. See Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court*, 6 WASH. U. GLOB. STUD. L. REV. 689, 700 (2007). Some authors, such as Cherif Bassiouni, trace the interest in an international criminal court back to a court "established in 1474 in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter Von Hagenbach for his violations of the ‘laws of God and man’ because he allowed his troops to rape and kill innocent civilians and pillage their property." M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1 (1991).

10 *Ad hoc* tribunals have also been criticized for their selectivity, limited reach and cumbersomeness. They are costly to create and maintain: entirely new personnel, facilities, and procedures must be set up each time they are created. Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT’L L.J. 513, 514-15 (2003). Establishing a single *ad hoc* tribunal is slow and difficult work. It took the United Nations two years to establish the ICTY and ICTR. Cassandra Jeu, *A Successful, Permanent International Criminal Court ... ‘Isn’t It Pretty To Think So?’*, 26 HOUS. J. INT’L L. 411, 425 (2004).


13 Kirsch, supra note 8, at 540.

14 Sievert, supra note 11, at 102 (citing Helen Robertson, *Looking Forward: Prospects for the International Criminal Court, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE?* 148 (Steven R. Ratner & James L. Bischoff eds., 2004)).
II. ACHIEVEMENT OF THE ICC

A. Completed Cases

The ICC completed only one case in the last ten years; however, in terms of international criminal justice and for a court that was starting from scratch, this should be viewed as a significant achievement that sets groundbreaking best practices for the ICC. In June 2008, the trial was suspended indefinitely because the ICC Prosecutor was unable to disclose a large amount of potentially exculpatory material due to confidentiality restrictions. This indicates that the ICC was willing to dismiss a case rather than complete it at any cost, even if there were due process concerns. So, while the ICC has lacked expeditiousness, it had a lot to do with its procedures, which are simply too cumbersome. With an eye on its long-term reputation, and to avoid the charge that it is a politicized institution, the ICC emphasized procedural propriety and fairness. The ICC’s reputation is important because “the court’s legacy, its judgments must be able to withstand the test of historic scrutiny.” In this context, the ICC’s long-term success must be assessed based on its record, particularly in fairly bringing to justice those who commit egregious crimes under circumstances that no national court would

16 According to Judge Philippe Kirsch, former President of the ICC, the lack of expeditiousness can be attributed to several factors. First, the ICC has to determine whether a new situation meets the requirements of jurisdiction and admissibility; then it has the double requirement of pre-trial and trial phases, which have been too long, elaborate and, to some degree, involved duplication of the two phases. Then there was a new feature introduced, namely, the victims’ participation. Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 J. MARSHALL L. REV. 515, 524 (2010).
17 In the case of Lubanga Dyilo, the Trial Chamber delivered 275 written decisions and orders and 347 oral decisions. *Lubanga Dyilo*, ICC-01/04-01/06.
18 As Judge Kirsch noted, the legitimacy of the ICC was a concern even during the negotiating period. According to Judge Kirsch, the ICC recognizes that it has the primary responsibility to demonstrate its credibility in practice as a judicial, and not political, institution, through fair, impartial and efficient proceedings consistent with due process. *See* Kirsch, *supra* note 8, at 541, 545. Some critics have compared the ICC to the ICJ, which has been blamed for politicized decisions. John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 198 (2000).
have been able to resolve them to justice.\textsuperscript{20} Beyond the one case that the ICC has completed, there are fourteen cases currently pending before the ICC, three of which are at the trial stage. The ICC can be expected to learn from its experience in the last ten years and become more expeditious while maintaining the highest standards of fairness.

B. Deterrence

The ICC’s objectives are deterrence\textsuperscript{21} and retribution.\textsuperscript{22} Some scholars have argued for the additional goal of expressionism, i.e., sending a message.\textsuperscript{23} This is a distinct objective, which can be pursued in addition to, or even in the absence of, retribution.\textsuperscript{24} The ICC’s prosecutions have expressive value in that they signal moral condemnation.

Through its deterrent effect the ICC achieves more with each decision than just completing the case at hand.\textsuperscript{25} Admittedly, the evidence in this regard is essentially anecdotal, but it should not be dismissed as insignificant since most of these cases arguably led to the prevention of further atrocities. Notwithstanding the fact that there have been delays in effecting arrest warrants, perpetrators of unspeakable atrocities have been reduced to fugitive status and must constantly live on the run. The existence of the ICC sends an unmistakable signal that perpetrators of international crimes will not go unpunished. The ICC is achieving this important result: deterrence.\textsuperscript{26} As early as 2004, the U.N. Secretary General noted

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20} Patricia M. Wald, \textit{Is the United States’ Opposition to the ICC Intractable?}, 2 J. INT’L CRIM. JUST. 19, 23 (2004).
\item \textsuperscript{21} The Preamble of the Rome Statute states that its objective is, \textit{inter alia}, to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crime.” Rome Statute, supra note 4, pmbl. (emphasis added).
\item \textsuperscript{22} The Preamble of the Rome Statute declares that the “most serious crimes of concern to the international community as a whole must not go unpunished.” Id.
\item \textsuperscript{23} Linda M. Keller, \textit{Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms}, 23 Conn. J. INT’L L. 209, 274 (2008) (“Expressivism . . . requires that the audience receive the message and absorb its meaning: that the conduct of the actor was wrong.”).
\item \textsuperscript{24} See id. (observing that “retribution generally does not require any message to be sent or received.”).
\item \textsuperscript{25} The Preamble of the Rome Statute provides that one of its purposes is to “contribute to the prevention of such crimes.” Rome Statute, supra note 4, pmbl.
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that the ICC "was already having an important impact by putting would-be violators on notice that impunity is not assured." 27

Some would argue that the ICC failed in this objective because deterrence only works if there is a punishment that is both severe and certain to be applied, but the ICC has not been able to effect both due to the difficulty in arresting indictees. Critics argue that deterrence ultimately depends on the perceived effectiveness of the ICC and that, in any case, recent history is filled with cases where even strong military force or threat of force failed to deter aggression or the commission of gross abuses of human rights. 28

What this criticism means is that the ICC has to aim at increasing its level of effectiveness to achieve this purpose. As for the proposition that if force failed to deter potential criminals in the past, this would hold true even more assuredly in the case of the ICC and perhaps, in national courts as well.

The deterrent effect of the ICC appears to be backed by the

The sentiment for an ICC emanates from dissatisfaction with the prevailing practice of international criminal law. Supporters of the ICC argue that individuals are not being held sufficiently accountable for the most serious crimes against the international community (genocide, war crimes, and crimes against humanity). The use of international tribunals in the 20th century has been ad hoc and temporary, while the present practice of extradite-or-prosecute does not function effectively when States experience bottlenecks in the prosecution of suspected criminals (i.e., because the suspect is a former head of State, because of civil war, because of refusal to extradite suspects, or because the requisite judicial institutions are missing). Under such conditions, an effective deterrent against criminal acts in the global community is lacking because individuals are not held systematically accountable for their transgressions. An ICC, according to supporters, would provide an ongoing deterrent and thus consolidate a global order based on a respect for international law. To the extent that an ICC became the central player in the prosecution and adjudication of international crime, there would indeed be a major qualitative change in the practice of international criminal law, which has heretofore been principally administered through sovereign States.


26 ALEXIS ARIEFF ET AL., CONG. RES. SERVICE, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 26 (2011), available at http://www.fas.org/sgp/crs/row/RL34665.pdf. Some critics counter-argument is that "difficulties encountered in enforcing ICC arrest warrants and the fact that the Court has yet to convict any suspects have led some to question whether the threat of ICC prosecution is credible." Id. at 26.


28 Bolton, supra note 18, at 197.
evidence. ICC indictments caused the decline of Joseph Kony's rebel movement, the Lord's Resistance Movement/Army (LRA), which terrorized Northern Uganda and left horrendous atrocities in its wake.\(^2\) This is a case where there is reason to believe the LRA is not in its last throes, has metamorphosed, and will continue to commit fresh atrocities in the wider region.\(^3\) That said, it is arguable that the indictments may have been an effective deterrent, at least in Northern Uganda. It was once thought, albeit incorrectly, that those indictments were the true obstacle to peace in Northern Uganda and that the traditional means of reconciliation alone could produce peace. However, time revealed that the indictments were the best means to end the long guerilla campaign. The rebels who once roamed the bushes of Northern Uganda now have no place to hide and fear capture.

**C. Prosecuting Serving Heads of State**

To the extent that the indictments of serving heads of state have had a deterrent effect, it can be argued that such a bold step was an achievement of the ICC. The Rome Statute provides that: "[t]his Statute shall apply equally to all persons without any

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\(^3\) Concluding, "although, over time, [LORD's Resistance Army or LRA] attacks have been less deadly, abductions and disappearances have continued," and further stating: LRA is undoubtedly, at present, a complex regional problem . . . . The various pressures and strategies, including military strategies implemented against it for over 20 years, have just provided the LRA with the opportunity to become an international movement, to spread and extend [its] actions over three neighbouring countries of the region and to commit human rights violations against the civilian population and serious violations of international humanitarian law in retaliation and as part of its survival strategy.

OHCHR REPORT, supra note 29, at 11, 19.
It also provides that the "official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility . . . . Immunities or special procedural rules which may attach to the official capacity of a person . . . shall not bar the Court from exercising its jurisdiction over such a person." Consequently, there can no longer be the gap in international law with regard to the possibility that an individual could escape liability simply due to his leadership position. To prove that these provisions were not mere paper tigers, the ICC boldly issued warrants of arrest against Omar Hassan Ahmad Al-Bashir, President of Sudan, and Muammar Mohammed Abu Minyar Gaddafi, then President of Libya, the first ever such action against serving heads of state. Some could dismiss these actions as mere theatrics with no realistic way of effectuating their objective; after all, President Al-Bashir is gallivanting even in states that are parties to the Rome Statute. There is some validity to that argument. However, it is possible that the mere indictment advance the objectives of the ICC in some degree.

By indicting current heads of state, the ICC dents their international clout and, at least in principle, confines the scope of their freedom of movement to only those states that are not parties to the Rome Statute. This situation would make President Al-Bashir, for example, an "international fugitive."


32 Rome Statute, *supra* note 4, art. 27 (emphasis added).


36 Peter Martell, *Dancing Bashir Scoffs at Darfur Warrant*, BBC NEWS (Mar. 5, 2009),
Despite any assurances, an indicted head of state can never be sufficiently confident that if he visited a state party to the ICC, he would not be surrendered to the ICC. The case of the former Liberian leader, Charles Taylor, is a clear precedent. Indicting President Al-Bashir has had a positive deterrent effect. Prior to the indictment, the atrocities in Darfur seemed intractable. For example, prior to the involvement of the ICC, the government of Sudan was adamantly uninterested in pursuing the peace process in Darfur. After the indictment, the Sudanese government agreed to become a party to the Doha agreements aimed at establishing peace in Darfur.

There is some validity to the argument that if the objective of indicting a serving head of state is accountability for alleged crimes, the fact that heads of state appear particularly insusceptible to surrender to the ICC (because not many states are willing to execute an arrest warrant) proves that the Rome Statute's provision in this regard is mostly a paper tiger. For example, in response to the indictment of President Al-Bashir, the African Union (AU)—with the exception of a few rules of law


37 President Al-Bashir, for example, cancelled his plan to attend an African Union Heads of State summit, held in Kampala, Uganda, in October 2009, despite assurances to him by President Museveni of Uganda that he would not be arrested. Uganda is a state party to the Rome Statute. Prior to that summit, President Al-Bashir had visited seven states—Eritrea, Egypt, Libya, Qatar, Saudi Arabia, Ethiopia and Zimbabwe—none of which are parties to the Rome Statute. Cyprian Musoke & Milton Olupot, Sudan's Bashir Skips Kampala Visit, NEW VISION (Uganda) (Oct. 19, 2009), http://www.newvision.co.ug/D/8/12/698394.

38 Mr. Taylor, then serving as President of Liberia, faced war crimes charges before the U.N.-backed Special Court for Sierra Leone (SCSL) over his role in the civil war in neighboring Sierra Leone. He was forced to go into exile in Nigeria in 2003 as part of a deal to end fourteen years of civil war in Liberia. Under international pressure, the Nigerian authorities surrendered Taylor to the ICC, even as Taylor's spokesperson condemned Nigeria for “breach” of the 2003 deal, saying, “African leaders cannot afford to renege on that agreement.” Nigeria to Give Up Charles Taylor, BBC NEWS (Mar. 25, 2006), http://news.bbc.co.uk/2/hi/africa/4845088.stm.

39 Claude Jorda, Reflections on the First Years of the International Criminal Court, 36 HOFSTRA L. REV. 239, 241 (2007) (observing that resorting to the ICC was having a positive impact on peace and security).

oriented states, like Botswana and South Africa, and including parties to the Rome Statute—issued a resolution in support of President Al-Bashir and disavowing cooperation with the ICC.

But this is part of a broader challenge of the ICC regarding state cooperation. The Rome Statute provides that a “State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question . . . .” It also provides that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” If a state party to the Rome Statute has reasons for not cooperating with the ICC, it has the duty to consult with the ICC and, in more difficult cases, the ICC can issue a determination as to how the state should cooperate. The ICC has held that states cannot rely on head of state immunity to refuse to arrest a serving head of state. And it is not open to the state

41 Musoke & Olupot, supra note 37.
43 African Union in Rift with Court, BBC NEWS (July 3, 2009), http://news.bbc.co.uk/2/hi/africa/8133925.stm.
44 Rome Statute, supra note 4, art. 59(1).
45 Id. art. 86.
46 Id. arts. 97, 87(7), 119.
47 In Prosecutor v. Bashir, Case No. ICC-02/05-01/09-139, Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court (Dec. 12, 2011) (in which Malawi relied on art. 98(1) of the Rome Statute to justify its refusal to comply with the cooperation requests to arrest and surrender President Omar Hassan Ahmad Al Bashir). The Pre-Trial Chamber found:

[C]ustomary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

Id. ¶ 43. It then held:

[If] accordance with article 87(7) of the Statute . . . the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

Id. ¶ 47.
party to question whether an arrest warrant was properly issued.48 Yet, currently, only five individuals are in the ICC’s custody and eleven suspects remain at large. The Rome Statute requires that, except for the hearing to confirm charges, the accused be present for the trial to commence.49 Thus, without state cooperation, indictments would be extremely difficult to effectuate.50 As the President of the ICC has noted, “a number of direct requests for cooperation have not yet been fulfilled . . . Without arrests, there can be no trials. Without trials, victims will again be denied justice and potential perpetrators will be encouraged to commit new crimes with impunity.”51 Burkina Faso invited Gaddafi into exile there although it is a party to the Rome Statute.52

Even internally speaking, there is no guarantee that those opposed to a serving Head of state would want him to be prosecuted by the ICC. For example, the Libyan rebels’ Transitional National Council insisted that Gaddafi would be subject to the Libyan courts.53 The Rome Statute also establishes an enforcement mechanism with regard to compliance with the state’s duty to cooperate.54 But, to date the ICC has not been able

48 Rome Statute, supra note 4, art. 59(4).
49 Id. art. 63.
50 See Göran Sluiter, The Surrender of War Criminals to the International Criminal Court, 25 Loy. L.A. INT’L & COMP. L. REV. 605 (2003) (observing that the ICC, like any other international criminal tribunal or international organization, can only fulfill its mandate when it receives the necessary assistance from cooperating states); see also Philippe Kirsch, Address to the United Nations General Assembly (Oct. 9, 2006), available at http://www.icc-cpi.int/NR/rdonlyres/53692E4E-2B35-41BD-8B90-91828D55880A/278543/PK_20061009_en.pdf (stating there could be no trial without arrests and that the ICC lacks the power to arrest defendants).
54 Article 87(7) of the Rome Statute provides that the ICC may make a judicial finding of noncompliance where a state party to the Rome Statute fails to comply with a request to cooperate with the ICC. Rome Statute, supra note 4, art. 87(7). Essentially, the ICC makes a judicial finding that a state has breached its international obligation. After the ICC issues such a finding, the ICC may refer the matter to the Assembly of States Parties (“ASP”) to the Rome Statute. Pursuant to Article 112(2)(f) of the Rome Statute, the ASP may “consider pursuant to Article 87 paragraphs 5 and 7, any question relating to non-cooperation.” In cases where the matter was referred by the Security Council, the ICC
to force state parties to comply with their duty to cooperate. For example, the ICC referred Kenya to the Security Council for its refusal to arrest and surrender President Al-Bashir to the ICC, but to date no remarkable steps have been taken by the Security Council. The ICC is subject to the international realpolitik evident in the Security Council Resolution that referred the Sudan situation to the ICC, which states that only Sudan and the other parties to the Darfur conflict were under the obligation to cooperate with the ICC. In contrast, all other states were merely "urged" to cooperate. But it would be a mistake to dismiss the ICC's indictment as being devoid of any significance because of this lack of cooperation and the feebleness of established enforcement mechanisms. International law works in many ways, including the marshaling of shame. The mere fact that a serving Head of state is indicted can have this value, especially if this is pursuant to a Security Council resolution. This is because the Security Council—which in many instances is disunited over strategic and ideological differences—demonstrated a degree of agreement in making such a referral, reflecting its wholesale condemnation.

III. OUTSTANDING ISSUES

A. Is the ICC a Court for African Situations?

All of the fourteen conflicts—for example, those relating to Uganda, DRC, Kenya, Central African Republic, Sudan, Libya and Côte d'Ivoire—that have come under the purview of the ICC relate to an African country. The African Union has expressed concern over this trend, and refused to sign a cooperation


56 Not every African leader subscribes to this view. See, e.g., Museveni Wants Africa to Embrace ICC, NEW VISION (Uganda) (June 1, 2010), http://www.newvision.co.ug/D/8/12/721470 (noting that President Museveni of Uganda urged African delegations attending the Kampala Review conference to discredit the claim that the ICC is a court for Europeans to judge Africans).

57 Some have argued that the ICC's focus on African situations, while "ignoring" atrocities committed in Western-friendly nations such as Israel, is proof that the ICC is an imperialist tool at the service of Western interests of third world re-colonization. See, e.g.,
agreement with the ICC and urged member-states to ignore the ICC’s orders, all of which can have serious implications for a court that depends on state cooperation to succeed. But is this criticism entirely justified? It would appear that the general conclusion that there is an ulterior ICC agenda to target African countries exclusively is not warranted. Factually speaking, and with regard to situations referred by the Security Council, it is important to note that international tribunals other than the ICC exist—such as the ICTY and the Extra Ordinary Chambers in the Courts of Cambodia—none of which have targeted African conflicts. Also, the ICC can’t be dismissed as a mere Western tool of third world re-colonization as indeed some western countries—such as: France, the United Kingdom, Germany, Italy, and the Netherlands—are parties to the Rome Statute, which potentially exposes them to the jurisdiction of the Court.

The legitimate subject of criticism should be the pertinent law. The ICC maintains that the ICC Prosecutor’s “choice of cases is based on the relative gravity of abuses, and that crimes committed in Africa are among the world’s most serious.”*58 It is important to note that Article 17(1)(d) of the Rome Statute provides that a case is inadmissible where it is “not of sufficient gravity to justify further action by the Court.”*59 The problem is that there are no specific criteria spelled out in the Rome Statute as to the elements that constitute “sufficient gravity.” This “gravity” threshold has played a critical role in guiding the ICC Prosecutor’s selection of situations and cases. Nevertheless, the ICC has offered some guidance in this respect. Interpreting Article 17(1)(d) of the Rome Statute, the Pre-Trial Chamber I (PTC I) held that to satisfy the gravity threshold, the following factors must be considered: (i) whether the relevant conduct is systematic or large-scale; (ii) whether “social alarm” has been caused in the international community; and (iii) whether the perpetrator of the relevant

* New Imperialist Tools for Third World Re-Colonization, AFR. LEGAL BRIEF (July 2, 2011), http://www.africalegalbrief.com/index.php?option=com_content&view=article&id=347:africannatoicc-new-imperialist-tools-for-third-world-re-colonization. Critics also argue that the ICC “limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.” ARIEFF, supra note 26, at 25, 27 (noting that some observers have criticized the “perceived [ICC’s] prioritization of Africa over other regions.”).

*58 ARIEFF, supra note 26, at 27.

*59 Rome Statute, art. 17(1)(d).
conduct is among those who bear the greatest responsibility for the alleged crimes.\textsuperscript{60} Despite this, it is submitted that this test is overly restrictive because targets of the Rome Statute are not limited to those who bear the greatest responsibility, and not every situation may be characterized by "systematic" or "large-scale" conduct.\textsuperscript{61} Moreover, it does not appear that "social alarm" can be measured by any objective standard.

\section*{B. Lack of Expeditiousness}

The ICC cannot fulfill its objectives if justice is delayed because "justice delayed is justice denied."\textsuperscript{62} Delays can be costly and threaten to create a backlog that will lead to the ICC being unable to respond effectively to new situations and cases as they arise.\textsuperscript{63} Some delays are institutional, such as those that can be attributed to the cumbersome nature of procedures as dictated by pertinent law, but others are extra-institutional, such as those due to the lack of state cooperation.

With regard to institutional delays, "Pre-Trial Chambers have in several cases taken more than two months to respond to applications for a warrant of arrest or summons to appear under Article 58 of the Rome Statute, and in only two cases did the Pre-

\textsuperscript{60} Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision of the Prosecutor's Application for Warrant of Arrest, \textsection 46 (Feb. 24, 2006).


\textsuperscript{62} See, \textit{e.g.}, \textit{War Crimes Research Office, The Confirmation of Charges Process at the International Court 1} (2008) [hereinafter \textit{Confirmation}], available at http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonConfirmationofCharges.pdf?rd=1 (arguing that serious delays in the confirmation process "has implications regarding not only the right of the accused to a speedy trial, but also on each accused's ability to prepare its defense."). In \textit{Lubanga Dyilo}, for example, the confirmation hearing started almost nine months after the accused was first taken into the custody of the ICC. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Order Scheduling the First Appearance (Mar. 17, 2006). There was more waiting before the real trial could commence due to a plethora of pre-trial procedures, such as the disclosure process that requires all relevant evidence to be turned over to the defense. Also, in \textit{Katanga}, the trial did not take place until eight months after Mr. Katanga was in the ICC's custody. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest (July 2, 2007).

Trial Chamber respond to an Article 58 application in less than one month." Additionally, the ICC's confirmation process takes several months. Substantial delay has also been noted with regard to the process by which parties secure judgments on interlocutory appeals. First, the Pre-Trial or Trial Chamber takes a substantial period of time before issuing rulings on whether to grant a party's request to obtain interlocutory appeal. Then, the Appeals Chamber consistently takes several months to render judgments on those issues that reach it, even though in many cases the proceedings below have been formally or effectively stayed pending the judgment. For example, "the Appeals Chamber often takes weeks to rule on a request from victims to participate in the appeal, which delays the proceedings because, once granted a right to participate, victims are given the opportunity to submit observations and the parties are permitted to respond to the victims' observations." 

With regard to extra-institutional delays, the lack of progress in many cases can be attributed to the lack of state cooperation. The ICC has demonstrated that when states cooperate, the ICC can deliver justice. The ICC's first trial took place in 2007. The defendant in this case, Thomas Lubanga Dyilo, was the leader of a lethal militia in the Democratic Republic of the Congo (DRC). He was the first person ever arrested pursuant to an ICC arrest warrant. He is among the very few defendants to be surrendered to the ICC. At first, Lubanga Dyilo was ordered by the Trial Chamber to be released—until the Appeals Chamber reversed this decision. Lubanga Dyilo had been ordered to be released by the Trial Chamber because of: (i) the unconditional stay of proceedings, (ii) the uncertainty of the trial resuming at a future date, and (iii) the length of Mr. Lubanga Dyilo's detention. However, the Appeals Chamber found that

[Significance was] attached by the Trial Chamber to the length

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64 Id. at 1.
65 Id. at 2.
66 Id. at 6.
67 Id.
68 Id.
69 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).
70 Id.
71 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Release (July 20, 2010).
of Mr. Lubanga Dyilo’s detention. However, the Appeals Chamber observes that the Trial Chamber made no finding either that the continued detention of Mr. Lubanga Dyilo was no longer necessary for trial under articles 58 and 60 (2) and (3) of the Statute or that Mr. Lubanga Dyilo was detained for an unreasonable period due to the inexcusable delay of the Prosecutor under article 60 (4) of the Statute.72

Another instance is Prosecutor v. Bemba.73 The warrant of arrest against Bemba was unsealed on May 24, 2008, and he was arrested on the same day by Belgian authorities. In the majority of cases, however, no arrests have been affected. For example, the ICC indicted Bosco Ntaganda of DRC in 2008,74 Ahmed Harun, the State Minister for Interior of Sudan in 2007, and Ali Muhammad Ali Abd-Al-Rahman, the alleged leader of the Janjaweed militia which acted as agent of the Sudanese regime in the commission of the atrocities in Darfur in 2007.75 In Prosecutor v. Kony,76 the arrest warrants were unsealed on October 13, 2005, and in October 2011, the Obama administration deployed 100 U.S. troops to Africa to help hunt down these indictees whose Lord’s Resistance Army “continues to commit atrocities across the Central African Republic, DRC and South Sudan.”77 However, to date, all of these indictees still remain at large.

The Rome Statute does not provide for trial in absentia. Even though aspects of the proceedings can be held in the absence of the accused, issues do arise. For example, it is difficult for the defense to effectively operate when they cannot have access to the

72 Id. ¶ 25.
73 Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Charges (June 15, 2009). Jean-Pierre Bemba Gombo is the alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC).
74 Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda (Apr. 28, 2008).
76 Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest (Sept. 27, 2005). Joseph Kony is the alleged Commander-in-Chief of the Lord’s Resistance Army. Vincent Otti is the alleged Vice-Chairman and Second-in-Command of the LRA. Okot Odhiambo is the alleged Brigade Commander of Trinkle and Stockree Brigades of the LRA. Dominic Ongwen is the alleged Brigade Commander of the Sinia Brigade of the LRA.
defendant. In *Kony*, defense counsel argued the inequality of arms was "compounded by the lack of instructions from the four suspects, who may have been unaware of the admissibility proceedings," and that if the defendants could not present their arguments, there could be a breach of their right to legal representation. Defense counsel also argued they could not proceed in the absence of any instruction without breaching the professional Code of Conduct. As the Appeals Chamber in this case noted, in those circumstances defense counsel’s role is very circumscribed. The Appeals Chamber noted the difficulties of a "Chamber appointed counsel who was located in Europe and who had no apparent means of communicating with the suspects, who are believed to be in DRC." The Appeals Chamber then stated that in those circumstances, there is no client and counsel relationship, and "Counsel’s mandate is limited to merely assuming the defense perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them."

One of the problems with the Rome Statute, as the Appeals Chamber has noted, is that "Article 19 (1) of the Statute is silent on the issue of whether suspects have a right to legal representation in admissibility proceedings, particularly in circumstances where they have not yet appeared before the Court." The *ad hoc* defense counsel in the DRC situation and the attorney appointed in the Sudan (Darfur) situation sought to submit observations to the PTC challenging the jurisdiction of the ICC and the admissibility of the relevant situation for which they were appointed. However, in both instances, PTC I refused to admit the submissions, "holding that under Article 19 of the Rome Statute, only an accused person or a person for whom a warrant of arrest or a summons to appear had been issued could challenge jurisdiction or admissibility." In April 2005, in

78 Prosecutor v. Kony, Case No. ICC-02/04-01/05 OA 3, Judgment, ¶ 31 (Sept. 16, 2009).
79 Id. ¶ 59.
80 Id. ¶ 56.
81 Id. ¶ 64.
82 Situation in the Democratic Republic of Congo, Case No. ICC-01/04-21, Decision on the Prosecutor’s Request (Apr. 26, 2005).
83 WAR CRIMES RESEARCH OFFICE, THE GRAVITY THRESHOLD OF THE INTERNATIONAL CRIMINAL COURT, PROTECTING THE RIGHTS OF FUTURE ACCUSED DURING THE INVESTIGATION STAGE OF INTERNATIONAL CRIMINAL COURT
conjunction with its decision to approve certain forensic examinations of evidence relating to the Prosecutor’s investigation in DRC, PTC I ordered the Registrar to appoint an ad hoc defense counsel to represent the general interests of the defense for the purpose of those examinations. On August 1, 2005, Mr. Tjarda van der Spoel was officially appointed for the role. Mr. Van der Spoel tried to challenge “not only the existence of a unique investigative opportunity, but also making ‘preliminary remarks on issues of jurisdiction and admissibility.’” However, PTC I held that “[c]hallenges to the jurisdiction of the Court or the admissibility of a case pursuant to [A]rticle 19(2)(a) of the [Rome] Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under [A]rticle 58.”

With regard to the situation in Darfur, the PTC I invited Louise Arbour and Antonio Cassese to “submit in writing their observations on issues concerning the protection of victims and the preservation of evidence in Darfur.” Instead of filing a response to the amicus observations, “Mr. Shalluf submitted a request that PTC I determine questions of jurisdiction and admissibility prior to taking any further action with respect to the situation in Darfur.” In addition to requesting the submissions from Ms. Arbour and Mr. Cassese, PTC I also ordered the Registrar to appoint an ad hoc counsel to represent and protect the general interests of the defense for the situation in Darfur, Sudan, during the proceedings pursuant to [R]ule 103. The Registrar appointed Mr. Hadi Shalluf as ad hoc counsel. But PTC I “held that the Rome Statute made no provision for challenges to the ICC’s jurisdiction or admissibility by ad hoc defense counsel.” The Rome Statute needs to provide for this situation in order to ensure that the defendant’s rights are protected from the very beginning of the investigation. In any event, the predicament of a defense

84 Id. at 26.
85 Situation in the Democratic Republic of Congo, Case No. ICC-01/04-21.
86 Situation in Darfur, Sudan, Case No. ICC-02/05-10, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, at 5 (July 24, 2006).
87 PROTECTING THE RIGHTS, supra note 83, at 29.
88 Id.
89 Id. at 30.
counsel who cannot have access to the accused all the more underscores the need for state cooperation.

C. Complementarity Principle

A bedrock principle of the Rome Statute is that of complementarity. The Rome Statute provides that the ICC "shall be complementary to national criminal jurisdictions." Complementarity is not an entirely unprecedented and novel concept. The Statute for the ICTR made the jurisdiction of the Tribunal concurrent with that of national courts. However, the Rome Statute takes it to a new level, which has brought on additional challenges for the ICC. This principle safeguards the sovereignty of state parties and eschews an absolutely independent, supranational court, while holding states accountable to international norms via an impartial monitor that can initiate proceedings through the Office of the Prosecutor if the state is unwilling or unable to do so.

Under the complementarity principle, the ICC is required to "determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." The Rome Statute provides that unwillingness to prosecute can be determined based on, inter alia, whether the "proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article," whether there has been "an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice," and whether "proceedings were not or are not being conducted independently or impartially."

In its judgment of September 25, 2009, the Appeals Chamber interpreted Article 17(1)(a) as involving a twofold test:

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90 Rome Statute, supra note 4, pmbl., art. 1.
92 Rome Statute, supra note 4, art. 17(1)(a).
93 Id.
94 Id. art. 17(2)(a).
95 Id. art. 17(2)(b).
96 Id. art. 17(2)(c).
In considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.97

The question remains, though, as to how the ICC actually determines if a state is unwilling to prosecute an international crime within its purview. The Rome Statute provides some general indications as to how the ICC is to make that determination:

[C]onsider, having regard to the principles of due process recognized by international law, whether . . . . [t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . . There has been an unjustified delay in the proceedings . . . . The proceedings were not or are not being conducted independently or impartially.98

The ICC also considers the gravity of the situation. According to the ICC:

[C]onducting an admissibility assessment within the context of a situation under article 53(1)(b) of the Statute not only requires an examination regarding the existence or absence of national proceedings, but also one which involves gravity. Therefore, although a State with jurisdiction over a case may have remained entirely inactive with respect to domestic investigations, the Court should still determine the case as inadmissible if it “is not of sufficient gravity to justify further action . . . ."99

98 Rome Statute, supra note 4, art. 17(2)(a)-(c).
99 Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision on the
The ICC has also discussed the factors that it considers in weighing the gravity of a situation, stating:

In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.\(^\text{100}\)

Further, the Court stated that in order to determine inability in a given case, it “shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”\(^\text{101}\)

In light of the foregoing discussion on this point, it remains unlikely that the provisions of the Rome Statute cast a net sufficiently comprehensive to catch all the tricks that states employ to circumvent their obligations. In the case of Uganda, for instance, it could be argued that the state was willing and able to prosecute because the Ugandan government originally referred the LRA case to the ICC. Others have argued that self-deferrals constitute a waiver under the complementarity principle, meaning that in some cases a state might refer/defer a situation to the ICC without waiting for an admissibility ruling that determines whether a state is unwilling or unable to proceed. Waivers of this sort are not explicitly provided for in the Rome Statute. In this context, it is questioned whether such self-referrals are legal under the Rome Statute.\(^\text{102}\) Critics of self-referrals indicate that the ICC’s jurisdiction can only be triggered pursuant to circumstances indicated in the Rome Statute, specifically Article 17, and that a

\(^{100}\) Id. \(\S\) 62 (stating “[w]hen considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(l)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.”).

\(^{101}\) Rome Statute, supra note 4, art. 17(3).

state that defers to the ICC from the start only indicates that it is unwilling to investigate.\textsuperscript{103}

Further, it is unclear if a state that conducted a self-referral can withdraw the referral and how this relates to the principle of complementarity. Some have argued that self-referral implies that the state party will not be invoking complementarity to prevent the ICC from prosecution.\textsuperscript{104} In 2004, however, soon after the ICC Prosecutor indicated he would, albeit at a later point, investigate Ugandan governmental actors for their commissions of war crimes or omissions in the war in Northern Uganda,\textsuperscript{105} the Ugandan government attempted to withdraw its referral on the ground that the withdrawal would facilitate cessation of hostilities and allow the parties to “engage in internal reconciliation mechanisms put in place by the Acholi community such as mataput.”\textsuperscript{106} In sum, the Ugandan government was invoking the complementarity principle as the basis for its withdrawal. The ICC Prosecutor opposed the Ugandan government’s request for withdrawal, stating that “there is not a scrap of evidence in the drafting history or in commentaries by leading international law experts on the Rome Statute suggesting that once a [S]tate [P]arty has referred a situation that it can ‘withdraw’ the referral.”\textsuperscript{107} But does the Rome Statute prohibit it explicitly? The Ugandan government could counter by pointing out that the Rome Statute not only places an emphasis on and defers to complementarity, it provides for the

\textsuperscript{103} Irene Marinakis,\textit{ A Weak ICC: Can the International Criminal Court Succeed Without U.S. Participation?}, \textit{5 EYES ON THE ICC} 125, 132 (2008).


\textsuperscript{105} See Luis Moreno-Ocampo, Chief Prosecutor, ICC, \textit{Statement by Chief Prosecutor Luis Moreno} (Oct. 14, 2005), \textit{available at} http://www.icc-cpi.int/NR/rdonlyres/9AC37606-6662-448F-8689-7317E341E6D7/277305/Uganda_LMO_Speech_141020091.pdf (reporting that the ICC had “analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces,” but had started with the investigation of the LRA because “[c]rimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF.”); \textit{see also} Luis Moreno-Ocampo, \textit{Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives}, \textit{21 AM. U. INT’L L. REV.} 497, 501 (2005) [hereinafter \textit{Keynote Address}]. But if so, the Ugandan government would probably not cooperate with the ICC, or would attempt to withdraw the case.


\textsuperscript{107} Id.
suspension of proceedings in the "interests" of justice or of the victims. It is suggested, therefore, that impliedly the Rome Statute allows withdrawal of a situation in its preliminary stages, as opposed to a fully instituted case or prosecution. This is a serious matter that needs to be settled unambiguously and thus, the Rome Statute's failure to address the withdrawal of referrals needs to be rectified in express terms.

The complementarity principle, in some cases, has had the unintended effect of allowing states to stall or buy time by engaging in sham or incomplete investigations, with implications for the extent to which the ICC can fight impunity. The ICC is not in all circumstances hoodwinked. For example, in Prosecutor v. Kirimi Muthaura, the ICC dismissed the Kenyan government's attempts to stop a probe into post-election violence, holding that Kenya had failed to show that it was conducting its own investigation of six suspects. These six Kenyans, including prominent politicians and businessmen, were indicted with regard to the violence that erupted after disputed elections in December 2007. About 1,300 people died and nearly half a million fled their homes. Kenya objected to the admissibility of the ICC proceedings arguing inter alia that it had adopted a new

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108 Rome Statute, supra note 4, arts. 53(1)(c), 53(2)(c). In some cases, it is stated that the interests of justice could better be served by means other than ICC prosecution. Further, it is suggested that withdrawal of a situation is permitted. Adel Maged, Withdrawal of Referrals—A Serious Challenge to the Function of the ICC, 6 INT'L CRIM. L. REV. 419, 422-23 (2006). But there is a precondition, the ICC has stated that "[i]t is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she must notify the Chamber of the reasons for such a decision not to proceed, therefore triggering the review power of the Chamber." Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, at 12 n.35 (Mar. 31, 2010). So it is the ICC's, rather than the state's, prerogative to determine if the interests of justice are being served.

109 Generally, the Rome Statute permits withdrawal by implication because of its strong deference to state sovereignty evident the principle of complementarity. Complementarity, it is argued, would fill a loophole left by the withdraw act. Maged, supra note 108, at 422-23. But any parallels must also take into account the distinction between the kinds of offenses that states deal with domestically and those that constitute the subject matter jurisdiction of the ICC—which are of global concern. This distinction is made even in domestic jurisdictions. See, e.g., People v. Quill, 11 Misc. 2d 512, 514-15 (1958) (ordinarily, withdrawal of complaints regarding robbery and burglary are not permitted because the crimes affect the public as a whole).

110 Prosecutor v. Kirimi Muthaura, Case No. ICC-01/09-02/11, Judgment on the Appeals Brought by the Republic of Kenya Against the Decision of Pre-Trial Chamber II on the Admissibility of the Two Cases of Mr. Ruto and Others, and Against Mr. Muthaura and Others (Aug. 30, 2011).
constitution and other reforms, that paved the way for it to carry out its own prosecutions. The Appeals Chamber first pronounced a test for inadmissibility under the complementarity principle, stating that for "a case to be inadmissible under Article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court." The Appeals Chamber emphasized that the words "is being investigated" in this context signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance, by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The "mere preparedness to take such steps is not sufficient [and that] unless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the Court and the national jurisdiction are investigating the same case. And there is, therefore, no conflict of jurisdictions." In the view of the Appeals Chamber, if "the suspects or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the cases inadmissible."

The Rome Statute does not establish a standard of proof for measuring whether a state party is unduly taking advantage of the complementarity principle. Rule 51 of the ICC provides that in making determinations concerning complementarity, the ICC may consider information previously provided by the state along with any additional information it may choose to present to the ICC. Some have observed that in this regard the ICC would not be much different from its counterparts, such as the International Court of Justice (ICJ), in which all that is required of states is to

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111 Id.; see also Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 38 (Feb. 24, 2006) (ruling, in order for a case to be inadmissible, national proceedings must encompass "both the person and the conduct which is the subject of the case before the Court.").
112 See Kirimi Muthaura, Case No. ICC-01-09-02/11, ¶ 40.
113 Id. ¶ 43.
114 Megan A. Fairlie, Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?, 39 INT'L L. 817, 818 (2005) (observing that the Rome Statute does not delineate "the standard of proof that must be met in order for the Court to find that a State is unwilling or unable to carry out an investigation or prosecution.").
persuade the Court without reference to a standard. But this comparison appears to ignore the fact that the standard of proof required in civil cases is not always the same as in criminal cases. The ad hoc international criminal tribunals have in all their cases applied a specific standard of proof. Were the ICC to apply a flexible standard regarding the implementation of complementarity, the result would be an inconsistent treatment of international crimes that are not substantially different. The argument for providing a specific standard of proof in all such situations ought not to be conflated with the recognition that the standard of proof for jurisdictional issues is often different from that for substantive issues. As the ICTY has noted, the standard of proof in criminal cases is proof of guilt beyond a reasonable doubt, but "the burden is different . . . when the allegation made by the prosecutor is not an essential element of the charges of the indictment." In such cases, the relevant standard of proof is that of a civil case, namely, the preponderance of evidence or "the balance of probabilities." With respect to Article 18(2) of the Rome Statute, the ICC Prosecutor has the evidentiary burden to prove by a preponderance of evidence that valid grounds exist for the proposition that a particular state is unwilling or unable to prosecute in order to supersede the complementarity requirement. Cases of deferral from the relevant domestic court to the ad hoc international criminal tribunals, e.g. the International Criminal Tribunal for Rwanda and the ICTY, disclose that no clear standard has been adopted not even a preponderance of evidence.

116 Fairlie, supra note 114, at 825 (citing Eduardo Valencia-Ospina, Evidence Before the International Court of Justice, 1 INT'L L.F. 202, 203 (1999)).
117 The standard applied by the ICJ is the preponderance of evidence. See, e.g., Fisheries Jurisdiction (Spain v. Can.) 1998 I.C.J. 432, 450-51 (Dec. 4).
118 Assembly of States Parties, supra note 115, at 19.
119 See, e.g., Stuber v. Hill, 170 F. Supp. 2d 1146, 1154 (D. Kan. 2001), aff'd in part, appeal dismissed in part, 50 F. App'x. 386 (10th Cir. 2002) (observing subject matter jurisdiction is "not an element of the crime that must be proved beyond a reasonable doubt."); see also, Fairlie, supra note 114, at 826 (observing that many contend that jurisdictional elements need not be proved in the same manner as the material elements of a criminal charge).
121 Id. ¶ 603.
122 Fairlie, supra note 114, at 827.
evidence standard is used.\textsuperscript{123} The international standard thus appears to be the \textit{prima facie} standard in jurisdictional cases.\textsuperscript{124} \textit{Prima facie} evidence is evidence which, if not rebutted, would be sufficient to maintain the proposition affirmed.\textsuperscript{125} Given the gravity of the allegations that appear before the ICC and the need to predict the outcome of prosecutions, it is imperative that the ICC define the standard.

In choosing a uniform standard, certain factors must be considered: the impact of the disparities between state parties to the Rome Statute on the standard of proof and whether rich states and poor states will be held to the same standard, when the former have more resources to meet that standard. Normatively speaking, poor states must not be judged to be "unwilling" or "unable" to prosecute without taking into account their economic means. Here, a lesson can be learned from the ICJ, which relegated the preparatory materials or negotiating history of a particular treaty to the status of a subsidiary source of law,\textsuperscript{126} making these important only for the interpretation of primary sources. It did this precisely because richer states had greater access to libraries containing these resources.

\textbf{D. Proprio Motu Powers of the ICC Prosecutor}

One of the innovations of the ICC was to grant the prosecutor \textit{proprio motu} powers, i.e. the unilateral power to trigger the jurisdiction of the Court, to initiate an investigation.\textsuperscript{127} The ICC can initiate investigations \textit{proprio motu} on the basis of information on crimes within the jurisdiction of the Court received from

\begin{enumerate}
\item Id. (discussing Prosecutor v. Radio Television Libre des Mille Collins Sarl, Case No. ICTR-96-6-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, ¶ 3 (Int'l Crim. Trib. for Rwanda Mar. 12, 1996) and noting that the deferral motion was granted although the prosecution did not meet the standard of preponderance of evidence).
\item See, e.g., Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran, 1 Iran-U.S. C.T.R. 455 (Iran-US Claims Tribunal Dec. 20, 1982) (holding that the \textit{prima facie} evidence was sufficient to establish corporate nationality as a requirement for jurisdiction).
\item See, e.g., Lillie S. Kling (U.S.) v. United Mexican States, 4 R.I.A.A. 575, 585 (Mex.-U.S. General Claims Comm'n Oct. 8, 1930).
\item Rome Statute, supra note 4, art. 15(1) ("Prosecutor may initiate investigations \textit{proprio motu} on the basis of information on crimes within the jurisdiction of the Court.").
\end{enumerate}
individuals or organizations called "communications.\textsuperscript{128}

According to Prosecutor Moreno-Ocampo, by establishing \textit{proprao motu} powers—subject only to judicial review\textsuperscript{129} and without an additional trigger from states or the Security Council—the Rome Statute ensured that the requirements of justice could prevail over any political decision.\textsuperscript{130} In this sense, the Rome Statute creates an autonomous actor on the international scene. As the Rome Statute provides "[t]he Office of the Prosecutor shall act independently as a separate organ of the Court... A member of the Office shall not seek or act on instructions from any external source.\textsuperscript{131}

However, it is argued that a politically motivated prosecutor could misuse these \textit{proprao motu} powers.\textsuperscript{132} It is valid to question whether this provision has politicized the Court.\textsuperscript{133} Critics argue that the Prosecutor lacks political accountability. They argue that while the Security Council may refer matters to the ICC, or order it to cease a pending investigation, it is essentially barred from any real role in the ICC's work. This creates in the ICC Prosecutor a powerful and necessary element of executive power, and the power of law-enforcement, placing the prosecutor outside the control of any national government.\textsuperscript{134} For some critics, the fact that the ICC Prosecutor focused almost exclusively on African situations vindicates their suspicions that his office is susceptible to politicization, particularly aimed at the promotion of Western interests, as some have suggested.\textsuperscript{135}

\textsuperscript{128} Id. art. 15(1).
\textsuperscript{129} Id. art. 15(3) (providing that the Prosecutor shall submit to the Pre-Trial Chamber a request for authorization to commence an investigation presenting the supporting material for the proposition that there is a reasonable basis to proceed with an investigation).
\textsuperscript{130} From Nuremberg to ICTY and ICTR, political authorities selected the conflicts that received attention, while international prosecutors could only select particular cases within those conflicts. Prosecutors had no authority to investigate beyond the jurisdiction granted by a political body. Luis Moreno-Ocampo, \textit{The International Criminal Court: Seeking Global Justice}, 40 CASE W. RES. J. INT'L L. 215, 219 (2007-2008).

\textsuperscript{131} Rome Statute, \textit{supra} note 4, art. 42(1).
\textsuperscript{132} Jeu, \textit{supra} note 10, at 438.
\textsuperscript{133} Bolton, \textit{supra} note 18, at 194.
\textsuperscript{134} \textit{Id}.

\textsuperscript{135} Joshua Rozenberg, \textit{Why the World's Most Powerful Prosecutor Should Resign: Part 3}, TELEGRAPH (U.K.) (Sept. 14, 2008), \url{http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2700862/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-3.html} (citing Phil Clark for the proposition that the Al-Bashir indictment was a pandering exercise by the ICC Prosecutor to improve the image of a weak ICC and improve the "international legitimacy and
The drafters of the Rome Statute feared that providing the Prosecutor with such “excessive powers” to trigger the jurisdiction of the Court might result in its abuse.136 Prosecutor v. Kirimi Muthaura137 represents the first proprio motu investigation by the ICC Prosecutor. On March 31, 2010, Pre-Trial Chamber II (PTC II) issued, by majority, a decision that authorized the ICC Prosecutor to commence an investigation, on his own initiative, into the situation in the Republic of Kenya.138 This Chamber noted the delicate nature of proprio motu investigations, stating that it “suffices to mention that, insofar as proprio motu investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicizing the Court and thereby undermining its ‘credibility.’”139 The Chamber further notes that to allay those fears, the Rome Statute “subjects the Prosecutor’s conclusion that a reasonable basis to proceed proprio motu with an investigation exists to the review of the Pre-Trial Chamber at a very early stage of the proceedings.”140

The Rome Statute tried to ensure that the ICC Prosecutor’s discretion is not unlimited. The Pre-Trial Chamber’s review power is an attempt to limit the power of the ICC Prosecutor.141 However, a unanimous ruling of the Pre-Trial Chamber is not required. Instead a decision to proceed can be granted by the concurrence of two members of the three-member panel of the Pre-Trial Chamber.142 Critics therefore argue that the relatively low threshold required for this Chamber to authorize an investigation means that an ICC investigation would in most cases likely be authorized. It has been suggested that the ICC could

relations with States that do not accept the court’s jurisdiction, such as the US.”).

137 Prosecutor v. Kirimi Muthaura, Case No. ICC-01/09-02/11, Judgment on the Appeals Brought by the Republic of Kenya Against the Decision of Pre-Trial Chamber II on the Admissibility of the Two Cases of Mr. Ruto and Others, and Against Mr. Muthaura and Others (Aug. 30, 2011).
139 Id. ¶ 18.
140 Id.
142 Rome Statute, supra note 4, art. 57(2)(a).
expand the Pre-Trial Chamber panel from three judges to seven or nine, thereby making it more demanding for the Court to come to an agreement on whether to bring a case against a state.\textsuperscript{143}

In Kirimi Muthaura, the Chamber elaborated the criteria or prongs for Chamber's authorization of a \textit{proprio motu} investigation. With regard to the first prong, the ICC must establish that there is a "reasonable basis" to believe that a crime within the jurisdiction of the Court has been or is being committed, per Article 53(l)(a) of the Rome Statute. PTC II considers that this is the lowest evidentiary standard provided for in the Statute, and this stems from the fact that the nature of this early stage of the proceedings is confined to a preliminary examination.\textsuperscript{144} According to the jurisprudence of the ICC, the "reasonable grounds to believe" standard does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available.\textsuperscript{145}

Next, this Chamber explained the second prong of the test: "crime within the jurisdiction of the court." The Chamber concludes that this expression means "that an examination of the necessary jurisdictional prerequisites under the Statute must be undertaken."\textsuperscript{146} Citing to the jurisprudence of the ICC, the Chamber noted that:

\begin{itemize}
\item \textsuperscript{143} Sievert, \textit{supra} note 11, at 120.
\item \textsuperscript{144} Pre-Trial Chamber II notes that there are three evidentiary standards in the Rome Statute corresponding to the different stages of proceedings. First, with regard to arrest warrants, Article 58 of the Rome Statute provides that a Pre-Trial Chamber is required to be satisfied that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." Second, with regard to the confirmation of charges under Article 61(7) of the Rome Statute, the evidence available must be "sufficient" to establish "substantial grounds to believe that the person committed each of the crimes charged." Lastly, the highest evidentiary standard, envisaged by Article 66(3) of the Rome Statute, "beyond reasonable doubt," is required to prove the guilt of an accused at the trial stage. The Chamber concludes that the "reasonable basis to believe" standard required in \textit{proprio motu} proceedings is closest to the standard required for arrest warrants. \textit{See} Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 28 (Mar. 31, 2010).
\item \textsuperscript{145} Prosecutor v. Bashir, Case No. ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor, ¶ 33 (Feb. 3, 2010).
\item \textsuperscript{146} \textit{Situation in the Republic of Kenya}, Case No. ICC-01/09-19, ¶ 37.
\end{itemize}
For a crime to fall within the jurisdiction of the Court, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction ratione materiae); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction ratione temporis); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction ratione loci or ratione personae).147

Next, the Chamber articulated the third prong of the test—whether the case is or would be admissible under Article 17.148 In this regard, the Chamber concludes that

The admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigations. If the answer is in the negative, the “case would be admissible”, provided that the gravity threshold is also met.149

The low evidentiary standard does not assuage those who worry that the ICC Prosecutor is not sufficiently constrained. The provision enabling the Pre-Trial Chamber to review the Prosecutor’s decision150 in a matter does not seem to remedy the situation since they would be applying the same statutory provisions, and the Pre-Trial Chamber itself is purely judicial and not subject to political controls.151 The criticism that the Prosecutor is unanswerable to anyone in the use of his discretion is overstated.

E. Miscellaneous Procedural Constraints

Other procedural constraints built into the Rome Statute have been practically prohibitive and have likely assisted state parties interested in frustrating investigation or prosecution. For

147 Bashir, Case No. ICC-02/05-01/09-73, ¶ 36; Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-14, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ¶ 12 (June 10, 2008).
148 Rome Statute, supra note 4, art. 53(1)(b).
149 Situation in the Republic of Kenya, Case No. ICC-01/09-19, ¶ 52.
150 Rome Statute, supra note 4, art. 53(3)(a).
151 Heyder, supra note 55, at 667.
example, the admissibility requirements provide that the ICC Prosecutor must confidentially notify the state concerned that a matter has been referred to the ICC. This confidentiality requirement is not warranted given that the ICC is designed to investigate crimes of unimaginable proportions. The U.N. Human Rights Council has used confidentiality requirements to frustrate the enforcement of human rights obligations. Similarly, in *Prosecutor v. Lubanga Dyilo*, the trial was suspended indefinitely in June 2008 because the Prosecution was unable to disclose a large amount of potentially exculpatory material due to confidentiality restrictions. Under Article 54(3)(e) of the Rome Statute, the Prosecution may obtain documents from information sources such as the United Nations upon agreement that they remain confidential from other organs of the Court. It was only after extensive ongoing negotiations that, in October 2008, the Prosecution announced that it had reached agreements with the information sources to disclose the relevant material to the Trial Chamber.

In addition, the Rome Statute provides that "[w]ithin one month of receipt of . . . notification, a state may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to states. At the request of that State, the Prosecutor shall defer to the State's investigation . . . ." These procedures introduce too much bureaucracy and to that extent are more state-oriented than victim-oriented, delaying action and giving opportunity to state officials to merely claim that they are investigating. This simply makes it more difficult for the ICC Prosecutor to prove that the

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152 Rome Statute, *supra* note 4, art. 18(1).
153 *See* E.S.C. Res. 1503, § 7(c), U.N. Doc. E/4832/Add.1 (May 27, 1970) (providing that the Human Rights Commission’s [Human Rights Council] proceedings “shall be confidential, its proceedings shall be conducted in private meetings and its communications shall not be publicized in any way.”).
154 Rome Statute, *supra* note 4, art. 54(3)(e).
156 Rome Statute, *supra* note 4, art. 18(2).
157 *Id.* art. 54(3)(e) (providing that the Prosecutor shall “[s]eek the cooperation of any State . . . in accordance with its respective competence and/or mandate.”).
state in question is unwilling or unable to investigate or prosecute.

F. National Amnesties: An Obstacle to the ICC?

For some cases pending before the ICC, amnesties were granted as part of the national effort to end a seemingly intractable conflict. For example, prior to referring the Northern Uganda situation to the ICC in December 2003, the Ugandan government enacted the Amnesty Act (2000)\textsuperscript{158} to shield several actors among the LRA from prosecution. The Amnesty Act was written to “[p]ardon, forgive, exempt or discharge from criminal prosecution or any other form of punishment by the State.”\textsuperscript{159} The Ugandan government promised to amend the law to exclude only those who bore the greatest responsibility for the crimes committed during the conflict from amnesty. Further, it enacted the Amnesty (Amendment) Act (2002), which excluded only so-called “repeat offenders”\textsuperscript{160} from further amnesty. However, the Amnesty (Amendment) Act (2003) excluded the top field commanders of insurgent groups and terrorist organizations and their financiers from amnesty.\textsuperscript{161} The June 2007 Agreement on Accountability


\textsuperscript{159} Id. § 2.


\textsuperscript{161} See Emmanuel Mulondo & Gerald Walulya, No Amnesty for Rebel Leaders, Monitor (Uganda) (Apr. 19, 2006), http://www.monitor.co.ug/news/news04195.php (observing that the government had enacted this amendment in order to “bring Uganda into tandem with the International Criminal Court which . . . indicted the five top leaders of the LRA accused of committing atrocities.”). Uganda could not possibly rely on its internal law to avoid its international obligations. Vienna Convention, supra note 126, art. 27 (providing “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”). Uganda is not a state party to the Convention. However, the PCIJ maintains, “according to generally accepted principles . . . a State cannot adduce against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.” Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, ¶ 62 (Feb. 4). The PCIJ noted, “it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.” Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, ¶ 223 (June 7); see also Helmut Gropengießer & Jörg Meißner, Amnesties and the Rome Statute of the International Criminal Court, 5 INT’L CRIM. L. REV. 267, 280-81 (2005) (arguing the question of the consequences of a national amnesty law for prosecution by the ICC is the question of the impact of national laws on the authority of an international organization and that “at least on the international level, international law takes precedence over national law.”).
and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement provides that “criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict.” The annexure, which provides the means of implementing the Agreement, enables the prosecution of those who “committed serious crimes during the conflict” in a special division of the High Court of Uganda. While these instruments were important political commitments, none were legally binding until they were given authority as laws pursuant to Uganda’s established legislative process. No bill was subsequently brought before Uganda’s parliament to implement them. Uganda’s vacillations could be interpreted as reluctance or unwillingness to apply the fullest extent of its domestic law to those who bear the greatest responsibility for atrocities committed in Northern Uganda. Without any doubt, to some degree the amnesty process may have contributed to the resolution of the conflict in Northern Uganda because every former soldier who surrenders to the government represents one step toward the end of the conflict. However,


163 Id. ¶ 15.1.

164 Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda (the Government) and the Lord’s Resistance Army/Movement (LRA/M) (Feb. 19, 2008), available at http://www.icenow.org/documents/Annexure_to_agreement_on_Accountability_signed_to_day.pdf.

165 CONSTITUTION OF THE REPUBLIC OF UGANDA art. 91(1) (1995) (Uganda) (“[T]he power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President.”).

166 The list of recent bills that have passed through Uganda’s parliament is available at http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=118.

167 Manisuli Ssenyonjo, Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court, 10 J. CONFLICT & SEC. L. 406, 425 (2005) (arguing the Ugandan government’s position that the ICC should be satisfied if the LRA leaders surrendered under the amnesty could confirm that “Uganda is neither able nor willing genuinely to investigate and prosecute such crimes.”).

168 Charles Ariko, Amnesty Commission Receives Award, NEW VISION (Uganda) (Nov. 25, 2009), (reporting the Commission was being recognized for “resettling over 23,000 former rebels” during its nine-year existence).
that alone does not answer questions of accountability and justice regarding those who bear the greatest responsibility for the atrocities. The fact that so many former rebels surrendered to the government could be interpreted to mean that the indictments were not (except in regard to those who bore the greatest responsibility for the acts of the LRA) an impediment to the resolution of the conflict in Northern Uganda while pursuing justice. Understandably, therefore, the ICC remained anxious to succeed in Uganda with respect to those actors who bear the greatest responsibilities for the atrocities (particularly those who were indicted by the ICC) in order to demonstrate that it could be an effective instrument of accountability for egregious violations of international criminal law.\(^{169}\) The ICC need not oppose amnesty laws that target only the lower cadres of rebels because they may contribute to the end of hostilities. The argument can also be made that the Rome Statute recognizes amnesties subject to certain conditions.\(^{170}\) During negotiations on the Rome Statute, South Africa had concerns that the Rome Statute would unravel some of the amnesties that it had guaranteed under its post-apartheid negotiated dispensation.\(^{171}\) To this end, the Rome Statute entrenches the principles of non-retroactivity\(^{172}\) and “jurisdiction *ratione temporis*.\(^{173}\)

But the Rome Statute does not explicitly deal with the issue of national amnesties. The Rome Statute does not expressly prohibit amnesties and it appears that there was very little discussion of the subject during the preparatory negotiations because it was thought that agreement was impossible.\(^{174}\) Instead, the Rome Statute obligates each state party to prosecute.\(^{175}\) Is this conclusive? How is the ICC likely to deal with the amnesty issue if it ever arises as a


\(^{170}\) For example, amnesties must be consistent with the overall objective of the Rome Statute to prosecute impunity. Thus, the South African Truth and Reconciliation process, which ensured that only those who made full disclosure would be granted amnesty, would meet the imperative of justice and avoid impunity. Sivuyile (Sivu) Maqungo, *The African Contribution Towards the Establishment of an International Criminal Court*, 8 AFR. Y.B. INT’L L. 334, 341-42 (2000).

\(^{171}\) *Id.* at 341.


\(^{173}\) *Id.* art. 11.


\(^{175}\) The Preamble of the Rome Statute declares, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Rome Statute, *supra* note 4, pmbl.
bar to prosecution? The Rome Statute should explicitly deal with this issue, as amnesties can bar the ICC from conducting simultaneous or additional investigations under the principles of complementarity and double jeopardy. With regard to the Rome Statute, only prior criminal proceedings, or the principle of non bis in idem, can bar ICC proceedings.

It could be argued that blanket and unconditional amnesties are impliedly prohibited by the requirement that a state must demonstrate that it was willing and able to prosecute. Therefore, based on Article 17(1)(a) and (b) of the Rome Statute, the ICC Prosecutor should conduct an investigation that includes determining whether an amnesty granted by the state in question meets the requirements of an investigation by that state. But could Article 17(1)(b) of the Rome Statute contemplate the recognition of other methods of accountability? A certain ambiguity persists. Does “investigation” within the meaning of Article 17(1)(b) preclude non-criminal investigations? Could it generally include a truth and reconciliation process? The fact that a perpetrator has completed a truth and reconciliation procedure does not necessarily absolve him of criminal

176 Id. art.17(1)(c).
177 Id. art. 20.
178 Id. art. 17(1)(a).
179 During the drafting process, there was debate whether the ICC should have jurisdiction over those individuals granted amnesty. Some delegations felt that there was no need for an explicit provision because Article 17 of the Rome Statute would cover those granted amnesty in bad faith. Alex K. Kriksiciun, Uganda's Response to International Criminal Court Arrest Warrants: A Misguided Approach?, 16 TUL. J. INT'L & COMP. L. 237 (2007).
180 Truth and reconciliation approaches are appropriate only in specific contexts such as South Africa, and may not be proposed as a general mechanism of accountability. The most recent evidence of this is Judge Kasper-Ansermet who was forced to resign from the U.N.-backed hybrid (domestic-international) crimes tribunal in Cambodia because his Cambodian counterpart, You Bunleng, had thwarted attempts to investigate former members of the 1970s regime. Previously, Judge Siegfried Blunk had resigned for similar reasons. The Cambodian government has been reluctant to have further figures of the Khmer Rouge regime investigated. See Judge Quits Cambodian UN-Backed Khmer Rouge Trial, BBC NEWS (Mar. 19, 2012), http://www.bbc.co.uk/news/world-asia-17432484. But, it is submitted that the ICC prosecutor is subject to multiple layers of institutional oversight. See also Philippe Kirsch, The International Criminal Court: A New and Necessary Institution Meriting Continued International Support, 28 FORDHAM INT'L L.J. 292, 292 (2005) (observing in all too many cases, terrible crimes went unpunished and a perceived culture of impunity protected the perpetrators); Orentlicher, supra note 19, at 511.
responsibility before an international court.181

The chapeau of Article 17(2) of the Rome Statute provides that unwillingness to prosecute shall be assessed with "regard to the principles of due process recognized by international law." But should prosecutorial and non-prosecutorial investigative mechanisms be required to comport with the same principles of due process? It is questionable, for example, whether proceedings such as the Gacaca trials in Rwanda, in which defendants have no lawyer and no opportunity to challenge the possible categorization of a crime by way of an appeal, would meet all the principles of due process.182 Moreover, the state must indicate that an independent and impartial body carried out its investigation.183 It is unlikely that all alternative justice mechanisms would meet these due process criteria. How then would the ICC be able to establish that a state's truth and reconciliation commission was not impartial or was independent of the state, especially when the state is involved either in its appointment, facilitation, and/or remuneration?

Amnesties and alternative accountability mechanisms appear to run afoul of customary international law when they concern the most egregious crimes and those who are most responsible for them.184 But it must be noted that, as the cases of Sierra Leone and East Timor intimate, the international community increasingly regards prosecutorial and non-prosecutorial approaches as complementary. So, amnesties, as such, are not prohibited by international law.185 Therefore, the ICC could simply refuse to accept amnesties that concern egregious crimes, such as genocide. The international community has made important distinctions, accepting conditional, but rejecting blanket, amnesties.186


182 Id. at 713.

183 Rome Statute, supra note 4, art. 17(2)(c).


185 Stahn, supra note 181, at 701.

186 Conditional amnesties can be consistent with standards of accountability. In South Africa, for example, the State reserved its right to prosecute malefactors who did not confess the fullest extent of their crimes. Wald, supra note 10, at 517.
Likewise, the ICC should refuse to recognize blanket amnesties. Additionally, under Article 53(1)(c) of the Rome Statute, the Prosecutor is required to consider whether investigations would jeopardize the "interests of justice" of the victim. It could conceivably be argued that amnesties would in some sense further the interests of justice of victims, when combined with a truth and reconciliation process, to the extent that they combine both punishment and reconciliation. But then, the criteria for assessment of "interests of justice" are open-ended. The Rome Statute merely states that the Prosecutor is to take into account "all the circumstances."

G. Justice Versus Peace

The issue of whether the ICC pursuit of justice is irreconcilable with the objective of peacefully resolving ongoing conflict is an operational issue that has plagued the ICC. It was

187 Some have argued that Rome Statute, Article 53(1)(c), combined with the absence of an explicit reference to amnesty in the Rome Statute, means that the ICC is obligated to respect a national amnesty and not initiate a prosecution. However, the Preamble of the Rome Statute provides that "the most serious crimes of concern to the community as a whole must not go unpunished and that their effective prosecution must be ensured." Rome Statute, supra note 4, pmbl. It is submitted that this means that the Rome Statute advocates a retributive justice model, which cannot be reconciled with the concept of justice. Claudia Angermaier, The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?, 1 EYES ON THE ICC 131, 144 (2004).

188 It has been argued that truth telling mechanisms of accountability constitute investigations. See Stahn, supra note 181, at 698.

189 In situations of political transition, especially where there is a military stalemate—neither party being able to defeat the other, or where nation-building can only be achieved through conditional amnesties—truth and reconciliation approaches are often encouraged as means for accounting for past gross violations of international law. See generally Charles Villa-Vicencio, Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet, 49 EMORY L. J. 205 (2000).

190 Some have argued that Article 53 of the Rome Statute gives the Prosecutor "unlimited political discretion as to decide whether or not amnesty laws constitute an exception to the jurisdiction of the Court." See Héctor Oládsoño, The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?, 3 INT’L CRIM. L. REV. 87, 141 (2003). While this may be an exaggeration, since some criteria have been established, it is probably not completely inaccurate to the extent those criteria may be insufficient.

191 Rome Statute, supra note 4, art. 53(2)(c) (emphasis added).

192 See Luis Moreno-Ocampo, Chief Prosecutor, ICC, Address at Nuremberg: Building a Future on Peace and Justice (June 24-25, 2007), available at http://www.iccnow.org/documents/LMO_nuremberg_26jun07_eng.pdf (stating after the Rome Statute entered into force the “next challenge was to make this body of law operational, to transform ideas and concepts into a working system.”).
argued, for example, that if the ICC did not defer its indictment of LRA warlords, it risked achieving neither justice nor peace in the region.\textsuperscript{193} As the current ICC Prosecutor, Luis Moreno-Ocampo put it, one of the challenges of the ICC is how to “investigate in ongoing conflict.”\textsuperscript{194} Unlike the ICTY and ICTR, where prosecutions took place after the conflict had ended, the ICC had to investigate allegations during ongoing conflict, such as in Northern Uganda and Darfur, DRC, the Central African Republic, Venezuela, and against nationals of about twenty-five state parties involved in the coalition campaign in Iraq. In all of these cases, the states involved were still engulfed in armed conflict.\textsuperscript{195} The ICC Prosecutor had to defend the ICC against accusations that it was thwarting peace negotiations by issuing indictments for those engaged in the ongoing conflicts. In sum, the interests of justice and peace seemed virtually irreconcilable. As the Rome Statute does not prescribe guidelines or rules for situations where a state may be currently involved in hostilities, the ICC Prosecutor was left in a precarious position where he had to carefully balance the interests of prosecuting perpetrators while simultaneously encouraging an end to hostilities.

However, as early as 2007, the International Crisis Group observed that “the ICC investigation of the Lord’s Resistance Army has been crucial for promoting peace, improving security in Northern Uganda and embedding international accountability standards into negotiations.”\textsuperscript{196} Historically speaking, there is evidence for the proposition that indictments during an ongoing conflict can be a catalyst for peace. It is argued, for example, that the indictment of Charles Taylor ultimately facilitated a peaceful resolution of the Liberian conflict.\textsuperscript{197} There was a two-month continuation of hostilities, causing West African leaders to criticize the indictment for scuttling the peace talks that had finally brought Liberia’s warring factions together. Yet Taylor was eventually forced to resign and to flee to Nigeria, where he was handed over to the Special Court for Sierra Leone.\textsuperscript{198}

Another example is the case of Radovan Karadzic and Ratko

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\textsuperscript{193} Ssenyonjo, supra note 167, at 406.
\textsuperscript{194} Moreno-Ocampo, supra note 192.
\textsuperscript{195} Id.
\textsuperscript{196} Kirsch, supra note 51, at 3-4.
\textsuperscript{197} RELATIONSHIP, supra note 40, at 38.
\textsuperscript{198} Id. (internal quotation marks omitted).
\end{flushleft}
Mladic, indicted in 1995 by the ICTY, right before the Dayton Peace Accords.\textsuperscript{199} The indictments came at a time when a cessation of hostilities agreement in Bosnia and Herzegovina appeared incredibly precarious. Many negotiators doubted whether they could continue to work towards a resolution of the conflict in Bosnia and Herzegovina without direct contact with either Karadzic or Mladic. And yet, the parties were able to conclude the Dayton Peace Accords. The ICTY Chief Prosecutor would later argue that the absence of Karadzic and Mladic was necessary for a peace agreement to be reached, since Bosnia’s Muslim-led government would not have participated if the Bosnian Serb leaders had been present.\textsuperscript{200}

Also, consider the case of Slobodan Milosevic who was indicted in May 1999. Those criticizing the indictment “argued that it would hinder those efforts to end the war and bring peace to the region, but NATO and the Federal Republic of Yugoslavia entered into a peace agreement on June 9, 1999, just days after the indictment was publicly released.”\textsuperscript{201} Granted, these examples could be dismissed as mere anecdotal evidence, but they nevertheless indicate that the resolution of conflict is not necessarily frustrated by the consistent pursuit of judicial proceedings against those who are alleged to have committed the most heinous crimes. In fact, prosecutions appear to have the opposite effect—they appear to further support efforts to resolve the conflict. In some cases, prosecutions offer just about the safest option for those who are indicted in order to either escape a more draconian process at home.\textsuperscript{202} So, far from undermining the


\textsuperscript{200} Id. at 39.

\textsuperscript{201} Id. at 40.

\textsuperscript{202} After the killing of Muammar Mohammed Abu Minyar Gaddafi after his capture in October 2011, his son, Seif al-Islam al-Qaddafi, a fugitive at the time, sought to surrender himself to the ICC fearing for his life. J. David Goodman, \textit{Criminal Court in Indirect Talks with Qaddafi Son, Prosecutor Says}, N.Y. TIMES (Oct. 28, 2011), http://www.nytimes.com/2011/10/29/world/africa/criminal-court-qaddafi-son.html?hp&gwh=556BC7CCD3CD9C360C8881AB7A3D78A. After his capture by the Libyan revolutionary authorities on November 19, 2011, the Libyan authorities indicated that they wanted him to be tried in Libya instead. The ICC indicated, however, that Libya had an obligation to surrender Saif al-Islam to the ICC and that if Libya wanted to conduct a trial, it needed to submit a request to judges and show that its legal system is capable of properly handling such a proceeding to ensure a fair trial. See Jomana Karedsheh, \textit{Libyans Celebrate Capture of Gadhafi’s Son Saif al-Islam}, CNN (Nov. 19,
peaceful resolution of conflicts prosecutions help secure a more enduring peace by ensuring that the ICC's legitimacy is not undermined through failure to end impunity.

The International Criminal Court was created to break vicious cycle of crimes, impunity, and conflict. In this respect, it is important to realize that expedient political solutions that ignore the need for justice often lead to more crimes, new conflicts, and recurring threats to peace and security. Thus, the U.N. General Assembly emphasized, "that justice, especially transitional justice in conflict and post-conflict societies, is a fundamental building block of sustainable peace." And the Security Council maintained that, "ending the climate of impunity is essential in a conflict and post-conflict society's efforts to come to terms with past abuses, and in preventing future abuses." During the Kampala Review Conference, the peace-justice dynamic was acknowledged as a mutually reinforcing relationship. Whereas it had been suggested that the two concepts of peace and justice may be in opposition to one another and that the requirements of one may require the abandonment of the other, the conference rejected this notion, accepted the complementary nature of peace and justice, and concluded that impunity is no longer an option.

It has been observed, "impunity for war crimes does not bring


203 The ICC exists for other objectives as well, including the maintenance of international peace and security. See Philippe Kirsch, The International Criminal Court and the Enforcement of International Justice, 17 PACE INT'L L. REV. 47, 49 (2005).

204 Kirsch, supra note 51, at 3.


207 See e.g., Linda M. Keller, Achieving Peace With Justice: The International Criminal Court And Ugandan Alternative Justice Mechanisms, 23 CONN. J. INT'L L. 209, 211 (2008) (stating “Uganda's situation exemplifies a low-level conflict of long duration, where the insurgent group is incapable of overthrowing the government, but more than capable of massacring and mutilating innocent civilians. Specifically, the apparent peace versus justice impasse exists in Uganda because the LRA will not sign a peace deal and disarm until ICC warrants for its leaders are withdrawn, while the government will not ask the ICC to withdraw warrants until after the LRA signs the peace deal and demobilizes.”).

stability to any conflict, but rather prolongs the realization of political settlements. If anything, we have learned that the best foundation for real and sustainable peace based on reconciliation is justice and justice alone.\textsuperscript{209} However, the Rome Statute's lack of guidance as to how to proceed in situations of investigations of ongoing conflict has yet to be resolved. The justice-peace problem has also been framed as one form of the perennial tension between the retributive and restorative imperatives of justice.\textsuperscript{210}

If states cooperate with the ICC, there is no doubt that the perceived irreconcilability of justice and peace would dissipate. The ICC Prosecutor, Luis Moreno-Ocampo, could not be clearer on the point:

It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace. Allowed to remain at large, the criminals exposed are continuing to threaten the victims, those who took tremendous risks to tell their stories; allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail.\textsuperscript{211}

\textbf{H. Victims: Reparations and Rights}

The Rome Statute is not completely oblivious to the need to provide for restorative justice. One of the great innovations of the Rome Statute and the Rules of Procedure and Evidence (ICC Rules) is the granting of rights to victims. Victim participation in the proceedings of the ICC is the “product of a much broader movement in recent decades towards the achievement of restorative—as opposed to strictly retributive—justice.”\textsuperscript{212} Victims have the right to present their opinions and observations directly before the Court.\textsuperscript{213} In addition, they can apply for reparations.\textsuperscript{214}

\textsuperscript{209} RELATIONSHIP, supra note 40, at 25.
\textsuperscript{210} Keller, supra note 23, at 212.
\textsuperscript{211} Moreno-Ocampo, supra note 192.
\textsuperscript{213} Rome Statute, supra note 4, art. 15(3) (“Victims may make representations to the
Although international law has previously recognized the importance of reparations, the ICC is the first international court to be granted the power to order an individual to pay reparation to another individual. Moreover, it’s a criminal court that has been granted the power. The ICC has noted the uniqueness of this feature, adding that the “success of the Court is, to some extent, linked to the success of its reparation system.” The inclusion of victim rights within the Statute and Rules of the ICC marks a compromise between the common law retributive justice system and the civil law restorative justice approach. For this reason, the inclusion of victims’ rights was a hotly debated issue even before the U.N. Diplomatic Conference of

Pre-Trial Chamber, in accordance with the [ICC] Rules of Procedure and Evidence.”)


Brianne N. McGonigle, Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court, 21 FLA. J. INT’L L. 93, 96 (2009) (observing the “participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice.”).


Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-04/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 136 (Feb. 24, 2006).

McGonigle, supra note 216, at 100-07, 112.
Plenipotentiaries on the Establishment of an International Criminal Court began. The mixed system was a compromise between states representing these two different systems, resulting in a completely new and innovative system of justice, which recognizes the important role of victims in the fight against impunity. The notion of the ICC awarding reparations was viewed as controversial mainly “due to concerns that the intermingling of civil claims with criminal proceedings would distract the ICC from its primary mission of fairly and expeditiously prosecuting individuals believed responsible for mass atrocities. But the consensus emerged that the ICC must be dedicated to not only retributive justice, but also restorative justice.”

It was also noted that “[a] court whose exclusive focus was purely retributive would lack a dimension needed to deliver justice in a wider sense” and “that there had to be a recognition in the Statute that victims of crimes not only had (as they undoubtedly did) an interest in the prosecution of offenders but also an interest in restorative justice, whether in the form of compensation or restitution or otherwise.” However, the ICC has faced a daunting task in implementing provisions related to victim participation, ranging from: (i) the sheer number of likely victims in light of the need to conduct efficient proceedings, (ii) the potential conflict between the right to victim participation and the right to fair hearing, and (iii) the need to balance “the disclosure of evidence necessary for the defense to prepare its case with the need to redact information to protect victims and witnesses.”

The reparations scheme has faced funding issues. The ICC is authorized to order that case-based reparations awards be made “through” the Trust Fund for Victims (Fund), meaning that the ICC may deposit assets seized from a perpetrator into the Fund

221 Id.
224 Kirsch, supra note 50.
and direct the Fund to distribute those assets in a certain way. According to the Rome Statute, the ICC may impose fines or forfeiture on a defendant but not the state itself. This may not be of much consolation to the victim, as the resources available for this purpose may be meager even in the case of defendants who amassed a lot of personal wealth because they may have spent most of it on their defense or made it disappear. By way of illustration, as of April 1, 2011, the Fund raised only €7.3 million from twenty-four countries. However, since 2005, the Fund received 2,031 applications for reparation. The Fund concedes that the “funds available for reparation may well be limited; funds collected from reparation awards, fines and forfeitures will often be minimal if non-existent.” Moreover, due to the time it takes to dispose of cases, reparations may be overly delayed. Thus in some cases, like Uganda, there could be a large and undefined pool of victims in a conflict dating back almost twenty years, the ICC may not have the funds needed to fulfill any awards, leaving otherwise rightful claimants empty-handed.

There are also issues with regard to the determination of reparations to be awarded, qualifying types of injury and definition of “victim” for the purposes of reparations. Rule 85(a) of the ICC Rules of Procedure and Evidence defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” But it has been noted that this definition raises three basic questions in the context of reparations that need to be addressed by the ICC in its reparations principles: (i) what constitutes “harm” for purposes of reparations; (ii) the link required between the crime(s) for which a perpetrator is convicted and the harm to the victim; and (iii) the

225 REPARATIONS SCHEME, supra note 222.

226 Rome Statute, supra note 4, art. 77.


standard of proof required for reparations claims. Is there any limit as to the type of harm for the purposes of reparations? Must harm only be physical or also psychological?

Additionally, the Rome Statute specifically mentions "restitutions, compensation and rehabilitation." Is this list exhaustive? How about satisfaction? Another challenge is that in light of the fact that a perpetrator may be liable for widespread harm requiring reparations for numerous persons, even entire communities. In this context, it becomes necessary that the responsibility for reparations for the harm resulting from gross and systematic crimes of a collective nature be attributed to an identified state or other collective entity, rather than to an individual. And yet, the ICC has no authority to issue awards against a state, even where it makes a finding of state complicity in a crime.

Other issues are whether the active participation by a large number of victims might affect the accused's fair trial rights, whether the victims should remain anonymous, whether victims could be excluded from certain stages of the proceedings, and how to reconcile the apparent conflict between the concurrent statuses of victim and witness. The ICC Trial Chamber had to confront some of these issues in Prosecutor v. Lubanga Dyilo where the Chamber granted 92 of 117 applicants the status of victims authorized to participate in the proceedings. With regard to the large number of the victims and its effect on ICC proceedings, PTC I's approach was that given that the views and concerns of many victims overlapped, the opportunity of joint representation had to be explored. But this is a broad response pursued at the

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231 Reparations Scheme, supra note 222.
232 Rome Statute, supra note 4, art. 75(2).
235 Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 St. Louis U. Pub. L. Rev. 249, 250 (2007) (arguing due to deficiencies in the Rome Statute and Rules, there is a risk that victim participation could violate defendants' due process rights, such as by lowering the prosecution's burden of proof, shifting this burden to the defense, and undermining the presumption of innocence).
236 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Applications by Victims to Participate in the Proceedings (Dec. 15, 2008).
expense of the need to examine each victim’s situation specifically on a case-by-case basis. In holding that anonymity could be decided on a case-by-case basis, the Chamber indicated that the ICC might, in fact, be able to do this.

In *Prosecutor v. Jean-Pierre Bemba Gombo*, questions arose regarding whether victims’ participation in confirmation proceedings would prejudicially impact fair trial rights. The Pre-Trial Chamber III (PTC III) held that victims could not participate. PTC III also determined that it was inappropriate to grant a victim’s legal representative to information provided to the ICC the same victim but pursuant to his/her status as a witness. According to ICC Rule 85, victims may be natural persons or organizations or institutions “who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” although the organizations or institutions seeking such status must have “sustained direct harm to any of their property” and that property must have been “dedicated to ‘religion, education, art or science or charitable purposes,’ historic monuments, hospitals” or other humanitarian purposes. The ICC has provided some guidance on the criteria used to determine victim status in both the Uganda situation and the *Prosecutor v. Lubanga Dyilo* case. In making its determination, the ICC used the following test to determine whether alleged victims should be granted the legal status of “victim” and allowed to participate in the investigation proceedings:

(i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) whether such harm appears to have arise[en] ‘as a result’ of the event constituting a crime within the jurisdiction of the Court for situations.

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237 Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-349, Sixth Decision on Victims’ Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims (Jan. 8, 2009).

238 Id.

239 McGonigle, *supra* note 216, at 100-07.

240 Id.; see also Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-320, Fourth Decision on Victims’ Participation (Dec. 12, 2008) (PTC III spelled out substantially similar requirements that must be met for the purpose of the rule 85 assessment); Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2,
But, victims must also demonstrate how their personal interests are affected.\textsuperscript{241} And even if all of these criteria are met, the ICC may still prohibit the victims from participating if they believe it will unduly prejudice the defense.\textsuperscript{242}

Another issue of concern is whether victims are being granted meaningful participation even after fair trial concerns have been taken into account. In order to participate in ICC proceedings under the status of “victim,” an alleged victim must follow a very detailed and potentially arduous application process.\textsuperscript{243} Each alleged victim must submit a written application to the Victim’s Participation and Reparation section of the ICC Registrar (Registrar). The Registrar must then submit the application to a Pre-Trial Chamber of judges.\textsuperscript{244} Either the prosecution or the defense may move to support or reject a victim’s application.\textsuperscript{245} The chamber of the ICC, which has been assigned to hear the particular case, has the ultimate discretion to determine if an applicant qualifies as a victim.\textsuperscript{246} Once victim status is granted, however, the role of the victim in the proceedings is still limited. A legal counselor represents a victim, or a group of victims. This counselor is party to public, but not closed-door, proceedings and cannot obtain any of the documentation from closed-door proceedings. The victim’s counsel may submit questions to the judge he wishes a witness to answer, but the counselor is not allowed to ask them and there is no guarantee that such questions will be asked to or answered by the witness. In \textit{Prosecutor v. Lubanga Dyilo}, the ICC Prosecutor opposed the request by the victim’s counsel to be party to the proceedings. According to the Appeals Chamber, under Article 68, participation by victims may “take place only within the context of judicial proceedings.”\textsuperscript{247} This means that the right to partake in active investigations, which was previously employed by victims, is no longer available except within the context of active judicial proceedings.

\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{244} Id. at 94.
\textsuperscript{245} See generally Jouet, supra note 235, at 270.
\textsuperscript{246} Will, \textit{supra} note 243, at 94.
\textsuperscript{247} McGonigle, \textit{supra} note 216, at 121.
In sum, the ICC’s allowance of victims into proceedings as third parties has obtained mixed reviews and still faces daunting challenges. While granting these rights to victims has been heralded as one of the great innovations of the Rome Statute, there have been many logistical and legal questions. It is submitted that given the “the slow and resource-intensive process of evaluating applications” it is it doubtful if the ICC has achieved a “reasonably effective balance between the restorative goals of the ICC victim participation scheme and the drafters’ concerns about efficiency and fairness.” Despite any weaknesses mentioned above, victims have been able to present their views at proceedings. Chambers have a three-tiered procedure, which allows victims to present their views, and they can depart from the position of the ICC Prosecutor. This is a unique feature that allows prosecutorial justice to go hand in hand with restorative justice.

IV. THE UNITED NATIONS AND THE ICC

Over the last ten years, the Security Council’s interaction with the ICC has mostly come down to referrals of certain situations to the ICC, making it unnecessary to create ad hoc tribunals. But such actions have become increasingly controversial, ranging from condemnation of referrals or refusal to defer as interference in the internal affairs of states and contradiction of the principle of complementarity, to arguments that referring serving heads of state the ICC only makes them more determined to hang onto power rather than negotiate their peaceful exit. It is important to note that at first, these indictments did not prove to be a magical wand, as President Al-Bashir simply continued to cling to power.

248 VICTIM PARTICIPATION, supra note 212.
249 See, e.g., Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision of the Appeals Chamber (Sept. 16, 2009).
250 Kirsch, supra note 8, at 542.
252 See, e.g., Syria violence: UN’S Pillay Speaks Out on Assad Culpability, BBC NEWS (Mar. 28, 2012), http://www.bbc.co.uk/news/world-middle-east-17522178 (observing that “referring Mr Assad to the ICC could simply make him more determined to hold on to power.”).
power. As a result, is the Security Council helping or hurting the work of the ICC?

Negotiators of the Rome Statute understood that the ICC needed to maintain judicial independence from the political workings of the U.N., but they also realized that, to be effective, the ICC would need the U.N.'s active support. Pursuant to Article 2 of the Rome Statute, the ICC entered into a cooperation agreement with the U.N.—the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations in October 2004 (U.N.-ICC Agreement). The Rome Statute entrenches a role for the U.N., in general, and its Security Council in particular. The Rome Statute provides that "[t]he Court shall be brought into relationship with the United Nations through an agreement to be approved by the ASP to this Statute and thereafter concluded by the President of the Court on its behalf." According to the U.N.-ICC Agreement:

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

The two bodies are independent entities. The reason for this independence of the Court was that the negotiators of the Rome Statute did not want "that the workings of the Court should not be

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253 See Alex Perry, Is Sudan Moving Back to the Brink of War?, TIME (Jan. 9, 2010) (arguing that the "2009 indictment . . . has pushed Al-Bashir into a corner and imperiled diplomatic efforts to avert a crisis."). For a further discussion of Al-Bashir, see infra Part II.C.

254 Relationship, supra note 40.

255 Rome Statute, supra note 4, art. 2.


257 "The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with Articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." U.N.-ICC Agreement, supra note 256, art. 2(1).
subject to political decisions."  

Under Article 6 of the U.N.-ICC Agreement, the ICC “may, if it deems it appropriate, submit reports on its activities to the United Nations through the Secretary-General.” The possibility of making this report is vital to the achievement of the objectives of the ICC because this is one way of marshaling shame on uncooperative state parties, as well as notifying the international community of situations in which the Security Council is reluctant to act.

Another form of collaboration between the ICC and the Security Council regards the gathering of evidence. Article 18 of the U.N.-ICC Agreement provides that the U.N. and the Prosecutor may agree that the former will provide documents to the Prosecutor “on condition of confidentiality and solely for the purpose of generating new evidence,” and that the documents “shall not be disclosed to other organs of the Court or to third parties... without the consent of the United Nations.” The ICC Prosecutor is expressly authorized to enter into such confidentiality agreements by Article 54(3)(e) of the Rome Statute. At the same time, however, the ICC Prosecutor is required under Article 67(2) of the Rome Statute to “disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” Indeed, the Prosecutor is also obligated, under Rule 77 of the Rules of Procedure and Evidence, to “permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are,” among other things, “material to the preparation of the defence.” Additionally, the Prosecutor has the obligation to search for both incriminating and exculpatory evidence precisely because the accused does not have the same resources as the Prosecutor.

The tension between the twin obligations of confidentiality and disclosure came to the fore in the Lubanga Dyilo case. The issue is that sometimes the evidence in the hands of the ICC Prosecutor is potentially simultaneously exculpatory and

258 See RELATIONSHIP, supra note 40, at 5.
259 Rome Statute, supra note 4, art. 54(1)(a).
confidential in character. About fifty percent of the information in the Lubanga Dyilo case was confidential, but some of it was also potentially exculpatory.261 In the Lubanga Dyilo case, the Prosecutor was able to obtain permission to disclose that information to the defense. On cases where the Prosecutor cannot obtain that permission or that permission is delayed, it becomes extremely difficult to put together a fair and/or speedy trial.262 In the Lubanga Dyilo case, proceedings had to be stayed.263 But, on the other hand, eliminating the confidentiality guarantees could have a "chilling effect" on the U.N.'s ability to gather information from states, intergovernmental organizations, and other international organizations if it is known that the U.N. will eventually disclose such information to the ICC Prosecutor. This could result in the ICC Prosecutor not seeing a considerable amount of information that is not only helpful as prosecution evidence, but also as exculpatory evidence.264 Perhaps there is need for more collaboration between the U.N. and the Trial Chambers of the ICC with regard to the characterization of evidence as confidential, instead of leaving the duty in the hands of the U.N. and the ICC Prosecutor.

But it is the Security Council that has made the most significant contribution to the work of the ICC, precisely because Chapter VII resolutions of the Security Council are binding on U.N. member states.265 Under Article 13(b) of the Rome Statute, the Security Council can refer a situation to the ICC.266 Additionally, the Security Council is empowered under the Rome Statute to request that the ICC defer an investigation or prosecution.267 Also, the Security Council can assist the ICC in securing the cooperation of state parties to the Rome Statute. The Rome Statute provides that:

261 RELATIONSHIP, supra note 40, at 6.
262 Philippe Kirsch, a former president of the ICC, claims that he has always tried to strike a balance between expeditious proceedings and the protection of the rights of the accused and at the same time meet the ICC's obligations to protect victims and witnesses. Kirsch, supra note 50.
263 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I (Oct. 21, 2008).
264 See RELATIONSHIP, supra note 40, at 54.
265 Lubanga Dyilo, Case No. ICC-01/04-01/06.
266 See U.N. Charter arts. 25, 39, 41, 48.
267 See U.N.-ICC Agreement, supra note 256, art. 17.
268 Rome Statute, supra note 4, art. 16; U.N.-ICC Agreement, supra note 256, art. 17(2).
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.²⁶⁸

The ICC Prosecutor has expressed “mounting frustration . . . because of a complete lack of engagement or any response to the indictments.”²⁶⁹ As Mr. Luis Moreno-Ocampo, the Chief Prosecutor of the ICC, related, one of the greatest challenges facing the ICC has been “[h]ow to ensure, in particular, the arrest and surrender of individuals sought by the Court.”²⁷⁰ The support of the Security Council is therefore indispensable. The success of the ICTY and ICTR can be, at least, partially attributed to the muscular support of the Security Council.

The power of the ICC to defer an ongoing investigation could undermine the work of the ICC by injecting the very element of political interference that negotiators of the Rome Statute sought to avoid to begin with.²⁷¹ Additionally, ICC referrals might be equally politicized, undermining the legitimacy of the ICC to some extent. An example is the situation in Sudan.²⁷² It should be pointed out, however, that some critics of the ICC would prefer an even more robust Security Council involvement in the work of the ICC. These critics point out that in requiring merely an affirmative Security Council vote to defer a case, the Rome Statute shifts the balance of authority from the Security Council to the ICC. This leaves the ICC largely unsupervised, it is contended.²⁷³

²⁶⁸ Rome Statute, supra note 4, art. 87(7).
²⁷⁰ Moreno-Ocampo, supra note 192.
²⁷¹ Some have argued, however, that any Security Council referral that purports to provide the ICC with a basis for jurisdiction outside that provided for in the Rome Statute should be seen as merely recommendatory. Chris Gallavin, The Security Council and the ICC: Delineating the Scope of Security Council Referrals and Deferrals, 2005 N.Z. ARMED F. L. REV. 19, 30 (2005).
²⁷² Rozenberg, supra note 135 (citing an Oxford University political scientist, Phil Clark, an Australian born in Sudan, who specializes in African conflict, for the proposition that the Al-Bashir indictment was the result of the OTP’s lobbying of the Security Council).
²⁷³ Bolton, supra note 18, at 198.
On the other hand, a more muscular Security Council could only further politicize the ICC and undermine its legitimacy. The risk of politicization of the ICC was on display when the Security Council referred Libya to the ICC, but almost under similar circumstances, it failed to issue a legally binding resolution or to refer the Syrian situation to the ICC.274

V. THE UNITED STATES275 AND THE ICC

The ICC is a creature of treaty, which means that it only binds states that are party to the Rome Statute—unless the statute otherwise provides, as in the case of Security Council referrals276—or non-party states that have accepted the jurisdiction of the ICC with regard to a particular crime.277 If the relation between the ICC and non-party states were that simple, no controversy would exist. However, the Rome Statute obligates state parties to surrender, to the ICC, anyone who is accused of a crime within the purview of the Rome Statute, regardless of that person's nationality. Specifically, Article 12 of the Rome Statute purports to grant jurisdiction to the ICC over the nationals of non-party

274 Russia and China vetoed a Security Council Resolution on Syria, even though the Arab League backed such a resolution. Russia blocked the resolution for strategic reasons (Russia's only military base outside the former Soviet Union is in Syria and it sells weapons to the Syrian government), even though the Syrian regime had committed atrocities against civilian populations, and even as the Russian ambassador to the United Nations acknowledged that “tragic events are happening” in Syria. Flavia Krause-Jackson & Henry Meyer, Russia, China Veto UN Security Council Resolution on Syria, BLOOMBERG BUSINESSWEEK (Feb. 4, 2012), http://www.businessweek.com/news/2012-02-04/russia-china-veto-un-security-council-resolution-on-syria.html.

275 For strategic reasons, other Security Council permanent members, particularly Russia and China, take into account the decisions of the U.S. For example, in refusing to sign or ratify the Rome Statute, China took cognizance of the fact that U.S. had refused to ratify it as well, and gave reasons that mirrored those of the United States, particularly the objections that the Rome Statute imposes obligations on non-state parties without their consent; the inclusion of the crime of aggression within the jurisdiction of the ICC weakens the power of the Security Council; and that the proprio motu power of the Prosecutor makes the ICC open to political influence so that it cannot act in a manner that is independent and fair. Lu Jianping & Wang Zhixiang, China's Attitude Towards the ICC, 3 J. INT'L CRIM. JUST. 608, 610, 611-12 (2005).

276 See United States Delegation, Intervention on the Bureau's Discussion Paper (July 9, 1998) (Ambassador David Scheffer observing, “[w]e have grave difficulties with a court of this charter being established that presumes to have jurisdiction over the citizens of a country that has not ratified the treaty creating the Court, except in those situations where the Security Council has taken enforcement action under Chapter VII of the UN Charter which binds member States.”).

277 Rome Statute, supra note 4, art.12 (3).
states. This provision has been a lightning rod for controversy between the ICC and non-party states, particularly the United States. Since the inception of the ICC, the U.S. had strong objections to it, particularly to the possibility of U.S. citizens being subject to the jurisdiction of the ICC without the consent of the U.S.—effectively introducing universal jurisdiction into the ambit of the ICC by the back door—and in a manner that circumvents the United Nations Security Council. Despite those objections, the U.S. was not, in principle, opposed to the ICC, for it has generally supported the notion of accountability, but its concerns with the ICC as a mechanism had to be addressed. Ten years later, where does the United States stand in relation to the ICC? Is there any hope that the United States might embrace the ICC in light of what has transpired over the last ten years?

Without the support of the United States, it is difficult to

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278 Some argue that under the Rome Statute, the prosecution of non-party nationals might affect the interests of that non-party. However, this is not the same as saying that obligations are imposed on a non-party without their consent, because none is required. Parties to the ICC possess territorial criminal jurisdiction over nationals of non-parties where those non-party nationals commit a crime within the territory of the ICC party. Thus, the consent of the state of nationality of the accused would not be required because the ICC's power to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the rightful criminal jurisdiction, which ICC state parties possessed to begin with. The ICC acts only in cases where the parties could have acted. The power to delegate derives from the fact that the principle of "extradite or prosecute," which is to be found in several international treaties, is not preconditioned on first obtaining the consent of the state of nationality of the offender, be it a party or non-party. See, e.g., Dapo Akande, _The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits_, 1 J. INT'L CRIM. JUST. 618, 622-625 (2003).

279 In fact, the Rome Statute accommodated many U.S. objectives, such as a strong regime of complementarity or deferral to national jurisdiction, a role preserved for the Security Council particularly with regard to intervention to stop the ICC's work, important due process protections, etc. See Scheffer, _supra_ note 33, at 73.


281 For reasons why the U.S. first signed the Rome Statute, and then unsigned it, see Scheffer, _supra_ note 33, at 68.

282 The U.S. has a unique role in the world as the only superpower. See e.g., PAUL HOLLANDER, _THE ONLY SUPERPOWER: REFLECTIONS ON STRENGTH, WEAKNESS AND ANTI-AMERICANISM_ 8 (2009) (observing that the "power of the United States is self-evident deriving from its size, population, unsurpassed economic and military strength, and a global political, military, and cultural presence. So much power, and especially its singular superpower status (attained since the fall of the Soviet Union) . . . "). Jack Goldsmith observes that "U.S. troops do not hide behind U.S. borders. Hundreds of thousands of them are spread across the globe and can much more readily be nabbed and whisked away to The Hague." See Jack Goldsmith, _The Self-Defeating International_
see how the ICC can fulfill its mandate of ending impunity\textsuperscript{283} when it lacks an enforcement mechanism and cooperation from states to gain custody of suspects,
\textsuperscript{284} and in some cases the ICC relies on the Security Council for the referral of situations that would otherwise not come within the purview of the ICC. Yet, the United States not only refused to ratify the Rome Statute, but also signed and then unsigned the Rome Statute,\textsuperscript{285} has been a steadfast critic of the ICC and has concluded bilateral immunity treaties (BITs)\textsuperscript{286} with many states that are parties to the ICC, pursuant to which those states promised never to surrender U.S. nationals to the ICC.\textsuperscript{287} That said, the U.S. has supported, if only reluctantly,

\textit{Criminal Court}, 70 U. CHI. L. REV. 89, 96 (2003). Also, the U.S. has been critical to the development of the rule of law internationally. U.S support has been critical to the success of the \textit{ad hoc} tribunals, not least from the financial perspective. For example, when it came to state cooperation with the \textit{ad hoc} tribunals it was the U.S. threat to withhold a half-billion dollars in U.S. and International Monetary Fund aid to the successor regime in Yugoslavia that led to Milosevic's actual transfer to the ICTY. \textit{Id.} at 93. John Bolton argues that whether the ICC survives and flourishes depends in large measure on the U.S., and that “America’s posture toward the ICC should be ‘Three No’s’: no financial support; no cooperation; and no further negotiations with other governments to ‘improve’ the ICC.” Bolton, \textit{supra} note 18, at 202.

\textsuperscript{283} It is not to be doubted that, at least domestically, the U.S. is committed to fighting impunity. The U.S allows victims of violations of international law to sue perpetrators when they are physically present in the country under the Alien Tort Claims Act and the Torture Victim Protection Act, and under the Foreign Sovereign Immunities Act, civil actions against foreign sovereigns can be brought before U.S. courts under certain exceptions to foreign sovereignty immunity. For further discussion of U.S. and its domestic application of international law, see, Fiona McKay, \textit{U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism}, 36 \textit{CORNELL INT’L L.J.} 455, 457-60 (2004).

\textsuperscript{284} Marinakis, \textit{supra} note 103, at 156.

\textsuperscript{285} President Clinton stated that signing the treaty would reaffirm the U.S’s strong support for international accountability and for bringing to justice perpetrators of international crimes, sustain U.S’s tradition of moral leadership and that, although the U.S. still opposed the idea that the ICC would have jurisdiction even over persons of states that were not party to the Rome Statute, the U.S. hoped that it would influence the evolution of the ICC through its signature. For reasons why the U.S. signed see Scheffer, \textit{supra} note 33, at 58-59, 64.

\textsuperscript{286} These agreements were entered into pursuant to the U.S. American Servicemembers’ Protection Act, which prohibits the United States from providing military assistance to state parties to the Rome Statute unless the latter have provided immunity from ICC prosecution to U.S. military servicemen when found on the territory of those states. American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2002).

\textsuperscript{287} The Rome Statute provides 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 agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court . . . .” Rome Statute, \textit{supra} note
the work of the ICC by abstaining from the use of its veto with
regard to Security Council referrals of certain situations to the
ICC, and the U.S. remained engaged with the ICC to the extent
it could such as with regard to negotiations of the Rome Statute
and subsequent normative developments such as those adopted
during the Kampala Review Conference. For example, the U.S.
was able to influence the definition of the crime of aggression at
the Kampala Review Conference. The U.S. was interested in

4, art. 98(2). The legal effect of the bilateral immunity agreements has not been tested. However, for those states which signed and/or ratified the Rome Statute prior to signing the bilateral immunity treaties ("BITs") they may find it difficult to prevent the Rome Statute from taking its full effect. Vienna Convention, supra note 126, art. 30(4)(b) ("When the parties to the later treaty do not include all the parties to the earlier one...as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations," when both the later and earlier treaties relate to the same subject matter). Moreover, "[p]aragraph 4 is without prejudice to article 41...or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty." Id. art. 30(5). "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty." Id. art. 41. In this case, the United States is not a party to the Rome Statute. The United States "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." See FAQ: Vienna Convention on the Law of Treaties, U.S. DEP’T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited on Mar. 1, 2012). Unequivocally, the International Law Commission has stated "the law of treaties...is part of general customary international law." See [1959] 2 Y.B. Int’l L. Comm’n 91, U.N. Doc. A/CN.4/Ser.A/1959/Add.1 (emphasis omitted), available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1959_v2_e.pdf. But, there is also a sound argument based on the Vienna Convention that U.S. citizens should not be subject to the jurisdiction of the ICC without the United States’ explicit consent because the Vienna Convention provides that treaties cannot “create either obligations or rights for a third State without its consent.” Vienna Convention, supra note 126, art. 34. However, it is submitted that the Rome Statute would not be the first treaty to provide for jurisdiction over nationals of non-party states. For example, treaties relating to war crimes, torture, and terrorism, just do that. See Orentlicher, supra note 19, at 510 (observing that these treaties require state parties to prosecute or extradite persons in their territory who are alleged to have committed defined crimes and that these provisions apply regardless of the nationality of the suspect or the site of the alleged crime).

But see Gallavin, supra note 271, at 25 (observing that although the United States abstained, this should not be seen as a softening of the United States approach to the ICC in general, particularly because the United States considers the Rome Statute as not having sufficient protections from the possibility of politicized prosecutions).

Even the U.N. Charter’s Article 2 general prohibition of the use of force is ambiguous in light of the fact that Article 51 of this Charter memorializes the customary international law’s undefined but “inherent” right to self-defense against an armed attack. See Benjamin B. Ferencz, Enabling the International Criminal Court to Punish Aggression,
how the Rome Statute, as revised, defines the role of the Security Council in judging the commission of aggression.\textsuperscript{290} In 2005, the United States—along with Russia and China—did not object to the Security Council's referral of the situation in Sudan to the ICC.\textsuperscript{291} More recently, the United States again did not object when it came to referring the situation in Libya to the ICC. And yet, even with regard to these referrals the United States did not go far enough in its support of the ICC. For example, through Resolution 1593 of the Security Council, the United States was able to wrest a concession that provided that none of the costs incurred in connection with the ICC investigations and prosecutions should be borne by the United States, even if what was at issue was a situation referred by the Security Council. This was contrary to the Rome Statute, which provides that all funds for the ICC shall be provided by both the State parties and by “[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”\textsuperscript{292}

The United States' initial support for the ICC was limited to the “prosecution of members of rogue States while essentially guaranteeing that U.S. servicemen and high level officials would never be prosecuted.”\textsuperscript{293} The U.S. Senate passed the American Servicemembers' Protection Act, which limited American cooperation with the ICC and specifically prohibited taxpayer funding of the ICC, demanded that the U.N exempt future U.S. peacekeepers from the ICC, and prohibited financial aid to States which did not promise they would not extradite U.S. citizens to the

\begin{footnotesize}
\item 6 WASH. U. GLOB. STUD. L. REV. 551, 556 (2007). During negotiation of the Rome Statute, the United States and the United Kingdom would not permit a particular definition of aggression to be adopted as they wanted to retain the last word in determining when aggression had occurred and feared that new legal restraints would hamper their freedom of military or humanitarian intervention. See id. at 558.

\item 290 The United States and several other delegations argued that the Security Council must trigger investigation of the actionable crime of aggression by first determining that a state has committed aggression and that the definition must be based strictly on customary international law and hence be of a narrow character (for example, a “war of aggression”). Scheffer, supra note 33, at 83.

\item 291 Some commentators have argued that the United States' decision to tacitly agree to such referrals, combined with its unwillingness to let the ICC try its own or its allies' citizens, may in the future put it in a controversial and embarrassing position. Marinakis, supra note 103, at 141.

\item 292 Rome Statute, supra note 4, art. 115(b).

\item 293 Sievert, supra note 11, at 95.
\end{footnotesize}
ICC.\textsuperscript{294} The effect of this, it was once feared, was that the ICC would lead the United States away from international interventions aimed at protecting human rights.\textsuperscript{295} Indeed, this fear also prompted Resolution 1422 of the Security Council, which requested the ICC not to commence or proceed with the investigation or prosecution of any case that may arise concerning acts or omissions relating to an operation established or authorized by the United Nations involving current or former officials or personnel from a State contributing to that operation which is not a party to the Rome Statute. It is proposed, however, that the Security Council’s reliance on Article 12 of the Rome Statute, which allows the Security Council to make resolutions deferring any investigation or prosecution at the ICC for a period of twelve months, is unwarranted, because the Security Council cannot purport to indefinitely stop the ICC from exercising jurisdiction; rather, it can only do so for a period of twelve months,\textsuperscript{296} and in any case this resolution was adopted in the abstract whereas it ought to have been in response to a concrete situation that constitutes a threat to international peace and security.\textsuperscript{297}

Critics of the ICC predicted that an ICC without United States support—and indeed, with its opposition—would not only fail to live up to its expectations, it would do actual harm as well by discouraging the United States from engaging in various human rights-protecting activities.\textsuperscript{298} Those particular effects do not

\textsuperscript{294} 22 USC §§ 7401, 7421-33 (Supp. III 2003).
\textsuperscript{296} Olufemi Elias & Anneliese Quast, \textit{The Relationship Between the Security Council and the International Criminal Court in Light of Resolution 1422 (2002)}, 3 \textit{NON-STATE ACTORS & INT’L L.} 165, 169 (2003); see also Marco Roscini, \textit{The Efforts to Limit the International Criminal Court’s Jurisdiction over Nationals of Non-Party States: A Comparative Study}, 5 \textit{L. & PRAC. INT’L CTs. & TRIBUNALS} 495 (2006) (arguing, Security Council resolutions no. 1422 (2002), 1487 (2003), 1497 (2003), 1593 (2005) were not adopted pursuant to the Security Council’s power to request the ICC not to commence or proceed with investigations or prosecutions under Article 16 of the Rome Statute as this provision was not conceived to cover future and hypothetical cases). Resolution 1422 was adopted in order to give a one-year immunity form investigation or prosecution to nationals of States that had not ratified the Rome Statute if such persons served in U.N. peace operation. The following year, the Security Council passed Resolution 1487, which renewed, for another year, that same exemption. But, when the United States sought to renew this resolution in 2004, it ran into stiff resistance in part because of the alleged abuses in Iraq. \textit{Id.} at 500.
\textsuperscript{297} Elias & Quast, \textit{supra} note 296, at 173.
\textsuperscript{298} Goldsmith, \textit{supra} note 282, at 89.
appear to have materialized in the last ten years, because the United States continued to intervene in several countries—such as Libya, Iraq, Afghanistan, Pakistan, Somalia, Yemen, and the Central African Republic—and the ICC has made some progress in terms of indicting those most responsible for egregious crimes. It might even be argued that the United States would not have even bothered to abstain from Security Council referrals of the Sudan and Libya situations if it had not observed, over the first ten years of its existence, that the ICC could deliver on justice, its many other weaknesses notwithstanding.

But the fact that reservations are not allowed under the Rome Statute left few options for the United States to protect its interests. Therefore, the United States tried to put Article 98 of the Rome Statute to maximum benefit. Even then, the Article 98 BITs were concluded with mainly with developing countries, most of which are still dependent on U.S. aid, and at least twenty-six of them of them are in Africa. But, with regard to these bilateral agreements, although it has been argued that Article 98(2) of the Rome Statute covers only agreements regarding the non-surrender to the ICC of a nation's military or official personnel and related civilian component sent abroad on official missions by that nation, the United States insists that the Article include all U.S. nationals, including those acting in a private or non-U.S. capacity. It is submitted that Article 98 of the Rome Statute arose out of the concern that a State should not be obliged to act in breach of pre-existing obligations under international law.

Additionally, the United States argues that to submit U.S. citizens to the jurisdiction of an international court, like the ICC, where judges and procedures are not supervised by United States'
own democratically elected leaders is not only unconstitutional, but also contrary to basic principles of treaty law. However, because arguments pertaining to consent emphasize State sovereignty, some commentators have submitted that the Rome Statute's insistence on trying citizens of non-party States is not an entirely a new phenomenon because—under traditional rules of international law—nationals of a foreign State are normally subject to the laws of the State were they are travelling. Indeed, under modern international law, if a U.S. national commits a crime in any foreign State he/she would be subject to the territorial jurisdiction of that State. Consequently, there is no logical reason why such States should be barred, by the Rome Statute, from cooperating to punish conduct which each of them had a clear right to punish individually. When States sign on to a multilateral court, they cede some of their sovereignty to the multilateral court, providing a basis for the multilateral court in relevant cases to use general principles of law that are otherwise only available to domestic courts. In any event, countries that signed the BIT are arguably in violation of Article 26 of the Vienna Convention on the Law of Treaties that provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The importance of this

303 There are many other objections such as due process concerns, particularly the absence of a jury trial, and the fact that the Rome Statute does not clearly state what constitutes right to trial without inexcusable delay. Although the Rome Statute provides for a watered down exclusionary rule, it does not protect accused persons against unreasonable searches and seizures. Also of concern is the fact that the Rome Statute lacks a provision giving the accused the right to confront and cross-examine witnesses, and the right to exclude hearsay evidence. Additionally, convicted persons under the Rome Statute are not protected against double jeopardy. See Redman, supra note 7, at 41-43.

304 Vienna Convention, supra note 126, art. 11 (establishing the consensual nature of treaty law); see also Seth Harris, The United States and the International Criminal Court: Legal Potential for Non-Party State Jurisdiction, 23 U. HAW. L. REV. 277, 284 (2000) (stating that if a state does not show its positive consent to be bound by a rule expressly through treaty (or impliedly through custom), the state cannot be bound).


306 Wald, supra note 10, at 518.

307 Struett, supra note 305, at 196.

308 See AM & S Europe Ltd. v Commission of the European Communities, Judgment, 1982 E.C.R. 1575 (May 18) (holding that when states ceded part of their sovereignty to the community, then some of their law-making power was also ceded to Brussels, and that so client-lawyer privilege could be implied).

309 Vienna Convention, supra note 126, art. 26.
principle is underscored in the Preamble to the Charter of the United Nations, paragraph 2 of Article 2 of which expressly provides that Members are to “fulfil in good faith the obligations assumed by them in accordance with the present Charter”. Under Article 90(6) of the Rome Statute, a State party’s duty to comply with other obligations can only be used as ground to refuse to surrender an individual if the obligation is under an existing extradition treaty. Treaties that have the sole purpose of keeping individuals out of the reach of the ICC could amount to a violation of the overall duty to cooperate with the ICC in good faith and therefore would not be taken into account.\textsuperscript{310}

It is worth noting that some proponents of BITs would argue that Article 98 the Rome Statute allows BITs because “there is nothing in the Statute to say that States are under an obligation not to enter into agreements that would contradict obligations undertaken by signing and ratifying the Rome Treaty, or that obligations under the Statute should prevail in the case of conflict.”\textsuperscript{311} However, although the Vienna Convention on the Law of Treaties provides that “[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.” It also adds that “[a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”\textsuperscript{312} Thus, relative to the ICC, the plausible effect of these provisions is that if a country signed both the Rome Statute and later signed a BIT, if it is also a party to the VCLT, then the provisions of the ICC would prevail in a matter that does not include the State that is not a party to the ICC, such as the U.S. Indeed, according to the negotiating history of the VCLT:

The rules in paragraph 4 determine the mutual rights and obligations of the particular parties in each situation merely as between themselves. They do not relieve any party to a treaty of any international responsibilities it may incur by concluding or by applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

\textsuperscript{310} Sluiter, \textit{supra} note 50, at 633.


\textsuperscript{312} Vienna Convention, \textit{supra} note 126, art. 30(3), (4)(b).

This reading appears to comport with the proposition that agreements envisaged under Article 98(2) of the Rome Statute are only those that (i) were in force between States that were parties to the Rome Statute (ii) before the Rome Statute came into force, and (iii) related to armed forces personnel only. They were meant to cover such agreements as Status of Forces Agreements and Status of Mission Agreements.\footnote{Daniel D. Ntanda Nsereko, \textit{Triggering the Jurisdiction of the International Criminal Court}, 4 AFR. HUM. RTS. L.J. 256, 262 (2004).} In this context, if a State party to the Rome Statute entered into a bilateral immunity agreement, and it subsequently refused to surrender an indictee as required under Article 89(1) of the Rome Statute, that State would still be subject to the ICC jurisdiction regarding the legality of its bilateral agreement.\footnote{Chet J. Tan, Jr., \textit{The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court}, 19 AM. U. INT'L L. REV. 1115, 1126-27 (2004).} Thus, unsurprisingly, the European Union indicated, "[e]ntering into US agreements—as presently drafted—would be inconsistent with ICC State Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties.\footnote{COUNCIL OF THE EUROPEAN UNION, \textit{COUNCIL CONCLUSIONS ON THE INTERNATIONAL CRIMINAL COURT} (Sept. 30, 2002), available at http://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf.}"

Currently, do more compelling reasons exist for the United States to consider becoming a party to the Rome Statute? More than ten years after September 11, 2011,\footnote{Steven C. Roach, \textit{Courting the Rule of Law? The International Criminal Court and Global Terrorism}, 14 GLOBAL GOVERNANCE 13, 17 (2008) (arguing that the ICC would address problematic geopolitical factors, in particular the regional or sectarian perception of the illegitimacy of national courts); see also Sievert, supra note 11, at 108 (arguing a strong case must be made for the international trial of terrorism when the perpetrators are global networks such as al Qaeda).} and in an increasingly globalized world where multilateralism and international rule of law (as opposed to the rule of force) are becoming the widely acceptable and dominant world order and norm for international
engagement, it appears that the United States now stands to gain more than lose if were party to the ICC. In that context, the Assembly of States Parties (ASP) would provide a ready-made forum for the United States to build legitimacy and credibility for its foreign policy objectives. Additionally, because the ICC is permanent body, it holds the key to future normative development of international criminal law and international humanitarian law. The United States can influence these developments most effectively by becoming a State party. The Appeals Chamber of the ICC is the only permanently constituted appellate body in international criminal law, which gives it the unique capability to develop that body of law through the force of its decisions. Moreover, the United States could benefit from ICC membership because it is not just an independent nation State, it is quickly being transformed into a “global” State that is intimately tied up with an increasingly connected global system, and so it could benefit from a system of international justice. Moreover, even if the United States were a party to the Rome Statute, it would be practically impossible for U.S. nationals to be tried by the ICC. The ICC jurisdiction is predicated on the fundamental principle of complementarity. Based on this principle, it is inconceivable that the United States would ever be conceived as unable—except perhaps the second prong of “unwillingness”—to prosecute those who would otherwise come under the purview of the ICC.

320 Sievert, supra note 11, at 79, 87.
321 If the Rome Statute had a wider provision or if it allowed reservations (these are denied under Article 120 of the Rome Statute), then the United States could have attached a reservation to the complementarity provisions requiring further determination of the admissibility of a case against U.S. service members prior to any planned surrender of a suspect to the ICC. For further discussion, see Scheffer, supra note 33, at 60. The United States argued that allowing reservations would be particularly useful in the field of state cooperation with the ICC. Indeed, it is submitted that if some qualified right to reservations had been permitted for the Rome Statute, then the U.S. would have been much better positioned to support or at least not object to the Rome Statute. Id. at 84. Based on the complementarity principle, U.S. citizens would never go to the ICC if the United States judicial processes were handling the cases appropriately. See Johansen, supra note 302, at 311.
322 Critics point out that ICC’s safeguards against rogue prosecutions are all ultimately subject to the ICC interpretation. Goldsmith, supra note 282, at 95. But the Security Council has the power to suspend an investigation if it believes that such an action is in the
if the United States were unwilling to prosecute, it would undermine international legality and based on the principle of reciprocity it could not expect other nations to be willing to prosecute either, which would be a violation of a fundamental tenet of international law that treaties ought to be fulfilled in good faith. If all the eighteen judges of the ICC were deemed to be conspiring against the United States, perhaps the same could be said of other international courts to which the United States is subject such as the World Trade Dispute Resolution bodies. And if that were the case, the United States could terminate or suspend its ICC membership.

The American rejection of the Rome Statute diminishes the United States’ participation in international law and does not comport with its historical leadership in the field, revealing a “remarkable reversal of American international law enforcement policy throughout the 20th century.” The best way for the US to protect its interests is to remain engaged in the ICC’s work. Unilateral action has limited effectiveness and lacks international legitimacy and respect. The United States’ interest in combating terrorism is advanced by international bodies like the ICC. The interest of international peace and security. The Security Council can keep suspending the investigation for every twelve months. Rome Statute, supra note 4, art.16. This provision is pursuant to Security Council Resolution 1422, adopted during the negotiations of the Rome Statute at the insistence of the United States. This resolution, adopted under Chapter VII, provides that the ICC, in cases involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting on July 1, 2002 not commence or proceed with an investigation or prosecution of any such case, unless the Security Council decides otherwise. Paragraph 2 of this resolution expresses its intention to renew that request each July 1 for as long as may be necessary. S.C. Res. 1422, U.N. SCOR, U.N. Doc. S/RES/1422 (2002); see also Robert Cryer & Nigel D. White, The Security Council and the International Criminal Court: Who’s Feeling Threatened, in INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 143, 150-51 (2004) (arguing that the Security Council could not make a declaration under Article 16 relating to future contingencies that have yet to arise; that because the ICC has an independent legal personality it is improbable that the Security Council can trump the ICC absent any express provision in the Rome Statute to that effect, and that in any event the Security Council could not point to any threat to the peace in Resolution 1422).

Vienna Convention, supra note 126, art. 26.

Scheffer, supra note 33, at 53-54.

Scheffer, supra note 12, at 1577.

Ambassador David J. Scheffer argued that “[t]he long war against terrorism will be incompatible with any American effort to oppose and dismantle the ICC. If only in its own self-interest, the United States will want to collaborate with its allies and friends around the world.” Scheffer, supra note 33, at 49-50.
ICC indicated its willingness to prosecute Al Qaeda for the World Trade Center attacks as crimes against humanity, which are proscribed by the Rome Statute.\textsuperscript{327} Faced with other serious threats such as Iran and North Korea, the United States could benefit from firmly supporting an international law enforcement body, if only to put those rogue States on notice that their international crimes will not be unpunished.\textsuperscript{328} If the United States were to advocate for special or ad hoc tribunals (like the ICTR or ICTY), with regard to crises arising out of North Korea or Iran, it might meet resistance from France, the United Kingdom, and other countries supporting the ICC. These state parties may be unwilling to spend more money for an ad hoc tribunal.\textsuperscript{329} The United States seeks not only military success in conflict-torn States such as Afghanistan and Iraq, but also to bring to justice some of the worst perpetrators of international human rights and humanitarian crimes. Those States torn by years of conflict lack the legal experts needed to execute an international regime of accountability.\textsuperscript{330}

Even without becoming a party to the Rome Statute, there are some steps that the United States could undertake as a global leader of the rule of law. In some cases, the Security Council has gridlocked resulting in the failure to refer cases to the ICC.\textsuperscript{331} In these situations, the United States could deploy its domestic legal machinery in furtherance of international criminal justice. To do this, the United States would need to conform its domestic laws to the crimes recognized in the Rome Statute. This would demonstrate that the United States shares the international community's moral condemnation of international crimes and is

\textsuperscript{327} Sievert, \textit{supra} note 11, at 100 (citing James Podgers, \textit{An Unused Weapon: International Criminal Court Could Play Role in War Against Terrorism, Says New Chief Prosecutor}, ABA JOURNAL (Sep. 19, 2003)).

\textsuperscript{328} \textit{Id.}

\textsuperscript{329} Ambassador Scheffer has argued that “[a]s a non-signatory, U.S. credibility to pursue ad hoc initiatives would rapidly decline.” Scheffer, \textit{supra} note 33, at 59.

\textsuperscript{330} See Sievert, \textit{supra} note 11, at 103 (observing that Iraqi judges and prosecutors of the Iraqi Special Tribunal, which tried Saddam Hussein and his associates for war crimes, crimes against humanity, and genocide, lacked experience in international law).

\textsuperscript{331} In fact, this was one reason most delegations opposed the idea that ICC prosecutions should be limited to cases referred by the Security Council. The Security Council failed to establish international tribunals for crimes in many troubled spots, leading to the belief that a Security Council gatekeeper would preclude legitimate prosecutions and thus undermine the aim of universal justice. Hence, the creation of a largely independent ICC. Goldsmith, \textit{supra} note 282, at 90.
willing to prosecute its own nationals and aliens within its territory who commit them. Presently, if an alien within the United States committed such a crime, neither the United States nor the ICC would have jurisdiction to prosecute it. The United States would be acting under the principle of universal jurisdiction.333

The United States has consistently opposed the ICC as contrary to its national security interests.334 But to be fair, why should the United States be a party to the ICC when its main competitors—especially Russia and China—have not demonstrated any willingness to join this Court? Even if the United States wanted to change course and join the ICC, this reason alone might give it pause. If China, North Korea, Russia, and Iran, for example, are unwilling to subject themselves to the jurisdiction of the ICC, why should the United States?335 Indeed,

332 Scheffer, supra note 12, at 1574.
333 The principle of universal jurisdiction remains important in international criminal law. Cedric Ryngaert, Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union, 14 EUR. J. CRIME CRIM. L. & CRIM. JUST. 46, 49 (2006) (arguing that although there will be cases which technically speaking are admissible before the ICC, the ICC may not adequately deal with them from a logistical and financial point of view, and that these cases should be addressed by national courts, exercising universal jurisdiction under the ICC's complementarity principle, when the defendant can be found in the territory of those states). It should be noted, however, that the principle of universal jurisdiction does not apply to the ICC as such because the ICC has no jurisdiction over non-signatory nations who commit crimes in their own territory. This was rejected because it appeared to border on being an excessive threat to national sovereignty. This insistence on a consensual model means that the ICC would fall short in its stated aim of ending impunity as dictators would never not sign on the ICC, and do not need to fear surrender to the ICC even when they enter a signatory state. They only need to fear United Nations Security referral action, which is not always guaranteed. Goldsmith, supra note 282, at 91.
334 Sievert, supra note 11, at 80. There was American suspicion that an international adjudicative body composed of foreign judges would be prejudicial to United States interests. As President George W. Bush explained during the 2004 presidential debates: “I wouldn’t join the International Criminal Court. It’s a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial . . . . it’s the right move not to join a foreign court . . . .” The First Bush-Kerry Presidential Debate, COMMISSION ON PRESIDENTIAL DEBATES (Sep. 30, 2004), http://www.debates.org/index.php?page=september-30-2004-debate-transcript.
335 Wald, supra note 10, at 522 (stating the real fear is that the “court, driven by members who may resent American global preeminence, could seek to restrain the use of U.S. military power through the prosecution of U.S. leaders.”). Also, it has been argued the “far-flung military obligations of the United States, and its role in post-Cold War global security, make it uniquely vulnerable to politically motivated prosecutions before the ICC.” Allen J. Dickerson, Who's in Charge Here?—International Criminal Court Complementarity and the Commander's Role in Courts-Martial, 54 NAVAL L. REV. 141, 142 (2007). Generally, four reasons are advanced for United States' opposition to the
only a few Asia Pacific countries are parties to the Rome Statute. Indeed, this was the same reason that the United States

ICC, in the words of Marc Grossman, the U.S. Department of State Under-Secretary for Political Affairs, "(1) [ICC] undermined the role of the UN Security Council in maintaining international peace and security; (2) it [ICC] created a prosecutorial system that is an unchecked power; (3) it [ICC] purports to assert jurisdiction over nationals of States that have not ratified the treaty; and (4) [the ICC] is therefore built on a 'flawed foundation.'" Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 96 AM. J. INT'L L. 706, 724 (2002).

Currently, one hundred and twenty countries are state parties to the Rome Statute of the International Criminal Court. Out of them thirty-three are African states, eighteen are Asia-Pacific states, eighteen are from Eastern Europe, twenty-six are from Latin American and Caribbean states, and twenty-five are from Western European and other states. As of March 1, 2012, the 18 Asia-Pacific state parties to the Rome Statute were: Fiji (Nov. 29, 1999), Tajikistan (May 5, 2000), Marshall Islands (Dec. 7, 2000), Nauru (Nov. 12, 2001), Cyprus (Mar. 7, 2002), Jordan (Apr. 11, 2002), Mongolia (Apr. 11, 2002), Cambodia (Apr. 11, 2002), Timor-Leste (Sept. 6, 2002), Samoa (Sept. 16, 2002), Republic of Korea (Nov. 13, 2002), Afghanistan (Feb. 10, 2003), Japan (July 17, 2007), Cook Islands (July 18, 2008), Bangladesh (Mar. 23, 2010), Philippines (Aug. 30, 2011), Maldives (Sept. 21, 2011), Vanuatu (Dec. 2, 2011). See Asia-Pacific States, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx (last visited on Mar. 1, 2012). It is suggested that the Asia-Pacific region has been particularly resistant to the ICC because several of these countries believe that a global institution such as the ICC may either not be relevant or is inappropriate to deal with regional issues, and that possible gross violations of human rights are best dealt with from within the region. Steven Freeland, Towards Universal Justice—Why Countries in the Asia-Pacific Region Should Embrace the International Criminal Court, 5 N.Z. J. PUB. & INT'L L. 49, 54 (2007). Overemphasizing sovereignty approach to human rights conception, Asia-Pacific countries generally resist the idea of universal human rights arguing that Western nations, in particular, use the idea of universal human rights as a pretext for illegitimate political interference in the internal affairs of other states with vastly unique value systems and challenges. World Conference on Human Rights, Regional Meeting for Asia, Bangkok, Thai., Mar. 29-Apr.2, 1993, Final Declaration, U.N. Doc. A/CONF.157/ASRM/8, A/CONF. 157/PC/59 (Apr. 7, 1993). Some observers have argued that the ICC is a patently "political" institution, which has been created to further Western imperialism. See, e.g., David Greenberg, African Union Declaration Against the ICC Not What it Seems, FOREIGN POL’Y IN FOCUS (Aug. 6, 2009), http://www.fpif.org/articles/african_union_declaration_against_the_icc_not_what_it_seems ("AU responded to criticism from human rights groups by accusing ICC Prosecutor Ocampo of going after [Al]-Bashir in order to seek publicity. Jean Ping is quick to point out that of those cases that have been referred to the ICC, so far only four have been selected for prosecution and all have been against Africans. Numerous African leaders have accused the ICC of being nothing more than a tool of Western imperialism... Rwandan President Paul Kagame has said in reference to the ICC that ‘Rwanda cannot be part of that colonialism, slavery and imperialism.’ Gaddafi himself said that the ICC represents ‘new world terrorism.’"). This argument holds in the Arab world as well, which performs even more dismally in comparison to the Asia-Pacific Region. Of the nineteen member states of the Arab League, for example—not counting Palestine—only five (Comoros, Djibouti, Jordan, Tunisia) are state parties to the Rome Statute. Paradoxically, though, several of the countries most resistant to the idea of universal human rights are
renounced its declaration regarding the compulsory jurisdiction of the ICJ. But, from the perspective of strategic interests of the United States, as long as it remains so extensively and intensely engaged in military and other campaigns abroad—whether unilaterally or multilaterally, it makes sense to avoid potentially crippling exposure to the jurisdiction of the ICC, when its competitors are not equally exposed relative to their interests.

VI. THE ICC AND REGIONAL ORGANIZATIONS

Pursuant to Article 87(6) of the Rome Statute, the ICC "may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate." Regional organizations can contribute vitally to enabling its work. To this end, the ICC signed a cooperation agreement with the European Union.337 However, a similar agreement with the African Union (AU) has been elusive, which is unsurprising because of AU's expressed displeasure at the fact that most situations being investigation concern African countries. The strained relationship between AU and ICC reached a new low when warrants of arrest were issued against President Al-Bashir. The AU has expressed its deep concern over these arrest warrants and called for non-cooperation by AU member states in the arrest of President Al-Bashir.338 The AU has also voiced its commitment to fighting impunity,339 but it perceives and protests a double

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337 Kirsch, supra note 50; see Agreement Between the International Criminal Court and the European Union on Cooperation and Assistance, 2006 O.J. (L 115) 50.


in the ICC's focus on exclusively African situations. According to the AU, the ICC could have investigated situations elsewhere where individuals from powerful states and their allies have been able to evade accountability for serious crimes in violation of international law, for example, in Burma, Chechnya, and Gaza/Israel. But, African States—such as DRC, Northern Uganda, and Central African Republic—referred most of the situations investigated by the ICC and the Security Council referred only two other situations, Darfur and Libya, to the ICC. The prosecutor acted on his own initiative to open an investigation in only one situation (Kenya).

The ICC's work is simply impossible without the cooperation of state parties to the Rome Statute individually and their respective international organizations collectively. But, the AU has interjected itself as a wedge between state parties to the Rome Statute and the ICC, explicitly urging them not to cooperate with the ICC. Far from cooperating with the ICC, at its summit in July 2010, the African Union declared that its members would not collaborate with the ICC to arrest and hand over President Al-Bashir. The AU singled out ICC Prosecutor Luis Moreno-

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340 See ICC Accused of 'Exclusively' Targeting Africans, MAIL & GUARDIAN (South Africa) (Apr. 20, 2011), http://mg.co.za/article/2011-04-20-icc-accused-of-exclusively-targeting-africans (reporting that AU Commission President, Jean Ping, had said that "We've been complaining . . . about the double standard," and that "[p]eople who are targeted there, all of them, are exclusively Africans.").

341 Israel deployed its navy, air force, and army in the operation it code-named "Operation Cast Lead," which lasted from December 27, 2008 to January 18, 2009. Palestinian casualty reports vary. Based on extensive field research, non-governmental organizations projected the total number of persons killed between 1,387 and 1,417. The Gaza authorities reported 1,444 fatalities. The Government of Israel estimated 1,166.


[U]pon receipt of the committee’s report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute.

Id. ¶ 1969(c). And yet, the Security Council did not refer Israel to the ICC.
Ocampo for declarations which it said were “rude and condescending” with regard to Al-Bashir and other cases in Africa.”  

The AU urged the Security Council to defer the situations of Sudan and Kenya and condemned the ICC for referring African states (Chad and Kenya) to the Security Council for having hosted the indicted President Al-Bashir and refusing to execute the arrest warrant contrary to their obligations under the Rome Statute. It would appear that the deferral powers of the Security Council under Article 16 of the Rome Statute are meant to be exercised in the rarest and most extreme circumstances in order to avoid overly subjecting the ICC to the politics of the Security Council.

But what were the solutions proposed by the AU? In the case of Kenya, it proposed a National Mechanism to investigate and prosecute cases under a reformed Judiciary provided for in the new constitutional dispensation in line with the principle of complimentarity. The ICC later held, in Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, that complimentarity could not apply because Kenya failed to demonstrate that it was conducting any investigations. The AU’s preferred solutions of political settlement or national prosecutions do not appear to be consistent with its claim to be committed to fighting impunity. It is also troubling that the AU would suggest that states such as Chad and Kenya, which ignored ICC’s orders, could not be held responsible before the Security Council because, in doing, so they were following decisions of the AU. The AU should not be in the business of aiding and

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343 African Union, supra note 251, ¶¶ 4, 5.


345 African Union, supra note 251, ¶ 6.


348 African Union, supra note 251, ¶ 5.
abetting its member states in the violation of international law. In any case, the AU obligations do not supersede those under the Rome Statute or the United Nations. The AU argued that its decision not to cooperate with the ICC was democratic because it was made by consensus, and it further argues that its position is the best way to promote both justice and peace in Darfur. This argument also entails the conclusion that legal obligations can be suspended by even a unanimous vote of state parties to the ICC. There is no provision for that in the ICC. The framers of the Rome Statute did not intend for head of state immunity or national sovereignty to diminish culpability for impunity when prosecuting serving Presidents. However, that is precisely what the African heads of state argue in their response to the Al-Bashir indictment. They insisted that the “African Union and its Member states reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.”

However, in some contexts the AU has expressed some support for the ICC. The AU responded to the human rights violations in Guinea by stating, through its International Contact Group on Guinea, that there was need to “investigate the 28 September 2009 gross human rights violations including the massacre of unarmed civilians and rapes, identify the culprits[,] and prosecute them in the competent courts in Guinea or at the International Criminal Court so as to put an end to acts of impunity.”

349 See U.N. Charter art. 103. Moreover, none of the AU treaties relates to the same subject matter as the Rome Statute in such a manner that would make the AU treaties supersede the Rome Statute. See Vienna Convention, supra note 126, art. 30.


351 During the negotiation of the Rome Statute, two issues of concern for the many African States were national sovereignty and that the ICC would not obsequiously follow the Security Council, but rather act independently. Maqungo, supra note 170, at 338.

352 African Union, supra note 350.

353 A military junta led by Captain Camara usurped political power in Guinea in December 2008 after the death of longtime ruler Lansana Conte. Camara first promised a return to civilian rule, but soon hinted that he would stand as president. That led to a pro-democracy rally at which more than 150 people were reportedly killed by the military. Guinea Coup Leader Camara Lets Konate Remain in Charge, BBC NEWS (Jan. 15, 2010), http://news.bbc.co.uk/2/hi/afrika/8462551.stm.

354 Eighth Session of the International Contact Group on Guinea, Final Communiqué (Oct. 13, 2009), available at
The ICC should build on these signs of support and flexibility. Should an autonomous regional criminal court in Africa be the way forward? Because the ICC has almost exclusively investigated African situations, it has been suggested that there is need for regional, permanent international criminal courts to complement the ICC that could avoid the shortcomings of the central court in The Hague. The disadvantages of autonomous regional criminal courts are plentiful. First, autonomous regional criminal courts could diminish the interest of the international community in those cases that are tried on a regional basis. Second, regional, political expediency might prevail over the imperatives of criminal justice. A regional court might be more vulnerable to the political needs and interests of neighboring states in the region. The AU, for example, has already demonstrated that in certain cases it would be unwilling to have some state officials, particularly serving Presidents, investigated by the ICC. Third, regional courts could take away from the uniform, consistent, and harmonious development of international criminal law because of the possibility of diverse regional interpretations of substantive and procedural law.

But some might argue that regional criminal courts would simply be another layer of jurisdiction that neatly fits into the existing complementarity scheme. In fact, drawing a parallel with international human rights law, it could be argued that regional human rights courts have contributed to a more rigorous human rights enforcement regime than would be the case if there were no such regional mechanisms to augment global human rights institutions. However, international human rights law is not to be compared with international humanitarian law, because the former involves state responsibility while the latter engages individual responsibility and this distinction is critical with regard to the level of enforcement. Yet, even without autonomous regional

356 *Id.* at 74.
357 *Id.* at 76.
358 *Id.*
359 As Ratner argues, one of the reasons why the ICC may not be as effective as International Human Rights adjudication bodies is that the “resistance to trials is very strong,” and that is why it is one thing for the states to sign on to international treaties that allow for the creation of courts that can impose damages upon states, and quite another
criminal courts, the ICC can "localize" its activities. Article 3(3) of the Rome Statute provides that the ICC can sit elsewhere than in The Hague.

VII. THE KAMPALA REVIEW CONFERENCE

Due to some unfinished business, such as defining the crime of aggression, at the end of the negotiations that led to the adoption of the Rome Statute, Article 123 of the Rome Statute stipulated that seven years after the Statute entered into force, the Secretary-General of the U.N. would convene a Review Conference to consider any proposed amendments to the Statute. In accordance with this provision, the first Review Conference was held in Kampala, Uganda from May 31 through June 11, 2010; its purpose was to discuss proposed amendments to the Rome Statute and to take stock of the progress of the Rome Statute system. The proposed amendments included: i) the incorporation of a definition and the conditions for the exercise of the jurisdiction of the ICC on the crime of aggression; ii) amendments to Article 8 to extend the criminalization of the use of certain weapons to non-international armed conflicts; and iii) the revision of Article 124, which grants an optional seven-year exemption from the Court’s jurisdiction regarding war crimes for a state’s nationals upon that state’s ratification of the Rome Statute.

State parties made various proposals for consideration at the conference, but not all of them gathered sufficient support to merit consideration. For example: the Netherlands proposed the inclusion of the crime of terrorism in Article 5 of the Rome Statute; South Africa made a proposal regarding Article 26 of the Rome Statute involving the power to defer cases and situations before the ICC to the U.N. General Assembly; Mexico put forward a proposal regarding the inclusion of the use of and the threat to use nuclear weapons in the definition of war crimes; Belgium proposed the classification as war crimes of the use of biological weapons, chemical weapons, and anti-personnel mines; for them to accept seeing their own leaders in the dock or in jail, which explains why the complementarity principle is the core of the ICC regime that cases are heard mostly at the national level where the states can have better control over the judicial process. Steven R. Ratner, The International Criminal Court and the Limits of Global Judicialization, 38 TEX. INT’L L.J. 445, 447-48 (2003).

360 COAL. FOR THE INT’L CRIMINAL COURT, supra note 208, executive summary.

361 Id.
and Belize and Trinidad and Tobago proposed the inclusion of the crime of international drug trafficking. However, none of these proposals gathered sufficient support for consideration at the conference itself. Instead, due to the limited time available and the need for result-oriented discussions, the focal points of the Review Conference were complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice.362

The Kampala Review Conference achieved some milestones, particularly the breakthrough in defining the crime of aggression. The first attempt to hold individual decision-makers accountable for the crime of aggression (i.e. "waging a war of aggression") was after the Second World War. Accordingly, several individuals were indicted for crimes against the peace. However, such indictments were criticized as an infringement of the nullum crimen sine lege principle, because there was no preexisting, binding legal instrument relating to crimes against aggressive war.363 Subsequently, there were several attempts,364 beginning with the United Nations General Assembly's adoption of the Principles of International Law Recognized by the Nuremberg Tribunal,365 to declare war of aggression a crime under international law. None of these instruments were binding.

The first opportunity to create a binding definition the aggression came at the Kampala Review Conference. How successful was this effort? First, the crime of aggression, as defined under Article 8bis(1), is a "leadership crime" that can only be committed by those "in a position effectively to exercise control over or to direct the political or military action of a State." Thus, acts committed by people acting in a private capacity or by lower-level political or military officials of a state are excluded.366 Although the elements of the crime indicate that more than one person may meet this test,367 not only is this stipulation vague, it would appear that the overall thrust of the provision is narrow and

362 Id.
366 Ruys, supra note 363, at 111.
367 R.C. Res. 6, U.N. Doc. RC/Res.6 (June 11, 2010).
self-limiting. Critical decisions can be exercised by persons well below those in the top echelons of government, although not strictly within the inner circle. Additionally, criticism has been leveled at the alleged lack of specificity of the crime of aggression inspired mainly by the vagueness of the term ‘manifest’ in Article 8bis. 368 “According to Article 8bis(1), the ‘manifestness’ must be assessed by reference to the ‘character’, ‘gravity’ and ‘scale’ of the act of aggression. Understanding 7 adds that each of the three components “must be sufficient to justify a ‘manifest’ determination.” It is not obvious whether (unauthorized) military interventions intended to bring an end to grave human rights violations in the target country or to oust brutal dictators and have them replaced by (more) democratic governments necessarily immune from prosecution under Article 8bis. 369 The counter-argument to this is that the crime of aggression had already entered the realm of customary international law, with reference to which any ambiguity can be resolved. 370 However, if that were the case, there would be no need to flesh out the elements of this crime with sufficient specificity under the Rome Statute and accompanying Elements of Crime. In any case, contrary treaty law can, in certain circumstances, supersede customary international law. 371

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368 The “threshold” clause at the end of the definition of “crime of aggression” indicates that not every act of aggression is the basis for criminal responsibility. It is only those that by their character, gravity, and scale, constitute a “manifest” violation of the U.N. Charter. Most conference participants accepted that they could live with this clause in return for removal of any requirement that there be a “war of aggression,” or that the list of acts in the definition of “act of aggression” be more limited than the list in General Assembly Resolution 3314. Roger Clark, The Review Conference on the Rome Statute of the International Criminal Court, Kampala, Uganda, 31 May-11 June 2010, 16 Austl. Int’l L.J. 9, 16 (2009).

369 Ruys, supra note 363, at 117.

370 See id. at 117-18 (citing R. v. Jones, [2006] UKHL 16, § 19 (U.K.) for the proposition that the “core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial . . . of those accused of this most serious crime.”).

Significantly, although debate had previously raged regarding the perception that there had been state party conflicts between justice and peace: particularly, that the requirements of one may require the abandonment of the other. State parties at the Review Conference firmly rejected this contention, accepted the complementary nature of peace and justice, and concluded that impunity is no longer an option.372 The Review Conference achieved consensus regarding three proposed amendments to the Rome Statute. Firstly, the state parties extended the use of certain weapons as war crimes in non-international conflicts. Secondly, they agreed not to delete Article 124, but to review it in five years. Article 124 allows a state, upon ratification of the Rome Statute, to exempt its nationals from jurisdiction of the Court over war crimes for a seven-year period. Thirdly, it adopted amending provisions for the crime of aggression. The Conference also reviewed the challenges pertaining to complementarity, a core principle of the ICC system. It highlighted the problems faced by domestic institutions operating in weak economies, the lack of infrastructure, and the lack of confidence in the judicial structure—exacerbated by a large backlog of cases—which is usually present in the aftermath of mass atrocity.373 The solution proposed was an emphasis on the notion of “positive complementarity”374 and the ICC’s Legal Tools Project, which is aimed at strengthening national jurisdictions. This project consists merely of a comprehensive online or electronic knowledge system that provides an expansive library of legal documents and a range of research and reference tools.375

The sticking point with regard to the crime of aggression was

(entered into force Nov. 16, 1994). These treaty Articles illustrate how a treaty may sometimes reverse a rule of customary international law. MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 117 (4th ed. 2011).

372 COAL. FOR THE INT’L CRIMINAL COURT, supra note 208, executive summary.


374 This notion was premised on the idea that the ICC is not a development agency. Positive complementarity was then defined as:

[All activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

Id. at 798.

375 Id. at 804.
the role of the Security Council. The state parties agreed upon a jurisdictional regime for the crime of aggression that provides separate procedures depending on whether the Security Council referred the situation, it came before the Court through a state referral, or upon the ICC Prosecutor’s initiative. A minimum of thirty states must ratify the new crime of aggression amendments and state parties are obligated to make a decision to trigger the ICC’s jurisdiction after January 1, 2017.

The conditions for triggering the ICC’s jurisdiction over the crime of aggression were a contentious issue. “Some States, led by the permanent five of the UN Security Council, argued that the Security Council should have the sole power to refer a situation that potentially involves the crime of aggression to the ICC for investigation.”376 The division was over whether the Security Council could refer a situation without first making a determination as to whether an act of aggression had occurred. “The supporters of the solitary Security Council trigger mechanism pointed to the powers given to that body to determine acts of aggression under Chapter VII of the U.N. Charter.”377 “The majority of States were concerned about limiting the referral mechanism for the crime of aggression to only the Security Council, arguing that this would risk politicizing ICC investigations on aggression.”378 The “possibility of Security Council paralysis might result in a crime of aggression going unpunished and the strengthening of impunity.”379 Moreover, “a dual system of accountability would arguably be created as the nationals of the permanent members of the Security Council would, protected by their governments’ veto power, be exempt from ICC jurisdiction over the crime of aggression.”380 “Adopted by consensus, the amendments on the crime of aggression reflect a delicate compromise negotiated among States.”381 Article 15bis establishes a regime for the exercise of jurisdiction covering state referrals and the Prosecutor’s proprio motu investigations. The ICC will have jurisdiction over situations arising from these two trigger mechanisms:

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377 Id.
378 Id.
379 Id.
380 Id.
381 Id. at 16.
(1) where the crime of aggression arises from acts of aggression between States parties to the Rome Statute, unless the State party committing the act of aggression has previously lodged an opt-out declaration with the Registrar of the ICC;

(2) where the Prosecutor considers there to be a reasonable basis to proceed with an investigation and has ascertained whether the Security Council has made a determination of an act of aggression and notified the UN Secretary General of the situation before the ICC; and

(3) where no such determination is made by the Security Council after six months, and the Pre-Trial Division of the ICC authorizes the investigation.382

Article 15bis excludes the ICC’s jurisdiction with respect to a non-state party over crimes of aggression when committed by that state’s nationals or on its territory. Under Article 15ter, the ICC can exercise jurisdiction over crimes of aggression pursuant to Security Council referral of a situation, in the exactly the same manner as that set out in Article 13(a) of the Rome Statute. Although there was a breakthrough, it appears that onerous conditions have been imposed for the ICC to ever exercise jurisdiction over the crime of aggression. There is a feeling that it is still business as usual when it comes to the use of force in international law. With regard to State referrals and proprio motu investigations, the prosecutor first has to ascertain whether a determination of an act of aggression has been made by the Security Council, and if not, the prosecutor must wait six months before he may proceed with the investigation provided that the Pre-Trial Division has authorized the commencement of the investigation. It is curious whether the passage of six months by itself can supersede the authority of the United Nations Security Council with regard to the determination of whether an act of aggression has taken place.383 Also, under Article 15bis, “why

382 Id. at 17.

383 See U.N. Charter art. 103 (providing that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). It is important to note, however, that amended Article 15 of the Rome Statute provides that the Security Council can intervene to prevent or suspend an investigation or prosecution for a (renewable) period of twelve months by means of a Chapter VII resolution to this effect. Rome Statute, supra note 4, art. 15. The point, though, is not whether the Security Council can stop the ICC from such an investigation or prosecution, rather it is which organ has primary, if exclusive, competence with regard to the determination of whether an act of aggression has taken place, unless we make the
would a State party which has accepted the amendment afterwards want to opt-out of the regime again? Would it then not be more sensible not to ratify the amendment in the first place?”

From a substantive standpoint, Article 8bis explicitly states that the act of aggression has to be determined “in accordance” with Resolution 3314 Article 4, which provides that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.” “From a criminal law perspective, this is problematic because the principle of legality, at least in national law, would require that the list of punishable actions be clearly defined and not open to interpretation (or amendment) by the judges.” The Kampala Review Conference was short on time and substance—covering little but important ground—and thus, this is why review of the Rome Statute and the ICC can only continue.

This is a result of the procedural hurdles that amended Articles 8 and 15 of the Rome Statute have been faced with. At any rate, the jurisdiction of the ICC, with respect to the crime of aggression has been drastically curtailed. One of the issues to be distinction that the Council’s role is a political determination while that of the ICC is judicial. It could be argued that based on Article 24 of the U.N. Charter and the 1950 Uniting For Peace Resolution, the Security Council has primary, but not exclusive power with respect to the maintenance of international peace and security, and that the ICJ has addressed issues of aggression without deferring to the Security Council, most notably in Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19). It is submitted, however, that like the Security Council, the ICJ has been wary of actually using the word “aggression.” Clark, supra note 368, at 17. In any case, the Security Council could point to Article 39 of the U.N. Charter which vests powers regarding the determination of the existence of a threat to international peace and security with the Security Council. U.N. Charter art. 39.


385 Id. at 724.

386 See The Crime of Aggression, supra note 367. Under the amended Article 15 of the Rome Statute, the ICC “may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties,” “shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute,” “may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar,” “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory,” and “may exercise jurisdiction only with respect to crimes of
decided is how to reconcile the current role of the Security Council in determining whether an armed attack, i.e. aggression, has taken place in violation of the U.N. Charter with the ICC's role in determining whether an accused's state has committed an act of aggression with the accused being the responsible agent of his State.

IIX. RECOMMENDATIONS AND CONCLUSION

A. Recommendations

The Kampala Review Conference was not the final review of an aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.”

387 Article 39 of the U.N. Charter provides that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter, art. 39 (emphasis added). Obligations under the U.N. Charter supersede those under any other international treaty. See id. art. 103. Some commentators believe that in the context of an ICC case, the Security Council's power to determine the existence of aggression is not exclusive; they believe that in the ICC context, the Charter permits other bodies, such as the ICC, the ICJ, or the General Assembly, to determine the existence of aggression. See Andreas L. Paulus, Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis, 50 WAYNE L. REV. 1, 21-22 (2004); see also Giorgio Gaja, The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 121 (Mauro Politi & Giuseppe Nesi eds., 2004); Saeid Mirzaee Yengejeh, Reflections on the Role of the Security Council in Determining an Act of Aggression, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, supra, at 125; Paula Escarameia, The ICC and the Security Council on Aggression: Overlapping Competencies?, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, supra, at 133; Marja Lehto, The ICC and the Security Council: About the Argument of Politicization, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, supra, at 145; Luigi Condorelli, Conclusions Générales, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, supra, at 151. Exclusive determination by the Security Council, a political body, would involve it in an inappropriate judicial role. See Mark S. Stein, The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power to Determine Aggression?, 16 IND. INT'L & COMP. L. REV. 1, 5 (2005). The Kampala Review Conference, but in a manner that tries to please everybody, settled this discussion by providing in Article 15(6) that “where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.” Additionally, Article 15(5), provides that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.” INT'L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 15bis(5) (2011), available at http://www.unhcr.org/refworld/docid/3ae6b3a84.html.
the Rome Statute, and in fact, it considered a limited number of issues. The Rome Statute provides further opportunities for review; stating “[a]t any time thereafter, at the request of a State party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of state parties, convene a Review Conference.”388 Whenever that opportunity becomes available, it will be necessary to review some of the issues that were not considered at the Kampala Review Conference. In light of the discussion in this Article, the following recommendations of reviewable issues can be made.

It is inconceivable that the ICC will ever succeed in its objectives unless it can realistically confront and deal with its cumbersome procedures. It is extremely important for the ICC to deal with excessive delays in determinations. Procedurally, and operating within the rules, it is important that the judges of the ICC do not allow cases to be prolonged and take ownership of the proceedings.389 The tendency of the ICC to be overly concerned with how it will be judged from the standpoint of history must be realistically moderated through lesser focus on procedural technicalities390 in order to dispense cases on a more realistic timescale.391 It is imperative, for example, to cut down the pre-trial procedures, such as the confirmation of charges and disclosure processes. The Pre-Trial Chamber should continue to take disclosure of evidence in summary form in order to save time, and the Chambers should aim for expedited confirmation proceedings.392 But it is not just the procedures that have dogged

388 Rome Statute, supra note 4, art. 123(2).


390 That said, it should be kept in mind that the complexity of the rules of procedure and evidence derives from the desire of the negotiators to significantly curtail the power of judges and to reduce judges to a mechanical function, thus preserving state sovereignty. For example, the Elements of Crimes have been fleshed out into a wealth of minute detail, which cannot be disregarded by judges because those definitions have been adopted by state parties. David Hunt, The International Criminal Court: High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges, 2 J. INT’L CRIM. JUST. 56, 61 (2004) (stating that the Rome Statute evinces a deep suspicion of the ICC judges, and that law-making by international judges is resented by many states).

391 A former judge of the ICC has lamented that the court has had to deal with a “particularly complex Statute and Rules of Procedure and Evidence, where certain provisions are ambiguous or even contradictory.” Jorda, supra note 39, at 254.

392 CONFIRMATION, supra note 62, at 8-9.
the ICC; the lack of cooperation has been a huge issue. There is need to provide more serious consequences for non-cooperative states. Those states that harbor suspects should either forfeit their membership of the ICC or be subject to a serious sanctions regime. Meanwhile, there is a need to develop criteria for the exercise of the ICC Prosecutor's discretion, which has been an issue of concern for many States. Pure discretion can be too unpredictable and easily politicized. Additionally, it is important to establish criteria for the determination of the gravity of a situation that is worth investigating by the ICC.

The Rome Statute could be amended in some of the following areas. The statute ought to explicitly deal with the issue of amnesties, as it is at the center of the debate as to whether peace and justice can be reconciled. With regard to victims and reparations, there is need to provide clearer and less restrictive guidelines for determining victim status. There is also a need for greater balance of defendants' and victims' rights. It is extremely important to streamline the right of victim participation in order to better achieve the objectives of efficiency and the avoidance of conflict between restorative and retributive justice. It may mean allowing a greater role of the ICC Registrar in the determination of eligibility of applicants. Article 19(1) of the Statute is silent on the issue of whether suspects have a right to legal representation in admissibility proceedings, particularly in circumstances where they have not yet appeared before the Court.

There is need to provide clearer stipulations on this issue. Substantively, and in light of the challenges of the last decade, it is imperative for the ASP to continue to work toward the adoption of additional crimes to be within the ambit of the ICC. In particular, there is need for the addition of specific weapons to the definition of War Crimes in Article 8, the inclusion of the use of nuclear weapons in the definition of War Crimes, the adoption of the crime of terrorism as a distinct crime under the Rome Statute, and the inclusion of the crime of International Drug Trafficking in Article 5.


394 See John T. Holmes, *The Principle of Complementarity, in The International Criminal Court: The Making of the Rome Statute* 52 (Roy S. Lee ed. 1999) (remarking that the “debate also revealed continued reservations over the . . . proposal . . . giving the Court jurisdiction where a person had been pardoned.”).
As a first step in implementing complementarity and in closing the impunity gap, it is important that state parties enact implementing legislation. There must be a time limit within which state parties to the ICC implement the Rome Statute within their domestic legislation, as well as a time limit within which a State can validly invoke the principle of complementarity. At the time of the Kampala Review Conference, it was reported that, of the one hundred and eleven state parties, only forty-four had enacted domestic legislation to enforce the Rome Statute, and in some cases they had enacted legislation that was flawed.  

In light of the strained relationship with the African region, the ICC must adopt a strategy that focuses on building support on a case-by-case basis into a groundswell of the AU's cooperation. It will also be necessary for the ICC and the Security Council to demonstrate evenhandedness when investigating non-African situations. Some African states such as Botswana, South Africa promised that they would arrest President Al-Bashir if he ever entered their territories, showing a willingness to cooperate that could lead to increased results if the ICC further integrates into Africa.  

It is important that the ICC considers setting up offices and conducting some of its activities within Africa, which would give African leaders an opportunity to more closely observe the workings of the ICC. In deciding to hold the Review Conference in Kampala, for example, the ICC was able to elicit support of Uganda with President Museveni urging African leaders to support the ICC. Also, the African Commission on Human and Peoples' Rights (ACHPR) as well as the African Court of Justice and Human Rights (ACJHR) could complement the work of the ICC. The African Union has, in fact, recommended that the ACHPR and the ACJHR "examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes." However, given that the ACHPR can only issue non-binding decisions and that the ACJHR is still in embryonic form and suffers from some of the

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395 COAL. FOR THE INT’L CRIMINAL COURT, supra note 208, at 36-37.
396 Musoke & Olupot, supra note 37.
397 See, e.g., Museveni Wants Africa to Embrace ICC, supra note 56.
limitations of the ACHPR,399 it would be necessary to first address these issues and then provide for proper jurisdiction. Additionally, it is important African NGOs try to advocate for the ICC. For example, when the Kenya section of the International Commission of Jurists sued the Kenyan government for its refusal to arrest President Al-Bashir, the High Court of Kenya issued an indictment to that end which put local pressure on the government.400

With regard to the apparent incompatibility of the goals of peace and justice, the Rome Statute needs to clarify what will happen in the event that the ICC pursues an ongoing investigation. Must the peace process supersede or stall the prosecutorial effort? If a peaceful resolution is found, must prosecution cease? These questions have arisen in the Darfur and Uganda situations and certainly need answers. The phrase in the "interests of justice" does not seem to include the interest of peace. It is argued that the Security Council's intervention to defer an investigation can only happen if the ICC's proceedings are hurting its role in promoting international peace and security. This condition must be fulfilled in order to preserve the ICC's independence from political influence and to uphold the rule of law.402 Thus, a deferral of a situation being investigated by the ICC must be proceeded by a demonstration that such a step would restore peace. All of these issues need to be clarified by the Rome Statute.

B. Conclusion

There is no doubt that the ICC has a promising future, although to date the single most important country—the United States—is not yet a member. But the objections of the United States relate to its national interests rather than its opposition to


401 Rome Statute, supra note 4, art. 53(1)(c).

402 See RELATIONSHIP, supra note 40, at 15.
the institution of the ICC per se, which is why the United States has not used its veto powers at the Security Council, which could have thwarted the objective of international criminal justice. The majority of states are parties to the Rome Statute. To date, there have been three State referrals from DRC, Uganda, and the Central African Republic, and two referrals from the Security Council regarding the situation in Darfur (Sudan) and Kenya. Compared to the other international prosecution forums, such as the ICTY and ICTR, the docket of the ICC is quantitatively dismal. The fact that the Security Council has referred certain situations, especially those regarding serving heads of state, to the ICC is an extremely important step in the fight against impunity. It sends an unmistakable signal about the resolve of the international community that when it established a permanent criminal tribunal, it meant serious business. The ICC faced tremendous challenges and dents to its reputation because, by investigating situations that involved ongoing conflicts, the ICC appeared to be an obstacle to peace. Nonetheless, time has vindicated the wisdom of the proposition that there can never be peace without justice. The single conviction the ICC made in the last ten years should not be underestimated in terms of its significance. It stands for the proposition that no matter how long it takes, the international community’s resolve to fight impunity is strong and unyielding. So, from a qualitative standpoint, the ICC has made important contributions to the achievement of the objectives of international criminal law. If most of the objectives of criminal justice have not yet been attained by the ICC, at least one of them was achieved—deterrence.

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403 The Rome Statute provides the ICC jurisdiction in a “situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party.” Rome Statute, supra note 4, art. 13(a); see also id. art. 14.

404 The Rome Statute provides that the ICC jurisdiction in a “situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” Id. art. 13(b).

405 The Preamble of the Rome Statute affirms that the “most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,” and that state parties were “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” Id. pmbl.

406 Critics argue that sometimes it is difficult to know if the ICC actually serves this objective. It is submitted, for example, that the Srebrenica massacre of an estimated 8,000
Unfortunately, although the ICC has received over 8,733 communications since July 2002, from more than 140 States, with a majority of those communications from individuals in the United States, United Kingdom, Germany, Russia, and France, it has completed only one trial. This does not reflect well on the reputation of the ICC, even if the result was arrived through a fair trial. The ICC must also understand that justice delayed is justice denied. The ICC’s procedure is too cumbersome. It is important that the ICC procedures be improved with a view to promote expeditiousness while upholding the imperative of holding fair trials. The ICC could learn a few lessons from the ICTY and ICTR, even if the ICC is the creature of a treaty. ICTR and ICTY did not have to depend so much on the cooperation of State parties. The ICC depends so much on the cooperation of states—the Security Council can only do so much when states do not cooperate—which has been one reason for the lack of arrests and, therefore, the lack of expeditiousness. The ICC must rely on state parties to the Rome Statute for the preservation of evidence, as well as to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant for arrest under Article 58. The Rome Statute must ensure that there are consequences for lack of state cooperation, perhaps in the way of sanctions, fines, suspensions, or even expulsion. The complementarity principle, predicated on a state-centric paradigm, has been a source of problems for the ICC in the sense that states tend to use it as a pretext to stall the work of the ICC. It could be

Bosniaks took place when the International Criminal Tribunal for the Former Yugoslavia was already fully operational, and that neither the ICTY nor the ICTR was able to influence the behavior of the political and military leaders in Sierra Leone, Chechnya, East Timor, or Darfur. Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ILSA J. INT’L & COMP. L. 145, 151 (2007). But even these critics admit that the long-term influence of international trials to discourage future offenders can be substantial, especially in light of the fact that the ICC is not an ad hoc institution but a permanent one that increases the chances that potential offenders will be prosecuted by way of a permanent threat. *Id.* at 54.


409 *Rome Statute*, *supra* note 4, art. 8(b).

410 *Id.* art. 8(e).
argued that complementarity is favorable to the ICC because ICC judges are granted the ultimate right to determine whether domestic courts have demonstrated the willingness and/or ability to prosecute. But several outstanding international courts, including the European Court of Human Rights, have analogous powers to determine whether domestic remedies have been exhausted. Ultimately, precious time is lost when States insist on complementarity, pushing the ICC to engage in prolonged investigations relating to this issue.

Regional organizations like the African Union ought to be more supportive of the work of the ICC if they are serious about fighting impunity. Although it appears that Security Council referrals of situations such as those in Darfur are counter to the principle of complementarity, the Security Council only acts upon threats to international peace and security. In cases involving State parties to the Rome Statute, the U.N. Charter would trump the Rome Statute's complementarity provisions, so regional organizations like the African Union should desist from pushing the ICC to defer ongoing investigations.

The ICTY and ICTR were formed pursuant to Security Council resolutions under Chapter VII of the U.N. Charter. All of the permanent members of the Council were supportive. This support significantly increased the impact of these ad hoc tribunals. Lacking the full support of the Security Council in politically and strategically significant situations, such as those in Syria, has negatively impacted the work of the ICC. That several major international actors like the United States, China, and Russia not only have yet to become party to the Rome Statute, but

411 Scheffer, supra note 12, at 1573.

412 U.N. Charter art. 103 (providing that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."), Sudan is not party to the Rome Statute but this makes no difference. Sudan is not only not a party, it objected to the inclusion of internal armed conflict as a crime under the Rome Statute during negotiations. See Maqungo, supra note 165, at 337 n.10.

413 U.N. Charter art. 25 (providing that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

414 See Lijun Yang, Some Critical Remarks on the Rome Statute of the International Criminal Court, 2 CHINESE J. INT'L L. 599, 600 (2003) (observing that some Chinese scholars point out that against the background of modern international politics, there exists the realistic danger that the ICC would be controlled and abused by politicization).
have actively undermined the ICC’s prosecutions, is an ongoing threat to its effectiveness. This is because these major actors cannot be credible enough when they are not themselves subject to the same standard. It leaves the impression that the ICC is a tool that is being wielded by the big brothers, short of war, against the smaller and developing states.\footnote{The ICC Prosecutor has defended his focus on Africa by stating that one of most important criterion for selection of situations and cases is gravity, and “situations are in Africa precisely because of the gravity criterion.” Keynote Address, supra note 105, at 498. The problem, though, which the Prosecutor admits, is that there is no precise delimitation of the factors that determine “gravity.” Id.} This situation has been resented particularly because ICC investigations have not gone beyond Africa.\footnote{The ICC Prosecutor has analyzed situations beyond Africa, but never recommended further action. In 2006, in two such situations, he announced his decision not to start an investigation. In the cases of allegations of war crimes against British soldiers in Iraq, he concluded that there was only a reasonable basis to believe that there were four to twelve victims of willful killing and a limited number of victims of inhuman treatment, totaling less than twenty in all, that the gravity of the allegations was too low to justify ICC intervention, and that national proceedings had been commenced in each instance. In the case of Venezuela, he similarly concluded that the alleged crimes fell short of the threshold of crimes against humanity. Kirsch, supra note 16, at 522-23. Other situations concerned Afghanistan, Colombia, Georgia, and Palestine. Id. at 523.} That African States would push back on the work of the ICC in Africa is not surprising. Even if the ICC was not created for this purpose, sometimes perception is reality.