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The International Criminal Court – An International Criminal World Court?

Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation

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Preface

My interest in International Public Law and Human Rights had already evolved in my youth and was the reason for studying law.

The further Advanced Master's Program (LL.M) at the *Geneva Academy of International Humanitarian Law and Human Rights* reaffirmed my commitment to stand up and fight for those who have suffered from the most serious crimes of concern but who have no means of fighting for justice themselves. It has been a great privilege to study under the best professionals in the fields of International Humanitarian, Criminal, Human Rights and Refugee Law. One of these legendary professors, to whom I owe the topic of my book, as well as my awareness of and special dedication to International Courts and Tribunals, is Professor Nicolas Michel. With his renowned expertise, his exciting and passionate lectures, and a visit to The Hague, he ignited in me a particular interest in and dedication to the International Criminal Court, while never failing to consider the political environment in which International Criminal Law is embedded. Furthermore, I had the opportunity to meet such rare charismatic and passionate individuals during my time at the OHCHR, whose work, along with Prof. Michel's, has encouraged me to take this path no matter how many obstacles need to be overcome along the way.

At my Alma mater, I am especially grateful to my supervisor and mentor, Prof. Dr. Stefan Oeter, from the Faculty of Law of the University of Hamburg, who enabled me to write my PhD thesis about my favourite topic and who supported me with his profound and distinguished competence; his willingness to engage in dialogue and to discuss various legal topics from different angles was more than helpful. With the special expertise of Prof. Dr. Oeter as well as my second supervisor, Prof. Dr. Florian Jeßberger, my PhD defence was one of the most interesting and inspiring discussions I have had about the International Criminal Court.

I am equally grateful to my closest friends and family for their invaluable support. I especially thank my cousin Natalie Haghnazarian for her thorough editing, but first and foremost Tamalin Bolus for her assistance throughout—be it advice on form or substance—from the other side of the world. It was a high workload, but I could always rely on her generous support.

Moreover, I am extraordinarily thankful to Minas Dreyer, who not only supported me during my work on my thesis but also constantly encouraged me to pursue and implement my dreams, no matter to which country or city they would take me, nor how far away the goal seemed to be at a given moment. I thank him for always being by my side.

Most importantly, I would like to express my wholehearted gratitude to my beloved grandmother, Maria Schebesta, and my beloved father, Albert Babajan. They accompanied me throughout the time with their support, counsel, patience, confidence and unconditional love.

For this reason, I would like to dedicate this work to both of them.

Hamburg, Germany Sarah Babaian

Contents

Chapter 1
Introduction

This book will cover the question, whether the International Criminal Court (ICC) can be regarded as an International Criminal World Court, capable of exercising jurisdiction upon every national of the world, despite the fact that the Court constitutes a treaty-based body which at this stage does not include all States of the world. To underline the phenomenal development in international criminal law over the past 50 years and the tremendous progress of the establishment of International Tribunals and in particular the International Criminal Court, a historical excursus will be given. Furthermore, the ICC and its intention and characteristics will be presented to determine the main question, if this permanent and independent Court can be regarded as a Criminal World Court. The analysis will be based on a twin-pillar system consisting of a judicial and an enforcement pillar.[1] While the first pillar is based on the Rome Statute itself, addressing the question whether the ICC has the capability of exercising its strength through the application of its jurisdiction regime, the enforcement pillar contains an analysis regarding the cooperation and judicial assistance mechanism pursuant to the Rome Statute's provisions on the one hand and its practical implementation through States practice on the other hand. The examination of both pillars comprises an analysis regarding the strength of the provisions themselves while simultaneously determining their applicability to Member- as well as Non-Member States to the Rome Statute.

The judicial pillar entails first and foremost the examination of two very important articles of the Rome Statute which may underline the power of the Court: article 12 (2) (a) and article 13 (b) ICC Statute.[2] While article 12 (2) sets the conditions for national and territorial jurisdiction and paragraph (a) gives the opportunity to exercise territorial jurisdiction even upon individuals of Non-Party States, article

[1] See Kirsch (2007), p. 4. Unlike the present interpretation, Judge Kirsch defines the twin-pillar system slightly different: While the "judicial pillar" constitutes the "Court itself", thus the Court's strict adherence of the provisions of the Statute, the "enforcement pillar" is dedicated to States, which' responsibility is to cooperate with and support the ICC.

[2] If not stated otherwise, those are articles of the Rome Statute.

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13 (b) triggers the ICC's jurisdiction also upon Non-Member States to the Statute when the United Nations Security Council (SC), acting under Chapter VII of the UN-Charter, refers the situation to the ICC. Both highly criticized articles will be extensively discussed to determine to what extent they give an affirmative response to the question of book, whether the ICC can be designated as an International Criminal World Court. For this reason the explicit accusation that article 12 (2) (a) constituted a violation of article 34 of the Vienna Convention on the Law of Treaties (VCLT) and entails therefore an invalid *Drittwirkung* on Third States, has to be examined. Afterwards attention will be paid on the difficulties arising out of SC referrals of situations of Non-Member States to the ICC; these referrals of the SC do not only trigger the jurisdiction of the Court but may lead for the Non-Member States by virtue of the SC resolution to the applicability of most of the Statute's provisions.[3] This difficult subject of SC referrals can be presented on two already existing examples: the SC referral of the situation in Sudan in 2005 to the ICC[4] and the SC referral of the situation in Libya in February 2011[5] and its decision that Sudan and Libya shall cooperate fully with the Court, even though none of those States are Parties to the Rome Statute.[6] At this stage the highly problematic aspect of personal immunities, especially the applicability of the irrelevance of the official capacity article 27, with all its controversial opinions will be incidentally discussed to determine to what extent the result of article 13 (b) supports or neglects the designation to be a Criminal World Court. The analysis regarding the removal of personal immunities will be pursued in the examination of one of the most important provisions of the Rome Statute, article 27. The article serves the Court's main purpose to end impunity for any perpetrators of Crimes against Humanity, War Crimes and Genocide while it simultaneously contributes to the prevention of these Crimes. Member-States to the Rome Statute waived their immunities when acceding to the Rome Statute. Consequently, it will be analyzed if the Court can equally exercise its jurisdiction by applying article 27 (2) in cases where a Member State referred a situation to the ICC or the Prosecutor initiated investigations *proprio motu* regarding a national of a Non-Member State to whom immunity *ratione personae* is attached. The response to the question will simultaneously contain the important determination regarding the difference between the vertical relationship on the one hand and the horizontal relationship on the other hand. While the first link regulates the relation between the Court and the State, the second relationship determines the connection of States among each other. It will be examined that the vertical as well as the horizontal relationship have to be strictly

[3]Despite the fact that the Court determines that all of the Rome Statute's provisions will be applicability, it has to be emphasized that provisions of part 4 and part 12 of the Statute remain untouched, see Akande (2009), p. 342.

[4]See UN-Security Council Resolution 1593 (2005) UN Doc S/RES/1593.

[5]See UN-Security Council Resolution 1970 (2011) UN Doc S/RES/1970.

[6]See Akande (2009), p. 342; UN-Security Council Resolution 1593 (2005) UN Doc S/RES/1593, para. 7; UN Security Council Resolution 1970 (2011) UN Doc S/RES/1970, para. 8.

distinguished from each other due to the fact that article 27 is part of the jurisdiction mechanism, therefore only regulating the vertical relationship. The conclusion is, firstly with regard to the judicial strength of the Court in applying the article also to Non-Member States of paramount importance and, secondly, does it provide clarification with regard to the accusation that article 27 constituted a contraction to article 98 (1), which triggers the triangular relationship between the Court, the requested—as well as third State.[7] As article 98 is part of the cooperation mechanism of the Court, it will be extensively portrayed in the enforcement pillar. A further significant determination relates to the in 2010 incorporated articles 15 *bis* and 15 *ter*, which regulate the exercise of jurisdiction regarding the Crime of Aggression pursuant to State referrals and *proprio motu* investigations as well as with regard to SC referrals. That States reached a consensus with regard to the definition of the Crime of Aggression as well as on the conditions with respect to the jurisdiction mechanism at the 16th Assembly of States Parties, activated at the 20th anniversary of the Rome Statute on 17 July 2018, constitutes one of the greatest and historic achievements in international criminal law.[8] It took the international community over 60 years to establish an International Criminal Court which makes individuals criminally responsible for the commitment of a Crime of Aggression. Nevertheless, the incorporation of articles 15 *ter* but first and foremost 15 *bis* involves several difficulties. Therefore, a comprehensive analysis will respond to the allegations that these new incorporated jurisdiction regimes are contrary to the jurisdiction mechanism anchored in article 12. Furthermore, the problems surrounding the clash of article 15 *bis* (4), (5) with the new applied paragraph (5) of the Amendment article 121 will be discussed to determine in how far the combination of both articles might restrict the exercise of jurisdiction of the Court to an extent that the ICC will be practically incapable to exercise this new jurisdiction. In addition, the role of the SC regarding the determination of an act of aggression will be examined which is with respect to the ICC, as an independent legal institution, of paramount importance. The analysis of the judicial pillar closes with the examination of articles such as 16, dealing with the deferral of the Court's proceedings, articles 17, 18 and 19 regulating challenges to the jurisdiction of the Court or the admissibility of a case and, finally, the Transitional Provision, article 124, which grants Member States the opportunity to declare their unacceptance of the jurisdiction of the Court regarding War Crimes for 7 years after ratifying the Statute. The interim result of the foregoing articles will determine whether these provisions bar the Court from exercising its jurisdiction or whether they constitute only a balance to States sovereignty and to the international peace component versus the justice mandate.

To fulfill the whole picture and to maintain the credibility of the ICC by enforcing the decisions made by the Court, an analysis of the enforcement pillar and its

[7] See Pedretti (2015), p. 272; Triffterer and Burchard (2016), p. 1040, para. 5.

[8] See Coalition for the International Criminal Court (2017), Press Release, available at: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ASP2017_CrimeofAggression_15Dec2017_final.pdf (Last accessed 18 Dec 2017).

effectivity will be carried out. The fact that the Court itself does neither dispose over executive powers nor over own police forces, makes the Court fully dependent on States motivation to comply with its requests. Consequently, the analysis of the enforcement pillar begins with an examination of the provisions regarding the cooperation and judicial assistance Part 9 of the Rome Statute to determine how much discretion the Court is given pursuant to its own provisions. The most important articles of Part 9 will be highlighted in order to, firstly, verify the Member States obligations stemming from the surrender of persons and other forms of cooperation articles, secondly the mechanisms the Court could apply in cases in which either Member- or Non Member States refuse to comply with its requests and lastly the determination of articles which might bar the Court from exercising its jurisdiction. Emphasis will be put on the general provision regulating requests for cooperation, article 87 and especially its paragraphs (5) and (7), which set the requirements for the procedures resulting from the non-compliance of Party and Non-Party States with respect to requests of the Court. Due to the fact that the non-cooperation of States prevents the Court from exercising its functions and powers under the Statute, both the measures of the executive organs of the Court, the Assembly of States Parties and the Security Council, will be examined to verify whether there exist possible sanction mechanisms with respect to the obligation-breaching State. Subsequently to the determination of the articles relating to arrest and surrender as well as the other forms of cooperation, which might entail possible restrictions for the Court's exercise of jurisdiction, the important and disputed article 98 will be extensively analyzed. Of special focus will be the analysis of article 98 (1), which comprises the prohibition of the Court to proceed with a request for surrender or assistance if such a request required the requested State to infringe its obligations under international law with respect to immunities towards the third State. To determine to what extent article 98 (1) leads to a reduction of the Court's capability to exercise its jurisdiction and therewith undermines the authority of the Court to constitute a Criminal World Court, the problems arising out of the literal interpretation of the paragraph will be examined but, first and foremost, its relationship to article 27 (2) in respect to the different jurisdiction trigger mechanisms.

Even if it is considered that the Rome Statutes provisions relating to cooperation and judicial assistance have an authoritative character in giving the ICC the strength to exercise its powerful jurisdiction, the determination of the international cooperation and judicial assistance analysis with respect to States practice will examine whether this strength can likewise practically be implemented. States practice with regard to the 11 investigations conducted by the Prosecutor will be evaluated, comprising, *inter alia*, Non-Member States like Sudan and Libya, referred to the ICC by the SC, self-referrals of States such as the Central African Republic, Mali and Uganda and the initiations of investigations *proprio motu* regarding States like Kenya, Côte d'Ivoire and Georgia. The analysis primarily focuses on the States' willingness or reluctance to cooperate with the Court but will also entail an examination of the Court's practice in applying its provisions in order to present its authoritative strength as a legal institution. The determination of the cooperation and judicial assistance in practice is very important with respect to the question of the

book, whether the ICC can be regarded as an International Criminal World Court. The solution of the book will contain possible improvements which might strengthen the Court and its credibility to underline the main purpose of the Statute to put an end to impunity of the defendants responsible for the perpetration of the most crucial crimes of mankind. The conclusion will entail all the important issues already thoroughly examined in each of the analyses to conclude with a result, which will neither violate international law, respectably international criminal law nor State sovereignty, but which will respect and, first and foremost, underline the main intention of the establishment of the International Criminal Court: to end impunity. The statement that the Court is only as strong as States authorize it to be,[9] may give an answer to the mightiness or weakness of the enforcement pillar and therefore the final decision to determine the effectiveness and credibility of the Court. The final conclusion to the question whether the ICC can be regarded as an International Criminal World Court constitutes a snapshot of the present situation. The Court's judicial strength assigned to it by the Rome Statute's provisions constitutes a substantial loss with regard to State sovereignty and entails an affirmative response to the question of the book; to what extent the reluctance of State's cooperation and the deficiency of an effective panel mechanism to enforce the compliance of States will lead to the circumstance that the enforcement pillar could not only be regarded as the main weakness of the Rome Statute but may currently destroy the strength of the Court to exercise its jurisdiction, will be presented. To be honored as an International Criminal World Court, States have to comply with the requests of the Court, in awareness of the sanctions which could be imposed on them in the case of a breach of their treaty obligations, as long as the community of States will not take the responsibility on their own. If the compliance of States, acting as the enforcement arm of the Court, either through the SC or the Assembly of States Parties, is not able to be achieved, the ICC will constitute nothing else than a repetition of what *Cassese* called once the International Criminal Tribunal for the Former Yugoslavia "a giant without arms or legs".[10]

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[9] See Kaul (2007), p. 580.

[10] Cassese (1998), p. 13.

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Chapter 2
Historical Excursus

The initiation of international trials and the intention to create an International Criminal Court, with the aim to end impunity of those perpetrators responsible for the most serious crimes in world history, is not a new phenomenon and did not find its origins with the establishment of the International Criminal Court in 1998. Already hundreds of centuries before, international criminal justice began to evolve.

During the Middle Ages, in 1268, one of the first international prosecutions is said to be the execution of *Konradin von Hohenstaufen*, who was sentenced to death for treason by King *Charles d'Anjou,* after the attempt to reconquer the Hohenstaufen heritage; the attack ended up in the battle of Tagliacozzo and the defeat of *von Hohenstaufen*.[1]

The groundbreaking precedent for international criminal justice manifested itself only 200 years later with the Breisach trial in 1474. Governor *Peter von Hagenbach,* who served Duke Charles of Burgundy, was convicted by an *ad-hoc* tribunal for the commitment of various atrocities, including confiscation of private property, murder, rape and pillage.[2] The Breisach proceeding is not just said to be the first international war crimes trial, in which, inter alia, present issues such as superior orders and sexual offences were dealt with, but also constitutes a phenomenon with regard to the establishment of an international[3] *ad-hoc* Tribunal, consisting of 28 Germanic and Swiss judges, *von Hagenbach* was fighting against.[4]

The first serious proposal for the establishment of an independent International Criminal Court was, with regard to the problem of partiality in criminal proceedings, made by *Gustave Moynier*, one of the founders of the International Committee of the

[1] See Von Flocken (2007).

[2] See Schwarzenberger (1968), pp. 462–466; McGoldrick (2004), p. 13.

[3] It is controversial, if the criminal process was international, due to the question, if the Swiss Confederation successfully seceded from the Holy Roman Empire. But the prevailing opinion affirms the international character. For more information on this issue see Schwarzenberger (1968), pp. 463–464.

[4] See Cryer et al. (2014), p. 115; Gregory Gordon (2012).

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Red Cross. In 1872, *Moynier* suggested that there should be an International Court due to the lack of impartiality by national judges, who, according to *Moynier*, were not capable to judge upon offences committed in the Franco-Prussian-War in which their own countries were involved.[5] This serious proposal, however, failed to be executed. But it was followed by the next important attempt to establish an International Criminal *ad-hoc* "Allied High Tribunal" after the incidents of the First World War in 1919; all those responsible for violations of the laws of war, customs of war and the laws and principles of humanity should be tried.[6] Nevertheless, the penalty provisions of the Treaty of Versailles and especially article 227 (1), which contained the public arraignment of the former German Kaiser *Wilhelm II von Hohenzollern* for "a supreme offence against international morality and the sanctity of treaties" became obsolete because they were neither implemented nor was the Court ever established.[7] Reasons for that were on the one hand the reluctance of the Netherlands to extradite the former German Kaiser, who had found asylum in the Netherlands, and on the other hand the German government which did not surrender the remaining accused persons. Eventually only 22 persons out of 895 were tried by Germany through the Leipzig Supreme Court during 1921 and 1923.[8]

The assassination of King *Alexander* of Yugoslavia and *Louis Barthou* on 9 October 1934 entailed a further attempt to establish a permanent International Criminal Court; under the auspices of the League of Nations, the Convention for the Prevention and Punishment of Terrorism as well as the Convention for the Creation of an International Criminal Court were concluded.[9] The Convention for an International Criminal Court required the ratification of the Terrorism Convention, so that any offences referred to in article 2, 3, 9 and 10 of the Convention on Terrorism, could be tried by the International Criminal Court in case the ratifying State wanted to exempt itself from the obligation to prosecute and extradited the convicted person to the Court.[10] Even though the Convention on the Creation of an International Criminal Court was well elaborated and appeared to be a genuine Statute, the required numbers of ratifications and accessions of either of these two Conventions were never reached, so that none of them came into force.[11]

The real breakthrough or "Birth of the international criminal law", as some call it,[12] could be manifested after the Second World War. The International Military Tribunals at Nuremberg in 1945 and Tokyo in 1946 were established as an answer to the war and its tremendous atrocities; for the first time, international crimes at an

[5] See Hall (1998), p. 59; See Cryer et al. (2014), p. 146; McGoldrick (2004), p. 40.

[6] See Mangold (2007), p. 6; See Cryer et al. (2014), p. 116.

[7] McGoldrick (2004), pp. 13–14.

[8] See Cryer et al. (2014), p. 116.

[9] See Historical Survey on the Question of International Criminal Jurisdiction- Memorandum submitted by the Secretary-General (New York 1949) UN Doc A/CN.4/7/Rev.1, p. 16 et seq.

[10] See Mosler (1938), p. 104 et seq.

[11] See Marston (2002), p. 293.

[12] Mangold (2007), p. 6; Werle and Jeßberger (2016), p. 17, para. 15.

international level were prosecuted. They were based on the Moscow Declaration of 30 October 1943, which addressed the individual responsibility of those who had committed war crimes and should therefore be tried and punished "by the joint decision of the Governments of the Allies".[13] The initiation for the creation of the International Criminal Tribunals was set. The ultimate manifestation of the establishment of the Nuremberg International Military Tribunal was realized on the 8 August 1945 through the London Agreement between the United States of America, the United Kingdom, France and the United Soviet Socialist Republic to which in the end 19 other States acceded.[14]

The International Military Tribunal for the Far East (Tokyo Tribunal) was not based on a multilateral treaty but on an executive decree issued on 19 January 1946 by the Supreme Commander for the Allied Powers in Japan, General *Douglas MacArthur*, who was acting pursuant to the orders of the occupying power of the US.[15] Both Charters of the Tribunals covered in their jurisdiction Crimes against Peace, War Crimes and Crimes against Humanity, whereas the Tokyo Charter made some modifications; in comparison to the Nuremberg Charter, Crimes against Peace constituted a prerequisite for the prosecution and the concept of command responsibility, which was totally disregarded by the Nuremberg Tribunal, was applied.[16]

In this context the important "Nuremberg Principles" accrued from the work of the United Nations International Law Commission (ILC); at this time it was not foreseeable what significant contribution they would have to further drafts in the following years.

Despite the more symbolic character of the Breisach trial and the Leipzig Supreme Court, together with the International Military Tribunals they can be regarded as the precedents for ending impunity. The circumstance that they only constituted *ad-hoc* and not permanent Tribunals and that they were harshly criticized for being too biased in only prosecuting the defeated, bearing the title of "victor's justice", cannot obscure the fact that they marked the initial beginning of the concept of individual criminal responsibility.[17]

Notwithstanding the years of the Cold War, which lead to a suspension of the creation of a permanent International Criminal Court and the fact that it took nearly 40 years until the General Assembly, at the instigation of Trinidad and Tobago, requested the ILC to resume its Draft Statute on the Establishment of an International Criminal Court, some mentionable attempts were done.[18] In 1947, on the basis of the Nuremberg Principles, the ILC started its work on the Code of Crimes against the Peace and Security of Mankind and presented its first Draft to the General Assembly four years later as well as a revised version in 1954. At the same time the 1948

[13] McGoldrick (2004), p. 14.

[14] See Mangold (2007), pp. 10–11.

[15] See Zahar and Sluiter (2007), p. 5.

[16] See Cryer et al. (2014), p. 122.

[17] See Cryer et al. (2014), p. 119; Bassiouni (2009), pp. 133–134.

[18] See Mangold (2007), p. 27; McGoldrick (2004), p. 41.

Genocide Convention was concluded with the tremendous new provision, article VI: next to domestic courts, an international penal tribunal should prosecute the perpetrators for the commitment of Genocide, even though such a Tribunal did not exist at that time.[19] With regard to article VI of the Genocide Convention, the General Assembly appealed to the ILC to draft a Statute for an international judicial organ, which is capable to prosecute crimes like Genocide, and a few years later the Draft Statute for the Establishment of an International Criminal Court was submitted.[20] But neither the Draft Code Crimes nor the Draft Statute for an International Criminal Court were permuted. Instead, the General Assembly postponed the matter with the explanation that no agreement could be found, especially as long as no definition of the Crime of Aggression exists; despite the acceptance of such a definition in 1974, the time did not permit the establishment of an International Criminal Court for which States would have abandoned their sovereignty.[21]

After the Cold War the developments of the creation of a permanent International Criminal Court grew with enormous pace: on the proposal of Trinidad and Tobago, to establish a permanent Criminal Court to prosecute drug offences, the General Assembly requested the ILC in 1989 to draft a Statute for such a permanent Court and the Commission responded to that request in 1994 with the ILC Draft Statute. The Statute was not yet fully matured and many critical points had to be solved, but this draft set the groundwork for the upcoming processes. In addition to this, the incidents in the Balkans in the early 1990 and the Rwandan Genocide in 1994 encouraged the procedure by creating two *ad-hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR), which were established by the SC acting under Chapter VII of the UN-Charter. The main intention of the SC acting under Chapter VII UN-Charter was on the one hand to contribute to the restoration and the maintenance of peace and on the other hand to "put an end to such crimes and take effective measures to bring justice the persons who are responsible for them".[22]

The progress made by the fast creation of the ICTY and ICTR, the continuing working process of the ILC in the 1990s as well as the final drafting of the Preparatory Committee from 1996 onwards, lead 2 years later to the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Rome. 160 States participated and on 17 June 1998 the "Rome Statute of the International Criminal Court" was adopted by a vote of 120 States.[23]

[19] See Cryer et al. (2014), p. 146.

[20] *Idem*, pp. 144–145.

[21] See Mangold (2007), p. 28; McGoldrick (2004), p. 41.

[22] UN Security Council Resolution 827 (1993) UN Doc S/RES/827, Preamble.

[23] See McGoldrick (2004), p. 42.

The Rome Statute came into force on 1 July 2002 with the 60th ratification pursuant to article 126 (1) Rome Statute and reduplicated itself 14 years later to 123 States.[24]

Even after the creation of the two *ad-hoc* Tribunals and the permanent ICC, the intention to combat impunity for crimes committed either in the past or at present further increased, so that additional internationalized/ hybrid bodies started to evolve. These hybrid courts, which were predominantly established by virtue of agreements with the affected State and the UN, are a combination of domestic law and international elements and address specific historical incidents in between a particular timeframe.[25] *The Special Court for Sierra Leone*, which prosecutes serious violations committed in the territory of Sierra Leone since 30 November 1996, *The Extraordinary Chambers of Cambodia*, which are responsible for the trial of atrocities committed by the Khmer Rouge regime in between 17 April 1975 to 6 January 1979 and *The Special Tribunal for Lebanon*, established by the SC acting under Chapter VII to examine the perpetrators for the assassination of Rafiq Hariri and the incidents in Lebanon between 1 October 2004 and 12 December 2005, are only a few to mention.[26]

As portrayed in this brief historical excursus, the willingness and intention to create an International Criminal Court, even only on an *ad-hoc* basis, it not a new phenomenon. The need to publicly expose the terrible commission of crimes, to bring justice to the victims and to end impunity of those responsible for the most serious crimes in world history, even if Head of States, has a long history but started to be implemented only 50 years ago. Even though there are many critical aspects of the Nuremberg and Tokyo trials, this cannot conceal the fact that those Tribunals laid down the groundwork of the creation of the International Criminal Court. Furthermore, the creation of many different Human Rights Doctrines over the past 50 years and the establishment of the two *ad-hoc* Tribunals, ICTY and ICTR, by the SC acting under Chapter VII, manifested once more the need for a permanent criminal entity, which not only enforces respect for those rights by prosecuting the perpetrators violating them but which will at the same time contribute to the prevention of such crimes.[27] *Kofi Annan* anchored this expectation at the ceremony for the opening of signatures of the Rome Statute in saying: "The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".[28]

[24]See Homepage of the International Criminal Court, State Parties to the Rome Statute, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Last accessed 07 Dec 2017).

[25]See Shaw (2017), p. 305 et seq.

[26]See Shaw (2017), p. 305 et seq.; Cryer et al. (2014), p. 188 et seq.

[27]See Cassese (2009), p. 123.

[28]Annan (1998), p. xiii.

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Chapter 3
Intention and Structure of the ICC

In conformity with the historical excursus, the present chapter will briefly describe the specific intention of creating an institution like the ICC. Apart from the determination of the core principles, the structure as well as the key characteristics of the Court will be highlighted.

I. Intention

With the foundation of the International Criminal Court and the adaption of the Rome Statute

> [A] clarion call has gone out to potential perpetrators of unspeakable atrocities that the world is not going to stand silently and watch the commission of outrageous violations of international law, such as genocide or crimes against humanity. The world has decided that 'enough is enough'.[1]

For this purpose, 160 States, 33 intergovernmental organizations and 236 nongovernmental organizations participated at the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Rome in 1998 and with the above mentioned words, the Chairman of the Committee *Kirsch* spoke out, what ultimately 120 States decided to change.

The creation of the ICC will not be a patent remedy against the "ills of humankind", but as *Bassiouni* further stated

> it can help avoid some conflicts, prevent some victimization and bring to justice some of the perpetrators of these crimes. In doing so, the ICC will strengthen world order and contribute to world peace and security.[2]

[1] Kirsch (1998), p. xix.

[2] Bassiouni (1998), p. xxi.

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These expectations are anchored in the Preamble of the Rome Statute which determines 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"- [. . .] -"to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes."

For the implementation of these core values of the Court, the ICC is surrounded by three main principles: the principle of complementarity, the principle to deal only with the most serious crimes of international concern and the principle of legality.[3]

The principle of complementarity constitutes one of the most important maxim of the Statute, despite the fact that the Court was also established as an answer to the failures and omission of national courts to prosecute those responsible for international crimes[4]; the problem that the perpetrators of those offences were in most of the cases State officials who acted "with support, connivance or at least acquiescence of the whole state apparatus or at least segments of it", constituted a perpetual obstacle.[5]

This principle manifests the maintenance of national sovereignty and respects the integrity of States. As propounded in article 1 and 17, the ICC is only intended to supplement national jurisdiction which means that the Court only has jurisdiction in case the State is unwilling or unable to carry out the investigation or prosecution. The ICC has therefore to be seen as a Court of last resort.[6] Moreover, also with regard to the effectiveness of criminal proceedings, in gaining evidence, in arresting the accused persons or in summoning witnesses, national courts will be the appropriate institutions.[7] So the principle of complementarity grants the Court an additional monitoring function, in putting pressure on national courts to punish the perpetrators themselves.

The second and the third principle are closely related. The ICC has only jurisdiction over the most serious crimes listed in article 5 of the Rome Statute. The limitation of jurisdiction up to just four crimes was, with regard to the credibility and effectiveness of the Court, of paramount importance to circumvent an overloading of "cases that could be dealt with adequately by national courts".[8] Moreover, with the concentration on only four crimes, the Court should compose a unique and stringent jurisprudence, which is also with regard to customary law greatly important.[9]

To comply with the principle of legality and to prevent former failures of the *ad-hoc* Tribunals with regard to this, the Elements of Crimes were not only exorbitantly detailed to avoid uncertainties but tried to remain within the realm of

[3] See Arsanjani (1999), p. 24; Sok Kim (2007), p. 12.

[4] See Sok Kim (2007), p. 11.

[5] Cassese (2009), p. 124.

[6] See Cryer et al. (2014), p. 154.

[7] *Idem,* p. 154.

[8] Arsanjani (1999), p. 25.

[9] *Idem,* p. 25.

customary international law.[10] Furthermore, emphasis was put on creating a combination of the common and civil law system so that the rules of procedure as well as the general principles of criminal law constitute a construct of both of them.[11]

Besides these principles, the Court serves the very important purpose to uphold the rule of law and to maintain legal order, so that on the one hand the truth of the atrocities will be unveiled and on the other hand a public demonstration of justice can take place.[12] Additionally, the prosecution of possible perpetrators, who committed one of the four core crimes, should not just have a deterrent effect for the future commitment of such crimes, but is also intended to provide redress for victims and their families.[13] The novel development of granting victims such an important status in the criminal process by recognizing "that during this century millions of children, women and men have been victims of unimaginable atrocities",[14] constitutes a precedent in international criminal justice; the Rome Statute disposes over an extensive victim's rights mechanism, either by including numerous articles about the rights of victims or by the provision of different organs, which are responsible for the implementation of their rights.[15]

With regard to the above mentioned, it can be examined that the community as a whole was ready to change what over 50 years seemed to be utopian. The intentions of the establishment of a permanent ICC as well as the Statute's underlying principles were carefully elaborated while trying to avoid past mistakes of any kind. In light of this framework of old but improved and new developed criminal procedures, the administrational function will be presented.

II. Structure

The ICC, with its seat in The Hague, is a permanent and independent international organization. The jurisdiction of the Court covers the most serious crimes of concern, listed in article 5 (a–d): the Crime of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression. The missing consensus with regard to the definition of the Crime of Aggression, which could not be reached at the Rome Conference in 1998, led to a suspension of jurisdiction until such a definition and the jurisdictional conditions were set out.[16] Twelve years later, at the Kampala Review Conference of the Rome Statute on 11 June 2010, an amendment was adopted which entailed a definition of the Crime of Aggression as well as the conditions for the

[10] See McGoldrick (2004), p. 44; Sok Kim (2007), p. 12.

[11] See Arsanjani (1999), p. 25.

[12] See Booth (2003), p. 177 et seq.

[13] See Sok Kim (2007), p. 11.

[14] Preamble of the Rome Statute.

[15] See González (2006), pp. 20–21.

[16] See old Article 5 (2) Rome Statute.

exercise of jurisdiction.[17] At the 16th Assembly of State Parties, States reached a "historic consensus decision" with regard to the activation of the jurisdiction of the Crime of Aggression; 20 years after the entering into force of the Rome Statute, the fourth crime will be activated, so that from the 17 July 2018 all four core crimes listed in article 5 will be applicable.[18]

The Rome Statute of the ICC is an international treaty, to which States may subject themselves through their consent; in doing so, they become State Parties.[19] The creation of a permanent entity, founded on an international treaty constituted one of the biggest obstacles but evolved to one of the most important achievements, as *Kirsch,* first President of the Court, repeatedly emphasized: "the Court did not create itself"; it was established by States with the intention to end impunity for the most crucial crimes and to prevent further such commitments by guaranteeing the "respect for and the enforcement of international justice."[20] The intrinsic will of States and therewith the principle of free consent, as mentioned in the Preamble of the Vienna Convention on the Law of Treaties (VCLT), could not be circumvented anymore. The umpteen problems, which surrounded the ICTY and ICTR through the reluctance of States to comply with SC resolutions, made the creation of an institution, which on the one hand is totally independent and free from any outside exertion of influence but which on the other hand grants through the consent given by States the most cooperative system, indispensable.[21]

With regard to the independency of the Court, article 2 Rome Statute declares that the ICC maintains only a relationship agreement with the UN while not being a body of the latter. This detachedness of the UN contributed in a very important manner to the future credibility of this new institution.

Pursuant to article 34 Rome Statute, the Court is composed of four organs: the Presidency, the Pre-trial, Trial- and Appeals Division, the Office of the Prosecutor and the Registry. The Assembly of States Parties elects 18 judges, who serve on a full-time basis and who have to be highly qualified experts in either international or criminal law areas.[22] The judges of the three divisions are responsible for examining the Court's proceedings at different stages.[23] The Pre-Trial Chamber constitutes the first stage in which the initiation of criminal investigations will be confirmed or

[17]See Amendment to the Rome Statute of the International Criminal Court, Kampala 11 June 2010, Adoption of Amendments on the Crime of Aggression, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf (Last accessed 18 Dec 2017).

[18]See Article 15*bis* (3) Rome Statute; Coalition of the International Criminal Court (2017), Press Release, available at: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ASP2017_CrimeofAggression_15Dec2017_final.pdf (Last accessed 18 Dec 2017).

[19]See Mangold (2007), p. 189.

[20]Kirsch (November 2007), p. 6.

[21]See Mangold (2007), p. 203 et seq.

[22]See articles 36, 40 Rome Statute.

[23]See Homepage of the International Criminal Court, How the Court Works, available at: https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#organization (Last accessed 07 Dec 2017).

rejected. Furthermore the Chamber may, on its own initiative, pursuant to article 53 (3) (b) Rome Statute, review a decision of the Prosecutor not to proceed with an investigation or pursuant to paragraph (a) review a decision at the request of a State making a referral under article 14 or the SC under article 13 (b). On the application of the Prosecutor, the Pre-Trial Chamber can issue a warrant of arrest or a summons to appear, if there are reasonable grounds to believe that the person has committed one of the core crimes and the arrest of the person seems to constitute a necessary measure.[24] Besides the other functions listed in article 57 (3) Rome Statute, the Pre-Trial Chamber is, pursuant to article 60 Rome Statute, responsible for satisfying itself that the accused person, present in the Court, has been informed of the crimes he or she is alleged to have committed as well as of his or her rights under the Statute. Within a reasonable time after the persons surrender or voluntary appearance before the Court, the Pre-Trial Chamber holds, in presence of the Prosecutor, the defendant and his counsel, a hearing to confirm the charges on which the Prosecutor initiated the trial.[25]

The Trial Chamber will be established by the Presidency once the Pre-Trial-Chamber has confirmed the charges.[26] According to article 64 Rome Statute, the Trial Chamber shall ensure that the trial is fair and expeditious as well as conducted with full respect for the rights of the accused regarding the protection of victims and witnesses. With the exception of special circumstances surrounding the protection of victims and witnesses, the trials have to be held in public, while the Trial Chamber has to determine the criminal responsibility or the innocence of the accused person. If the accused is culpable, the Trial Chamber can impose imprisonment, financial penalties and may order directly against a convicted person the payment of reparations to the victims.

The Appeals Chamber is the last instance to make use of. In case there is a procedural error, an error of fact or of law, a disproportion between the crime and the sentence or any other ground that affects the fairness or reliability of the proceedings or decision, the convicted person or the Prosecutor can appeal against the decisions of the Pre-Trial and Trial Chambers.[27] Pursuant to article 83, the Appeals Chamber may reverse or amend the decision or sentence, or order a new trial before a different Trial Chamber, if it finds that the proceedings appealed from were affected by any of the grounds listed in article 81 (1) Rome Statute. In case the sentence was disproportionate to the crime, the Appeals Chamber may vary the sentence pursuant to articles 77 ff. Rome Statute.

The Presidency, which is composed of three judges, the President, the First and Second Vice-President, is responsible for the overall administration of the Court (with the exception of the Office of the Prosecutor), while the Registry undertakes

[24] See articles 57, 58 Rome Statute.

[25] See article 61 Rome Statute.

[26] See Shaw (2017), p. 304.

[27] See article 81 Rome Statute.

only the non-judicial administration and servicing of the Court.[28] The Office of the Prosecutor, which is headed by the Prosecutor and assisted by one or more Deputy Prosecutors, is an independent and separate organ of the Court.[29] It is responsible for the examination of State referrals and any other substantial information on crimes as well as for conducting investigations and prosecutions before the Court.

The jurisdiction system of the ICC is not retrospective, so that it only covers situations which occurred after its entry into force. It is based on both the territorial and nationality principle, so that the membership of State-Parties leads on the one side to the automatic jurisdiction of the Court while on the other side Member-States as well as the SC can refer situations to the Prosecutor pursuant to articles 13 (a) in conjunction with 12 (2) and 13 (b). Furthermore and as a novelty to the above mentioned trigger-mechanisms of the Court's jurisdiction, the Prosecutor is given pursuant to article 15 the possibility to initiate investigations *proprio motu* on the basis of information on crimes which fall within the jurisdiction of the Court so that the Court will also be able to exercise its jurisdiction in accordance to article 13 (c).

Even though the main goal of the ICC is to put an end to impunity through punishing all those responsible for the most serious crimes of concern, the Court itself does not dispose of an internal police force or executive system so that it is, pursuant to its articles 86 et seq., only able to rely on State's cooperation to enforce its decisions due to the inability to carry out trials *in absentia.* The obligation to cooperate entails, inter alia, the provision of evidence, the arrest of possible perpetrators and the relocation of witnesses. Furthermore, the Court is not in possession of its own prison, so that State Parties will be responsible for the enforcement of sentences of imprisonment in their own countries.[30] This duty is adhered in article 103 (3) Rome Statute, which determines that "State Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution". The State's action has therefore to be regarded as the "enforcement arm" of the Court.[31]

Taking the main characteristics of the ICC into consideration, it crystallized that the Court is based on a judicial and an enforcement pillar, as mentioned above. To what extent this twin pillar system will contribute to the question of the book, whether the ICC could be regarded as an International Criminal World Court or not, will be thoroughly examined in the following chapter.

[28] See article 43 Rome Statute.

[29] See article 42 Rome Statue.

[30] Article 103 Rome Statute; See Sok Kim (2007), p. 280.

[31] Rastan (2009), p. 163.

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Chapter 4
The International Criminal Court: A Criminal World Court?

In this chapter and in accordance to the foregoing examination it will be determined how the subject-matter of the twin-pillar system lead to the response of the book, whether the ICC could be regarded as an International Criminal World Court which already at that stage has potentially worldwide[1] jurisdiction upon every national of any State; may it be a Member or a Non-Member State to the Statute. The judicial pillar entails the analysis of significant provisions which deal with the "heart of the Statute",[2] the jurisdiction system of the Court, article 12 (2) (a) and 13 (b) Rome Statute. The huge controversies of these two articles are essential in response to the question and will therefore be portrayed extensively. Furthermore, attention will be paid on articles like 15 *bis*, 15 *ter,* 16, 17 and 124 to examine if these provisions may bar the Court to exercise its jurisdiction. Moreover, emphasis will be put on the enormously important article 27, which contains the irrelevance of the official capacity. Notwithstanding the analysis of the article itself, it will be also incidentally addressed and examined in relation to the jurisdiction mechanism regarding article 12 (2) (a), article 13 (b) as well as with respect to the cooperation and especially the matter of conflicting obligations, pursuant to article 98 (1). After verifying to what extent the judicial pillar underlines the question of the book affirmatively, an examination of the enforcement pillar will be evaluated. Whereas firstly the theoretical strength of the Court through the applicability of its provisions with regard to international cooperation and judicial assistance will be presented, extensive attention will be focused on the practical implementation of the Rome Statute's provisions regarding cooperation and judicial assistance, thus States practice, to determine whether the cooperation system and therefore the whole enforcement mechanism of the Court operates effectively. In order to strengthen the cooperation regime of the ICC, possible new solutions will be examined. The conclusion will

[1]The literal interpretation of "worldwide" is not to confound with the definition of universal jurisdiction in criminal law.

[2]Arsanjani (1999), p. 25.

S. Babaian, *The International Criminal Court – An International Criminal World Court?*, https://doi.org/10.1007/978-3-319-78015-3_4

entail an extensive analysis of the statutory regime and its practical implementation in order to determine whether the ICC can be designated as an independent International Criminal World Court.

I. Judicial Pillar

The fundamental basis to declare the ICC from its establishment as an International Criminal World Court could be manifested on two very important provisions of the Statute, article 12 (2) (a) and 13 (b). One of the most controversial and difficult articles while drafting the Rome Statute is article 12, which determines the preconditions to the exercise of jurisdiction. To what extent especially paragraph (2) (a) of article 12, namely the exercise of territorial jurisdiction and the UN Security Council trigger mechanism of article 13 (b) lead to the assumption of a worldwide jurisdiction and therefore to an affirmative answer with regard to the question of the book, will be examined in the following.

1. Article 12 (2) (a) Rome Statute

The "question of questions of the entire project" or "make or break provision" is what the most important, but at the same time politically challenging and controversial article 12 is famous for.[3] The range of different approaches by various Commissions as well as by States in the drafting process during the Rome Conference was huge: from extremely narrow and the Court restricting proposals to very broad suggestions, granting the Court universal jurisdiction.

In 1995, the General Assembly established the "Preparatory Committee on the Establishment of an International Criminal Court", which should "discuss the major substantive and administrative issues" elaborated by the International Law Commission (ILC) as well as "the report of the Ad Hoc Committee and the written comments submitted by the States",[4] to prepare "a widely acceptable consolidated text of a convention for an international criminal court".[5] From 15 June to 17 June 1998, the Preparatory Committee (PrepCom) presented its elaborated and utilized proposals at the Rome Conference in a new Draft Statute.[6]

[3] Kaul (2007), p. 584; Schabas and Pecorella (2016), p. 673, para. 1.

[4] UN General Assembly Resolution 50/ 46 (1995) UN Doc, A/RES/50/46, para.2.

[5] *Idem,* para.2.

[6] See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, Volume III, Reports and other documents, A/CONF.183/13/Vol. III.

The Committee incorporated many different proposals, characterized through various options in the Draft Statute. As determined by the General Assembly, the bases for the new Statute should be one of the first compiled Draft Statutes for the jurisdiction system of the Court, elaborated by the ILC in 1994. This proposal, which is also famous for being designated as the "Opt-In, Opt-Out Proposal" constituted one of the most restrictive approaches and "made large concessions to State sovereignty".[7] Pursuant to the "opt-in proposal" of the ILC's Draft, the Court's jurisdiction over a suspect should be dependent on the consent of the custodial as well as of the territorial State, if not the SC referred the situation to the Court; only with regard to the Crime of Genocide, the consent of the State Party referring a situation to the Court while at the same time being a contracting Party to the Genocide Convention, would be sufficient.[8] Furthermore, article 22 of the ILC's Statute provided for a special crime-acceptance-modus, which did not automatically lead to the jurisdiction of the Court once a State had ratified the Statute; the State was given the capability to declare which crimes it wanted to include under the jurisdiction system of the ICC and for which period of time. The "opting-out" mechanism, in reverse, should have given State Parties to the Statute the right to exclude specific crimes from the jurisdiction of the Court.[9] However, even the members of the ILC had no unanimous opinion with regard to the latter option, which was worked out by the ILC in its older report of 1993; whereas some considered the "opting-in" approach as the proper one because the "opt-out" mechanism "could prevent the court hearing a case, even though all States concerned are willing that it should do so [. . .]", others put more emphasis on the positive acceptance of the Court's jurisdiction as such, "so that States on becoming parties to the statute would have to publicly declare" their unacceptance of jurisdiction over the selected crimes.[10]

As an alternative to the ILC's "opting-in" system, the PrepCom elaborated another proposal, which foresaw an acceptance-mechanism with regard to a specific "case" lodged by a State.[11] But this option, which is also referred to as the "À-La-Carte" proposal,[12] was with regard to the core crimes unacceptable and therefore dismissed by the vast majority of States; the probability that one of the possible States referred to in article 7, option 2 would reject the prosecution of a

[7]Cryer et al. (2014), p. 167.

[8]See Kaul (2007), p. 593; Report of the International Law Commission on the Work of its 46th Session, Draft Statute of an International Criminal Court, 2 May-22 July 1994, UNGAOR, 49th Session, Supp.No.10, UN Doc. A/49/10 (1994); Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, further option for article 7, article 11, UN Doc.A/CONF.183/2/Add.1 (14 April 1998).

[9]See Kaul (2007), p. 594.

[10]Report of the International Law Commission on the work of its forty-sixth session, Draft Statute of an International Criminal Court, 2 May-22 July 1994, UNGAOR, Forty-ninth Session, Supplement No.10, UN Doc. A/49/10 (1994), Commentary to article 22, para. 3.

[11]Report of the Preparatory Committee on the establishment of an International Criminal Court, article 7, option 2, UN Doc.A/CONF.183/2/Add.1 (14 April 1998); Sok Kim (2007), pp. 115–116.

[12]See Sok Kim (2007), pp. 115–116.

specific case, was too high.[13] Even the different options of the ILC Draft Statute, which were affirmed by some States at the Conference, had ultimately not found many supporters; the fear that the Court would be paralyzed and therefore be ineffective from its beginnings, was omnipresent.[14]

Besides the "Opt-in, Opt-out and À-la-Carte" proposals of the ILC and the PrepCom, a clash of the "State Consent Regime" and the "inherent jurisdiction" scheme evolved[15]: four major State's proposals emerged.

The UK, on the one hand, wanted to confer automatic jurisdiction to the Court through the ratification of the State alongside the requirement that both the custodial and the territorial State had to have already or on an *ad-hoc* basis accepted the Court's jurisdiction.[16] The US, originally of the opinion that the Security Council action- and blocking mechanism should be the only trigger instrument to the jurisdiction of the ICC, were subsequently convinced by parts of the "opt-out"—as well as of the "opt-in" proposals of the ILC's Draft.[17] In addition to that, they attempted to restrict the Court's jurisdiction further by emphasizing the consent-principle on both the territorial but first and foremost the State of nationality of the suspect, except the jurisdiction was triggered by a SC resolution.[18] The widest proposal to make the new Court an effective institution and to circumvent any possible loopholes was suggested by the German Government and preferred by the non-governmental organizations: the Court should be provided with universal jurisdiction.[19] The German explanation for granting the Court universal jurisdiction was based on the fact that every country in the world had the capability already to prosecute the Crime of Genocide, Crimes against Humanity and War Crimes on the basis of universal jurisdiction, so that for an International Criminal Court nothing else could apply.[20]

These recommendations by Germany on the one and the UK and the US on the other hand, could not have been more different and irreconcilable so that in between, the proposal of the Republic of Korea found the middle course of all of them. South Korea emphasized especially, next to the automatic jurisdiction for State-Members, the need of a jurisdictional nexus. Thus, they declared that at least one State, regardless if it is "the territorial State, the custodial State, the State of nationality of the accused, and the State of the nationality of the victim" should have "given its

[13] *Idem*, p. 116.

[14] See Kaul (2007), p. 594.

[15] Schabas (2010), p. 278 et seq.

[16] See Kaul (2007), p. 597.

[17] See Rhea (2012), pp. 168–169; Scheffer (1999b), pp. 12–13 et seq.

[18] Schabas (2010), p. 279.

[19] See Schabas (2010), pp. 279–280; Kaul (2007), p. 598.

[20] See Sok Kim (2007), p. 118.

consent to the exercise of jurisdiction by the Court."[21] In the clash of various unbridgeable suggestions, this proposal gained the most encouragement.[22]

Despite the existing contrariness between universality and State sovereignty, most of the States voted against a solely sovereign approach but favored a universal jurisdiction approach in respect to the future Criminal Court. As much as the US tried to amend the Rome Statute pursuant to American interests in the last moments of the Conference, it is very important to emphasize that the proposal of the US was not only not followed, but even rejected by 113-17, with 25 abstentions.[23] The purpose to ensure criminal responsibility for the most serious crimes, with jurisdiction on a fair and equal basis have outweighed considerations regarding State sovereignty: the nationality of any perpetrator and therefore the consent of the national State could not be of importance anymore.[24] The majority of States were more than aware of the fact that any other outcome would not only have constituted a powerless and paralyzed Court but would have rendered the whole new justice system void.[25]

The final outcome at the Rome Conference can therefore be regarded as a compromise between the most important principle of State sovereignty and the creation of a new independent and international criminal entity and justice system.[26] Whereas in article 12, paragraph 1, the Court has *ipso facto* jurisdiction over State-Parties, paragraph 2 sets the preconditions which require that either territorial or national jurisdiction has to be given by one State which has accepted the Courts jurisdiction. Pursuant to paragraph 3 every Non-Party State can give its consent by declaration on an *ad-hoc* basis. In the case of fulfillment of territorial jurisdiction of a State-Party and its referral pursuant to article 13 (a) in conjunction with article 12 (2) (a), the Court will have jurisdiction upon every individual who is committing one of the core crimes mentioned in article 5 (a–c)[27] on the territory of that State Party. This applies regardless of the nationality of the accused, even if the accused is a national of a Non-Party State to the Statute. The consent of the State of nationality does not constitute a prerequisite for the exercise of jurisdiction, as long as territorial jurisdiction by a State-Member is given.[28] The same jurisdiction trigger mechanism applies with regard to the Prosecutor's initiation of investigations *proprio motu* with respect to the crime which is committed on the territory of the State Party, article 13 (c) in conjunction with article 12 (2) (a).

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[21] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc. A/CONF.183/C.1/L.6; Kaul (2002), p. 599.

[22] See Kaul (2007), p. 599; Cryer et al. (2014), p. 167.

[23] See Sok Kim (2007), p. 113.

[24] See Kaul (2007), p. 586; Bourgon (2002), p. 569; Schabas (2010), p. 283.

[25] See Bourgon (2002), p. 564.

[26] *Idem,* p. 562.

[27] For the Crime of Aggression, other preconditions for the exercise of jurisdiction were set up, which will be elaborated in Chapter C, I, 3 (a).

[28] See Crawford (2003), p. 147.

The foregoing examination constitutes one of the first and main grounds to declare this originally treaty-based Court, to which presently not all States are Members, already at this stage a Criminal World Court with the capability of prosecuting not only nationals of State-Members but any national of the world in a situation of article 13 (a), 13 (c) in connection with 12 (2) (a).

The Statute's incorporation of the principle of territorial jurisdiction, which constitutes an assertion of State sovereignty and which is solidly anchored in international as well as in domestic law, was not meant to lead to any difficulties. This principle enables countries to "prosecute [. . .] offences committed upon its soil [as, incl. by S.B] a logical manifestation of a world order of independent states [which, by S.B] is entirely understandable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state".[29] Nevertheless, it gave rise for a few States and especially the US, to object to the whole Statute. From the US perspective, article 12 (2) (a) constitutes "a form of extra-territorial jurisdiction which would be quite unorthodox in treaty practice – to apply a treaty regime to a country without its consent".[30] A few months after the Rome Conference, Ambassador *Scheffer* reaffirmed the American approach with its statement to the General Assembly by saying that the United States would not have the intention to sign the treaty; neither presently nor in the future.[31]

The demand of the US that the consent of the State of nationality of the accused has to be an inevitable requirement or was ever asked for to circumvent a violation of article 34 Vienna Convention on the Law of Treaties (VCLT) is without any foundation; "the principle of territorial jurisdiction as the universally undisputed standard rule in international criminal law" is not just widely exercised through multilateral Conventions and bilateral extradition treaties but neither could an explicit provision nor State practice underline the foregoing claim.[32] No State has "unlimited" or "exclusive" rights with regard to its own nationals; the right of a country to try a foreigner for the commitment of a crime on its territory remains untouched. This standard rule of international law was already determined in the *Lotus Case* in 1927, in which the Permanent Court of Justice (PCJ) determined that the exercise of jurisdiction from Turkey over a French national, who was responsible for the collision of a Turkish and French vessel which as a the consequence led to the drowning of eight Turkish nationals, does not constitute a violation of international law:

[29]Shaw (2017), p. 489.

[30]Scheffer, Head of the United States Delegation, on the Bureau's Discussion Paper of 9 July 1998 in Kaul (2007), p. 601.

[31]Statement of US Ambassador Scheffer in the Sixth Committee of the General Assembly on the International Criminal Court, 21 October 1998, Sixth Committee -10- Press Release GA/L/3077, 9th meeting, available at: http://www.un.org/press/en/1998/19981021.gal3077.html (Last accessed 18 Dec 2017).

[32]Kaul (2007), p. 607 et seq.

> Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each [. . .] would appear calculated to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.[33]

Furthermore, the fact that the overwhelming majority of States at the Rome Conference voted against a solely powerful sovereignty-approach but for the provisions of the Statute and the fact that at present the Non-Member-States are in the main minority, leads to the assumption that the critics of the US are completely unfounded.

Regardless of the foregoing determination but in compliance with a juridical report, the following part will address the main objections of the antagonists stating, *inter alia* that article 12 (2) (a) constitutes a violation of the well-established principle of article 34 VCLT and is therefore contrary to international law.[34]

a. Main Objections and Possible Violation of Article 34 VCLT

The main criticism of article 12 (2) (a) is made by States which have a large number of armed forces in own military or UN operations overseas, especially the US.

> It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. [. . .]. The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction.[35]

This "principal legal objection" to the ICC is worked out from the US, claiming that the ability of a treaty-based Court to exercise jurisdiction even upon nationals of Non-Party States without the explicit consent of that State violates article 34 VCLT; the imposition of obligations on Non-Members would constitute an invalid *Drittwirkung*.[36] Furthermore it is argued that the subjection of nationals of Non-Member States to an International Criminal Tribunal, namely the delegation of territorial jurisdiction from Member-States to the Court, is without precedent, neither valid nor recognized under international law.[37] In addition to that, it would constitute an unlawful act if the Court exercised jurisdiction upon Non-Party nationals who were acting in reliance to their official policy and therefore for the State; this would amount to a breach of the *Monetary Gold* Doctrine, which implies

[33]Brown (1999), p. 870; *Lotus Case (France vs. Turkey)* PCIJ [1927] Series A No. 10, p. 24.

[34]See Akande (2003), p. 620; Schabas (2010), p. 286.

[35]Scheffer (1999b), p. 18.

[36]See Mangold (2007), p. 275; Akande (2003), p. 620.

[37]See Morris (2001), p. 27.

that a Court will not be able to exercise jurisdiction over a State as such without its consent.[38] The further fact that Member-States in comparison to Non-Member States may "opt-out" of the jurisdiction system of the Court with regard to War Crimes and to possible new amended crimes, pursuant to article 121 (5), would once more constitute "an indefensible overreach of jurisdiction".[39]

Taking into consideration the main claim of the US that article 12 (2) (a) violates article 34 of the VCLT it is apparent that a treaty may not create obligations or rights for a Third State without its consent. In this respect, the argument of the US is correct. However and as a matter of fact it is also self-evident that especially multilateral treaties will not be without any effects for Non-Party States.[40]

The author *Danilenko* correctly determined that

> The pacta tartiis principle does not mean that treaties may not have certain indirect effects on non-States Parties. Practice suggests that multilateral treaty arrangements often create legal and political realities that could in one way or another affect political and legal interest of Third States and impose certain constraints on the behavior on non-parties. These constraints may not result from imposition of legal obligations on Third States, but from the fact that a large portion of the international community adopts, in conformity with international law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures.[41]

In case a crime is committed on the territory of a State, the mechanism for jurisdiction of that State is triggered pursuant to the well-established principle of territorial jurisdiction on the one, and sovereignty on the other side. The prosecution of the accused is not imposing any obligation whatsoever on the State of nationality; the only thing that might be effected are the interests of the latter.[42] More explicitly, nothing in the Rome Statute gives rise for the conclusion that Non-Party States as such have to fulfill any obligations or have to refrain from performing any proceedings. On the contrary, article 86 declares that only State-Parties to the Statute have a general obligation to cooperate fully with the Court whereas a duty for Non-State-Parties to cooperate remains untouched; pursuant to article 87 (5) (a) they are only *invited* to provide assistance if the special conditions of the article are met. In addition to this, article 18 and 19 give all States involved in a case, including Non-Member States, the opportunity to challenge the ICC's jurisdiction or the admissibility of a case on the grounds referred to in article 17.

The Rome Statute does not create a thorough new international criminal law system, but adheres to

[38] See Morris (2001), p. 20 et seq.; Wedgwood (2001), p. 199.

[39] Scheffer (1999b), p. 20.

[40] See Danilenko (1999–2000), p. 448.

[41] Danilenko (1999–2000), p. 448.

[42] See Akande (2003), p. 620; Junck (2006), p. 55.

> the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.[43]

The above mentioned words by the Chairman of the Conference as well as the provisions of the Rome Statute underline that the Statute is neither obliging Non-Member-States nor do they take away their right to try their own nationals. The attempt to argue that even through the principle of complementarity an obligation arises out for Non-Member States, has therefore to be rejected; being imposed with a pressure to prosecute its own nationals is not the same than being responsible for the failure to comply.[44]

Sok Kim highlighted this argument from a different angle in emphasizing the customary law status of the three core crimes of the Statute.[45] Pursuant to his approach all the obligations arising out of the provisions to investigate and prosecute the worse crimes of concern do not emerge from the Statute itself but through customary international law; it would also be on the Non-Party State to cooperate in punishing these criminals. Pursuant to his view, article 12 only reaffirms "that the Nuremberg Principles, the principles of the Genocide Convention and the universal jurisdiction over the three core crimes [. . .] exist as customary international law."[46] Accordingly, article 38 VCLT, which defines that nothing in articles 34 to 37 VCLT precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, would constitute an exception and annul the principle *pacta tertiies w*hich results in the inapplicability and therefore no violation of article 34 VCLT.[47]

The applicability of the principle of territoriality and the determination that the articles of the Statute do not oblige Non-Member States to comply with the Court in a situation of a State referral, lead to the result that the claim of a violation of article 34 VCLT is untenable. The prosecution of nationals of Non-Party States by the ICC does not impose any obligations or new rights on these Non-Members. For this reason, the argument of the antagonists that the delegation of jurisdiction to an international Court creates new rights vis-à-vis Third States is misleading, because it does not take into account that it is just a new system which collectively exercises previously (old) existing rights.[48]

Furthermore and in the light of the existence of an "universal public body"[49] with the competence to carry out international acts, *Danilenko* calls attention to the

[43] Kirsch (1998); Brown (1999), p. 870.

[44] See Akande (2003), p. 620.

[45] See Sok Kim (2007), p. 125 et seq.

[46] *Idem,* p. 130.

[47] *Ibidem*, p. 125, 130.

[48] Kaul (2002), pp. 608–609.

[49] See Danilenko (2002), p. 1873.

circumstance that it would not be on Non-Member States to neglect this judicial authority.[50] Ambassador *Scheffer,* on the contrary, stated that the number of ratifying States would neither lead to a circumvention of abuses by States, delegating their jurisdiction to the Court nor would it make the Court a more objective one.[51] The ICJ determined in its 1949 *Reparation for Injuries* Advisory Opinion that 50 States—as the vast majority of the international community—may be in the position to establish an entity with "objective international personality and not merely personality recognized by them alone".[52] The Rome Statute was established by 120 States and counts presently 123 ratifications. These 123 Member-States constitute the vast majority of countries around the world, which makes the ICC also for Non-Member States not an invisible legal body.[53]

Tying up on the foregoing and with regard to the core crimes of the Statute, which pursuant to the prevailing opinion not only primarily reached customary law status,[54] but which affect the interests of the entire international community, States are permitted to exercise universal jurisdiction on behalf of the international community as whole, regardless of any existing territorial or nationality link.[55] If States already have the right to prosecute foreign nationals without the consent of the State of nationality, how can the assessment be that different, if this jurisdiction is now exercised by a specialized International Criminal Court through which the Member States try collectively to achieve what they could do by their own?[56]

The foregoing question alludes to the second accusation that the delegation of States jurisdiction to the ICC constitutes an unorthodox and invalid practice in international law.[57] Furthermore it is argued that the consequences arising from the exercise of jurisdiction of the Court will be fundamentally different, especially with regard to a political angle.[58]

Taking into account the first argument it has to be emphasized that there is no explicit provision which determines that the conferment of jurisdiction to jointly prosecute crimes of international concern is forbidden and would therefore amount to a violation of international law.[59] The PCJ determined in the *Lotus Case* that the conduct of States lay in their discretion as long as they do not violate a prohibitive rule of international law:

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[50] *Idem,* p. 1873.

[51] Scheffer (1999a), The Challenge of Jurisdiction, p. 8.

[52] See Danilenko (2002), p. 1873; *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports (1949) 174, 185.

[53] See Danilenko (2002), p. 1873.

[54] See Kaul (2002), pp. 586–591; Sok Kim (2003), pp. 223–230; Cryer et al. (2014), p. 57; Akande (2003), pp. 626 and 639.

[55] See Akande (2003), p. 626.

[56] See Zimmermann and Scheel (2002), p. 137; Akande (2003), p. 626; Danilenko (2002), p. 1882.

[57] Scheffer (1999a), The Challenge of Jurisdiction, p. 7.

[58] See Morris (2001), p. 29 et seq.

[59] See Zimmermann and Scheel (2002), p. 137; Scharf (2001), p. 99.

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[60]

Thus, with regard to the argument of Professor *Morris*, who claims that there is no precedent for the delegation of States jurisdiction to an ICC, the main question is not whether there is already an existing practice but whether there is an international law rule which prohibits such an arrangement by States.[61]

In support of this, *Crawford* goes one step further in making a distinction of "structural" and "positive" rules, in which the structural rule can be derived "inducible by recognized methods of reasoning from other clearly established rules" which supports the induced rule through the "absence of clear indications to the contrary".[62] Based on that definition of *Crawford*, *Scharf* but even more comprehensively *Akande* presents in an extensively historical analysis, how the delegation of jurisdiction among States on the one hand—and from the national to the international level on the other hand can be shown.[63] *Akande* underlines the structural rule of international law in representing many lawful and sufficient precedents which highlight the permission to confer State's jurisdiction to International Courts. One of the most frequently mentioned examples brought by proponents like *Akande,* is the practice of the Nuremberg Tribunal, next to the ICTR, ICTY and the Special Court for Sierra Leone, which supports the argument that the delegation from the national to the international level is nothing uncommon. Pursuant to this, the Nuremberg Tribunal stated:

> The Signatory Powers created the Tribunal, defined the law it was to administer, and made proper regulations for the proper conduct of the trial. In doing so, they have done together what any of them might have done singly; for it is not doubted that any nation has the right thus to set up special courts to administer law.[64]

The UN Commission of Experts on the Former Yugoslavia underscored this practice in their Report to the SC and stated that:

> States may choose to combine their jurisdiction under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up the Tribunal.[65]

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[60] *Lotus Case (France vs. Turkey)* PCIJ [1927] Series A No. 10, p. 19; Scharf (2001), p. 73.

[61] See Scharf (2001), p. 73.

[62] Crawford (1983), pp. 85–86.

[63] For further information see Akande (2003), pp. 622–634; Scharf (2001), p. 76 et seq.

[64] Trial of the Major War Criminals Before the International Criminal Tribunal 22 (Lake Success, NY: United Nations 1949), p. 466.

[65] Interim Report of the Independent Commission of Experts Established pursuant a Security Council Resolution 780 (1992), 73 UN Doc S/25274 (1993); Scharf (2001), p. 105.

Another more recent example for the lawful delegation of criminal jurisdiction of a State to an international treaty-based Court is the Special Court for Sierra Leone. The Court was established in 2002 by a treaty between Sierra Leone and the United Nations to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian and Sierra Leonean Law committed in the territory of Sierra Leone since 30 November 1996."[66] The Court indicted and prosecuted the former President of Liberia, Charles Taylor, a non-national of Sierra Leone but a national of Liberia for aiding and abetting as well as planning the commission of serious crimes in Sierra Leone.[67] Despite the fact that Taylor was not a national of Sierra Leone and that Liberia was not a Party to the treaty, Liberia never claimed the Courts exercise of Sierra Leones territorial jurisdiction over a non-national; even the US strongly supported the prosecution of Mr. Taylor and the Court as such.[68] Thus it is very questionable, why the US government affirms a principle in special circumstances to deny this standard when it has to be applied on them.

Scharf and *Sok Kim*, on the other hand, put forward many examples in which the conferral of jurisdiction among States over Non-Party nationals through the mechanism of treaty law is nothing exceptional; the 1970 Hijacking Convention, the 1979 Hostage Taking Convention, the 1984 Torture Convention or the 1949 Geneva Conventions are only a few among many examples where the consent of the State of nationality was and is not a prerequisite.[69] The US is a party to all of these international Conventions.

Beside the foregoing examples for the lawful delegation of State's criminal jurisdiction to an international criminal entity, the 1948 Genocide Convention as well as the 1973 Apartheid Convention serve additionally as very strong evidence that it is not unorthodox for an International Tribunal to exercise the territorial jurisdiction of a State-Party and therefore jurisdiction over the Crime of Genocide and the Crime of Apartheid.[70] These two Conventions explicitly determine the possible "conferral of criminal jurisdiction on 'an international penal tribunal",[71] so that the critical challenge by *Scheffer,* whether such a delegation without the consent of the Non-State Party to the treaty is lawful,[72] can be answered affirmatively.

In the light of the foregoing examination, the accusations of the US that the territorial State does not have the power to confer its jurisdiction and that such an

[66]See Article 1 of the SCSL Statute.

[67]*Prosecutor vs. Charles Ghankay Taylor*, Sentencing Judgement, SCSL-03-01-T (30 May 2012).

[68]See Akande (2003), p. 631.

[69]See Scharf (2001), pp. 99–100; Sok Kim (2007), p. 131.

[70]See Danilenko (2002), p. 1882.

[71]*Idem,* p. 1882; Article V of the International Convention on the Suppression and Punishment of the Crime Apartheid and article VI of the Convention on the Prevention and Punishment of the Crime of Genocide.

[72]See Scheffer (1999a), The Challenge of Jurisdiction, pp. 1 and 8.

exercise is unorthodox, without precedents and therefore contrary to international law, are completely unfounded and cannot withstand. On the contrary, the precise analyses of *Akande* and *Scharf* and the non- existence of any opposite provision or prohibitive rule demonstrates the lawfulness of such a delegation.

The further assumption of *Scheffer* and Professor *Morris* that the arguments of the proponents in relying on the delegation of State's universal jurisdiction to the Court "would render nonsensical the jurisdictional provisions" of the Rome Statute, because the jurisdiction was especially not built up on this construct, is misjudging the facts.[73] It is apparent that with the delegation of States universal jurisdiction upon the core crimes, the Court does not obtain the same jurisdiction apparatus; otherwise, as the antagonists correctly stated, the consent of either the State of nationality or the territorial State would not have been a requirement and article 12 would have become obsolete.

Therefore, it is very important to thoroughly separate the two jurisdictional arguments as well as principles: All States, Party to the Statute, are conferring their universal jurisdiction upon the core crimes of mankind to the Court "to act collectively for the protection of interests on the international community as a whole".[74] The universal character of these heinous crimes forms the "legitimate interest" for the ICC to also prosecute citizens of Non-Member States.[75] But this special interest does not change the fact that the Court is not capable to exercise their exact universal jurisdiction as such, if neither the territorial nor the national link is given, with the exception of a SC referral. Not every Member of the Statute could refer a situation to the Court, regardless if the crime was committed elsewhere, just because the State itself would theoretically be able to exercise jurisdiction on the principle of universality.

To affirm the claim of the US, the further fictitious case should serve as an example for the referral of States universal jurisdiction to the Court, which would in turn exercise that exact jurisdiction: France could refer a War Crime committed by an Italian during an international armed conflict in Austria to the ICC, which would be able to exercise jurisdiction. On the basis of universal jurisdiction, France itself would be able to prosecute the Italian for the perpetration of War Crimes; but as a Member to the ICC, France decides to refer the situation to the Court, even though the incident was committed in Austria. This constitutes a pure case of State's referral of their universal jurisdiction to the Court with the result that the Court exercises the exact same universal jurisdiction of that State. But this example is just surreal and pursuant to article 12 (2) neither the case nor even possible. The argument of the lawful referral of State's universal jurisdiction to the Court is meant with regard to the core crimes; it is the logical consequence of the principle of universality. Every State in the world has universal jurisdiction regarding the three core crimes. It would render the whole establishment of the international Court void, if States by

[73] *Idem,* p. 6.
[74] Akande (2003), p. 634.
[75] Scharf (2001), p. 76.

themselves could do for what they collectively will be prevented for.[76] Pursuant to article 4 of the Statute the ICC has international legal personality and derives its power from the Member-States of the Statute. This can lead to no other conclusion as that those States are able to delegate "on the Court they are founding together the authority and rights to exercise jurisdiction they themselves have under international law."[77]

Especially the second argument that from a political angle the delegation of jurisdiction to an international Court will lead to fundamental differences, has to be critically put in question. The universal jurisdiction of States contains jurisdiction upon the core crimes of human history: Crimes against Humanity, War Crimes and Genocide. The political embarrassment can neither serve as a justification to deprive an international Court of its legal competence to exercise jurisdiction nor can this statement serve the argumentation that in such a case the consent of the State of nationality is needed.[78] On the contrary, the tremendous severity of those crimes lead to the permission of States to exercise universal jurisdiction, in the interests of the international community as a whole, even without the consent of the State of nationality to deterrent and punish those committing the crimes.[79]

Regarding the penultimate argument made by the objectors to the Court that the exercise of the ICC's jurisdiction upon Non-Party nationals acting in reliance to their official policy, would amount to a prosecution of the non-consenting State as such and therefore violate the *Monetary Gold* doctrine, is erroneously missing the point. In accordance to the well-established principle of international law, which was also underlined by the *Monetary Gold* case, it is correct that a Court[80] will only be able to exercise jurisdiction with the consent of the State and can therefore not decide on legal rights of Third States, where those legal rights would form the main subject matter of the decision.[81] But this doctrine, anchored in international law, is not pertinent for this special matter. Pursuant to article 25 (1), the ICC contains only jurisdiction over natural persons. No provision of the Statute relating to individual criminal responsibility will affect the responsibility of States under international law, article 25 (4). In prosecuting State officials, who have acted on behalf of the State, the Court focuses itself not directly against the State but exclusively on the criminal responsibility of that individual. This is in accordance with the rationale of international criminal responsibility, which differentiates between the responsibilities of States from the personal responsibility of individuals.[82] The claim that the exercise of jurisdiction will be on an interstate-level and therefore violates international law is disregarding the important distinction between State- and individual responsibility

[76]See Schabas (2010), p. 286; Akande (2003), p. 626.

[77]Kaul (2002), p. 591.

[78]See Akande (2003), p. 625.

[79]See Akande (2003), p. 626.

[80]With regard to this doctrine the International Court of Justice.

[81]See Shaw (2017), pp. 818–819.

[82]See Akande (2003), p. 636.

on the one side and the International Court of Justice and the ICC on the other side and has therefore to be dismissed.

Furthermore, in accordance with the Nuremberg principles it should be emphasized that those principles explicitly stated for the first time that the official capacity of a representative of a State will not exempt him from being prosecuted for international crimes.[83] Whereas it was well-established that State officials with immunity *ratione materiae,* protecting the conduct carried out on behalf of a State, would be immune from scrutiny and therefore prosecution, the development of international criminal law abolished this extension with regard to international core crimes.[84] This was confirmed by national courts in the *Pinochet*—as well as in the *Eichmann* Case, where the Court determined in the latter case that international crimes

> are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.[85]

In 1997, the Appeals Chamber of the ICTY underlined the foregoing and stated that for crimes like Genocide, Crimes against Humanity or War Crimes, "those responsible [. . .] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity".[86] Thus, pursuant to contemporary customary international law a State official in possession of functional immunity cannot claim the latter immunity when international crimes are being prosecuted.[87] With respect to this examination, no evidence could be produced that the ICC has to refrain from exercising jurisdiction upon nationals acting in their official capacity *ratione materiae,* even if those are nationals of Non-Member States.[88]

The final accusation of the US implies that article 121 (5) as well as article 124 would constitute an "unproductive asymmetry",[89] because a Non-Party State would be placed in a less favorable position than a Member to the ICC.[90] While the amendment article 121 (5) entails an opt-out mechanism of the Courts jurisdiction with regard to possible new amended crimes, the Transitional Clause, article 124,[91]

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[83] See See Cryer et al. (2014), p. 546.

[84] *Idem,* p. 546.

[85] Attorney General of Israel v. Eichmann, Israel Supreme Court (1968) reprinted in 36 ILR 277, pp. 308–310.

[86] *Prosecutor v. Tihomir Blaskic,* Judgement of the Appeals Chamber, IT-95-14-AR9 (29 October 1997), para. 41.

[87] See Pedretti (2015), p. 278 and more detailed in Chapter 6 of her book; Triffterer and Burchard (2016), p. 1048, para. 16.

[88] The problem of the applicability of article 27 to Non-State Members will be extensively discussed within the analysis of article 13 (b) as well as 27.

[89] Wedgwood (1999), p. 104.

[90] See Scheffer (1999b), p. 20; Wedgwood (1999), p. 104.

[91] More information in this chapter, Sect. I, 3, e.

contains the non-acceptance of the ICC's jurisdiction with respect to War Crimes for a period of 7 years after the State's entry into force of the Statute. Pursuant to the antagonists, it would be "unfair and parochial" if a Member-State could submit a declaration with regard to article 121 (5) or 124, which bars the Court from exercising its jurisdiction upon a national of that State or on a crime committed in its territory, while a national of a Non-Party State could still be prosecuted in case a Member-State, which did not lodge a declaration, refers the situation to the Court.[92]

At the time of the Rome Conference, these two provisions were carefully negotiated as an incentive to achieve universal acceptance of the Courts jurisdiction. However, it became apparent that the whole commotion about these two articles, first and foremost created by the U.S, resolved itself. State's practice for the last 15 years has shown that this cautiousness was unnecessary, because with regard to article 124 only two States made use of it; France withdrew in 2008, and the declaration of Colombia, which wanted to withdraw from it a long time, already expired.[93] The majority of States wanted to delete the dispensable article at the Review Conference in Kampala in 2010 and at the fourteenth session of the ASP in 2015, but due to the disagreement of some States the article was retained while simultaneously losing its importance.[94] Presently, none of the 123 Member-States have made a declaration with regard to the transitional provision.

Article 121 (5) should constitute a privilege to Member-States, which ratified the Statute at a time, in which the Courts jurisdiction covered only the Crime of Genocide, Crimes against Humanity and War Crimes.[95] The acceptance of the Court's jurisdiction until 2010 could not entail an overall affirmation of everything which might be amended in the future. Furthermore and in the light of the laws of treaties, mainly the amendment of multilateral treaties, article 40 VCLT, State's Party to a treaty must be able to affirm or neglect new amendments of a treaty. Thus, the opt-out mechanism with regard to article 121 (5) just reaffirms article 40 (4) VCLT. It is correct that the jurisdiction of the Court omits the exercise of its jurisdiction with regard to the declaration making State, either for that State's national or on that State's territory; but this does not mean that the State is free from any other prosecution. It has to be emphasized that the declaration, pursuant to 121 (5), only touches the international/vertical relationship, the State with regard to the ICC, whereas the national/ horizontal level remains untouched. If, for example, War Crimes are committed on the territory of the declaration making State, the Member-State is still obliged to prosecute the ones responsible. And the territorial jurisdiction as well as the universal jurisdiction of any country stays in force, so that in case a national of that declaration making State commits War Crimes or any of the other crimes in the territory of any State, this person could be made accountable by that State. Thus, the opting-out Member-State, with regard to the new amended

[92]Wedgwood (1999), p. 104; Scheffer (1999b), p. 20.

[93]See Zimmermann (2016), p. 2317, para. 20.

[94]See Clark (2010), p. 691; Zimmermann (2016), pp. 2316, 2317, paras. 18–19.

[95]See Brown (1999), p. 887.

crime, is not treated more favorable than a Non-Party State which might come, under very special circumstances, under the jurisdiction of the Court.

Whereas the foregoing examination is highlighted from a theoretical angle, the fear of the antagonists is with regard to the first amended (or better specified crime of aggression) practically unfounded, as the new agreement pursuant to the Crime of Aggression has shown. State Parties adopted at the Kampala Conference in 2010 the amendment of the Crime of Aggression in agreeing on a definition as well as on the conditions for the exercise of jurisdiction.[96] The new article 15*bis* reaffirms in its paragraph (4) the intent of article 121 (5) but adds in paragraph (5) "[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". The drafting of article 15*bis* (5), in the opinion of *Scheffer,* "corrected [. . .] the apparent drafting flaw in Article 121 (5)".[97]

b. Interim Result

In accordance to the foregoing determination, it could be demonstrated that article 12 (2) (a) is neither violating article 34 VCLT nor does it lead to an impermissible *Drittwirkung* under international law. All the arguments which were brought forward against article 12, ranging from the unlawful imposition of obligations on Non-Member States to the inadmissibility of delegating State's universal jurisdiction to an international criminal entity like the ICC, could be clearly rejected. Independently of the well-established principle of territorial jurisdiction and the inherent right to prosecute every national of the world without the consent of the State of nationality, the extensive practice has once more underlined that no evidence could be found that States are obliged to obtain the consent of the State of nationality of the accused they want to prosecute; this consent was neither a prerequisite if the territorial State conferred its jurisdiction to another State or a Tribunal.[98] Furthermore, the surrender of Non-Party nationals by Member-States to the ICC neither violates article 34 VCLT nor the *aut dedere aut judicare* principle*;* the State's obligation is to try the accused itself or to extradite them to another requesting State for trial which could be, with regard to the foregoing purpose of the Court, also the ICC. The fact that States are permitted to exercise universal jurisdiction over the core, and meanwhile nearly undisputable customary law crimes on behalf of the international community as a whole and the fact that the ICC derives through article 12 (1) and article 13 (a) in conjunction with article 12 (2) the power from the State Parties itself, results in the admissibility of the delegation of States universal jurisdiction, if they liked to do so.[99] No explicit provision could demonstrate that

[96]Crime of Aggression, Resolution RC/Res.6 (11 June 2010).

[97]Scheffer (2010a), para. 10.

[98]See Akande (2003), p. 634.

[99]See Kaul (2002), p. 591; Akande (2003), p. 626.

the conferment of jurisdiction to jointly prosecute crimes of international concern is forbidden or could a prohibitive rule be identified. Statements that through the jurisdiction of the Court fundamental changes on the political platform will be registered, especially if nationals of Non-Member States committed a crime in their official capacity, have to be seriously scrutinized. First of all it is the criminal responsibility of the individual and not the responsibility of the State upon which the Court exercises jurisdiction. And the fact that immunity *ratione materiae* is not protecting the conduct of State officials from prosecution of international respectively the core crimes is just underlying the argument.

Furthermore, the claims regarding the "unfair and parochial"[100] articles 121 (5) and 124, which bar the Court from exercising its jurisdiction upon the declaration making Member-State, could be invalidated. It could be demonstrated that the cautiousness in drafting these articles was not that necessary as the drafters thought at the Rome Conference. Already at the Kampala Conference in 2010, the participants thought about the deletion of the transitional clause, because of its uselessness; except of two States, no State ratifying the Statute had ever made use of article 124. With regard to article 121 (5), as a logical incorporation pursuant to the VCLT, the first amended crime, Crime of Aggression, demonstrated that the fear of Non-Member States was without reason. Article 15*bis* determines that a non-ratifying State will not be under the jurisdiction of the Court with regard to that crime; neither if the crime happens on its territory nor when committed by its nationals.

Independently of the fact that all these alleged accusations, made by the US, could be disproved, it has to be emphasized that the exceptional fear of the US and other States with armed forces outside their territory is without any foundation. The ICC is built upon the principle of complementarity. Even if a Member-State referred a situation regarding a national of a Non-Member State to the ICC, the Court would have pursuant to article 18 to inform the State, in this example also the US. Furthermore, the threshold for the three core crimes has to be reached. If the US was willing and able to genuinely carry out investigations or prosecutions, the ICC would not be able to exercise its jurisdiction. Only in the extraordinary circumstance that the Pre-Trial Chamber of the ICC examined that options of paragraph (2) and (3) of article 17 are fulfilled, it could overrule the exercise of jurisdiction by America.[101] Thus it becomes apparent that there have to exist many irregularities until the ICC will be able to exercise its jurisdiction.

With regard to a historical and teleological interpretation, article 12 constitutes the minimum requirement an international Court has to fulfill to be effective and powerful enough to circumvent any loopholes and initial paralysis.[102] Furthermore it

[100] Wedgwood (1999), p. 104; Scheffer (1999b), p. 20.

[101] See Carr Center for Human Rights Policy, "The United States and the International Criminal Court", Working Paper T-00-02, p. 13 available at: https://www.innovations.harvard.edu/sites/default/files/ICC.pdf (Last accessed 07 Dec 2017).

[102] See Bourgon (2002), p. 569.

could be shown that even though not all participating States at the Rome Conference were in favor for a pure universal jurisdiction for the Court and therefore decided not to grant that kind of extensive jurisdiction, to date 123 States are members to the Statute which entails their implied consent to the jurisdiction system of the Court. The decision, to base the jurisdiction on the territoriality or the nationality and not one and the other principle of jurisdiction, broadens the applicability of jurisdiction.

The examination of the controversies surrounding article 12 and the result that all the different claims of the objectors could on the basis of international law and national or international practice be rejected, are especially with regard to the question of the book of paramount importance. Article 12 contributes in a very significant way to the prevention of impunity from prosecution regardless of the nationality of the accused, while the provision at the same time respects the sovereignty of States in granting the exercise or delegation of their territorial jurisdiction to the Court. Not to forget the complementarity principle, which always grants the State primary jurisdiction. This clause sets the basis for an equal jurisdiction system while still accepting the status of Non-Member States, in not imposing any obligations on them.

Accordingly, the jurisdiction system of articles 13 (a), 13 (c) in conjunction with article 12 and especially paragraph (2) (a) contributes significantly to a positive response to the question, whether the ICC could be designated as an International Criminal World Court.

2. Article 13 (b) Rome Statute

The history of drafting article 12 has shown that it constituted one of the main challenges of the whole Statute. The consensus to article 13 (b), on the other hand, did not create significant problems nor great controversies.[103] In light of ending impunity and the main goal of the UN-Charter to maintain international peace and security in case of the "existence of any threat to the peace, breach of the peace, or act of aggression" by taking measures under Chapter VII, it was obvious that this important maintenance—and enforcement mechanism had to be incorporated into the Statute of the future Court.

In accordance with this and the innovative measures taken by the SC in creating two *ad-hoc* Tribunals as a response to the incidents in the Balkans and Rwanda in the beginning of the 1990s, the Commission of the 1994 Draft Statute prepared a provision, which came very close to article 13 (b); they explicitly emphasized the necessity of a provision like article 13 (b) "to enable the Council to make use of the Court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind".[104] Moreover, the incorporation of an

[103] See Schabas (2017), p. 151; Wilmshurst (2001), p. 39.

[104] Schabas (2010), p. 294.

article like 13 (b) was, compared to the more restrictive article 12 of great significance to ensure that no criminal perpetrator responsible for the worst crimes of mankind is able to escape trial.[105] Even though some of the participants at the Rome Conference, especially the five permanent members of the SC, tried to give the SC the one and only power to refer, filter or block cases, the main and final purpose was not "to add or increase the powers of the Council as defined in the Charter",[106] but to create an independent Court with its own Statute, mechanisms and provisions, on which the Court has to rely on. The final draft manifested this principle and stipulated in article 1: "The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute". The relationship between the United Nations and the ICC was specifically expressed in article 2 in conjunction with the Negotiated Relationship Agreement[107] (NRA) which acknowledges in its article 2 (1) "the Court as an independent permanent institution"; article 17 NRA stipulates detailed information about the cooperation between the SC and the ICC so that a possible overriding of SC competencies was circumvented.

According to the final draft of article 13 (b), the ICC may exercise its jurisdiction with respect to a crime referred to in article 5 of the Statute in a situation in which one or more of such crimes appears to have been committed and are referred by the SC, acting under Chapter VII of the UN-Charter, to the Prosecutor of the ICC. Under this procedure the ICC will have territorial and personal jurisdiction not only in regard to State-Parties to the Statute but according to articles 24 and 25 UN-Charter, upon theoretically all UN-Member States.[108] More explicitly and pursuant to a literal and teleological interpretation: this exceptional triggering provision entails the world-wide jurisdiction of the ICC despite the non-membership of either the State of nationality or the territorial State to the Statute. Consent of none of those States is of any importance or is a requirement because the obligation to comply with the Statute stems from article 13 (b) in conjunction with article 25 UN-Charter.

Even though article 13 (b) was through the majority consent of States incorporated in the Statute, it is not without criticism. The critique and fear that the role of the SC might reduce the credibility and moral authority of the Court, is only one reluctant argument against the Court. Assertions of authors like *Dralle* that the SC is "empowered to extend the Court's jurisdiction"[109] by making use of the trigger-mechanism disregards the relationship between these two institutions. The SC is only able to take advantage of the Rome Statute provision article 13 (b) and will therefore neither extend the Court's jurisdiction nor undermine its independence or credibility because the trigger-mechanism arrives out of the Statute itself.[110]

[105] See Bourgon (2002), p. 563.

[106] Kaul (2002), p. 585; Schabas (2010), p. 294.

[107] Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

[108] See Condorelli and Villalpando (2002), p. 630.

[109] Dralle (2011), p. 3.

[110] See Schabas (2010), p. 294.

It has to be underscored that article 13 (b) represents only one out of three triggering mechanisms for the jurisdiction of the Court, for which a threat to the peace, breach of the peace or an act of aggression has to be examined by the SC. These are exceptionally circumstances under which the SC is allowed to take measures pursuant to article 41 and 42 of the UN-Charter. This mechanism does not provide the Council with the pure strength the permanent members wanted to grant the SC, but constitutes an extraordinary measure in an extraordinary situation.[111]

A further very strong argument for the incorporation of an article like 13 (b) and its possible consequences shall be presented in light of a teleological and historical interpretation, as mentioned above. The SC has already established two *ad-hoc* tribunals as a measure to restore peace, so that the intention to include a provision like 13 (b) into the Rome Statute was to relieve the SC from establishing one expensive and time-consuming *ad-hoc* Tribunal after the other.[112] Instead, the Council should make use of a permanent Court which, in extraordinary circumstances, can exercise its jurisdiction over State-Members of the UN like an *ad-hoc* Tribunal would have exercised its jurisdiction with regard to the special situation and the relevant UN-Member States.

Pursuant to the foregoing statement it could be assumed that the ICC has to be seen as an International Criminal World Court in regard to the case of a SC referral, because all 193[113] worldwide UN-Member States, if Party- or Non-Party-States to the ICC, may firstly theoretically fall under the jurisdiction of the Court and have secondly, pursuant to article 25 UN-Charter, to accept and carry out the decisions of the SC.

To discontinue at this point would omit some important determinations which, as a result of the trigger-mechanism anchored in article 13 (b), still lead to great controversies and difficulties. Firstly, the SC referral induces not only to the ICC's jurisdiction but intends therewith the Court to investigate and prosecute if necessary. This results in the applicability of the Statute provisions which deal with the jurisdiction, investigation and prosecution of the Court.[114] Secondly, as a logical consequence with regard to a treaty-based Court and the inherent subjection of Member-States under it, it is apparent that the main situations referred by the SC will not only contain situations in which nationals of Non-Member-States to the Statute are responsible for threatening or breaching the peace, but that these nationals will possibly hold the position of Head of States of those Non-Member-States equipped with the corresponding immunity *ratione personae*.

The above mentioned statement is not purely utopian but can be presented on two already existing SC referrals of situations of Non-Party States to the ICC but

[111] And even in situations, where such a breach is given, as the incidents in the Syrian Arabic Republic since 2011 could demonstrate, there will still remain the political problem in getting to a mutual consent of the five permanent members to take action.

[112] See Schabas (2010), p. 294.

[113] United Member States, available at: www.un.org/en/members/ (Last accessed 07 Dec 2017).

[114] See Akande (2009), p. 342.

UN-Member States like Sudan and Libya, which are presently under the jurisdiction of the Court.[115] While Sudan's President *Omar Al Bashir* is charged for Crimes against Humanity, War Crimes and Genocide, Libya's deceased President *Muammar Mohammed Abu Minyar Gaddafi* (Muammar Gaddafi) faced charge for Crimes against Humanity.[116] The criticism is not mainly focused on the pure fact that neither Libya nor Sudan are States Parties to the Statute. Rather, it concentrates entirely on the further and crucial questions, if those States can be bound by a Statute of a treaty-based Court they did not ratify, especially with regard to provisions like article 27. This article contains the irrelevance of the official capacity in front of the Court and does constitute an exception to the principle of diplomatic immunities *ratione personae,* which entails absolute immunity with regard to official and private acts of "[. . .] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs [. . .].[117]

Regarding the situation in Libya the question of the applicability of article 27 (2) has become obsolete, due to the circumstance that *Muammar Gaddafi* died during his capture and the other two accused persons, *Saif Al-Islam Gaddafi* as *de facto* Prime Minister and *Abdullah Al- Senussi* as Head of the Military Intelligence, do not enjoy personal immunity.[118] However, this still leaves open the question, to what extent the Rome Statute becomes applicable with regard to some provisions by virtue of the SC resolution. With regard to the situation in Darfur and President Al Bashir, attention will especially be paid to the most important and controversial issue of immunities, article 27 (2). The different decisions of the Court, which has already ruled on that matter, will briefly be considered to focus on the more important issue, if the ICC, through the SC referral of situations over Non-Member-States and the resulting applicability of some of the Statute's provisions, overrides the principle *pacta teriis nec nocent nec prosunt* and thus the intention of the treaty-based Court.[119] The further analysis will present the controversial arguments to determine whether the ICC violates international law.

The detailed analysis and the result of article 13 (b) is of crucial importance for the question of the book, as the outcome constitutes one essential basis for the determination of the strength or weakness of the Court, which could finally affirm or decline it's designation as an International Criminal World Court.

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[115]UN Security Council Resolution 1593 (2005) UN Doc S/RES/1593; UN Security Council Resolution 1970 (2011) UN Doc S/RES/1970.

[116]See *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi*, Decision on the "Prosecutor's Application Pursuant to Article 58", ICC-01/11 (27 June 2011); *The Prosecutor v. Omar Hassan Ahmed Al Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09 (4 March 2009).

[117]*Case Concerning The Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium,)* ICJ Reports (2002), p. 21, para. 51.

[118]See Homepage of the International Criminal Court, Libya, available at: https://www.icc-cpi.int/libya (Last accessed 07 Dec 2017).

[119]Simbeye (2004), p. 19.

a. Applicability of the Rome Statutes Provisions

With respect to the case law of the International Criminal Court so far, the latter does not see a bar to exercise its jurisdiction also with regard to Head of States from non-contracting Parties to the Statute when a situation is referred to it by the SC pursuant to article 13 (b). Unfortunately, the Pre-Trial Chambers do not apply a unanimous standard when it comes to such referrals but instead justify the applicability of article 27 (2) or better to say the irrelevance of immunity *ratione personae* by means of four different approaches. In the Al Bashir Arrest Warrant Decision from 2009, the Pre-Trail Chamber I emphasized that with regard to the applicability of article 13 (b) the "current position of Omar Al Bashir as a Head of State which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case" and that with regard to the purpose of the Statute, to end impunity, article 27 is directly applicable.[120] The Chamber based its decision on the fact that the SC has "accepted that the investigations into the said situation, as well as any prosecution arising there from, will take place in accordance with the statuary framework provided for in the Statute, the Elements of Crimes and the Rules as a whole" so that the Court will apply its own Statute, according to article 21 (1) (a) due to the fact that neither subparagraph (b) nor (c) are pertinent.[121] With regard to the Decision of the "Prosecutor's Application Pursuant to Article 58 as to Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", the paragraphs of the Al Bashir Arrest Warrant decision from 2009 were reiterated by the Pre-Trial Chamber I in the situation of the Libyan Arab Jamahiriya, so that the official position of *Gaddafi*, at the relevant time clearly still being the Libyan Head of State, would not have exempted the Court's jurisdiction over him from prosecution.[122] Despite the fact that the latter repetition of the direct applicability of article 27 through the SC referral was decided on in June 2011, the Pre-Trial Chamber's explanation changed in December 2011. With respect to the failure of the Republic of Malawi to cooperate pursuant to the request with the Court in arresting and surrendering Al Bashir, the Chamber cited the ICJ Arrest Warrant Case, referred to the SCSL decision on Immunity of Jurisdiction and determined "that the principle in international law is that immunity of either former or sitting Head of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties the Statute whenever the Court may exercise jurisdiction".[123] Thus, the Chamber circumvented the thematic surrounding the applicability

[120] *The Prosecutor v. Omar Hassan Ahmed Al Bashir,* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009, para. 41.

[121] *Idem*, para. 43–45.

[122] Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", ICC-01/11-12, Pre-Trial Chamber I, 27 June 2011, para. 9.

[123] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests

of article 27 (2) and concluded that there is a customary international law which removes functional as well as personal immunities in front of an international court. This approach was reaffirmed one day later with regard to the non-cooperation of the Republic of Chad.[124] In April 2014 the Pre-Trial Chamber II took an additional approach to justify the exercise of jurisdiction even upon officials equipped with personal immunity of Non-Member States. In relation to the non-cooperation of the DRC to arrest and surrender President Al Bashir, the Chamber determined that "the SC implicitly waived the immunities granted to Omar Al Bashir" because "the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities".[125] Therewith article 27 does not constitute a bar and therefore with regard to article 98 the Court would not be prohibited from requesting a Member State to surrender the accused. In the most recent decision of the Pre-Trial Chamber II in 2017, regarding the failure of South Africa to comply with its obligations to arrest and surrender Al-Bashir in 2015, the Chamber determined that with the SC triggering jurisdiction of the Court, "Sudan has rights and duties analogous to those of State Parties to the Statute"[126]; and as article 27 applied on both the vertical and the horizontal level, South Africa could not invoke article 98 (1).[127]

Taking the above mentioned into consideration, the Court does not regard personal immunities of officials of Non-Member States as an impediment to its exercise of jurisdiction, when the SC acting under Chapter VII refers a situation to the Court. In one way or another, the Court has justified that neither immunities *ratione materiae* nor *ratione personae* exist in front of the Court and that the applicability of some of the Statute's provisions will consequentially oblige Non-Member States to comply with the latter which could result in the violation of the *pacta teriis nec nocent nec prosunt* principle.[128] As expressed by article 34 VCLT, a treaty does as long as Non-Party States do not give their consent, neither create rights nor obligations for the latter. With respect to the two existing SC referrals of the situations in Sudan and Libya and the decisions taken by the Court with regard to the latter, the problem of the applicability of article 27 (2), upon

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Issued by the Court with Respect to the Arrest and Surrender of Omar Hasan Ahmed Al Bashir, ICC-02/05/01/09, 12 December 2011, para. 36.

[124] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hasan Ahmed Al Bashir, ICC-02/05/01/09, 13 December 2011, para. 13.

[125] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of The Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 April 2014, para. 29.

[126] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Hasan Ahmed Al Bashir, ICC-02/05/01/09, 06 July 2017, para. 88.

[127] *Idem,* paras. 76 and 93.

[128] See Crawford (2012), pp. 384–385.

Non-Members to the Statute arises. As already stated, the Court pursuant to article 27 (2) is theoretically authorized to exercise jurisdiction upon persons who in general enjoy immunities whether under national or international law, given that the official capacity is irrelevant in front of the Court and does not bar the latter from exercising its jurisdiction. Due to the circumstance that even the Court does not apply one and the same standard with regard to that matter, which could have helped in determining its applicability, it will be further examined, whether the maxim of the irrelevance of immunities in front of the Court and its applicability to Non-Member States could be regarded contradictory to the customary law of personal immunities and if the applicability of some of the provisions of the Statute infringes article 34 of the VCLT. For this reason, the different controversial opinions will be analyzed.

(1) Strict Approach

With regard to a very strict view, Prof. *Schabas* sees an absolute prohibition of removing immunities of Head of States of Non-State Parties in front of the ICC.[129] He underlines this reasoning by questioning how "a group of States, acting collectively," can "withdraw an immunity that exists under international law"[130] simply because these States decided, by treaty, to waive such immunities in front on their own established Court; consequently, there would be no right to abandon the immunity of Non-Party States to the ICC by applying article 27 II without their consent. Pursuant to his theory the personal immunities of State officials of Non-Members remain untouched.

(2) Strict/Customary International Law Approach

Prof. *Gaeta* confirms the foregoing opinion by saying that a SC referral cannot turn a Non-Member State into a State-Party to the Statute even because it is a treaty-based Court; but the author turns then to the approach that article 27 II will nevertheless be applicable because of its international customary law status.[131] She underscores her view by emphasizing the case law of the International Court of Justice (ICJ) *Arrest Warrant Case Decision*[132] as well as the Statutes and practice of International Tribunals and Courts such as the ICTY, ICTR and the SCSL. Both the ICTY and the ICTR have pursuant to their Statutes no obligation to respect immunities, as it states in article 6 II of the ICTR and article 7 II of the ICTY:

[129] See Schabas (2017), p. 62.

[130] See Schabas (2017), p. 62.

[131] See Gaeta (2009), p. 322.

[132] *Case Concerning The Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium,)* ICJ Judgement (2002).

> The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.[133]

Furthermore, the ICTY's Trial-Chamber decided in its Decision on Preliminary Motions in the *Milosevic* case that these articles of the two *ad hoc* Tribunals "are indisputably declaratory of customary international law".[134] The ICJ stated in its judgment in 2002 that personal immunities are still to be seen as absolute in regard to the exercise of criminal jurisdiction by domestic courts, but constitute no bar to the International Criminal Court's jurisdiction. This judgment is in conformity with the SCSL argumentation in the *Taylor*[135] case, in which the Court reiterated that personal immunities have "no relevance to international tribunals which are not organs of a State but derive their mandate from the international community."[136] Agreeing to the derogation of personal immunities at the "vertical" level, Prof. *Gaeta* draws the conclusion that article 27 II just "restates an existing principle of customary international law", namely the irrelevance of personal immunities "for the exercise of jurisdiction by any international criminal court".[137]

(3) Non-State-Member as an Analogous Party Approach

In contrary to the foregoing two opinions, authors like Prof. *Cryer, Wilmshurst and Akande* determine that in a case of a SC referral pursuant to article 13 (b), Non-Member States to the ICC have to be set in an analogous position to a Party to the Statute, which means that the provisions of the Statute would also be binding on Non-Members.[138] Prof. *Akande* explains his view in emphasizing the *Al Bashir Arrest Warrant Decision* of 2009 which, as already mentioned above, states that the ICC will in the situation of a SC referral investigate and prosecute in accordance with its statuary framework; the jurisdiction and functioning of the Court will be in accordance with article 1. In addition to underline the applicability of the Statutes provisions to Non-Party States, article 25 of the UN-Charter is highlighted, which determines that UN-Members agreed to accept and carry out the decisions of the Security Council. Consequently, all 193 UN-Members are legally bound by the content of SC resolutions, even if this entails the triggering of the ICC's jurisdiction and therefore the applicability of the Rome Statute's provisions by virtue of the SC

[133] Article 6 II ICTR Statute, article 7 II ICTY Statute.

[134] *Prosecutor vs. Milosevic,* Decision on Preliminary Motions, IT-02-54-PT, 8 November 2001, para. 28.; Schabas (2010), p. 448.

[135] See *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, Appeals Chamber, 31 May 2004.

[136] *Idem,* para. 51.

[137] Gaeta (2009) p. 325 et seq.; Gaeta (2002), p. 991.

[138] See Cryer et al. (2014), p. 560; Akande (2009) p. 340 et seq.

resolution to restore international peace and security.[139] This argument is highlighted in SC Resolution 1593 which explicitly obliged the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with and provide any necessary assistance to the Court. With regard to the situation in Libya and the duty of UN-Members to comply with the resolutions, the former ICC Prosecutor *Ocampo* underscored the foregoing opinion and added that even though "Libya is not a State Party of the Rome Statute, it is a member of the United Nations since 1955" and has through the UN- Security Council Resolution 1970 "the primary responsibility to implement the arrest warrant".[140]

In conclusion of the foregoing determination of the third approach, some of the Statute's provisions and especially article 27 (2) will be applicable because States like Sudan and Libya have to be seen as analogous members of the ICC by virtue of the SC resolution; as UN-Member States they are obliged to implement the content of the resolution, which explicitly determines that these States have to "cooperate fully with and provide any necessary assistance to the Court".

(4) Analysis and Discussion

The fact that neither Sudan nor Libya are Member-States to the Rome Statute and therefore not under the duty to comply with the Court, constitutes the basis for the thesis of Prof. *Schabas'* opinion which manifests the strict adherence to the *pacta teriis nec nocent nec prosunt* principle. States Parties to the Statute have revoked their immunity of their Heads of States in front of the ICC as well as among themselves.[141] For Non-Member States the immunity could not be regarded as abolished, article 27 (2) therefore would be inapplicable. The only possibilities for the ICC to apply its provisions, pursuant to this author, would be firstly the waiver of immunity by the State itself; secondly their explicit consent to the ICC's jurisdiction, pursuant to article 12 (3) or finally the consequence to wait until the official is no longer serving in a capacity that entails personal immunity. Acceptance of this opinion would disregard the main purpose of the ICC and therefore be contradictory to the fundamental intention anchored in the Preamble of the Statute. As Prof. *Triffterer* correctly highlights, the article which entails the "irrelevance of official capacity" constitutes "one of the clearest manifestations in the Statute" in due consideration of the main goal "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[142] Additionally, it appears inconsistent of *Schabas* to permit and not prohibit *ab initio* the

[139] See Cryer et al. (2014), pp. 559–561.

[140] ICC-Statement by the ICC Prosecutor on the Decision by the Pre-Trial-Chamber I to issue three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, Press Releases, 28.06.2011, p. 1.

[141] See Daqun (2012), p. 62.

[142] Triffterer and Burchard (2016), p. 1049, para. 17; Preamble of the Rome-Statute, para.5.

existence of a provision like 13 (b) and the resulting trigger-mechanism of the Court's jurisdiction also upon Non-Member States to the Statute, to determine afterwards the inability of the Court's proceedings. It can be assumed that the author is aware of the requirements which have to be fulfilled for the perpetration of the core crimes listed in article 5 and that primarily people in such an official capacity have "the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes".[143] That Head of States of Non-Member States could be possible perpetrators of these heinous crimes is not unexpected and was one of the reasons for the cooperation of the SC acting under Chapter VII and the ICC. The consequence to wait until the perpetrator no longer serves as a Head of State but just equipped with *ratione materiae,* while possibly continuing his policy during the time being the Head of State, is unacceptable. Moreover, the author entirely disregards the explicit obligations emerging directly out of the SC resolutions themselves, which trigger the jurisdiction of the Court and oblige States like Sudan and Libya to fully comply with the Court.

With regard to the opinion of Prof. *Gaeta,* it could be argued that her opinion sets, with regard to its emphasis of a customary international law pursuant to the irrelevance of personal immunities vis-à-vis an International Criminal Court, a very important addendum to justify the applicability of article 27. Pursuant to her view, article 38 VCTL constitutes the relevant provision, which determines that nothing in article 34 VCTL may preclude "a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law", so that the claim of insisting on article 34 VCTL becomes invalid. Her approach reflects what the Pre-Trial Chamber determined in its decisions regarding the non-cooperation of the Republic of Malawi and Chad in December 2011. Authors like *Akande* and *Daqun* oppose the assumption that the abolishment of *ratione personae* in front of International Tribunals as such has become a rule of customary international law.[144] *Akande* sees no justification for such a rule only because special legal instruments at that time abolished the immunity of the respective States and incorporated articles like 27 (1) in former Statutes of International Tribunals and Courts,[145] whereas *Daqun* ties up on the foregoing view while highlighting first and foremost the *Arrest Warrant Decision* of the ICJ.[146] Although Prof. *Gaeta* and the Chamber applied the same ICJ judgment to underline their customary law approach by stating that the Court tried to assert that "the international nature of a criminal court constitutes per se a sufficient ground" to abolish immunities before "those international bodies", *Daqun* claims exactly the opposite.[147]

He determines that the ICJ by stating that

[143] 1996 ILC Draft Code against the Peace and Security of Mankind, Commentary (1) to article 7.

[144] See Daqun (2012), p. 56 et seq.; Akande (2011), p. 3.

[145] *Idem,* p. 3.

[146] See Daqun (2012), p. 67.

[147] Gaeta (2009), p. 322; Daqun (2012), p. 67.

> "the immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution [. . .]" to the extent that these people "may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction",

did not remove immunities in front of "any" International Court.[148] With regard to the existing referral of the situation in Darfur to the ICC, this judgment would serve more the argument that the accused *Al Bashir* may not claim his personal immunity in front of the ICC, which pursuant to article 13 (b) has jurisdiction upon him. But this decision does not constitute a definite conclusion with regard to a possible customary law of removing personal immunities vis-à-vis any International Criminal Court.

The causal chain of possible further problems arising out of the ICJ's judgement does not stop at this point. *Daqun* and *Damgaard* argue further that even if it was assumed that the ICJ meant "that international tribunals must automatically overrule immunities", the latter's judgment would lack a clear and comprehensive definition of an international criminal court.[149] The fact that "any" international Tribunal could overrule the customary law of personal immunities in combination with the lack of an international criminal court's definition could lead to detrimental outcomes, as Prof. *Schabas* highlights.[150]

The author states

> If there is no immunity before any international criminal court [. . .] would it be possible for Nauru, Monaco, Andorra, Taiwan and the Palestinian Authority to join together and create an international criminal tribunal where the President of the United States would be stripped of the immunity that he would otherwise possess before the national courts of those countries?

The foregoing arguments have demonstrated, how ambivalent the issues surrounding a customary law removing personal immunities are dealt with and how serious the discussion could be taken.

Nevertheless it has to be examined that a decision with regard to the dispute can be left open due to the circumstance that Prof. *Gaeta,* just like Prof. *Schabas,* bases her opinion on the wrong reasons and therefore misjudges the facts. While the author tries to support her customary law approach in differentiating the ICC and the *ad-hoc* Tribunals, by arguing that the latter were "created by virtue of a decision of the UN Security Council and are vested with the authority of a Chapter VII measure",[151] she ignores at the same time one main and important aspect: Non-Member States to the ICC, upon which the Court has jurisdiction pursuant to article 13 (b), are not bound directly through the treaty but by virtue of the decision of the SC resolution as a UN-Member, following article 25 UN-Charter; this is exactly the same basis for the claim like in the case of the *ad-hoc* Tribunals. Her argumentation that SC resolutions

[148] Daqun (2012), pp. 67–68.

[149] Damgaard (2008), pp. 264–265; Daqun (2012), p. 68.

[150] Schabas (2011).

[151] Gaeta (2009), p. 319.

may just trigger the jurisdiction of the Court, to leave it afterwards by that triggering mechanism, because of the inapplicability of the Statutes provisions,[152] is missing the point. Authors like Prof. *Akande* and *Cryer* as well as the ICC's former Prosecutor *Ocampo* clearly explain the importance and consequences of SC referrals to the ICC: the applicability of some of the Statute's rules for States not Party to the ICC arise not directly from the Statute itself, but out of the SC resolution and the Charter.[153] These resolutions unambiguously determined that the authorities of Sudan and Libya "shall cooperate fully with and provide any necessary assistance to the Court and Prosecutor pursuant to this resolution".[154] This argumentation goes in the same direction as the Chamber's determination in the decision regarding the non-cooperation of the DRC in 2014, whereas the Chamber incorrectly concluded that the obligation to cooperate entails the implicit removal of immunities by the SC resolution, because article 27 (2) could not be applied to Non-Member States.[155] First of all, this determination is in contradiction to every other decision with regard to that matter, especially to the examination taken in the Arrest Warrant decision of 2009 and in the most recent Pre-Trial II decision of 2017. Secondly it is very questionable whether the literal interpretation of the "obligation to cooperate" under the resolution entails an implied relinquishment of immunities; a more plausible argument is that the wording of Part 9 of the Rome Statute was reiterated which contains provisions relating to cooperation and judicial assistance.[156] And thirdly, the Chamber does, in justifying the removal of immunities by the SC, overrule its own Statute and grant the SC a power, which it does not have pursuant to the Rome Statute. The SC may only make use of the jurisdictional trigger mechanism anchored in article 13 (b); it is not the UN-Charter which grants the SC the possibility to refer a situation to the Court.[157]

The wording of the resolutions and the initiated trigger-mechanisms lead to the consideration of the third approach to treat Non-Member States as analogous parties to the ICC, which make some Statute provisions binding on them. All the other approaches, which try to emphasize the adherence to the Statute provisions, result in the meaninglessness and invalidity of article 13 (b). As mentioned in the historical part of article 13 (b), the intention of drafting the provision was to allow the Council to make use of an independent and permanent International Criminal Court, to circumvent the establishment of further extraordinary expensive *ad-hoc* Tribunals. In an imaginable different situation of no existence of an ICC, the SC would have

[152] See Gaeta (2009), p. 324.

[153] Akande (2009), p. 342.

[154] UN Security Council Resolution 1593 (2005) UN Doc S/RES/1593, para. 2; UN Security Council Resolution 1970 (2011) UN Doc S/RES/1970, para. 5.

[155] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of The Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 April 2014, para. 26.

[156] See also Pedretti (2015), p. 288.

[157] See also Jacobs (2015), p. 290.

been able to establish new *ad-hoc* Tribunals which would have been capable to exercise jurisdiction with regard to the President of Sudan, because personal immunities would have been abolished. Finally, the result would be exactly the same as applying some of the Statutes provisions by virtue of the SC resolution on States not Members to the Statute and the objectors of the third approach would be satisfied.[158] This conclusion is also in conformity with the decisions of the Chamber in 2009 and 2017 regarding the SC referrals of Sudan and Libya to the Court, in which the Chambers applied article 27 (2) directly because of its jurisdiction triggered by the SC referral; it would have been appropriate to determine the applicability of article 27 more carefully in examining that the irrelevance of the official capacity is by virtue of the SC resolution applicable. Nevertheless, the decision of the Pre-Trial Chamber II of 2017 can be regarded as the most explicitly formulated decision regarding the applicability of article 27 and its interplay with article 98 (1).

The further determination of Prof. *Schabas* that even the establishment of new ad-hoc Tribunals would not support the abolishment of immunities because the reliance on provisions of the *ad-hoc* Tribunals as well as from the SCSL do not include the removal of immunity as such because the "official capacity" does not address the matter of immunity under international law, has to be clearly rejected.[159] Following this approach would not only render the whole intention and creation of the *ad-hoc* Tribunal's void, but it is furthermore not in accordance with a teleological interpretation. As mentioned in the Tribunals' Statutes, the official capacity of a Head of State does not constitute an obstacle for the Court or Tribunal to prosecute the latter. The teleological interpretation can only manifest the implicit jurisdiction over such individuals and therefore an abolition of immunities. Only because article 27 differentiated for the first time between a person being criminal responsibility regardless of its official capacity, paragraph 1, and the immunities which shall not bar the Court to exercise its jurisdiction, paragraph 2,[160] does not render all the other incorporated articles in Statutes of the ICTY, ICTR or the Charter of the International Military Tribunal at Nuremberg void. The further accusation that the ICJ disregarded the profound differences between the *ad-hoc* Tribunals and the ICC, because the Tribunals were establishments of the SC acting pursuant to Chapter VII, once more misinterprets the intent of article 13 (b) and can therefore not be maintained. Precisely because of the power given to the SC taking measures under Chapter VII UN-Charter and the right to make use of an article like 13 (b), such referrals are permitted, so that Non-Member States to the ICC are bound to the Statute by virtue of that SC resolution and not directly by the Court.

[158] See Gaeta (2009), p. 319.

[159] See Schabas (2010), pp. 451–452.

[160] See Triffterer and Burchard (2016), p. 1038, para. 1; Akande (2004), p. 419.

b. Interim Result

Taking into consideration the prior examination it can be concluded that Non-Member States to the ICC are bound to the Statute or at least to some of its provisions relating to the jurisdiction, investigation and prosecution by virtue of the resolution of the SC, as a UN-Member, article 25 UN-Charter. Additionally, it has to be emphasized that the third approach and likewise the Pre-Trial Chambers decision[161] of 2017 lack a bit of clarity in so far, as that they define Non-State Parties as such as analogous Parties to the Statute, which could imply that these States would also be obliged to comply with financial or administrative regulations of the Statute, which obviously is not the case. The applicability of the Rome Statutes provisions by virtue of a SC resolution furthermore abolishes the immunities of Head of States of Non-Parties in accordance with article 27 (2) in front of the Court which leads to the exercise of jurisdiction upon Presidents like *Al Bashir* or *Gaddafi*. Those States have by virtue of the SC decision to comply fully with and provide any necessary assistance to the Court and Prosecutor.

The final result of the applicability of article 27 (2) to Head of States of Non-Parties and the possibility of the Court to proceed with its work in accordance with its Statute has to be determined as the only consequence with regard to a teleological and historical interpretation of the purpose of the ICC and the SC acting under Chapter VII UN-Charter.

Furthermore and with a view to the most important question of this assessment, the foregoing examination underscores that the ICC can be regarded as an International Criminal World Court with the possible worldwide jurisdiction in the case of article 13 (b). The capability of the ICC to exercise its jurisdiction upon every UN-Member State, regardless of their status to the Court and despite the official capacity of the perpetrator, defines the Court as a very powerful criminal institution. Article 13 (b) "links the peace and security mandate of the SC to the justice mandate of the ICC."[162] On the one hand article 13 (b) has to be seen as an exceptional provision to which the States at the Rome Conference mainly agreed to. On the other hand the provision underlines the key purpose of the Statute that "the most serious crimes of concern to the international community as a whole must not go unpunished". In the case of a SC referral of a situation to the Court, Heads of States of Non-Parties to the Statute lose their inherent right of personal immunity and therefore their inviolability in front of the Court. As examined in the historical excursus, the time was ripe for a change in the criminal justice system, and what had been seen as utopia for more than 50 years, should become reality. It could not possibly be the intention of the drafters to create an article like 13 (b) to trigger the

[161]The Pre-Trial Chamber determined that the legal framework of the Statute applies "in its entirety" to Sudan. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Hasan Ahmed Al Bashir, ICC-02/05/01/09, 06 July 2017, para. 85.

[162]Sarooshi (2004), p. 100.

jurisdiction of the ICC only with regard to Member States, because this jurisdiction is already covered by article 12. Furthermore, it would have been inconsistent to trigger the jurisdiction also upon Non-Member States, only to stop the procedure afterwards, by relying on the *pacta teriis nec nocent nec prosunt* principle and resulting inapplicability of its provisions. It is not a new phenomenon that behind the commission of the core crimes of the Statute a whole State's apparatus will be found responsible, which leads to the States officials' involvement. It would be presumptuous to claim that all those Governments at the Rome Conference were not aware of this fact while accepting a provision like article 13 (b). On the contrary, the trigger-mechanism of the SC acting under Chapter VII has to be seen as an exceptional measure but *condition-sine-qua-non* for all the further proceedings of the Court. Interrupting this chain would not only hinder peace or justice and, therefore, resulting in the senselessness of SC resolutions, but would also lead to the redundancy and inutility of the whole provision 13 (b) whilst simultaneously undermining the credibility and main purpose of the ICC. To circumvent such an outcome and to remain within the aim of the establishment of an International Criminal Court, there can be no other result than the worldwide jurisdiction of the ICC in the exceptional case of 13 (b) upon all UN-Member States,[163] regardless of their status. If one State in the world decides to threat or breach the peace or to commit an act of aggression, there will be no room for impunity anymore. Accordingly, provision 13 (b) constitutes one more evidence for the affirmative answer to the question of the book and therefore to the ICC's designation as an International Criminal World Court.

3. Article 15 bis, *15* ter, *Article 16, Article 17 et seq., Article 27 and Article 124 Rome Statute*

This section will discuss possible restrictions with regard to the jurisdiction, investigation and further proceedings of the Court, which could potentially reduce the foregoing determination that the ICC has to be regarded as an International Criminal World Court. Firstly, emphasis will be given to the Review Conference of the Rome Statute in Kampala in 2010 and the concluding articles 15 *bis* as well as 15 *ter,* dealing with the exercise of jurisdiction over the Crime of Aggression and its activation in 2018 (State referral, *proprio muto*, SC referral). Twelve years after the establishment of the Rome Statute and the disagreement around a definition of the Crime of Aggression at that time, States finally reached a consensus with regard to the definition and elaborated the conditions necessary for the ICC to exercise jurisdiction about the Crime of Aggression.[164] At the 14th December 2017 States

[163]It is dependent on each resolution, which UN-Member State is obliged to cooperate with the Court, but theoretically the ICC can exercise its jurisdiction upon every UN-Member State.

[164]See Barriga and Grover (2011), p. 517.

Parties reached a consensus decision regarding the activation of the jurisdiction of the Crime of Aggression as of 17 July 2018.[165] This breakthrough is historic on the one hand, but problematic on the other hand; the new jurisdiction mechanism implemented in articles 15 *bis* and 15 *ter* for the Crime of Aggression sets new standards with regard to the capability of the Court to exercise jurisdiction and differs from what was anchored in article 12 Rome Statute.[166] All the various modifications with regard to these new amendments will be portrayed in light of the question of the book.

Secondly, emphasis will be put on essential articles such as the deferral of investigation or prosecution (article 16), the principle of complementarity (article 17), the irrelevance of the official capacity (article 27) and the transitional provision (article 124).

a. Article 15 *bis* and 15 *ter* Rome Statute

Sixty five years after the International Military Tribunals at Nuremberg and Tokyo had prosecuted "the supreme international crime",[167] defined as "crimes against peace", States as well as Non-States Parties to the Rome Statute and members of civil society reached an agreement with regard to definition of the Crime of Aggression as well as on a jurisdiction mechanism at the Review Conference in Kampala in June 2010.[168] "For the first time, we now have international criminal law defining clear limits for the *ius ad bellum*",[169] as Hans-Peter Kaul, former Judge and Second Vice President of the ICC correctly stated. Since the Second World War there will be an international criminal court prosecuting the Crime of Aggression, holding responsible those, who effectively exercise control over, or direct the political or military action of a State, by planning, preparing, initiating or executing the act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[170]

While in 1998 States could not reach an agreement with regard to the definition of the crime of aggression and postponed this matter in accordance with articles 121 and 123,[171] this former divergence no longer constituted an obstacle at the

[165]Resolution ICC-ASP/16/Res. 5, Activation of the jurisdiction of the Court over the Crime of Aggression, Adopted at the 13th plenary meeting, 14 December 2017, by consensus, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf (Last accessed 19 Dec 2017).

[166]See Reisinger Coracini (2010), pp. 747–748.

[167]Trial of the major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945 -1 October 1996; Trahan (2011), p. 50.

[168]See Trahan (2011), p. 49 et seq.

[169]Kaul (2011), p. 4.

[170]See Crime of Aggression, article 8 *bis* Rome Statute.

[171]Former article 5 (2) Rome Statute, which was deleted in accordance with RC/Res.6, Annex I, 11 June 2010.

Review Conference. With the establishment of the Special Working Group on the Crime of Aggression (Special Working Group) by the Assembly of States Parties in 2002, various proposals on the definition of the crime as well as to its jurisdiction mechanism were elaborated. In 2009 the Special Working Group successfully completed its work and with the exception of different proposals for the exercise of jurisdiction, State Parties agreed already at this stage on a definition and the elements of the Crime of Aggression, which ultimately resulted in an unanimous adoption of the final version at the 2009 Review Conference.[172] Without going deeper into the draft history of the definition for the Crime of Aggression,[173] a few important points should be mentioned. For the criminal offence to constitute a Crime of Aggression, the definition of an "act of aggression" is anchored in article 1 in conjunction with article 3 of the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, with one important modification: The "act of aggression" was made subject to the highest requirements. In contrary to the definition of the General Assembly, not every illegal use of force, such as the invasion, bombardment or blockade by armed forces of States referred to in art. 8 *bis* (2) (a-c) Rome Statute, falls under the definition of article 8 (1). Instead, the act of aggression has to constitute a manifest violation of the UN-Charter, by its character, gravity and scale. This special threshold requirement was further explained and manifested in the "Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression".[174] Pursuant to paragraph 6 and 7, aggression was defined as "the most serious crime and dangerous form of the illegal use of force" which "requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned"; for the violation to be manifest and to be determined as a Crime of Aggression, all "the three components of character, gravity and scale must be sufficient" so that "no one component can be significant enough to satisfy the manifest standard by itself".[175] These exorbitantly high demands in the definition of the Crime of Aggression are not necessarily a bar for the Court: Firstly it is more likely that States will ratify the amendment more quickly and secondly they have to been seen as a reflection of the Rome Statutes Preamble, which states that the ICC has jurisdiction only over the most serious crimes of concern to the international community as a whole.[176]

In contrast to the definition of the crime, the consensus for an agreement with regard to the exercise of jurisdiction of the Crime of Aggression was the cause of much debate, which continued into the final minutes of the Kampala Conference.[177] Open issues such as entry into force procedures, States consent as a condition for and

[172] See Trahan (2011), p. 55; Barriga and Grover (2011), pp. 518, 521.

[173] Due to the fact that this analysis does not play an essential role with regard to the question of the book.

[174] See RC/Res.6, Annex III, 11 June 2010.

[175] See RC/Res.6, Annex III, paragraph 6 and 7, 11 June 2010.

[176] See Trahan (2011), p. 59; Kaul (2011), p. 5.

[177] See Reisinger Coracini (2010), p. 763; Schabas (2011), p. 202.

the SC determination of an act of aggression as a prerequisite for the exercise of jurisdiction, ultimately resulted in a big compromise but a final agreement on the Crime of Aggression.

The final package is laid down in the new amended article 15 *bis*, which regulates the exercise of jurisdiction with regard to State referrals as well as the prosecutors initiation of a *proprio mutu* investigation, and article 15 *ter*, which contains the requirements for the exercise of jurisdiction with regard to Security Council referrals. The amended articles can be read as follows:

Article 15 *bis:*

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed 1 year after ratification or acceptance of the amendments by 30 States Parties.
3. The Court 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.
4. The Court 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. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within 3 years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. 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 such a determination of an act of aggression committed by that State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect to a crime of aggression.
8. Where no such determination is made within 6 months after the date of notification, the Prosecutor may proceed with the investigation in respect to a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect to the crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter:*

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed 1 year after ratification or acceptance of the amendments by 30 States Parties.
3. The Court 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.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

These amendments with regard to the exercise of jurisdiction constitute in many respects a novum. Firstly, the ICC is only able to exercise jurisdiction after the ratification of thirty State Parties in addition to a new decision not taken before the year 2017. Secondly, the ICC is not dependent on SC determinations as to whether an act of aggression was committed nor and thirdly, does the ICC only has jurisdiction in respect of States Parties ratifying the amendment while not declaring its unacceptance; Non-State Parties are entirely excluded from the jurisdiction of the Court.

These new procedures will be analyzed by virtue of the question of the book to determine to what extent the result might strengthen or weaken the Court's jurisdiction. For this reason the main and most important paragraphs of both articles 15 *bis* and 15 *ter* will be examined.

(1) Exercise of Jurisdiction with Regard to the Crime of Aggression

Article 15 *bis* deals with the jurisdiction mechanism with regard to State referrals and *proprio motu* investigations and article 15 *ter* governs the exercise of jurisdiction of Security Council referrals.

One of the most important achievements with regard to the exercise of jurisdiction of the Crime of Aggression for both articles is the independency of the ICC to determine whether an act of aggression was committed or not. Pursuant to both articles, 15 *bis* (9) and 15 *ter* (4), the Court is only bound by its own findings with regard to the determination of an act of aggression, irrespective of such an examination by an organ outside the Court. Even if the prosecutor pursuant to article 15 *bis* (6) is asked to inform the SC about proceeding with an investigation and instructed to wait 6 months in case the SC has not yet made a determination with regard to an

act of aggression, it is the Pre-Trial Division of the ICC which ultimately decides whether the prosecutor may commence with the investigation or not, article 15 *bis* (8); the final decision regarding the examination of an act of aggression stays within the Court, irrespective of the SC's capability to defer the investigation or prosecution pursuant to article 16.

The decision to provide the SC with primary instead of exclusive responsibility emerged not only out of a practical point of view in recognizing the clash of legal versus political aspects and therewith a possible paralysis of the Court in case of exclusive SC responsibility; it was supported by previous decisions of the ICJ as well as by the SC's and General Assembly's practise of the past.[178] Firstly, members of the Special Working Group as well as participants of the Review Conference were aware of the fact that the SC is very reluctant with regard to a determination of an act of aggression; since its establishment the SC has used the word "aggression" in some of its resolutions, but has never determined a situation concretely as an "act of aggression".[179] Thus, it would have been unfavourable for the Court to be made dependent on a prior determination of the SC, especially if the veto powers either blocked the resolution or failed to react by virtue of political reasons. Secondly, organs such as the ICJ and the GA do not only constitute rigid and subordinated bodies to the SC; their commitment in cases where the SC failed to determine whether an act of aggression was committed or not, does not only demonstrate their practical contribution but upholds the fact that the SC is not the exclusive power when it comes to the maintenance or restoration of international peace and security.[180] Examples like the Uniting for Peace Resolution of 1950, which resolved

> that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security [...] the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including on the case of a breach of the peace or an act of aggression the use of force when necessary, to maintain or restore international peace and security,[181]

highlights the primary but not exclusive role of the SC in determining acts of aggression.

In addition, the ICJ in its Advisory Opinion on the "Certain Expenses" case concluded the non-exclusivity of the SC in stating that the SC has only "primary responsibility".[182] In its competence to exercise jurisdiction with regard to legal disputes between States Parties the ICJ pursuant to article 36 (2), (c) Statute of the

[178] See Yengejeh (2004), p. 127 et seq.; Barriga and Grover (2011), p. 527.

[179] More detailed information with regard to the SC practise, see Gaja (2004), p. 124; Escarameia (2004), p. 140.

[180] See Escarameia (2004), p. 136; Kemp (2010), p. 223.

[181] General Assembly, Uniting for Peace 377 (V), 302nd plenary meeting, 3 November 1950. Para. A.

[182] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 1962, p. 163.

ICJ is entitled to examine whether the existence of any fact would constitute a breach of an international obligation. Furthermore, and with regard to its advisory function pursuant to article 96 UN-Charter the SC and the GA may request the ICJ to give an advisory opinion on a legal question so that this serves another example that the SC is not the only institution to determine whether an act of aggression was committed.[183] These foregoing examples were some of the reasons, why two of the six different options, elaborated by the Special Working Group, integrated organs such as the ICJ and GA, which' determination of an act of aggression should have served as a filter in case of a SC inactivity.[184] In the end, the foregoing options were rejected; the risk that a determination by the ICJ could have subverted the integrity of the ICC thought to be too high. Instead it was agreed upon a filter, which stays within the Court itself in that 6 judges of the Pre-Trial Division may permit or prohibit the further commencement of an investigation.[185]

The role of the SC was one of the most complicated issues during the negotiating process of the Special Working Group for more than 6 years and it remained an open issue until the last hours of the Kampala Conference. The conclusion to grant the SC only primary instead of exclusive responsibility, thus neglecting the SC as the filter mechanism, constitutes a significant decision which in light of an independent and mighty Court is of paramount importance. However, it still maintains the special role of the SC while additionally granting it the right to defer an investigation or prosecution in light of its Chapter VII UN-Charter mechanism.

Where one decision at the Kampala Conference strengthened the jurisdiction of the ICC and thus the Court's independency, other decisions did not only restrict the actual jurisdiction system with regard to State referrals and *proprio motu* investigations but created new mechanisms concerning the entry into force conditions for especially these amendments. Pursuant to the former article 5 (2),[186] the Court was commissioned to exercise jurisdiction over the Crime of Aggression once a provision was adopted pursuant to articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Article 123 (1) states that 7 years after the entry into force of the Rome Statute, a Review Conference, such as the Kampala Conference, shall be convened to consider any amendments; further paragraph (3) states that the adoption and entry into force mechanism with regard of any amendment shall be regulated pursuant to article 121 (3–7).[187] The wording of both article 5 (2) and 123 (3) was very vague with regard to the specific applicability for an amendment such as the Crime of Aggression. From the Rome Statute's entry into force the Crime of Aggression was listed in article 5 as one of the four core crimes and pursuant to article 12 (1) Member States of the Rome Statute committed themselves to the jurisdiction of the Crime of

[183] See Escarameia (2004), p. 137.

[184] See Barriga and Grover (2011), p. 528.

[185] See Barriga and Grover (2011), p. 530.

[186] See Article 5 (2) was deleted in accordance with RC/Res.6, annex I, of 11 June 2010.

[187] See Article 123 (3) Rome Statute.

Aggression at a time where neither a definition nor the conditions for the exercise of jurisdiction had been agreed upon. This exceptional case was not considered in articles such as 121 or 123. These articles do not contain any clarification with regard to an amendment of a crime, which was already incorporated as an integral part of the Rome Statute but represented nothing more than a term without content. And due to the imprecise wording of article 5 (2) a clash between the applicability of articles 121 (4) and 121 (5) emerged during the negotiation process of the Kampala Conference.

The proponents of paragraph (4), which makes an amendment entering into force for all States one year after ratification or acceptance of seven-eighths of them, declared that neither the new article 8 *bis* nor articles 15 *bis*, 15 *ter* would fall within the scope of article 121 (5); the latter article regulates amendments regarding the subject matter of the Court and as the Crime of Aggression already would fall within in the jurisdiction of the Court, article 121 (5) would get obsolete.[188] Further it was argued that even if article 8 *bis* fell under the procedure of article 121 (5), the activation mechanism, such as articles 15 *bis* and 15 *ter* would not, leaving article 121 (4) as the only appropriate provision.[189] The adherence to this proposal was double-edged: On the one hand the ICC would have been able to exercise jurisdiction with regard to every Member State once the 7/8th majority was met and the ratification of each of them would not have constituted a requirement. This would also have entailed the preservation of the principle of territoriality.[190] On the other hand it would have taken a long time for the Court to be able to exercise its jurisdiction with regard to the Crime of Aggression. Furthermore, the opponents of the applicability of article 121 (4) were reluctant with regard to the fact that the Crime of Aggression would then enter into force for all States, thus preferring the consent-based regime of article 121 (5) which theoretically, if applied correctly, would enter into force for each of them following the first ratification on.[191] In light of the discrepancy in which of the paragraphs of article 121 are to be applied and a possible deadlock with regard to this matter, it was finally agreed upon the applicability of article 121 (5), but not as the actual article had been provided for; various political reasons lead to a "reformed" article 121 (5) which has to be seen as a compromise to paragraph (4) and (5) with numerous modifications and additional clauses.

It was determined that the Court would only have jurisdiction over Crimes of Aggression committed 1 year after the ratification or acceptance of the amendments by 30 States Parties in addition to the requirement that a decision has to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment by the Statute; where the requirement of the ratification of 30 States should constitute an additional hurdle, the delayed exercise of jurisdiction was

[188] See Barriga and Grover (2011), p. 524; Scheffer (2010b), p. 3; Reisinger Coracini (2010), p. 766.

[189] See Scheffer (2010b), p. 3; Reisinger Coracini (2010), p. 766.

[190] See Barriga and Grover (2011), p. 524.

[191] *Idem,* p. 524.

reduced to the fact that the Court was not yet capable to handle cases like those, either with regard to SC referrals or with regard to State referrals or *proprio motu* investigations.[192]

Furthermore and in addition to article 121 (5) the Court may pursuant to article 15 *bis* (1), (4) only exercise its jurisdiction in accordance with article 12, when the Member State has not previously lodged a declaration declaring its unacceptance of such a jurisdiction. The president of the Conference and lead negotiator, Ambassador *Wenaweser*,[193] argued that this additional opting-out mechanism was the logical consequence of the previous submission of the Court's jurisdiction with regard to the crimes referred to in article 5.[194] This assumption could be in conformity with article 15 *bis* (4), which states: "The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression [. . .] unless that State Party has previously declared that it does not accept such a jurisdiction by lodging a declaration [. . .]." With regard to a literal interpretation of article 15 *bis* (4), it seems as if the Court would pursuant to article 12 have automatic jurisdiction, which the reference of the word "unless" accentuates. But tying up on this interpretation could lead to the following possible problem: Should States commit themselves under the jurisdiction of the Court also with regard to the Crime of Aggression, to then opt-out of the jurisdiction for exactly that crime, this could be seen as a reservation.[195] A reservation is a unilateral statement which purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State, article 2 (d) of the VCLT. Furthermore, article 19 (a) VCLT states that a reservation is prohibited when such a provision is included in the treaty; in this regard article 120 Rome Statute determines that no reservations may be made to this Statute. In declaring that the State does not accept the jurisdiction of the Court with regard to the Crime of Aggression, it therefore excludes itself from an essential part of the Statute. Thus, the opting-out mechanism, interpreted in the manner Ambassador *Wenaweser* did, could be seen as an impermissible reservation under the Rome Statute. Furthermore, and with regard to the foregoing statement of Ambassador *Wenaweser*, it is questionable why States have to ratify an amendment to opt-out of the jurisdiction for exactly a crime they had already accepted when entering into the Rome Statute.[196] More precisely: Pursuant to article 15 *bis* (4) States have "previously" to declare their unacceptance. The question is what exactly did the authors mean by referring to this word? Was it prior to thirty ratifications by States Parties in addition to a decision to be taken after January 2017? Or was it prior to ratification in light of article 121 (5)? Does every single Member State has to ratify the amendment unless it lodges a declaration of unwillingness to be bound by the amendment or is every State automatically bound by the amendment after the required 30 ratifications plus

[192] See Articles 15 bis (2) (3), 15 ter (2), (3); Barriga and Grover (2011), pp. 526, 530.

[193] See Barriga and Grover (2011), p. 519.

[194] *Idem,* p. 526.

[195] See Reisinger Coracini (2010), p. 778.

[196] See Trahan (2011), p. 80 et seq; Akande (2010), pp. 5–6.

an agreement in or after 2017 and may then declare its unacceptance in opting-out?[197] Following the first question, it is debatable why States have to declare at all their active unacceptance in opting-out, when the amendment would in any case only become effective with their ratification. It seems to defy any logic to ratify an amendment only to lodge a declaration of the unacceptance of the amendment. *Akande* tried to unravel these inconsistencies and concluded that the latter option would only become coherent when firstly through 30 ratifications the entry into force should be assured and secondly, States "may wish to bring the amendments into effect generally while excusing itself from prosecution."[198] The assumption that States are automatically bound by the amendment after 30 ratifications can therefore be rejected. This option would not only contravene article 121 (5) but is furthermore contrary to articles 39 ff. VCLT that governs the rules regarding the amendment of treaties.

These previously unsolved questions have been recently answered. In November 2017, 34 State Parties had ratified the Crime of Aggression amendments as one of the conditions set out for the exercise of jurisdiction.[199] In December 2017, at the 16th session of the Assembly of States Parties, a resolution was adopted to activate the jurisdiction of the Crime of Aggression as of "17 July 2018- the date of the 20th anniversary of the ICC's founding treaty".[200] Despite this "historic consensus" regarding the activation of a crime which since the Nuremburg and Tokyo Trials was never prosecuted anymore, States decided that without their explicit consent, in accepting or ratifying the amendment, no jurisdiction will be given to the Court. The fact that the Court will not be able to exercise its jurisdiction with regard to a Member State not ratifying the amendment limits the jurisdictional mechanism and is contrary to what is anchored in article 12 (2); concepts such as the principle of territoriality or nationality are fully undermined. In case of an Aggressor State, which as a Member State of the ICC but who has not accept the amendment commits a Crime of Aggression on the territory of another Member State, who has ratified the amendment, that Member State is not able to refer the situation to the Court, or rather the Court in this instance is unable to exercise its jurisdiction.

Furthermore, article 12 is once more levered out in article 15 bis paragraph (5) stating that the perpetration of the Crime of Aggression by a Non-State Party, either with regard to its nationals or on its territory, is completely excluded from the Court's jurisdiction. What *Scheffer* calls a correction of "the apparent drafting flaw in article 121 (5)"[201] is contrary to what was anchored in the Rome Statute under article

[197] See Akande (2010), pp. 5–6; Reisinger Coracini (2010), pp. 776–779.

[198] Akande (2010), p. 6.

[199] State Parties to Amendments on the Crime of Aggression to the Rome Statute, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (Last accessed 19 Dec 2017).

[200] Coalition of the International Criminal Court (2017), Press Release, available at: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ASP2017_CrimeofAggression_15Dec2017_final.pdf (Last accessed 17 Dec 2017).

[201] See Akande (2010), p. 6.

12. The exercise of jurisdiction with regard to the Crime of Aggression is completely different to the jurisdiction mechanism of the other three core crimes. Doctrines such as the territoriality and nationality principles are declared as invalid. The reiterated decision of the Assembly of States Parties at their 16th session regarding the jurisdiction mechanism for the Crime of Aggression will lead to rare cases in which the ICC is able to exercise this new activated jurisdiction; only in cases when the Member States accept the amendment and does not previously lodge a declaration, jurisdiction may be exercised. These new requirements minimize the jurisdiction system of the Court tremendously.[202]

While the incorporation of article 15 *bis* contains a new mechanism, which is contrary to its prior and major article dealing with the preconditions to the exercise of jurisdiction anchored in article 12, article 15 *ter* remains in the realm of the general jurisdiction mechanism with regard to SC referrals, article 13 (b). The SC is still able to refer any situations to the ICC regardless if the State concerned is a Party to the Rome Statute or not. With regard to the latter determination, some authors, such as *Reisinger Coracini* and *Akande*, explicitly emphasise that the SC's determination of an act of aggression does not constitute a prerequisite for such a referral.[203] *Reisinger Coracini* bases her argument on the President's non-paper, which firstly contained the requirement of such a prior examination by the SC, but which was finally deleted out of the proposal.[204] It may once have been part of the proposals, but in light of article 15 *ter* (4), which states that the Court is not bound by such a determination of an outside organ and with the additional reference to article 13 (b) in article 15 *ter* (1), which requires the SC to act under Chapter VII of the UN-Charter, it is questionable whether this statement has to be explicitly highlighted or be identified as a modification. Pursuant to article 39 UN-Charter, the SC has to determine whether any threat to the peace, breach of the peace, or an act of aggression exists. Thus, one of these three options has to be fulfilled for the SC to refer a situation to the Court, and these different options—all with the same gravity—already constitute a manifest violation of the UN-Charter. It is then for the Court to examine, which of the four core crimes have been committed.

(2) Interim Result

The consensus on the Resolution on the Crime of Aggression constitutes one of the greatest achievements in international criminal law. Twenty years before, no one would have believed that there would be a permanent international legal and independent Criminal Court prosecuting the most serious crimes of concern. That States would agree unanimously on an acknowledged definition for the Crime of Aggression as well as on the conditions setting out the jurisdiction mechanism,

[202] See also Reisinger Coracini (2010), p. 772 et seq.

[203] See Reisinger Coracini (2010), p. 786; Akande (2010), p. 4.

[204] See Reisinger Coracini (2010), p. 761.

activated in the year 2018, would have more to be seen as an idealistic idea than a tangible goal. Nevertheless, when States have to reach a common agreement, even with regard to the Statute of a legal institution, the decision is always to some extent politically motivated; especially with regard to a crime such as the Crime of Aggression.[205]

The above mentioned analysis has shown that States agreed upon a high threshold with regard to the definition of the Crime of Aggression. Pursuant to the "Understandings" of the Resolution, aggression constitutes "the most serious and dangerous form of the illegal use of force" so that the act of aggression has to constitute a manifest violation of the Charter of the United Nations.[206] These high requirements do not have to be regarded as a bar for the Court to prosecute the Crime of Aggression; they reflect the main purpose of the ICC to punish only the most serious crimes of concern of the international community as a whole.[207] That the ICC was given the capability to prosecute the Crime of Aggression with the result that the person not the State as the aggressor will be held criminally responsible, without being able to hide behind the action of that State, tremendously strengthens the Court as the one and only international criminal legal institution. It took the international community more than 60 years to start implementing what the actors of the Nuremberg and Tokyo Tribunals had already done: to punish the perpetrators for the war of aggression which was defined as the "supreme international crime".[208] Notwithstanding the importance of defining and regulating the *ius ad bellum,* is it only one aspect which was dealt with at the Conference. The more important issue, especially with regard to the question of the book, is under which conditions the ICC is able to exercise its jurisdiction with regard to the Crime of Aggression. The tighter the jurisdictional system is laced, the smaller the global scope will be; this would result in the denial of the question, whether the ICC could be regarded as an International Criminal World Court.

Regarding the requirements of determining whether an act of aggression was committed or not, it has to be ascertained that the Kampala Conference concluded one of the most significant decisions with regard to that matter. In granting the ICC the right to only relate to its own findings under its Statute, it preserved the Court as an independent legal institution; the fact that the ICC is not dependent on an outside organ examining an act of aggression, not even by the GA, the ICJ or first and foremost the SC, does empower the Court to an authoritative international criminal institution. The SC was only given primary but not exclusive responsibility with regard to the determination of an act of aggression. It constitutes a great achievement that States acknowledged the inability of the SC to react appropriately to situations like these and that granting the SC such an exclusive right would have most probably

[205] See Trahan (2011), p. 93.

[206] See Annex III, para. 6 of the Resolution RC/Res.6 (11 June 2010) and article 8 *bis* (1) Rome Statute.

[207] See Paragraph 5 of the Preamble of the Rome Statute.

[208] See also Schabas (2012), p. 204.

amounted to a deadlock for the prosecution of a Crime of Aggression by the ICC. Even if the prosecutor is tasked to ascertain himself whether the SC has made a determination of an act of aggression and, in case it did not, has to wait for 6 month until the Pre-Trial Division may authorize the commencement of the investigation, this will not minimize the independency of the Court in relying on its own findings. It is an interaction of the SC with the ICC whereby the final decision lays within the Court. Only an autonomous legal institution may uphold the rule of law and guarantee a fair trial, detached of any political reasons but exclusively in light of legal determinations[209]; this relevant decision-making authority entails the basis for the Court to be designated as an International Criminal World Court.

This Court's strengthening assessment does not obscure the fact that the further examinations with regard to the exercise of jurisdiction, first and foremost with regard to State referrals and *proprio motu* investigations by the prosecutor, diminish the jurisdictional mechanism of the Court. Whereas SC referrals mainly remain in the realm of article 13 (b), the only modification pursuant to article 15 *ter* is that a prior determination of an act of aggression by the SC does not constitute a prerequisite, article 15 *bis* was made by compromises entirely motivated by political aspects and therewith detrimental to the Court and its capability to punish the perpetrators for Crimes of Aggression. Due to the fact that States could not agree on a definition of the Crime of Aggression in 1998 as well as on the conditions for the exercise of jurisdiction with respect to that crime, they incorporated the vague article 5 (2) in the Statute, without foreseeing what results such an imprecise article may have for future negotiations. Despite the ambiguity regarding the Crime of Aggression at that time, States decided nevertheless that the crime should be incorporated as one of the core crimes of the Rome Statute. It is questionable why the crime at that time had to be incorporated in article 5, thus becoming one of the core crimes to which States, in becoming a party, accepted the jurisdiction of. It would have been more favourable to either leave the matter until the Review Conference to decide in the future whether to make it a crime listed in article 5, or such an article as 5 (2) should have contained information that the Crime of Aggression would be incorporated in paragraph 1 in the moment when a definition as well as the conditions for the exercise of jurisdiction were agreed upon. If the Crime of Aggression had not been included in article 5 from the beginning on, a clash of the provisions 121 (4) or (5) could have been circumvented. The Crime of Aggression would have been a new crime relating to the subject matter of the Court, thus article 121 (5) would have been the appropriate provision for the amendment to articles 5, 6, 7 and 8.

Furthermore it is doubtful why the conditions for the exercise of jurisdiction had to differ so much from the ones anchored in article 12 or more precisely why a completely new jurisdiction system had to be elaborated. New decisions, such as the delayed jurisdiction, which was only confirmed due to a fear that the Court would not have been able to handle cases like that at this early stage as well as the required

[209] See Reisinger Coracini (2010), p. 786.

thirty ratifications by State Parties to the amendment, do not play the essential role. Even the pursuant to article 15 *bis* (4) opting-out possibility for States to declare their unacceptance with regard to the jurisdiction for the new crime, will possibly not weigh as high as it might seem; even though this system is contrary to article 121 (5) as well as the rules setting out the conditions for amending treaties pursuant to the Vienna Convention. On the other hand is this opting-out mechanism not new to the Court and could be seen as a parallel to the Transitional Provision, article 124.[210] For a period of 7 years after the Rome Statute's entry into force, States were permitted to opt-out of the jurisdiction with regard to War Crimes; except of France and Columbia, which already withdrew their declaration, no State has made use of this article.[211] It was agreed upon that decision in the same course as at the Review Conference in 2010: States should be encouraged to ratify the Statute without the fear that the Court would prosecute their nationals for the commitment of War Crimes. Nevertheless, at the 16th session of the ASP, States have decided that no jurisdiction will be given until the Member State accepts or ratifies the amendment. To date[212] 35 States have accepted or ratified the amendment, whereas no State has made a declaration of non-acceptance. A delayed jurisdiction system as such does not automatically minimize the designation to be an International Criminal World Court however; the possibility of making use of a declaration of unwillingness to be bound by the amendment negatively affects the jurisdiction system of the Court. There is a difference whether there is such an option or whether the State is only able to demonstrate its unacceptance by not ratifying the amendment. As for now, where the required ratifications are given, it seems that the latter possibility will be appropriate mechanism.

In addition, and more concerning is the combination of article 121 (5) with article 15 *bis* (4) and (5). Pursuant to this jurisdiction mechanism, cases in which the ICC has jurisdiction over the Crime of Aggression would be very rare; the ICC may only prosecute States which are Members to the Statute and that have accepted or ratified the amendment without a prior declaration of unwillingness to be bound by the amendment. Even though article 12 is explicitly mentioned in paragraph (4) of article 15 *bis*, its second paragraph was nearly entirely levered out. In a situation, where a Member State but not the amendment ratifying Party commits an act of aggression on the territory of a ratifying Member State, the ICC will not have jurisdiction; the same applies to nationals of Non-Member States when committing an act of aggression on the Member States territory. Furthermore, the ICC pursuant to paragraph (5) of article 15 *bis* is prevented from exercising its jurisdiction even in a situation where a Member and amendment ratifying State commits an act of aggression on the territory of a Non-Member State. Consequently, the only existing link for the ICC to exercise jurisdiction for the Crime of Aggression is the ratification or acceptance of the amendment of a State Party to the Statute.

[210] See Trahan (2011), p. 93.

[211] See Zimmermann (2016), p. 2317, para. 20.

[212] December 2017.

With regard to the foregoing determination it can be concluded that the ICC has to forfeit its strength through the restricted new jurisdiction mechanism with regard to the Crime of Aggression. The accusation arises that this new jurisdiction mechanism contradicts the aim of article 12 (2) with the result of overriding anchored doctrines such the principles of territoriality and nationality.[213] However, following this approach unrestrictedly might disregard some important considerations. Pursuant to the extensive analysis with regard to article 12 in this chapter, Sect. I, 1, it is determined that the delegation of territorial jurisdiction of each State to an International Criminal Court, such as the ICC, is valid and does explain why Non-Member States of the ICC may be prosecuted in a case where they commit one of the three core crimes on a territory of a Member State.[214] The main justification for the conferment of jurisdiction from the national to the international level is explained with the argument that the Court is through the association of States collectively exercising previously existing rights of these Member-States.[215] Moreover, the applicability of universal jurisdiction with regard to the three core crimes underlines the permission of the ICC to exercise jurisdiction even over nationals of Non-State Parties; if States were already permitted to exercise jurisdiction without any national or territorial link on behalf of the international community as a whole to fulfil their obligations under international law, nothing else would apply for a specialized international criminal court which is tasked to do what States could do on their own.[216] These foregoing determinations, which serve as a justification of State's delegation of jurisdiction to the ICC, simultaneously underline why these arguments could not be applied with regard to the Crime of Aggression.

The criminal liability of an individual for the commission of an act of aggression amounting to a Crime of Aggression is a new construct which was only applied once after the Second World War by the Nuremberg and Tokyo Tribunals.[217] The Crime of Aggression, as incorporated in the Rome Statute, did not exist until the Review Conference in 2010. The previous determination of an act of aggression, as defined by the General Assembly Resolution 3314 (XXIX), tied up on the responsibility of States. Doctrines such as State sovereignty and the equality of States become applicable; they lead to State responsibility in case States have breached their obligations under international law.[218] It is the conduct of organs of the State which is attributable to the State.[219] This is on an interstate level and thus to be regulated by the ICJ. The Crime of Aggression, as defined in the Rome Statute, is to

[213] See Reisinger Coracini (2010), pp. 787–788.

[214] See this chapter, Sect. I, 1, Main objections and possible violations of article 34 VCLT, p. 28 et seq.

[215] See Kaul (2002), pp. 608, 609.

[216] See this chapter, Sect. I, 1a, p. 27; Akande (2003), p. 626; Danilenko (2002), p. 1882.

[217] With regard to the crime against peace.

[218] See Shaw (2017), p. 589.

[219] See Articles 4–7 of the Draft Articles for Responsibility of States for Internationally Wrongful Acts.

be persecuted on grounds of personal criminal responsibility; with regard to the condemnation of the Crime of Aggression, this is a completely new concept in international criminal law. According to the doctrine of State sovereignty such a crime does not exist in the domestic legislation of States and pursuant to the Resolution of The Crime of Aggression, this regulation also has to be maintained in the future. Pursuant to the Understandings of the amendments regarding the domestic jurisdiction over the Crime of Aggression, annex III, paragraph 4 and 5 state the following:

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for the purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

As the Crime of Aggression has never been incorporated in the domestic legislation of a State and should furthermore not be implemented in the national laws of State-Members, States are not capable to delegate their jurisdiction to the Court, because they are not in the possession of such a jurisdiction. States may also not assert universal jurisdiction with regard to the Crime of Aggression, as this Crime has never been a personal crime until its designation in the Rome Statute of the ICC and consequently could therefore not have reached customary law status.[220] Thus the allegation that article 15 *bis* (4) and (5) completely violates the concept anchored in article 12 (2), (a) cannot be maintained. Having the result that if an amendment ratifying Member State was invaded by a Non-State Party or a Member but the amendment not ratifying State, the attacked Member State would not be able to refer its jurisdiction to the ICC, because there is none with regard to the Crime of Aggression. The link of jurisdiction is only between the aggression ratifying State and the Court. Even though this conclusion does not strengthen the Court regarding its jurisdiction system, it is not unreasonable. In conformity with the foregoing determination, the Court will have jurisdiction in the case of an amendment ratifying Member State of the Rome Statute committing an act of Aggression on the territory of another State; whether a Member or Non-Member of the Statute. This would be in accordance with article 12, paragraph (2), (b) and in line with regard to the jurisdictional link between the Court and the Member-State. In this case it is not the invaded State which defers its jurisdiction to the Court but the jurisdictional link between the amendment ratifying Member State and the Court. Conversely, pursuant to paragraph 5 of article 15 *bis*, the Court has no jurisdiction when the crime is committed on the territory of the Non-Member State. States, not Party to the Statute are completely exempted from the jurisdiction mechanism regarding the Crime of

[220] See Cryer et al. (2014), p. 57.

Aggression. The incorporation of such a regulation is unfamiliar to the Statute as well as with regards to the principle of nationality.[221] Furthermore, and with regard to article 121 (5), the same problem arises when the invaded State is a Member to the Statute but is not an amendment ratifying State; article 121 (5) excludes the jurisdiction—territorial as well as national- of the Court when the State Party does not accept the amendment. The already limited jurisdiction system with regard to the Crime of Aggression is therewith further restricted so that the Court is practically paralyzed when it comes to the applicability of the Crime of Aggression. Only in light of a SC referral, any State may be subject to the jurisdiction of the ICC.

The inclusion of the Crime of Aggression into the Rome Statute and its jurisdictional activation as of July 2018 constitutes a breakthrough in international criminal law. Nevertheless, the concessions with regard to the jurisdiction system of the Court are too high. Where States established in 1998 a jurisdiction system which empowered the Court, they created a cave in which the ICC is nearly unmoveable when it comes to the prosecution of the Crime of Aggression. Ambiguities with regard to the inclusion of the Crime of Aggression under the four core crimes of the Statute in 1998 and therewith under the jurisdiction system pursuant to article 12 on the one hand and the vague article 5 (2) on the other hand could have been circumvented at the Rome Conference. As States could not reach an agreement with regard to the Crime of Aggression, they postponed the subject and embedded the definition as well as the jurisdiction mechanism with regard to that Crime in a variety of different rules applicable to completely different scenarios. The fact that Member-States have to ratify new amendments to be bound by these new decisions does not minimize the jurisdiction system; this regulation arises out of the Statute itself and is in conformity with the Vienna Conventions on the Law of treaties.[222] Even the opting-out mechanism does not change anything with regard to States which are already Members of the Statute; if they do not ratify the amendment or explicitly declare that they do not want to be bound by the amendments, the same result will be entailed: the Court has no jurisdiction with regard to that crime.

Ultimately it is left for the States to change that limited jurisdiction system by ratifying the amendment by all Member-States.[223] Even these decisions will be mainly motivated by political aspects. As the former Nuremberg Prosecutor Prof. *Benjamin Ferencz* with regard to the Crime of Aggression correctly stated: "We have come a long way from Nuremberg, and have miles to go before we sleep".[224] It is correct that the Court is still in its beginnings. However, after the adopted resolution on the activation of the jurisdiction over the Crime of Aggression in December 2017 and the reiteration of the previous elaborated jurisdiction mechanism of 2010, the jurisdiction apparatus of article 15 *bis* will not only restrict the Court to a large extent but works against its own Statute; this present draft leads to the determination that

[221] See Reisinger Coracini (2010), p. 788.

[222] See Article 121 (5) Rome Statute.

[223] See Reisinger Coracini (2010), p. 789.

[224] Kaul (2011), p. 12.

with regard to the Crime of Aggression the Court cannot be designated as an International Criminal World Court.

b. Article 16 Rome Statute

Article 16 contains a time-limited 12 month deferral of investigation or prosecution proceedings by the ICC in situations where the SC, pursuant to Chapter VII UN-Charter, adopts a resolution which requests the Court to that effect; in cases of a renewal, a new decision will have to be taken by the SC.[225]

The incorporation of an article like 16 constituted a very controversial venture. The first version of article 16, composed by the 1994 ILC draft Statute, only provided the SC with full powers to the effect that

> no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.[226]

Even if the 1994 ILC proposal had some supporters, most of the delegations objected to it. Such an intervention by the SC, as a political organ, into the jurisdiction of an independent Court, as a judicial organ, was seen as highly problematic[227]; the outcome would have been a Court without any credibility and authority in addition to a paralyzed jurisdiction system from its beginnings on.[228]

The final version of article 16 originated pursuant to the Singapore proposal which modified the ILC version insofar as it changed the ICC into the organ, which may proceed with its investigations, unless the SC actively, through its Chapter VII mechanism, decides differently.[229] The intention behind this modification was on the one hand to "provide the appropriate vehicle for the future balancing of interests of international peace and justice mandates" so that "the article can be used by the Council to postpone ICC investigations and prosecutions, when the Council assesses that the peace efforts need to be given priority over international criminal justice."[230] For instance in the situation where a Head of State is under investigation by the Court, while at the same time his presence in peace negotiations would be of great importance, justice should be deferred as long as a peace settlement would be adopted.[231] On the other hand, was it of great importance that the SC was the organ which had to act actively pursuant to its Chapter VII mechanism in case of a deferral; "the public nature of such a resolution and, most likely, the public nature of

[225] See Wilmshurst (2001), p. 40.

[226] 1994 ILC Draft Statute, article 23 (3), p. 85; Wilmshurst (2001), p. 40.

[227] See Rwelamira (1999), p. 150; Bergsmo et al. (2016), p. 771.

[228] See Akande et al. (2010), p. 8.

[229] See Rwelamira (1999), p. 150.

[230] Bergsmo (2000), p. 93; Sarooshi (2004), pp. 105–106.

[231] See Wilmshurst (2001), p. 40.

the crimes that the Court will be asked to desist from addressing, deferral will be politically more difficult to justify than approval."[232]

In support of the Singapore proposal, Canada and the UK made the final modifications: While Canada added a period of 12 months for a deferral and foresaw a renewal, in case the SC adopted a new resolution, the UK replaced the word "direction" of the old version into "request", this compromise became the final version of article 16."[233]

In conformity with the foregoing explanation that article 16 was neither intended to grant the SC general political control nor to give it a blank check, the Council seemed to challenge exactly this assessment in the year 2002 in adopting the highly doubtful resolution 1422.[234] In light of the entering into force of the Rome Statute, the US manipulated the SC by threatening the use of the veto against every future United Nations peacekeeping operation.[235] This threat resulted in resolution 1422, stating that

"*Acting* under Chapter VII of the Charter of the United Nations,

1. *Requests,* consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;"
2. *Expresses,* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;

Despite the fact that the resolution was adopted and 1 year later following resolution 1487[236] renewed, it was very controversially debated. The fact that the SC resolution generally and preventively exempted UN peacekeepers of non-member States to the Rome Statute from a possible future ICC's jurisdiction and additionally proclaimed "automatic unlimited renewals" for every year was seen as highly problematic.[237] There has been much criticism directed against the resolution, including the discriminatory character of treating member and Non-Member States of the Rome Statute differently or the casual determination to renew the resolution under the same conditions. Many scholars and governments called attention to the fact that the deferral in article 16 had to be determined on a case-by-case

[232]Bergsmo et al. (2016), p. 774, para. 9.

[233]Proposal by the United Kingdom of Great Britain and Northern Ireland: trigger Mechanism, U.N. Doc. A/AC.249/1998/WG.3/DP.1 (25 March 1998); Bergsmo et al. (2016), p. 773, para. 6; Abass (2005), p. 271.

[234]See Security Council Resolution 1422 (2002) UN Doc S/RES/1422 (2002).

[235]See Akande et al. (2010), p. 8; Global Policy Forum: "The ICC in the Security Council", available at: http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-in-the-security-council-6-4.html (Last accessed 07 Dec 2017).

[236]See UN Security Council Resolution 1487 (2003) UN Doc S/RES/1487 (2003).

[237]See Akande et al. (2010), p. 8.

basis and had to be renewed every single time under the specific requirements of Chapter VII UN-Charter.[238] Hardly condemned was the SC's assessment of a Chapter VII situation, which constitutes the prerequisite for the applicability of article 16. Article 39 of the UN-Charter states that the SC shall, in its capacity to maintain or restore international peace and security, decide what measures shall be taken in case of any threat to the peace, breach of the peace, or an act of aggression. It is extremely questionable whether one of these three options of article 39 UN-Charter could be determined in the year 2002 or 2003. Many governments emphasized that the requirements for a Chapter VII decision were not given and that the SC would undermine and infringe the Rome Statute of the ICC on the one—and international law on the other hand.[239] Even the former UN Secretary General, *Kofi Annan*, expressed his concerns in front of the SC after it renewed the resolution; *Annan* questioned the existence of a Chapter VII situation in stressing the intention of article 16, saying that "I believe that that article was not intended to cover such a sweeping request, but only a more specific request relating to a particular situation".[240]

NGO's, governments and scholars extensively analyzed, whether resolution 1422 and 1487 are inconsistent with the Rome Statute and/or are ultra vires to international law; further it was examined to what extent these resolutions would be binding in case of invalidity and what consequences this would entail for the ICC and UN-Member States.[241] Notwithstanding the importance of such an analysis, the conclusion may be left undetermined for the following reasons: First of all a situation, in which an investigation against peacekeepers of Non-Member States of the Rome Statute has never been initiated. Secondly, since 2004 the SC never invoked article 16 again to defer a potential prosecution of UN peacekeeping forces of ICC's Non-Member States. With regard to the incidents in Iraq committed by the US, UN Secretary-General *Annan* increased the pressure on the SC, insisting not to renew the exemption; urging that such a renewal "would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law."[242] Thus, the US withdrew its behest being aware of the fact that it would not garner the required support for such a resolution. Thirdly and most importantly, the International Criminal Court determines ultimately, whether article 16 is applicable or not, thus if the SC resolution would be valid or not or more precisely whether the

[238]See UN SCOR, 58th Session, 4772nd meeting, UN Doc S/PV.4772, 12 June 2003, p. 20; Akande et al. (2010), p. 8; Cryer et al. (2014) , p. 174.

[239]UN SCOR, 57th Session, 4568th meeting, UN Doc S/PV.4568, 10 July 2002, p. 9; Jain (2005), pp. 241–242.

[240]See Kofi Annan (2003), p. 1.

[241]See American Non-Governmental Organization Coalition for the ICC (AMICC), Background on Peacekeeping and the ICC, p. 2 available at: http://www.iccnow.org/documents/FS-AMICC-Peacekeeping.pdf (researched on: 10 July 2015) Extensive analysis of legality of SC resolutions 1422, 1487: Jain (2005), p. 244 et seq.; Stahn (2003), p. 85 et seq.

[242]Kofi Annan (2004); Global Policy Forum: "The ICC in the Security Council", available at: http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-in-the-security-council-6-4.html (Last accessed 19 Dec 2017).

requirements of article 39 UN-Charter would have been fulfilled. too much space.[243] For some reason, the ICC never made a public statement regarding these resolutions which may have helped to strengthen its credibility and power as an international, independent organization. But perhaps it is exactly the latter characteristic which was responsible for the lack of reaction by the ICC; only Member States of the UN are bound by SC resolutions, not independent organizations with their own legal personality, such as the ICC.[244] The ICC is only bound by its Statute; thus, a SC resolution would only be binding by virtue of article 16. However, if the prerequisite of article 16, the existence of any threat to the peace, breach of the peace, or an act of aggression is not given, article 16 will not be applicable and such a SC request to defer investigations or prosecutions would be invalid in the light of the peace and justice consideration.

For this reason it can be concluded that the invocation of article 16 in the first 2 years of the Rome Statute coming into force did not undermine the credibility of the ICC. As the former Legal Counsel of the UN, *Corell,* correctly stated this matter can be referred to as a "non-issue".[245] It can be assumed that the US and other Member States of the SC at that time were afraid of the potential mightiness of the new born Court so that they attempted to find a solution to minimize the jurisdiction of this novel international organization. As already mentioned in part I.1: The US is famous for its harsh criticism with regard to the jurisdiction system of the Court so they try to invoke every possibility to undermine the jurisdiction of the ICC, even in its function as a permanent member of the SC. It is important not to disregard the political power of the SC and its Members and to carefully observe that its powers are not easily overridden. In the end article 16 was created to combine the two mandates of peace and security on the one- with the mandate of justice on the other hand.[246] For this reason article 16 should not be seen as a provision which goes against but works together with the Court in order to maintain international peace and security. The Preamble of the Kampala Declaration reaffirmed that there will be no long-lasting peace without justice but that peace and justice are complementary requirements.[247] This underlines the interplay of the two different institutions and their common goal, applied from two different angles, to achieve in the end the best result for the whole international community. Thus, even if the SC tried to minimize the jurisdiction of the Court by invoking article 16 twice through its resolutions 1422 and 1487, it never came to its applicability; as long as the Court is not practically restricted in its exercise of jurisdiction, the Court is not assaulted in its credibility.

[243] See Corell (2004), p. 1.

[244] See Article 25 UN-Charter; see also Jain (2005), p. 253.

[245] See Corell (2004), p. 2.

[246] See Sarooshi (2004), pp. 100, 116.

[247] See Kampala Declaration (RC/Decl.1), in: Selected Basic Documents Related to the International Criminal Court (The Hague 2011), p. 430.

There were two more requests for deferral: the first was invoked by the African Union in 2008 and the other request was made by the Kenyan government in 2011.[248] Once the Prosecutor submitted his application to issue an arrest warrant against the sitting Head of State *Al Bashir,* the AU filed a communication to the SC in which it requested the SC to defer the judicial proceedings of the Court pursuant to article 16; as the arrest warrant against the Sudanese President would endanger the ongoing peace negotiations in Sudan and "may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region".[249] Amid the heated debate between the SC and Sudan whether or not to renew the UNAMID mission, Libya reinforced the invocation of article 16 by trying to force the Council to take action regarding the applicability of article 16; otherwise it would not support the UNAMID resolution.[250] The resolution regarding the referral of the Court's proceedings was not adopted; France and the United Kingdom determined that the ongoing proceedings of the ICC in Sudan have to be differentiated from the debate about a possible renewal of the UN mission in Darfur. The request by Kenya to defer the proceedings by the Court was likewise triggered as in the case of the AU. In 2010, the Prosecutor initiated investigations *proprio muto* regarding the post-election violence in 2007 to 2008.[251] Kenya challenged the admissibility of the case, which was rejected by the Pre-Trail Chamber I; nevertheless, the Kenyan Government attempted everything to block the jurisdiction of the Court in order to prosecute the accused by its national courts. After the Prosecutor issued six summonses to appear against *William Samoei Ruto*, *Henry Kiprono Kosgey*, *Joshua Arap Sang*, *Francis Kirimi Muthaura*, *Uhuru Muigai Kenyatta* and *Mohammed Hussein Ali*,[252] Kenya invoked article 16 to defer the investigation and prosecution of the ICC. The African Union supported Kenya's concern and called the SC to use its Chapter VII enforcement to defer the case at least for 1 year, so that Kenya will be given the opportunity to establish a special tribunal in which crimes in relation to the conflict in 2007 and 2008 could be prosecuted.[253] After an interactive dialogue in the SC, the latter determined that no consensus could be reached by the Members of the Council. Two years later, Kenya requested the Council once again to defer the proceedings initiated by the Court due

[248]In the following see Verduzco (2015), pp. 53–57; *Verduzco* further determined that the Central African Republic requested the SC for a deferral in 2008, but due to the fact that no official documents prove that request, it will be not mentioned. See Verduzco, pp. 54–55.

[249]Letter from the Permanent Observer of the African Union, Communiqué of the 142nd meeting of the Peace and Security Council, 21 July 2008, Annex to the UN Doc Security Council S/2008/481. 23 July 2008, para. 9.

[250]See Verduzco (2015), p. 54.

[251]See Homepage of the International Criminal Court, Situation in Kenya, available at: https://www.icc-cpi.int/kenya (Last accessed 23 Dec 2017).

[252]*Idem.*

[253]See Assembly of the Union, Sixteenth Ordinary Session, 30–31 January 2010, Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.334 (XVI), para. 6.

to the fact that the two accused *William Ruto* and *Uhuru Kenyatta* were in the meantime designated to Vice President and President of Kenya after they had won the elections. After further consultations, no consensus could be reached, thus no resolution was adopted.

These two incidents demonstrate that the invocation of article 16 is more politically motivated than it is applied with the original object and purpose of the article. Nevertheless, both requests were rejected by the SC which is a further indication that article 16 does not permit States to abuse this option in order to satisfy their subjective interests.

Consequently and with regard to the question of the book, it can be determined that article 16 does not minimize the already examined strength of the preposition that it may constitute an International Criminal World Court.

c. Articles 17, 18, 19 Rome Statute

Article 17, manifested as the principle of complementarity, constitutes one of the main pillars of the Statute and underlines that the Court has to be seen as a Court of last resort. Contrary to the ad hoc Tribunals, ICTY and ICTR, which had primary jurisdiction over national courts,[254] paragraph 10 of the Preamble as well as article 1 of the Rome Statute determine the following: The ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, whereas this jurisdiction will be complementary to the national criminal jurisdiction of the State concerned.

Enshrined in the principle of complementarity is State sovereignty and therewith State's primary right to prosecute their own nationals or crimes committed on their territory.[255] In addition to the above mentioned rights of States, the Preamble recalls in paragraph 6 likewise the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Thus, the principle of complementarity does not only protect the sovereignty of States but was intended to promote an effective prosecution mechanism at the national level to end impunity and to contribute to the prevention of such crimes.[256] The ICC only supplements national jurisdiction in cases where the State is unwilling or unable to execute its obligations. Pursuant to article 17, a case is only admissible when none of the four grounds referred to in paragraph 1 are given. In cases where the State is willing or able to genuinely carry out investigations or prosecution, the person concerned has already been tried for the same conduct or the case is not of sufficient gravity, States with jurisdiction or the accused or person for whom a warrant of arrest of summons to appear has been issued can challenge the jurisdiction of the Court or the admissibility

[254] See Benzing (2003), p. 592.

[255] *Idem*, p. 595.

[256] Preamble, paragraph 4–5; similar Benzing (2003), pp. 596–597.

of a case pursuant to articles 18 and 19.[257] While article 18 will be applied in a situation of a preliminary admissibility challenge, article 19 will become applicable if the admissibility of concrete cases is challenged.[258]

It could be assumed that the principle of complementarity restricts the jurisdictional apparatus of the ICC and therewith diminishes the strength of the Court. Furthermore, it could be argued that the principle constitutes a blank check for States to decide, whether or not and how they want to handle cases in which one of the most serious crimes of concern could have been committed. Nevertheless, both of these concerns can be dispelled and are unfounded. Firstly, the principle of complementarity is anchored in the Statute with the intention to uphold the sovereignty of States on the one hand - and to foster domestic prosecutions of these crimes on the other hand. As a Court of last resort it only supplements national jurisdiction in case the State itself is for several reasons unwilling to fulfil its obligations under international law. The principle is therefore not minimizing the strength of the Court. Former Prosecutor *Ocampo* underscored that the effectiveness of the Court should not be valued on the high amount of cases brought before it; "on the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[259] Secondly, articles 17–19 illustrate precisely the interaction of the States concerned and the ICC; the rights of the States to exercise their jurisdiction on the one—and the ICC as a monitoring legal institution on the other hand have to cooperate to ensure a fair trial and effective prosecution to exclude any kind of impunity. In cases where the State could not thoroughly demonstrate its capability and willingness to investigate or prosecute, it is the duty of the ICC to take over this responsibility. Even in a situation in which the Court decides that a case is inadmissible, the State with primary jurisdiction has to periodically inform the Prosecutor on his request of the progress of its investigations and possible prosecutions; should the Prosecutor be aware of any new circumstances which might change the determination with regard to the inadmissibility of a case, he may proceed with the investigations.[260] This is highlighted by the former Prosecutor who stated that "The principle of complementarity can neither be applied to force national proceedings, nor can it be applied to effectively perpetuate impunity."[261]

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[257] See Akande (2003), p. 648.

[258] *The Prosecutor v. Francis Kirimi Muthaura,Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11 OA, 30 August 2011, para. 38–39.

[259] Cassese (2009), p. 28.

[260] See Article 18 para. (3), (5) and article 19 para. (10), (11).

[261] Former Prosecutor Ocampo, Response to the Document in Support of the Appeal, para 82, in: The *Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, Judgement of the Appeals Chamber, Situation in the Democratic Republic of the Congo, ICC-01/04-01/07 OA 8, 25 September 2009, para. 67.

To date[262] the Court has had to face three admissibility challenges of concrete cases by the following States: the Republic of Kenya, Côte d'Ivoire and Libya.[263] The Appeals Chamber ruled, with the exception of the case against Abdullah Al Senussi, all cases admissible before the ICC; with regard to Côte d'Ivoire and Kenya the Chamber doubted that the domestic authorities were "taking tangible, concrete and progressive steps"[264] or "failed to submit information that showed that concrete investigative steps had been taken"[265] to determine whether the alleged suspects were criminally responsible for the same conduct which was investigated by the Court. With regard to the admissibility challenge of Libya the Chamber noticed the good will of the government on the one hand but concluded after further examination and several more opportunities for Libya to deliver additional evidence than the ones which were transmitted, "that Libya was unable genuinely to carry out the prosecution of Mr. Gaddafi and found that the evidence submitted was not sufficient to consider that the domestic and the ICC investigations cover the same case."[266] Only with respect to the admissibility challenge of the case of Al-Senussi, the Chamber decided for the first time that a case was inadmissible before the ICC; the competent Libyan authorities demonstrated through the "considerable amount of evidence, including several relevant witness and victim statements, as well as documentary evidence such as written orders, medical records and flight documents" that they are "willing and able genuinely to carry out such investigation".[267]

Pursuant to the foregoing arguments as well as the above mentioned practice of the ICC, it is demonstrated that the principle of complementarity does not constitute an obstacle for the jurisdictional system of the Court. It is the ICC that determines whether the State with jurisdiction is capable of exercising its criminal jurisdiction

[262]December 2017.

[263]See Homepage of the International Criminal Court, Case Information Sheet, Situation in the Republic of Kenya, available at: https://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf (Last accessed 18 Dec 2017); Homepage of the International Criminal Court, Case Information Sheet, Situation in Côte d'Ivoire, available at: https://www.icc-cpi.int/cdi/simone-gbagbo/Documents/SimoneGbagboEng.pdf (accessed 23 Dec 2017); Homepage of the International Criminal Court, Case Information Sheet, Situation in Libya, available at: https://www.icc-cpi.int/libya (Last accessed 31 Dec 2017).

[264]Homepage of the International Criminal Court, Case Information Sheet, Situation in Côte d'Ivoire, available at: https://www.icc-cpi.int/cdi/simone-gbagbo/Documents/SimoneGbagboEng.pdf (Last accessed 07 Dec 2017).

[265]*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*, Appeals Chamber, ICC-01/09-02/11 OA, 30 August 2011, p. 30, para. 80.

[266]Homepage of the International Criminal Court, Case Information Sheet, Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi, p. 2, available at: https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf (Last accessed 18 Dec 2017); The *Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, ICC-01/11-01/11, 31 Mai 2013, p. 90, para. 219.

[267]Summary of the Decision on the admissibility of the case against Mr. Abdullah Al-Senussi, p. 7, 8; Homepage of the International Criminal Court, Case Information Sheet, Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi, p. 2, available at: https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf (Last accessed 18 Dec 2017).

over perpetrators of the most serious crimes of concern or not. In granting the States the primary right to fulfill their obligations, the authority and strength of the Court is not as a result reduced, but rather it remains untouched and as such its possible classification as an International Criminal World Court.

d. Article 27 Rome Statute

Anchored in article 27 is the irrelevance of the official capacity, one of the most essential articles of the Rome Statute as it serves the implementation of the main aim of the International Criminal Court to put an end to impunity for any kind of perpetrators who commit the most serious crimes of concern to the international community as a whole.[268]

The first paragraph of the article reaffirms the content of various other international Statutes; the novelty of article 27 is that it differentiates between the criminal responsibility of all persons irrespective of their official capacity as the substantive law, pursuant to paragraph 1, and the right to exercise its jurisdiction regardless of any kind of attached immunity as the procedural law, pursuant to paragraph 2.[269] The dispute, as to whether paragraph 1 deals at all with immunity or only refers to the criminal responsibility of a person whose official capacity is irrelevant, or whether it covers the irrelevance of functional immunity granted under national law, while only paragraph 2 explicitly refers to the triviality of immunities and especially personal immunities under international law,[270] is irrelevant to this discussion, as nothing changes with regard to the important fact that no person, irrespective of their official capacity, can exempt themselves in relying on the international law on functional or personal immunity. At least there is clarity that the second paragraph abolishes immunities as a whole, so that immunities or special procedures granted either under national or international law do not constitute an obstacle for the Court to exercise jurisdiction. Article 27 neither protects the conduct of the State official nor does it secure the maintenance of international relations between States and therewith the complete protection of any conduct carried out by a limited set of people during their office, instead it determines the criminal responsibility of the person regardless of their official capacity and irrespective of the commonly attached immunity.[271] Thus, when States ratify the Rome Statute, they automatically waive their immunities which are attached to them under international law, respectively they consent to a regime which does not grant the State a plea with regard to one of

[268] Paragraph 4 and 5 of the Preamble of the Rome Statute; Similar Triffterer and Burchard (2016), p. 1049, para. 17.

[269] See Triffterer and Burchard (2016), p. 1038, para. 1; Akande (2004), p. 419.

[270] See Gaeta (2002), pp. 990–991; Triffterer and Burchard (2016), p. 1040, para. 4; Schabas (2010), p. 449; Pedretti (2015), p. 246; Akande (2004), pp. 419–420.

[271] See Cryer et al. (2014), pp. 556–5557.

most sensitive matters, the customary law on personal immunities.[272] The vertical relationship between the Member State and the ICC is therewith determined.

This leads to the further question whether article 27 only applies to Members of the Statute or also to Non-Members in cases where the ICC is in possession of jurisdiction. The foregoing question is not hypothetical but arises in respect of the following scenario. Pursuant to the analysis with regard to article 12 (2) (a), it was determined that a Member State may refer a situation, in which a national of a Non-Party State is alleged of having committed one of the core crimes referred to in article 5 on the Member State's territory to the Court which will then be able to exercise jurisdiction also with regard to that person of the Non-Party State, article 13 (a) in conjunction with article 12 (2) (a). It was concluded that the latter determination does not constitute a violation of the *parta tertiis nec nocent nec prosunt* principle and is thus not contrary to article 34 VCLT. Consequently, it has to be examined whether this trigger mechanism leads likewise to the applicability of article 27, when the alleged perpetrator of the Non-Party State is equipped with either immunity *ratione personae* or immunity *ratione materiae*. The problem seems familiar as the irrelevance of the official capacity has, in relation to the analysis of article 13 (b), incidentally been examined. Thus, the determined results and mentioned problems should not be repeated this context, nevertheless, there will be some overlaps.

The difference with regard to article 13 (b) is that it is the SC which refers a situation to the Court in acting under Chapter VII UN-Charter, while article 13 (a) in conjunction with article 12 (2) (a) grants the territorial Member State the right to confer its jurisdiction to the Court. In both situations the Court has jurisdiction despite the fact that these referrals may contain situations in which nationals and even a Head of State of Non-Party States might have committed one of the core crimes. The Court will have jurisdiction upon Non-Member States despite the fact that they neither consented to the Rome Statute nor waived their attached immunities. With respect to article 27 it has to be determined that the article does not differentiate between Member—and Non-Member States to the Statute. On the contrary, the first sentence of paragraph 1 states that "The Statute shall apply equally to all persons" irrespective of their official capacity. As already determined in the entry of the article, article 27 and the irrelevance of the official capacity is to be regarded as one of the main pillars to end impunity regardless of what kind of perpetrators; Member or Non-Member States. Additionally, article 25 (3) which determines in which cases an individual may be criminally responsible in front of the ICC, does not refer to either a person of a Member State or Non-Member State; instead the article only provides for the punishment of an individual who commits a crime within the jurisdiction of the Court.[273] Authors such as *Triffterer* and *Burchard* abide by the literal interpretation of the first sentence of article 27, paragraph 1 and deduce that "no one", neither Member—or Non-Member States, may be

[272] See similar Pedretti (2015), p. 247.

[273] See Article 25 (3).

exempted from prosecution by the Court.[274] However, it has to be indicated that their opinion is supported by the fact that paragraph 1 refers only to immunity *ratione materiae* and that this type of immunity is anyhow handled differently with regard to the customary international law forbidding state officials, equipped with immunity *ratione materiae,* to rely on the latter in front of a national court or an International Criminal Court prosecuting international crimes.[275] The latter is a well-established customary international law on the irrelevance of functional immunity[276] and constitutes a very powerful justification which prevents the applicability of functional immunity by an individual of a Non-Party State in front of the Court; it serves as an additional explanation as to why the Court is not barred from exercising jurisdiction even upon a national of a Non-Member State in possession of immunity *ratione materiae.* However, this correct determination does not answer the question, how to classify provision 27 and its direct applicability by the Court, especially with regard to immunity *ratione personae.* As has been analyzed elsewhere,[277] there is still disagreement whether with regard to personal immunities there is equally a customary international law negating this form of immunity when international crimes, such as Genocide, Crimes against Humanity or War Crimes have been committed and are to be prosecuted by an International Court such as the ICC. As it was already discussed in between the analysis of article 13 (b), the ICC ruled on the matter[278] in reaffirming the ICJ Arrest Warrant Decision as well as the determination made by the SCSL regarding the irrelevance of personal immunities in front of an international Court, and concluded the following:

> Therefore the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of States cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Party to the Statute whenever the Court may exercise jurisdiction.[279]

This book does not attempt to decide on that matter, it will be focused on the more important determination how far article 27 can directly be applied irrespective of any customary international laws. Thus, it has to be questioned whether it was in the drafters aim to grant the Court such an extensive jurisdiction mechanism to determine afterwards that the Court may not apply its own provisions, only because the

[274] In the following Triffterer and Burchard (2016), pp. 1048–1049, para. 16–17.

[275] Whereas Triffterer and Burchard emphasize that there is no unanimous decision regarding the abolishment of immunity *ratione materiae* for international crimes in front of national courts dues to the ICJ's Arrest Warrant decision, authors such as *Akande* and *Pedretti* determine that there is no functional immunity with regard to the prosecution of international crimes in front of either a national or international court. See Akande (2004), pp. 414–415; Pedretti (2015), p. 248.

[276] Further and more detailed reference to the exception of functional immunity, see article 98 (1).

[277] Within the analysis of article 13 (b).

[278] But with regard to a SC referral and the applicability of article 27 (2). See Chapter C, I, 2.

[279] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 December 2011, p. 35, 36.

Non-Party State did not ratify the Rome Statute and therewith did not expressly consent to it. The link to the jurisdiction mechanism, which may lead to the applicability of article 27, even with regard to Non-State Members, will be disregarded if the focus only lies on the principle *parta tertiis nec nocent nec prosunt*. If the link was not provided, the Court would never be able to apply any of the articles to non-contracting States. Furthermore, one author equally refers to the wording of the article—in that the latter does not differentiate between persons of Party or Non-Party States—and concludes that article 27 has to be applied directly by the judges, pursuant to article 21 (1).[280] In cases where the jurisdiction of the Court is triggered, it would not be for the judges to decide contrary to the Statute, but instead to apply article 27 II, which removes immunities *ratione personae* as well as *materiae*. This argument is followed by the determination of the Pre-Trial Chamber I in its Warrant of Arrest decision against Al Bashir in 2009, in which it was concluded that in light of ending impunity for the perpetrators of the most serious crimes of concern, the Statute and therewith article 27 has to be applied in the first place, because the other subparagraphs (b) and (c) of article 21 (1) are not pertinent.[281] This decision is in conformity with the 2017' decision of the Pre-Trial Chamber II regarding the non-cooperation of South Africa to arrest and surrender Al-Bashir: SC resolution 1593 triggered the ICC's jurisdiction so that article "27 (2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law."[282]

Interestingly, whilst the Court's Statute provides for challenges to the jurisdiction of the Court or the admissibility of a case, it does not provide any grounds for admissibility with regard to a question on immunities. Article 17 would not be the pertinent provision for the Non-Member State to challenge the jurisdiction of the Court, it could perhaps make use of article 19 (2) (c). This article provides for a ground to challenge the jurisdiction of the Court, if the jurisdiction is required under article 12. But, as was determined, the jurisdiction is given, pursuant to article 13 (a) in conjunction with article 12 (2) (a). Thus, there would be no provision to challenge the jurisdiction. Furthermore, it is questionable how the Court would behave—in a fictitious example—if the alleged perpetrator, a Head of State of a non-contracting Party, was arrested and surrendered to the Court by a Member State without the consent of the Non-Party State? Would the Court then decide that it is not capable to exercise its jurisdiction due to the fact that the Official of the Non-Member State neither waived its attached immunity nor consented to the

[280] See Jacobs (2015), pp. 291–292.

[281] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, para. 42–44.

[282] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 6 July 2017, para. 91.

Rome Statute's provisions, despite the fact that article 27 expressively determines that exactly these immunities or special procedural rules shall not bar the Court from exercising its jurisdiction over such a person and that there is no case which shall exempt such a person from its criminal responsibility? If the answer to this question was affirmative, the Court would violate its own Statute and more specifically article 27; the Court would undermine the main rationale of its establishment to put an end to impunity for the perpetrators of the worst crimes of mankind. In cases where the alleged perpetrator is physically present in front of the Court, the latter would apply article 27 regardless of the actual possession of immunity *ratione personae* or *materiae*.[283]

Furthermore and with respect to the maxim *par in parem non habet imperium,* which concerns the inter-relation of States, it could be argued that the latter principle will not even be affected in cases in which the ICC may exercise its jurisdiction with regard to article 27 upon a high ranking official.[284] It is however something entirely different if a national Court—in representing the State—exercises its jurisdiction or if an International Criminal Court makes a person criminally responsible for the commitment of one of the core crimes.[285] The link between a national Court of a State and an accused person equipped with the customary international law on immunities of another State touches on the horizontal relationship, while the level between the ICC and a Non-Member State relates solely to a vertical relationship. This important determination leads to another very important aspect: the relationship between articles 98 and 27. Article 98 (1), which will be thoroughly examined in the enforcement pillar, comprises the prohibition of the Court to send a request for surrender or assistance if such a request would require the requested State to infringe its obligations under international law with respect to immunities. Article 27 is in many instances said to be the counterpart of article 98 (1) due to the fact that both articles would contradict each other. However, this argument cannot be accepted because it does not, as already stated, differentiate between the two different relationships. Article 27 is part of the jurisdiction mechanism of the Court and hence only determines the relationship between the Court and the State, i.e. the vertical component, while article 98 is part of the cooperation apparatus, protecting the obligations between the requested State and the third State and adjusts the triangular relationship between the two States and the Court.[286] It is very important to distinguish both articles, and especially the stages at which they become applicable. As the author *Jacobs* correctly states, it would be appropriate to entirely disconnect the two articles.[287] Without anticipating the analysis regarding article 98 (1) and its relationship to article 27 (2), it can be determined that article 98 serves as a protection mechanism for the Member-States and simultaneously preserves the

[283] See also Steinberger-Fraunhofer (2008), p. 215.

[284] See also Triffterer and Burchard (2016), p. 1053, para. 24; Akande (2004), p. 433.

[285] See also Triffterer and Burchard (2016), p. 1053, para. 24.

[286] See Pedretti (2015), p. 272; Triffterer and Burchard (2016), p. 1040, para. 5.

[287] See Jacobs (2015), p. 296.

principle *pacta tertiis nec nocent nec prosunt,* because the article prohibits the Court to request for surrender or assistance which would require the Member State to breach its obligations under international law. Thus, even if the Court has jurisdiction and is pursuant to article 27 not barred to exercise it, despite the attached immunity to the person from the Non-Member State, this does not change the relationship between the Member and the Non-Member State. First of all the status of the Non-Member State in relation of the Member State does not change, the Non-Member therefore remains a Non-Member to the State; the non-contracting Party is still not bound by the Rome Statute and the Court does not impose any rights or obligations on the State only because it may investigate and prosecute.[288] Secondly, and in contrast to the relationship among Member States to the Statute and the fact that they removed their immunities with regard to the Court and among each other, this removal of immunity *ratione personae* between the Non-Party State and the Member to the Rome Statute is not given, so that the Member-State would violate its international obligations with regard to the Non-Member State, if it complied with the request of the Court and surrender the latter to the Court.[289]

The analysis of article 27 has demonstrated that there is no unanimous opinion with regard to its applicability, when it comes to a situation in which the ICC has jurisdiction upon a high ranking official of a Non-Member State, pursuant to article 13 (a) in conjunction with article 12 (2) (a). Even the ICC does not apply one and the same standard; in its decision from 2009 the Chamber directly applied article 27, while in its decision in 2011 it relied on the customary international law removing functional as well as personal immunities in front of an international court. In 2014 the Chamber took another approach and determined with regard to the non-cooperation of the DRC to arrest and surrender President Al Bashir, that it is the SC resolution which "implicitly waived the immunities" of the Head of State,[290] so that article 27 was applicable and therefore did not prohibit the Court to request a Member State to surrender the accused.

And in its most recent decision regarding South Africa's failure to arrest and surrender Al-Bashir, the Pre-Trial Chamber II highlighted that article 27 (2) applies to the Head of State of Sudan, due to the fact that this original Non-Party State has to be treated like an analogous Member to the Statute through the SC referral of the situation to the Court."[291] Even if the latter examples refer to SC referrals, it is always the jurisdictional link which makes article 27 also with regard to Non-Member States applicable—between the Court and the State concerned.

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[288] See detailed analysis with regard to article 12 (2) (a).

[289] See detailed analysis with regard to article 98, p. 77 et seq., especially 84.

[290] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of The Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/056-01/09-195, 9 April 2014, para. 29.

[291] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 6 July 2017, para. 88.

So in the course of 8 years the Court justified the applicability of article 27 in the same case based on four different approaches.

With regard to the abolishment of immunity *ratione materiae* in front of a national or at least an International Court prosecuting international crimes, there is no longer a dispute, while the construct of immunity *ratione personae* still bears problems. The accusation that the applicability of article 27 on an official, in possession of personal immunity, of a Non-State Member would amount to a violation of article 34 VCLT, is persistent.[292] With regard to the latter approach the only possibility for the Court to exercise jurisdiction would be either the waiver of immunity by the Non-Member State, the reliance on the customary international law removing personal immunities in front of an international Court (if even applicable) or the cessation of the superior official capacity of that person. The other preference would be the adherence to the vertical relationship between the Court and the Non-Member States. If the Statute was built upon a jurisdiction mechanism, in which State-Parties delegate their rights to the Court, so that the latter may exercise their jurisdiction even with regard to a scenario of article 13 (a) in conjunction with article 12 (2) (a), how would it then be determined that the Court may not apply its Statute's provision further and first and foremost deny the content of one of the most essential articles such as article 27 (2)? It is not conceived that the core crimes listed in article 5 will be committed solely by a single person, it is more likely that they will be committed by a whole State apparatus or by people who have the power to authorize such atrocities. The Expert Workshop on Cooperation determined that "90 % of the crimes under the ICC jurisdiction are committed by States or have an element of State involvement therein".[293] This was the intention of the incorporation of an article such as 27, to reaffirm what was anchored in the Preamble: to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes. If article 27 constitutes the exception and is only applicable to Member States and among each other, the provisions regarding the exercise of jurisdiction, articles 12 and 13, should have been elaborated differently. Not only with regard to article 13 (b) but also with regard to a Member-State's referral of a situation regarding a Non-Member State. The capability to refer a situation regarding a Non-Member State to the Court, despite its rejection to the Court, should have been *ab initio* impossible if article 27 should also not to be applied on the latter.

The fact that the ICC constitutes a Court of last resort, complementary to a national jurisdiction, and that it will only operate when the most serious crimes of concern to the international community as a whole have been committed, may not allow the person of the Non-Member State to plea for its personal immunity in front of the Court. The applicability of article 27 does not convert a Non-Member State into a Party to the Statute. Obviously other articles, such as the general obligation to cooperate, article 86, will not be applicable as the article only obliges State Parties to

[292] See Triffterer and Burchard (2016), p. 1041, para. 6; Akande (2004), p. 433.

[293] See Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 6.

cooperate fully in the Court's investigation and prosecution. The applicability of article 27 only operates on the vertical relationship between the Court and the Non-State Party. It does not impose any obligations or rights on the non-contracting Party. It is a matter of jurisdiction, not to be confused with all the other further proceedings which might bar the Court to exercise this obtained jurisdiction. Articles such as 98 (1) preserve the construct of international law immunities because here the triangular relationship comes into play and the relations of obligations change. But article 98 and its determination do not form part of the jurisdiction of the Court and should therefore be divided. In light of the object and purpose of the establishment of the Court and therewith the Rome Statute and in consideration of the provisions 13 (a), 12 (2) (a) in conjunction with article 27, it can be concluded that no immunities may be granted to any person worldwide, regardless of its official capacity and attached functional or personal immunity, if that person from the Non-Member State has committed one of the core crimes referred to in article 5 on the territory of a Member State, and the Court has jurisdiction pursuant to the above mentioned articles. In the moment of the establishment of jurisdiction, either with regard to article 13 (b)[294] or 13 (a) in conjunction with 12 (2) (a), article 27 will be applicable.[295] The further argument that a customary international law is evolving or already exists, depending on the observer, which provides for the abolishment of international law immunities, immunity *ratione personae*, in cases where an international criminal court prosecutes international crimes, supports the applicability of article 27 even upon Non-Member States. Consequently, it can be concluded that article 27 contributes to a large extent to the affirmation of the question whether the ICC can be regarded as an International Criminal World Court.

e. Article 124 Rome Statute

In accordance with the applicability of article 124, the Court is for a period of 7 years following the entry into force of the Statute, once a State becomes a Party, barred from exercising its jurisdiction upon the State of which the person accused is a national or the State on which territory the crime occurred, if at least one of these States made a declaration that it does not accept the jurisdiction of the Court with respect to War Crimes, contained in article 8. Article 124 is therefore designated as a suspension- or time-limited opt-out provision which can be applied only once and which can be withdrawn at any time.

Interestingly, this article was not even mentioned once in one of the umpteen Draft Statutes but evolved in the last days of the Rome Conference; the five

[294]Regarding article 13 (b) it is first and foremost the SC resolution which makes the Rome Statutes provisions applicable to the Non-Member State but it is the initial trigger mechanism of the Statute itself, which at all constitutes to the bases for such a referral.

[295]Regarding article 12 (3) it should be stated that the Non-State Party waived its immunity at the moment of accepting the jurisdiction of the Court. See Triffterer and Burchard (2016), p. 1041, para. 6.

permanent members of the SC, especially France supported the idea that for War Crimes and Crimes against Humanity the State should give its consent—either on an ad-hoc basis or by declaration—for the Court to exercise its jurisdiction.[296] In the end it was the German proposal with some modifications of the Bureau of the Conference which resulted in the so called "Transitional Provision". Thus, it is not surprising that France was the first State which lodged a declaration pursuant to article 124, however it withdrew its declaration nearly 1 year before the declaration would have expired.[297]

Despite the fact that article 124 was incorporated into the Statute, there are some inconsistencies with regard to its interaction with some of the Rome Statutes articles, such as articles 12 and 13 (b). Firstly, it is disputed how the following situations are to be dealt with: does the ICC have jurisdiction if a national of a Member- but declaration making State, commits a War Crime on the territory of a State Party which, pursuant to article 13 (a) in conjunction with article 12 (2) (a) has the right to refer the situation to the Court or when the national of the latter commits a War Crime on the declaration- making States territory and refers the situation pursuant to article 12 (2) (b) to the Court? That the State, which did not make use of article 124, has the right to refer both scenarios to the Court traces back to the Rome Statutes provisions itself. But this does not answer the question whether the ICC may exercise its jurisdiction despite the fact that the other Member-State lodged a declaration pursuant to article 124. To respond to the question, the wording of the declaration made by the State itself needs to be carefully considered. As article 124 states, the declaration-making State does "not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals *or* on its territory." With the word "or" the State is given the decision whether it wants to exclude both, the territory and its nationals or just one or the other.[298] In cases where the State does not accept the jurisdiction of the Court with regard to both possibilities, two different interpretations evolved: On the one hand it could be determined that article 124 constitutes an overall exclusion with the result that the ICC would be prohibited from exercising its jurisdiction despite the fact that both States are Members of the Rome Statute.[299] On the other hand it could be argued that the declaration only has an effect on the State, which made the declaration. Although the latter view would be in the aim of the Statute to ensure that the ICC would not be prevented from exercising its jurisdiction, it would simultaneously render void article 124 and the original intent to include such an article into the Statute.

[296] See Zimmermann (2016), p. 2312, paras. 1 and 2.

[297] See Zimmermann (2016), p. 2312, para. 9. The declaration of France became effective with the Rome Statutes entry into force on 1 July 2002; thus the declaration would have last until the 1 July 2009.

[298] See Zimmermann (2016), p. 2315, para. 10.

[299] See Zimmermann (2016), p. 2313, para. 4 et seq.

Secondly, and with regard to the interaction of articles 13 (b) and 124 there are controversial opinions with regard to the question what affect such a declaration will have on a SC referral. *Zimmermann* abides to the wording of article 12 (2), which stipulates that in case of a SC referral, the ICC is not bound by the acceptance of jurisdiction of either the Member- or Non-Member State which leads to the redundancy of the declaration.[300] *Bourgon*, on the contrary, determines that a SC resolution does not have the power to override the declaration made by a Member-State pursuant to the Statute provision.[301] He justifies his argument with the already mentioned Pre-Trial Chamber Decision in the situation of Darfur, in which the SC confirms that it has the possibility to make use of article 13 (b) to trigger the jurisdiction of the Court, but that all the other proceedings have to be in reliance of the Statute's provisions. This conforms to the International Law Commissions Draft Statute which stated: "Once a crime has been referred by the Security Council, the normal requirements of the statute will apply [. . .] in other words, although the Security Council may initiate proceedings, the source of law to be applied will be the same as if the complaint were lodged by a State."[302] Pursuant to this view, the Prosecutor has to assess whether the Member-State has made such a declaration and in cases where the result is affirmative, the Court has to discontinue with its proceedings. Despite the power of the SC to also refer situations over Non-Member States to the ICC with the justification that in such situations neither the consent of the territorial, national nor Non-State Party is required, it seems apparent that the power cannot be overridden in declaring a whole provision of the Statute obsolete; even if this provision deals with the exercise of jurisdiction of the Court. Pursuant to the author, every other outcome would amount to an unlawful extension of the power of the SC over the ICC and would thus be *ultra vires*.[303]

The incorporation of article 124 was the last attempt for some States to create an opportunity to protect their nationals for at least 7 years from the jurisdiction of the Court with regard to War Crimes. Even the further accusation that article 124 would potentially circumvent article 120, which forbids reservations, was accepted at the Rome Conference[304]; that the incorporation of this transitional clause could foster the negotiation process so as to make the Statute more attractable to States, even in the future, was the lesser evil.[305] Nevertheless, practically the provision does not have or has it had any real impact on the jurisdiction mechanism of the ICC. As already emphasized, only two States, France and Colombia, have made such a declaration; France withdrew in 2008 and Columbia's declaration of Colombia

[300] See Zimmermann (2016), p. 2314, para. 8.

[301] See Bourgon (2002), p. 565.

[302] Crawford (1994), p. 147.

[303] See Bourgon (2002), p. 565.

[304] There is a dispute whether article 124 has to be regarded as a reservation, which is prohibited, or as an interpretive declaration. More to this dispute: Tabak (2009), pp. 1075–1076.

[305] See Arsanjani (1999), p. 53.

expired, however they wanted to withdraw from it a long time.[306] Moreover, at the Review Conference on the Rome Statute in Kampala in 2010, State Parties only agreed with regard to a strategic basis not to a deletion of article 124, which makes this article more a useful promotion of future ratifications; it had been stipulated that article 124 will be reviewed once more "with a view towards its elimination."[307] For this reason a decision to the above discussed disputes remains unresolved.

The last 17 years have demonstrated that the fear of States in 1998, to concede their jurisdiction and therewith accept the jurisdiction of an independent and new institution, was unfounded and the incorporation of an article like 124 was superfluous. Except for two States, no other State at the Rome Conference or even later made use of the transitional clause. The criticism of human rights organizations that the transitional clause would protect the nationals of those declaration-making States from the effective prosecution of these crimes,[308] is misleading: the fact that the ICC may not exercise its jurisdiction with regard to the State making the declaration has nothing to do with the territorial jurisdiction of the State on which the War Crime has been committed and the right of that State to prosecute the alleged perpetrator.

It can be concluded that article 124 practically does not constitute a bar for the Court to exercise its jurisdiction with regard to War Crimes. This is manifested by the fact that nearly no State has made use of the provision and that State-Parties want to eliminate it; thus, the Court even with an article like 124 can still be designated as an International Criminal World Court.

f. Interim Result

The previous determination has demonstrated that neither article 16, 17, 27 nor 124 are regarded as provisions working against the Court. Article 16 is very important to combine the two principles of justice and peace; their reciprocal interaction provides for the possibility to achieve a satisfactory compromise for the international community. Should the jurisdiction of the Court to be deferred for a time, in order to strengthen the peace and security of a nation, this does not lead to a powerless Court, as long as this option is exercised in a legal manner. The few attempts by African States to invoke the article in order to prevent the Court from prosecuting its nationals were rejected by the SC, which demonstrated that the article cannot be abused easily. Furthermore, the principle of complementarity, as one of the main pillars enshrined in the Statute, is not contrary but in favor of the Court because it empowers the Court to implement the objective of the Rome Statute that States will investigate and prosecute crimes which threaten peace and security

[306] See Zimmermann (2016), pp. 2315, 2316, 2317 para. 9 and paras. 19–20.

[307] See Coalition for the International Criminal Court (2010), Report on the first Review Conference On the Rome Statute, 31.May- 11.June 2010, Kampala Uganda, p.4, available at: http://www.iccnow.org/documents/RC_Report_finalweb.pdf (Last accessed 11 Dec 2017).

[308] See Tabak (2009), p. 1098.

through their domestic criminal legislation and Courts. That States are given the capability to challenge the admissibility of a case reflects the principle of the rule of law. However, the Court is given the discretion to determine whether the State is willing and able to carry out the investigation or prosecution. The argumentation that the principle of complementarity removes the jurisdiction of the Court, even by Member- or Non-Member States, is correct from an objective point of view but subjectively disregards that this is the intention of the Court; therefore the accusation is clearly rejected. The examination of article 27 has confirmed the judicial strength of the Court to exercise its jurisdiction upon individuals of Member but also of Non-Member States equipped with immunity *ratione materiae* and *ratione personae*, when the jurisdiction had been triggered pursuant to articles 13 (a), 13 (c) in conjunction with article 12 (2) (a) or article 13 (b). The ICC is not barred from applying article 27, due to the fact that the article applies only to the vertical relationship between the State and the Court. The logical consequence of one of the trigger scenarios of the Court, which grants the ICC jurisdiction with regard to Member and Non-Member States, can be no other than the applicability of the article dealing with the irrelevance of the official capacity. This does not make the Non-Member State a Party to the Statute and it furthermore does not violate the *pacta tertiis* principle; the horizontal relationship between the Member and the Non-Member State remains untouched and any international obligations with regard to immunities will be preserved at a different part of the Rome Statute. The applicability of article 27 with regard to Member and Non-Member States to the Statute does not only reflect the wording of the article itself, which states that it applies "to all persons without any distinction" and "shall exempt no person from criminally responsibility under this Statute", but it is also in conformity with the teleological interpretation to put an end to impunity for the perpetrators of these crimes. Article 27 strengthens the Court's ability to exercise jurisdiction tremendously and therefore contributes to the affirmation of the question, whether the ICC can be regarded as an International Criminal World Court.

With respect to article 124, it could be demonstrated that the article does not have to be defined as an overall exclusion but that it was only by reason of calculation—to increase future ratifications—incorporated. Except for two States, the article was never applied and the fact that it shall possibly be eliminated at the next conference underlines the practical irrelevance of this provision. States practice has shown that in ratifying the Statute, States agreed to subject themselves to the jurisdiction of the Court and have not excluded one of the, in any case, few core crimes of the Statute. The further fact that article 124 plays in the case of a State referral over a Non-Member State pursuant to article 13 (a), 12 (2) (a) no essential role results in the determination that article 124 does not practically lead to a limitation of jurisdiction, and therefore does not undermine the ability to constitute an International Criminal World Court.

The fact that the ICC is based on a treaty can and shall not be circumvented by attempting to apply the Statute provisions equally on Member- as well as upon Non-Member States. This was not the intention of establishing an independent criminal court which is free from any exertion of influence. But the determination

that the Statute grants the ICC, through Member States referrals as well as the Prosecutor's initiation of investigations *proprio motu,* pursuant to articles 13 (a), 13 (c) in connection with 12 (2) (a), the exercise of jurisdiction with regard to Member and Non-Member States can likewise not be negated. The additional capability to obtain jurisdiction without any territorial or national linkage through a SC referral of a situation amounting to a threat against international peace and security, article 13 (b), complements the foregoing examination. The ability of the SC to refer any situation, which activates a Chapter VII UN-Charter proceeding, to the ICC entails the exercise of jurisdiction upon potentially any national of the world, regardless if these States ratified the Statute or not. The Statutes provisions will accordingly be applicable to these States by virtue of the SC resolution. The further analysis that the Court is not barred from applying further provisions, such as article 27, so that any national, regardless of his official capacity can be prosecuted by the Court is another important verification of the judicial strength of the Court. The only exception to the broad jurisdiction mechanism is the new elaborated mechanism with regard to the Crime of Aggression. The result of the extensive analysis regarding articles 15 *bis* and 15 *ter* has demonstrated that this different jurisdiction mechanism restricts the Courts capability to prosecute the Crime of Aggression enormously. Nevertheless, the fact that the ICC is given the capability to prosecute the crime of crimes in that it holds Head of States individually criminal responsible for the commitment of the Crime of Aggression constitutes a historic milestone.

The extensive analysis of the judicial pillar has not only highlighted the purpose of the treaty to punish the most serious crimes of concern to the international community in putting an end to impunity for any perpetrators of these crimes, but equally affirms the question to the book that the ICC is entitled to be designated as an International Criminal World Court.

II. Enforcement Pillar

The ICC may be theoretically in possession of jurisdiction upon every national on earth—but if the ICC is prevented from investigating and the alleged perpetrators are not arrested and surrendered to the Court, the latter will be hindered to exercise this potentially worldwide jurisdiction rendering it "utterly impotent".[309] The Court does neither dispose over its own police force nor does it have any other executive powers to enforce its own decisions; the Court was made distinctly, if not entirely, dependent on the cooperation of States.[310] The reasons for making an International Court dependent on States will to comply, despite the risk of being influenced by the current "*Realpolitik*" and good faith of the States, traces back to the simple fact that

[309]Cassese (1998), p. 3.

[310]See Broomhall (2003), p. 155.

the Rome Statute was created by States and the inherent compulsion to protect their sovereignty.

Nonetheless, this appeared to be the only way to achieve the greatest consensus.

> The ICC has no army. The ICC has no police. That's what States wanted, and – having wanted that system - now States need to cooperate with the Court to ensure that the system works[311]

to speak in the words of the former President of the International Criminal Court, Philippe Kirsch.

In accordance with the Preamble of the Statute, Member-States agreed to exercise their criminal jurisdiction over those responsible for international crimes, to ensure effective prosecution by taking measures at the national level and by enhancing international cooperation to guarantee lasting respect for and the enforcement of international justice. These general obligations to cooperate are manifested in Part 9 of the Statute and are introduced in article 86, which stipulates that State Parties shall cooperate fully with the Court in its investigation and prosecution of crimes. Articles 86 to 102 regulate State's cooperation in, *inter alia*, collecting evidence, in guaranteeing the Court's investigation staff safe access in those regions, the serving of documents, the protection of witnesses and the arrest or surrender of defendants. And these are only a few to mention.

The enforcement pillar encompasses an analysis regarding the cooperation and judicial assistance mechanism in theory as well as in practice. The theoretical examination, based on Part 9 of the Rome Statute provisions itself, will focus on the most important articles regarding general provisions dealing with cooperation and assistance, the arrest and surrender of persons and other forms of cooperation provisions in order to determine the judicial discretion of the Court to request States for their cooperation. Furthermore, the analysis will on the one hand consider whether there are measures the Court could seize in cases where States, Member as well as Non-Member States, refuse to comply with their obligations of the Statute and on the other hand it will be examined whether there might be possible restrictions for the Court to exercise its jurisdiction. Regarding the assessment of potential restrictions, article 98 and especially its paragraph (1) will play an essential role in determining to what extent the article might bar the Court's ability to exercise its jurisdiction. After having examined the theoretical part of cooperation pursuant to the Statute, the practical implementation will be carefully considered as well as State's cooperation so far. Emphasis will focus on the 11 investigations recently under the jurisdiction of the Court. The most famous example of State's reluctance to cooperate is the non-compliance with regard to manifold requests of the Court to arrest and surrender Sudan's President *Omar Al-Bashir* for the commitment of all three core crimes.[312] Since his first arrest warrant in 2009, President Al-Bahir has travelled 65 times to 19 different countries, 9 of which are Members of the ICC,

[311] Kirsch (2007), p. 546.

[312] See Kreß and Prost (2016), p. 2037, para. 54.

which have partially refused repeatedly to cooperate with the Court in arresting and surrendering the accused.[313] To date, "the biggest challenge for the ICC remains ensuring sufficient cooperation of States [...]. The lack of execution of arrest warrants is the biggest obstacle to the full implementation of the ICC's mandate."[314] In order to find solutions with regard to the foregoing determination made by the former President of the ICC, Judge *Sang-Hyun Song,* several proposals will be presented and scrutinized.

In order to determine to what extent the international cooperation mechanism pursuant to the Rome Statute as well as its practical implementation through States practice on the one hand and the Court's applicability of the provisions on the other hand may reject or affirm the designation to constitute an International Criminal World Court, will be determined in the following.

1. International Cooperation and Judicial Assistance in Theory

The international cooperation and judicial assistance provisions of the Rome Statute are unsurprisingly famous for being hardly negotiated. With the maintenance of State sovereignty in mind, the adherents of the "horizontal" approach plead for the analogous applicability of the inter-State treaty based extradition and mutual assistance model.[315] The "vertical" supporters, on the contrary, wanted to strengthen the Court through the creation of a different but first and foremost exclusive cooperation system between the Court and the State; the guarantee of a proper international criminal prosecution should have been of more importance than the strict adherence to State sovereignty.[316] As is the case in nearly every other article in the Rome Statute, Part 9 is also a combination of compromises of the two different opinions, although the vertical approach had to forfeit to a great extent. States attempted to decrease the power and therewith the establishment of an effective Court, so that the result is a cooperation system primarily based on the power of the contracting States.[317] Existing international obligations but first and foremost States sovereignty had to be protected by all means. Another aspect was the high number of possible ratifications, which would have been endangered, if the new entity was given the opportunity to intervene with a strong enforcement system into the sovereignty of each State.[318] Despite the concessions that had been made due to State sovereignty, elements of the vertical regime were nevertheless included; at least some of them left

[313] See Information made available from Bashir Watch, Bashir Travel Map" available under: http://bashirwatch.org/#section-case-against-bashir (Last accessed 19 Dec 2017).

[314] Song (2015), p. VIII.

[315] See Schabas (2010), p. 975.

[316] See Kreß and Prost (2016), p. 2008, para. 5.

[317] See Sluiter (2009), p. 188.

[318] See Sluiter (2009), p. 188.

no loopholes for States to circumvent cooperation. Firstly, the cooperation system differs in its language from the inter-State UN model treaties, in that "mutual assistance" was changed to "other forms of cooperation" and "extradition" into "surrender".[319] Contrary to the customary sense of the term "extradition", "surrender" means the delivering-up of a person to the Court by a State, article 102. This modification implies a different relationship between the Court and the State Party; in cases where the Court requests a Member State to arrest and surrender of a person, it is not at the discretion of the State to decide whether to comply with the demand or not.[320] Pursuant to article 89 in conjunction with article 59, the Member State is obligated to take immediate steps to arrest the person and to surrender him to the Court. Secondly, the obligation to cooperate fully, anchored in article 86, has to be regarded as a great achievement when compared to the original draft: it initially started with "best efforts", which State Parties should be required to provide, to the adoption of "State Parties shall cooperate" to the final drafting of "States Parties shall cooperate fully" with the Court.[321] Furthermore, in respect of the division between the two categories "surrender" of suspects and "other forms of cooperation",[322] the most important aspect in relation to the "surrender" of suspects is that it does not contain any traditional inter-State extradition grounds to refuse cooperation[323]; "grounds for refusal *strictu sensu* are virtually absent in Part 9".[324] Nevertheless, it has to be analyzed whether there are limitations with regard to the provisions on the surrender of persons or other forms of cooperation or whether general provisions relating to Part 9 may potentially bar the Court from exercising its jurisdiction. Should a Member State fail to comply with the Court's requests, the latter is pursuant to article 87 (7) given the discretion to make a finding to that effect and to refer the matter to the Assembly of States Parties (ASP) or, where the SC referred the matter to the Court, to the SC. The cooperation between Non-Member States and the Court is in turn provided for under paragraph (5) of article 87 and subparagraph (b) foresees the capability of the Court to take action, the same procedure as set out in paragraph (7), in cases where the Non-Member State does not cooperate pursuant to the ad hoc arrangement or agreement. Granting the Court the right to respond to States non-cooperation can be regarded as an important concession regarding the horizontal approach.[325] The Assembly of State Parties, the body comprised of representatives of each Member State with various administrative as well as legislative functions, will play an essential role in the enforcement of the Court's requests. Together with the SC, they constitute the two important mechanisms to take action in instances where States refuse to cooperate. It will be

[319] See Kreß and Prost (2016), p. 2005, para. 2.

[320] See Rinoldi and Parisi (1999), pp. 346–347.

[321] See Schabas (2010), p. 974.

[322] *Idem,* p. 981.

[323] See Kreß and Prost (2016), p. 2008, para. 5; Broomhall (2003), pp. 157–158.

[324] Kreß and Prost (2016), p. 2008, para. 5; Mochochoko (1999), p. 314.

[325] See Broomhall (2003), p. 156.

determined what kind of measures these "two executive arms"[326] of the Court may take in order to remind the recalcitrant States of their obligations.

To determine how far the compromise at the Rome Conference strengthened or weakened the Courts authority to exercise its jurisdiction, the different and most important articles of the cooperation mechanism of the Rome Statute will be analyzed. Due to the illogical order of the articles in Part 9, a consequence of the time limit at the Rome Conference,[327] the articles are precisely divided into "general provisions" of the first half of Part 9 and the second half, "arrest and surrender articles" as well as "other forms of cooperation articles". The analysis is of paramount importance as it is an assessment of the Court's power and indicates whether the ICC constitutes an International Criminal World Court.

a. General Provisions Under Part 9; Articles 86, 87 and 88 Rome Statute

Pursuant to article 86, States Parties to the Statute are under the general obligation to cooperate fully with the Court. Following this obligation, States are required to comply with the Court's requests pursuant to articles 89 (1) et seq. as well as 93 (1) et seq.. As already mentioned above, can the final affirmation to such an obligatory cooperation system, with respect to the original idea of voluntarily leaving the cooperation within the discretion of the State concerned, be considered as an important achievement.[328] A further great achievement with regard to the cooperation mechanism was the confirmation of the vertical approach and therewith the incorporation of article 88; instead of leaving the final obligation to cooperate within the original national law of each State, pursuant to the horizontal approach, it was agreed upon the inclusion of article 88 which stipulates that Members to the Statute have to insure that their procedures under national law comply with all forms of cooperation set out in Part 9.[329] Article 88 was incorporated to insure that the proper cooperation of States is guaranteed, preventing States from justifying their non-compliance by reference to their national laws.[330] This strategic move was important and ingenious in two respects: Firstly it assured the Court the cooperation it needed to exercise its jurisdiction and secondly, States would apply their own national laws in responding to the requests of the Court, which simultaneously maintains their sovereignty.

According to the importance of the cooperation of States, article 87 constitutes the general provision for the regulation of requests for cooperation, which grants the Court the "authority" to request Member States for their cooperation. Article 87 relates to the whole Part 9. Contrary to the Statutes of the ICTR and ICTY,

[326] Verduzco (2015), p. 44.

[327] See Kreß and Prost (2016), p. 2007, para. 4.

[328] See Mochochoko (1999), p. 306.

[329] See Kreß and Prost (2016), pp. 2043–2044, para. 2.

[330] See Broomhall (2003), p. 155; Mochochoko (1999), p. 308.

article 87 is very precise.[331] It contains guidelines with regard to, *inter alia*, the language and confidentiality requirements, the protection of potential witnesses and their families, requests to organizations such as the International Criminal Police Organization (Interpol) or assistance of intergovernmental organizations and the invitation of Non-Party States to provide assistance.

With regard to paragraph 1 (b), which allows the Court to transmit the request through Interpol or any other appropriate regional organization, it should be noted that the article seems more promising than it will practically be.[332] Despite the fact that Interpol wanted to constitute an essential tool regarding the enforcement of the Court's requests, States decided instead that its role would be subordinated in that such a transmission of a request could only be directed to the police organization in cases where the State concerned gives its consent to it.

One of the most important paragraphs with regard to article **87 is paragraph 7** which regulates the mechanism in instances where State Parties do not comply with the Court's request, which prevents the latter from exercising its functions and powers under the Statute; in case of non-compliance the Court may pursuant to paragraph (7) make a finding to that effect and refer the matter to the Assembly of State Parties or to the SC, if a situation of 13 (b) exists. As one author correctly emphasized, both of these organs can be regarded as the "two executive arms" of the Court in case of non-compliance.[333] Before examining the measures that can be taken by the SC or the ASP, it has to be clarified, what the drafters meant with the reference to a "finding" and especially at which stage of the proceeding the Court may come to such a conclusion. The article itself does not give an answer to the questions. Even the "Rules of Procedure and Evidence" do not contain any further information regarding the non-compliance of States. The only guideline derives from the Regulations of the Court, 109 paragraph 3, which requires the Chamber to hear from the State before making such a finding.[334] Consequently, it can be noted that the Court has firstly to consult with the State concerned to decide afterwards any further action. With regard to the clarification of the term "finding", reference may be made to the Appeals Chambers *Blaskic* judgement, in which the Chamber examined that the term "finding" in article 29 of the ICTY Statute means that the Court "scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal".[335] As *Kreß* and *Prost* correctly conclude, this determination

[331] See Kreß and Prost (2016), p. 2020, para. 2.

[332] In the following see Kreß and Prost (2016), p. 2025 ff., para. 219 et seq.

[333] See Verduzco (2015), p. 44.

[334] See Kreß and Prost (2016), p. 2036, para. 53.

[335] *Prosecutor v. Tihomir Blaskic*, Appeals Chamber, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July (29 October 1997), para. 35; Kreß and Prost (2016), p. 2036, para. 53.

can be "*mutatis mutandis*" applied by the ICC.[336] Thus, a "finding" presupposes an unjustified breach of an international obligation and not only a mere misbehaviour.

Despite the fact that paragraph (7) determines that action has to follow in cases where Member States to the Statute breach their international obligation by non-complying with the Courts request, the paragraph remains silent with regard to what exact penalties may result from this violation. The original draft of the Preparatory Committee contained in article 78 the reference that either the SC or the ASP could apply any measures to bring States back to their inherent obligation to cooperate; but it was decided to abandon this important addition in the ultimate Rome Statute.[337] While the enforcement mechanisms of the SC are anchored in the UN-Charter, in that the SC is able to make use of its Chapter VII powers—either by applying diplomatic or use of force measures—in the case of a 13 (b) referral, the role of the ASP is less obvious. Article 112 (2) (f) only stipulates that the ASP shall consider any question relating to non-cooperation; this unsubstantial wording can lead to no other assumption than the sanctioning of State Parties through diplomatic channels.[338] The inaccuracy of this article is once more owed to the reluctance of States to have a higher authority interfering with their sovereignty, so that this sanction mechanism was intentionally not further elaborated on at the time of the Rome Conference.[339]

As *Cassese* explicitly highlighted, the Drafters of the Statute could

> have specified that the Assembly of States Parties might agree upon countermeasures, or authorize contracting states to adopt such countermeasures, or, in the case of disagreement that each contracting state might take such countermeasures.[340]

Instead, article 112 (2) (f) contains similar ambiguities to article 87 (7), stating only that the ASP shall consider any question relating to non-cooperation.

Notwithstanding that authors such as *Zimmermann* and *Sarooshi* deny the ability of the Assembly of States Parties to deal effectively with those enforcement issues due to its large size and low frequency of meetings,[341] it must be noted that the forum could theoretically and in accordance with article 112 (2) (f) adopt important measures to bring the recalcitrant States back in line in order to fulfill their obligations.[342] In 2011 the ASP reacted to numerous disregarded requests by the Court to the appealed States to arrest and surrender suspects; at its tenth session it adopted a resolution, which' Annex consists of procedures relating to non-cooperation.[343] Paragraph 7 of the Annex distinguishes between two different scenarios: In the

[336] See Kreß and Prost (2016), p. 2036, para. 53.

[337] See Rinoldi and Parisi (1999), p. 376; Article 78 PrepCom Draft.

[338] See Broomhall (2003), p. 156.

[339] See Schabas (2010), pp. 1123–1124; Broomhall (2003), p. 156.

[340] Cassese (1999), p. 166.

[341] See Zimmermann (1989), p. 223; Sarooshi (2004), p. 102.

[342] See Rinoldi and Parisi (1999), p. 377.

[343] See Resolution ICC-ASP/10/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties (2011), Annex.

first instance the Court refers the cause of non-cooperation to the ASP which would lead, pursuant to paragraph 10 of the Annex, to a formal response; the political and diplomatic measures entail, *inter alia*, an Emergency Bureau meeting or an open letter from the President of the Assembly to the State concerned.[344] In the second instance of non-cooperation, which applies in a situation in which the Court has not yet referred the situation of non-compliance to the ASP but either a future or ongoing breach of cooperation requires an urgent intervention of the latter, an informal response procedure is provided for: The President of the Assembly is able to take diplomatic action in building upon his good offices directly with officials of the non-cooperating State to promote full cooperation.[345]

Even if these procedures set up by the ASP, 9 years after the entering into force of the Rome Statute, contribute more precisely to a definition of possible measures which the ASP can apply in cases of non-cooperation, academics such as *Kreß* and *Prost* determine that these measures are not sufficient enough; instead they claim that the International Law Commission Articles on State Responsibility, which reflect international customary law, should be applied to fill the gap.[346] That Member States intentionally oppose requests of the Court and therewith violating their obligation to cooperate would amount to an internationally wrongful act; a mandatory duty arising out of article 86 "exist *erga omnes partes*", so that "collective countermeasures" by the ASP—as an intergovernmental Organization—would be justified as a proper sanction mechanism.[347] This argument is also in line with the Appeals Chambers judgement in the *Blaskic* case, in which the Chamber concluded that "every Member State of the United Nations has a legal interest in seeking compliance by any other Member State with the International Tribunal's orders and requests" and "in addition to this unilateral action, a collective response through other intergovernmental organizations may be envisaged.[348] Furthermore, the Chamber determined that this collective action "may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions".[349] *Kreß* and *Prost* go one step further in arguing that even in the case of a paralyzed ASP, it must be possible for Member States to act individually against the recalcitrant and Statute-breaching State.[350]

[344] See Resolution ICC-ASP/10/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties (2011), para. 14 (a), (b) of the Annex.

[345] See Resolution ICC-ASP/10/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties (2011), para. 15, 19 of the Annex.

[346] See Kreß and Prost (2016), p. 2035, para. 49 and pp. 2041–2042, para. 69–71; similar also Sluiter and Talontsi (2016), p. 103.

[347] See Kreß and Prost (2016), p. 2035, para. 49 and pp. 2041–2042, para. 69–71.

[348] See *Prosecutor v. Tihomir Blaskic*, Appeals Chamber, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July, para. 36 (29 October 1997).

[349] *Prosecutor v. Tihomir Blaskic*, Appeals Chamber, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July, para. 36 (ii) (29 October 1997).

[350] See Kreß and Prost (2016), p. 2042, para. 71.

Despite the reference to the ILC State Responsibility Articles by some scholars as well as the obligations *erga omnes*, elaborated by the ICTY, to collectively react on the non-complying and therewith international obligation-breaching State, the ASP did not explicitly include a stricter sanction mechanism, which would not only have a real impact on the non-cooperating State but which would increase the threshold for the State to oppose to these obligations.

Furthermore, regarding the involvement of the SC as the other appropriate organ to support the Court in exercising its functions and powers, authors such as *Sarooshi* and *Cassese* represent the opinion that article 13 (b) does not constitute the only authoritative trigger mechanism in the instance of non-cooperation.[351] It is correct that pursuant to a literal interpretation of article 87 (7), the SC is only able to deal with the failure by Member-States to cooperate, if the Council previously referred the situation to the ICC. The latter case explicitly authorizes the Court to refer the matter back to the SC, but it is questionable whether this right means *a contrario* that the SC is not authorized to act if such a referral is not given. The Rome Statute as such does not bar the SC from determining that the non-compliance of a State, even in the non-existence of an article 13 (b) situation, fulfills the requirements for a determination of an article 39 UN-Charter matter and its consequences of Chapter VII against the unwilling State. The power given to the SC and its capability to take any kind of measures to maintain international peace and security has been presented on various different examples in the past. Special emphasis, however, shall be put on an important decision taken by the SC, in which it intervened in a dispute and imposed sanctions to enforce the principle *aut dedere aut judicare.*[352] With regard to the *Lockerbie* incident, in which two Libyan officials were accused for the bombing of an airplane which exploded above the town Lockerbie, the SC determined, on the reluctance of Libya to extradite the two accused to either the United States or the United Kingdom - an existing threat to international peace and security—and required the Libyan government to transfer the two Libyan security personnel to a State which has the ability and jurisdiction to try the accused for their crime.[353] The enforcement of this principle was indeed based on the horizontal level, so from State to State, but this can still be regarded as an analogous precedent that the SC may enforce decisions made by the ICC with regard to requests to arrest and surrender, if the requested States are unwilling to comply, which could amount to a breach of international peace and security.[354] With regard to the duty of the SC to maintain or restore international peace and security there is no reason why the latter may not also take such measures with regard to an unwilling Member State to comply with the Court. Consequently, there is no reason why the SC could not develop a consistent practice "of linking a threat to the peace to the non-compliance

[351] In the following see Sarooshi (2004), p. 103; Cassese (1999), p. 166.

[352] See Sarooshi (2004), p. 104; Plachta (2001), p. 136.

[353] Plachta (2001), p. 129 et seq.

[354] See Sarooshi (2004), p. 104.

by States with ICC orders".[355] But as *Cassese* correctly determined, it would have been very important to expressly include such a possibility in the Rome Statute[356]; first and foremost to circumvent the allegation that the SC exceeds its competencies towards the ICC.

Following the above mentioned involvement of the SC it could be questioned furthermore, whether the ICC could in cases of the absence of a SC referral but an existing non-compliance situation of a Member-State make use of article 87 (6) to ask the UN, respectively the SC, for its assistance with regard to the arrest and surrender of sought suspects. Pursuant to paragraph 6, the Court may request information and documents from intergovernmental organizations but ask also for other forms of cooperation and assistance, as long as they are in accordance with their competence and mandate. This paragraph is incorporated in article 15 (2) of the Relationship Agreement between the International Criminal Court and the United Nations, which constitutes the primary instrument with respect to paragraph 6[357]; article 15 (2) reiterates that the UN may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute. It could be argued that article 17 of the Agreement, which refers to the cooperation between the SC and the ICC, in a situation whereby the SC has referred the situation to the Court, automatically precludes the Court from asking the SC for its assistance or cooperation pursuant to article 87 (6) if the unwilling State Member referred the situation to the ICC or the Prosecutor investigates *proprio motu.* On the contrary, article 17 (1) and (2) of the Relationship Agreement only addresses the manifested provisions of the Rome Statute, 13 (b) and 87 (7)[358]; the explicit mentioning of a procedure, such as a SC referral, neither forfeits the further possibility to make use of another option—if available—nor does the imprecise wording of paragraph 6 exclude such an option.[359]

This can be portrayed on the "*Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court*".[360] The latter agreement entails that the ICC may make use of the peacekeeping forces on the ground; the cooperation and legal assistance offered by the UN does not only comprise the access to documents and information, article 10 of the Memorandum, but also provides for the possibility that MONUC assists the government in arresting or securing the

[355] *Idem,* p. 103.

[356] See Cassese (1999), p. 166.

[357] See Schabas (2010), p. 984.

[358] See Article 17 (3) also refers to article 87 (5) but the non-cooperation of Non-Member States will be discussed elsewhere.

[359] See Kreß and Prost (2016), p. 2033, para. 46.

[360] See United Nations and International Criminal Court, Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, 8 November 2005, No. 1292.

appearance of persons sought by the Court, article 16 (1) (a), (b) of the Memorandum. Although this option of making use of peacekeeping forces was only incorporated in the Draft Statute and was not explicitly mentioned in the final version of the Rome Statute, it does not make such agreements impossible or void.[361]

Furthermore and with regard to the question, whether the SC could be consulted or act on its own initiative in cases where a Member State is unwilling, respectively unable to comply with the requests of the Court, examples such as the SC Resolution with regard to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in 2013 or of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) might explain the cooperation between peacekeeping operations and the ICC.[362] In both of these Resolutions, the SC determined a threat to international peace and security and authorized, acting under Chapter VII of the Charter that in the first instance, MONUSCO shall

> Support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC.[363]

With regard to the Mission in Mali the SC decided that the mission should support the efforts of the transitional authorities in Mali to bring to justice those responsible for War Crimes and Crimes against Humanity while simultaneously urging the authorities to cooperate with the Court and reminding them of their obligation under the Rome Statute.[364] It is correct that both of these States gave their consent for the mission and that the peacekeepers were more subordinated to the governments of both States, than directly responsible to cooperate with the ICC. But both of these States referred the situations to the Court on their own initiative—so that a SC referral mechanism was not given—and nevertheless, the SC mandated the peacekeeping forces to help in arresting the fugitives or supporting the governments in holding accountable those responsible for the most serious crimes of concern. These two resolutions demonstrate that the SC does not need an applicable article 13 (b) situation to claim a certain behavior of a Member State and it may be a State which referred a situation pursuant to article 13 (a) in conjunction with article 12 (2) or (3) to the Court.

Consequently, the result for the ICC is that with regard to article 87 (6), the ICC may ask the SC for other forms of cooperation which could also entail that peacekeeping forces help to arrest and surrender the sought suspects. But this option does customarily contain the consent of the territorial State on which' ground the peacekeepers are operating. *Kreß* and *Prost* argue that nothing in paragraph 6 precludes the direct cooperation of the peacekeeping mission, should the requested State itself

[361] See Kreß and Prost (2016), p. 2033, para. 46.

[362] See UN Security Council Resolution 2098 (2013) UN Doc S/Res/2089 and UN Security Council Resolution 2100 (2013) UN Doc S/Res/2100.

[363] UN Security Council Resolution 2098 (2013), paragraph 12 (d).

[364] See UN Security Council Resolution 2100 (2013), paragraph 16 (g) and 27.

be unwilling or unable to cooperate with the Court.[365] The possibility of the ICC to ask the SC with regard to article 87 (6) for assistance in that the Council determines the non-compliance of the Member-State as a threat to international peace and security and therewith releases a resolution sanctioning the violating State, remains untouched. With regard to paragraph 7 it has to be emphasized that it is in the final discretion of the Council to react to the non-complying Member State which bars the ICC from exercising its functions and powers; a determination of a threat against international peace and security is fully detached from paragraph 7 unless the Council itself referred the situation to the Court.

For Non-Member States to the Statute the situation is different due to the fact that these States do not have a general duty to cooperate with the Court. In accordance with article **87 (5)** (a), the Court may only invite any State not Party to the Statute to provide assistance on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. If the Non-Party State is despite one of these legal affiliations unwilling to comply with the requests of the Court, the ICC may pursuant to article 87 (5) (b) inform the Assembly of States Parties or, where the SC referred the matter to the Court, the SC.

Despite the fact that the possible cooperation and assistance of Non-Party States was provided for in Part 9 of the Rome Statute, inconsistencies appear between subparagraphs (a) and (b) of article 87 (5). With regard to the principle that a treaty does not create either obligations or rights for a third State without its consent, article 34 VCLT, paragraph (5) (a) refers to the three options, of which one has to be applicable for the Court to ask the Non-Member State for assistance. The ad hoc arrangement or the agreement has to be made between the Court and the State concerned; Rule 107 of the Regulations of the Court specifically determines this procedure.[366] The question which arises is, under which of the three possibilities, determined in article 87 (5) (a), a SC referral of a situation of a Non-Party State has to be subsumed? It could doubtlessly be argued that such a SC referral constitutes the "other appropriate basis", so that the Court could apply paragraph 5 (a) to invite the Non-State Party, which' explicit consent becomes obsolete due to the SC resolution, to provide assistance.[367] However, already at this stage two inconsistencies arise. First of all, it is questionable and contradictory that the Court is only authorized to "invite" the Non-Party State to provide assistance, if the SC resolution explicitly obliges the State to cooperate fully with the requests of the ICC. With regard to SC referrals, the word "invite" seems to relate more to the wording "urges", which is used in the resolution for the cooperation of Non-Party States which have no relation to the case referred to the Court. Also in respect of the other two forms of agreements mentioned in the provision, the word "invite" creates the false impression that it would be on the Non-Member State to decide whether it would like to cooperate or

[365] See Kreß and Prost (2016), p. 2033, para. 46.

[366] See Regulations of the Court, adopted by the judges of the Court on 24 May 2004, ICC-BD/01-01-04.

[367] See Heilmann (2006), p. 181.

not which is not the case, when entering into such an agreement with the Court. Secondly, it is problematic to subsume such a SC referral under "*any other appropriate basis*" if the second paragraph, 5 (b), which determines the procedure in instances where the non-contracting Party, nevertheless, refuses to cooperate with the Court, lacks exactly this option of paragraph 5 (a); instead the paragraph only determines that the Court may inform the ASP or the SC, when applicable, in case the State with which an arrangement or an agreement exists rejected the cooperation. Consequently, and in light of a literal interpretation, SC referrals of situations, in which the Non-Party State did not enter into such an agreement or arrangement, would not be covered by that article; the ICC would be paralyzed to react to the non-complying State despite its obligation stemming out of the SC resolution. To circumvent such an "absurd result",[368] authors such as *Kreß*/*Prost* and *Palmisano* determine that the Court is nevertheless in the position to firstly request Non-State Members for their cooperation and to secondly inform the SC, if the Non-Party State does not obey its orders; the authors however rely on different explanations.[369] While the authors of the "analogy approach" determine a SC referral to the ICC pursuant to article 13 (b) as a different legal source and therewith an exception to the consent-regime of article 87 (5) (b), *Palmisano* bases his argument on the power of the SC resolution itself which imposes on its UN-Member States obligations which they have to obey pursuant to article 25 UN-Charter; both arguments do not require any agreement between the Court and the Non-Party State. Other authors, such as *Heilmann* and *Gallant* rely strictly on a literal interpretation of article 87 (5) (b) and argue a missing arrange- or agreement between the Court and the Non-Party State, paragraph 87 (5) (b) nevertheless becomes inapplicable.[370] These authors explain the applicability of article 87 (5) on a completely different construct: Pursuant to their view the SC resolution, which obliges Non-Party States to cooperate, would likewise lead to an obligation for the State concerned to enter into an special agreement with the Court.[371] This special agreement, anchored in article 4 (2) would be required for the Court to operate on the territory of the non-contracting State. Thus, if such a special agreement existed, paragraphs (a) and (b) would become applicable again; in case the Non-Member State refused to enter into such a special agreement with the Court, it would violate its obligations pursuant to article 25 in conjunction with 103 UN-Charter.[372] A further approach would be the determination that article 87 (5) would one way or another become obsolete due to the fact that rather article 86 et seq, respectively article 87 (7) would constitute the pertinent provision by

[368]Kreß and Prost (2016), p. 2030, para. 39.

[369]See Kreß and Prost (2016), pp. 2028–2030, para. 31, 36, 39 et seq; Palmisano (1999), pp. 417–418.

[370]See Heilmann (2006), p. 182; Gallant (2003), pp. 30–31.

[371]See Gallant (2003), p. 31.

[372]See Heilmann (2006), pp. 182–183; Gallant (2003), pp. 30–33.

virtue of the SC resolution. In light of the examination made with regard to article 13 (b),[373] it was concluded that the Non-Member State has to be regarded as an analogous party to the Rome Statute; thus the States which are pursuant to the SC resolution obliged to comply with the Court would be bound by the Rome Statutes cooperation and judicial assistance provisions relating to Member-States by virtue of the SC resolution. This approach is in conformity with the case law of the ICC, which applied article 87 (7) in cases where it decided on the failure of a non-complying Non-Member State, such as Libya and Sudan. In all of the Chamber's judicial findings on non-compliance regarding the failure of the two to the Court referred situations of Libya or Sudan, the Chamber either "recalls article 87 (7)"[374] or determined that it is "acting under article 87 (7)"[375] to issue a finding of non-compliance.

Although it is irrelevant, which opinion is followed, due to the fact that each of them come, *mutatis mutandis,* to the same conclusion while justifying their opinions on the applicability of different articles, the latter argument is compatible with the case law of the ICC and the forgoing determination of the book that Non-Member States have to be regarded as analogous Parties to the Statute.[376] The SC referral of a situation of a Non-Member State to the ICC, entails the analogous applicability of the statutory regime to the State. The SC obliges these States to cooperate fully with the ICC, so that also all the provisions regarding cooperation and judicial assistance will become applicable for that State. Thus, as a logical consequence the Non-Member State has to comply with the requests and if not, the Court may pursuant to article 87 (7) make a finding to that effect and refer the matter to the SC.

It is always the exorbitant special situation of the SC acting under Chapter VII and its related capability to refer such a situation regarding a Non-State Member to the ICC. As a threat to the peace, breach of the peace or the act of aggression constitutes a danger to international peace and security, such a "referral power" was agreed upon. Hence, the SC should enforce the cooperation of States, regardless if they are Members- or Non-Members of the ICC.[377] Every single resolution has to be

[373] See this chapter, Sect. I, 2, p. 54 et seq.

[374] *The Prosecutor v. Abdel Raheem Muhammad Hussein,* Decision on the Prosecutor's Request for a finding of non-compliance against the Republic of the Sudan, Pre Trial Chamber II, ICC-02/05-01/12, 26 June 2015, para. 16; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecutor's Request for a finding of non-compliance against the Republic of the Sudan, Pre-Trial Chamber II, ICC-02/05-01/12, 9 March 2015, para. 18.

[375] *The Prosecutor v. Saif Al-Islam Gaddafi,* Decision on the non-compliance by Libya with requests of cooperation by the Court and referring the matter to the United Nations Security Council, Pre-Trial Chamber I, ICC-01/11-01/11, 10 December 2014.

[376] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, para. 54; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 88.

[377] Similar Verduzco (2015), p. 44.

carefully examined to determine which States the Council obliges to cooperate and which States or international organizations it has just "urged" to provide assistance to the Court. The content of the resolution is therefore of paramount importance. The statement of authors such as *Palmisano,* who determined that the existence of any cooperation agreement with the Court is "legally unnecessary and a waste of time" due to the incumbent duty of "each and every State Member of the United Nations" to cooperate in the case of a SC resolution, is too broad and a misleading interpretation.[378] Also a SC resolution can only be measured by its intent, so that the foregoing statement would only be correct if the Council obliged every single UN-Member State to cooperate with the ICC; in every other case the resolution will only be applicable to those States which the SC explicitly obliges to cooperate fully pursuant to its resolution. Regarding the latter argument it seems to go beyond the resolution to conclude that the obliged cooperation of the SC resolution entails an automatic "special agreement" between the Non-Member State and the Court, which would make article 87 (5) (b) directly applicable. It is correct that a special agreement in the sense of article 4 (2) would be required in case the Court liked to operate on the territory of a State which did not ratify and therewith did not give its consent to the Court. But the assumption of such an agreement appears very constructed, and there is no practical or theoretical evidence of such management with regard to SC referrals. With regard to the SC referral regarding the situation in Sudan and the reluctance of the latter to cooperate with the Court, the Pre-Trial Chamber explicitly determined "that the Republic of Sudan is not a State Party to the Statute and has not entered into an agreement or an arrangement with the Court",[379] which excludes the suggestion made by *Gallant*. Instead, the Court based its "inherent power" to request the cooperation of Sudan and to inform the SC only on the SC resolution itself and the obligation of Sudan, as a UN-Member State, to comply with the request pursuant to article 25 UN-Charter. It is the trigger mechanism of the SC referral, which makes the Statute applicable.[380]

Consequently, there are two possibilities to deal with SC referrals on Non-Member States which do not comply with the requests of the Court; either article 87 (5) will be applied so that the Court may only oblige the in the SC explicitly mentioned Non-Member States to cooperate and provide any necessary assistance. Due to the fact that the SC resolution would constitute a different legal basis and therewith constitute an exception to the possibilities referred to in paragraph (5), the Court may further inform the Council if the Non-Member State is, despite its obligation, stemming from the resolution, not complying with the latter. If the Court has additionally entered into an agreement with the State concerned, article

[378] See Palmisano (1999), p. 418.

[379] *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman,* Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, Pre-Trial Chamber I, ICC-02/05-01/07, 25 May 2010, p. 7.

[380] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, paras. 94.

87 (5) (b) may be directly applied by the Court to inform the SC about the failure to cooperate. Regarding the other approach, article 87 (7) would be the pertinent provision following the analogous Member approach. Both opinions lead to the same result. With regard to Non-State Members to the ICC but UN-Member States, which were only urged to comply fully with the Court, the Court may make use of article 87 (5) (a), because the SC resolution can be regarded as "the other appropriate basis"; but if the State is unwilling to comply, the ICC may neither inform the ASP nor the SC. The latter situation explains the weak language of paragraph 5 (a), in only inviting the Non-Party State to provide assistance to the Court. Notwithstanding, the special situation of a SC referral, the Court may in every other situation only rely on article 87 (5) (b), if the ICC concluded an *ad-hoc* arrangement or other agreement with the State, to which the State does not comply. Otherwise there would be no other basis for the duty to comply if neither the resolution nor any other agreement obliged the Non-Member State to do so.

Subsequently, it leads to the circumstance that in cases in which a Member-State referral, article 13 (a), or an initiative investigation by the Prosecutor, article 13 (c) over a Non-Party State has taken place, the Court could neither rely on article 87 (5) (a) nor on subparagraph (b) unless the Court entered into an *ad-hoc* agree- or arrangement with the State concerned. Even if it is argued that the trigger mechanism, thus the jurisdiction of the Court constitutes the "other appropriate basis" in subparagraph (a), the Court could only invite the Non-Member State to provide assistance. With regard to the latter option, the wording "invite" establishes its proper sense, but subparagraph (b) would obviously not be applicable. This result relates to the determination made with regard to the exercise of jurisdiction articles: The triangular-relationship has to be separated from the vertical relationship between the Court and the State. Even if the Court has jurisdiction upon a national of a Non-Member State, pursuant to a Member State referral, the Non-Member State will not be made to a Member of the Statute and therefore has no obligation to cooperate with the Court; should the Court, nevertheless, make a request to the non-contracting Party, this would amount to a violation of article 34 VCLT.

In conclusion of the extensive analysis of article 87, it has been shown with regard to Member States that the ICC not only has the authority to request its Member States for any kind of cooperation anchored in articles 89–102, but that article 87, paragraph (6) and (7) provides for different measures which could be taken in cases where a Member State does not comply with the request of the Court and therewith prevents the latter from exercising its jurisdiction. It has to be emphasized that article 87 (7) is the pertinent provision when it comes to the non-cooperation of Member States in that it explicitly refers to States misbehavior. Despite the fact that the drafters in Rome decided to leave the sanction mechanism without any specific procedures but instead very superficial, in only granting the Court the right to refer the matter to the ASP and/or SC, whilst simultaneously omitting any further reference by what means the ASP or SC could react, there are several options the ICC or its "executive arms" can take advantage of. Both of these instances have different possibilities to react to the Statute breaching State. The procedures of the Assembly relating to non-cooperation elaborated and adopted in 2011, constitute only an initial written

directive on how to deal with the failure of States to cooperate and do not have to be regarded as an exhaustive catalogue of measures.[381] The specific procedures anchored in part D of the Annex contain different political and diplomatic measures whereby these are once again not specified and the extent of political pressure, first and foremost exercised by the President of the Assembly in combination with the Bureau, not precisely governed. This inaccuracy could be negatively assessed, but with regard to the mandate of the ASP to support the effectiveness of the ICC and to promote cooperation, it does not conceivably constitute a deficiency that the procedures were not point by point elaborated; a sanction mechanism, based on diplomatic and political measures, leaves a certain margin and therewith an individual discretion with the ASP. Referring to the ILC Articles on State Responsibility by some scholars, the ASP could for example in a case of a repeated reluctance of a Member State to cooperate, rely on a stricter sanction mechanism which would be covered by both its mandate and the construct of State responsibility. Additionally, the exception to the in article 87 (7) required "finding" by the Court before the referral of the matter to the ASP, is an important acknowledgement. Paragraph 7 (b) of the Annex determines that the ASP may take action with regard to a situation which was not yet referred to the Court but which gives reasonable doubts that a future or on-going serious incident of non-cooperation is about to occur and that urgent action has to follow. Thus, the ASP is theoretically given a great extent of power to foster cooperation by applying various diplomatic or political measures; but the ASP has strictly to make use of all its different procedures to firstly get the attention and respect as one of the executive organs and secondly to strengthen the International Criminal Court.

Moreover and with regard to the SC, as the most powerful organ to react to internationally wrongful acts possibly amounting to a threat to international peace and security, measures pursuant to article 41 or article 42 UN-Charter could be adopted. While it is on the one hand on the Court to refer the matter to the SC, in cases where the latter referred the situation to the Court, to determine which steps could be taken to bring the non-cooperating Member State back to its obligation, it is on the other hand something completely different, if an article 13 (b) situation is not given and action by the SC fully depends on its political will to take the initiative to go against the obligation-breaching State. The latter situation is detached from the Rome Statute and article 87 (7) would not be the appropriate provision. The only possibility for the ICC to include the UN into an issue of non-cooperation would be paragraph 6 of article 87; the Court could ask the UN for its cooperation, either by making use of a peacekeeping operation on the ground which could foster the process and cooperation—even in arresting and surrendering the sought suspects—or by asking for other forms of cooperation which are compatible with the provisions of the Charter and the Statute.[382] But in making use of paragraph 6, the ICC is highly dependent on the motivation of this institution to assist. Nevertheless,

[381] Similar O'Donohue (2015), p. 133.

[382] See Broomhall (2003), pp. 160–161.

the authority of a SC resolution as an answer to the obligation-breaching Member State, either by applying paragraph 6 or 7 of article 87, creates a new and powerful legal basis; UN-Member States would be obliged to comply, article 25 UN-Charter, and could always in case of a clash with other international agreements rely on article 103 UN-Charter, so that their obligations stemming from the resolution would prevail and the cooperation of the non-complying Member State could be secured. Even if the SC does not release a resolution but makes a declaration, first and foremost with regard to a situation which was previously referred to the Court, article 13 (b), could be a successful measure to indirectly force the reluctant Member State to cooperate.[383]

Regarding the cooperation of the Court and Non-Member States, the analysis of article 87 (5) has shown that once again the imprecise wording and determination leads to varied interpretations making it difficult for the ICC to apply its own Statute provisions. Granting the Court only the possibility to "invite" Non-Member States to provide assistance, despite the required ad hoc arrangements, agreements or other appropriate basis, appears illogical; entering into an agreement with the Court to cooperate constitutes an obligation and not an indulgence. The ability for the SC to make use of article 13 (b) in referring a situation regarding a Non-Member State of the Rome Statute to the Court was the answer to the establishment of the two expensive ad-hoc Tribunals, ICTY and ICTR. It would be contrary to the object and purpose of the Statute and would render a SC referral meaningless, if the latter only triggered the jurisdiction of the Court to subsequently prohibit the Court from continuing with its investigations and prosecutions. The cooperation of States is of paramount importance for the Court in order to exercise its jurisdiction. If the consent of the Non-Party State was already obsolete at the initial stage of triggering the jurisdiction of the Court pursuant to article 13 (b), nothing else could apply with regard to the cooperation requests by the Court. This is also in conformity with the wording of such a SC resolution which determined that the Non-Party State concerned has to cooperate fully with and provide any necessary assistance to the Court. Consequently, the best option to the presented alternatives is to apply article 87 (7) to Non-Member States, which' situations were referred to the ICC by the SC; it reflects the analogous Party approach and is in accordance with the object and purpose of the SC resolution. Regarding the other approaches, SC referrals would constitute the exception for the Court to request these Non-Party States for cooperation pursuant to article 87 (5), due to the fact it constitutes the only way to oblige non-contracting States to comply with its requests and to inform the SC in cases of non-compliance. The latter may then decide how to react to the non-compliance. But Non-Member States, which were not obliged through the SC resolution or which are only under the jurisdiction of the Court pursuant to article 13 (a) and (c) still have to be treated like non-contracting Parties so that the Rome Statute neither creates obligations nor rights without their consent on them. This neither constitutes a deficiency of the Rome Statute nor does it weaken the Court. It is only a

[383] See similar Verduzco (2015), p. 47.

manifestation of the law of treaties, which was forfeited to a great extent with regard to the SC referrals of Non-State Parties.

b. Arrest and Surrender Articles 89–92 Rome Statute

The arrest and surrender of persons to the Court, pursuant to article 89, can be regarded as the most important form of cooperation due to the circumstance that trials *in absentia* are not permissible. The Court's jurisdiction upon persons will be rendered obsolete, if the defendants do not appear before the Court in person. The four articles with regard to the arrest and surrender of persons were very precisely determined in the Statute while articles 89 and 90 constitute the most important ones. Nevertheless, articles 91 and 92 should not remain without any comment.

While article 91 constitutes more a technical ruling regarding the explicit handling of requests for arrest and surrender, article 92 governs the provisional arrest in urgent cases. The latter article was not further debated due to the fact that it reflects the substance of States extradition agreements as well as of the UN-Model Treaty on Extradition.[384] Regardless of the wording of paragraph 1, which seems to be optional, the request of the provisional arrest of a person to the Member State is pursuant to article 59 (1) mandatory. Despite the administrative character of article 91, controversy existed with regard to the production of evidence which some delegations wanted to require from the Court; others strongly opposed this prerequisite which would constitute a further burden for the Court in its requests for surrender.[385] Consequently and as a compromise, paragraph 2 (c) was incorporated which states that the requirements for the surrender process in the requested State "should not be more burdensome than those applicable to requests for extradition [. . .] and should, if possible, be less burdensome, taking into account the distinct nature of the Court". This concession was a result of the different legal systems, however, it does not create any further problems.

Regarding articles 89 and 90, it has to be further determined how much discretion the Court has to request Member-States for the arrest and surrender of the sought persons and whether there are grounds or situations in which the Court is barred from making such requests. In cases where there are circumstances in which the Court may be hindered from enforcing its requests, it has to be examined further whether these reasons diminish the Court's power to exercise its jurisdiction or whether they have to be regarded as a balance between the discretion of sovereign States, which do not only have obligations pursuant to the Rome Statute but also under other international obligations such as extradition treaties.

As already mentioned above, the surrender articles do not contain any conventional grounds for refusal, such as the mandatory or optional grounds listed in

[384] In the following see Kreß and Prost (2016), p. 2075, para. 2.

[385] See Kreß and Prost (2016), p. 2069, paras. 2–3.

articles 3 and 4 of the UN-Model Treaty on Extradition.[386] This ultimate result constitutes a great achievement, with regard to the initial roster of grounds for refusal, elaborated by the Preparatory Committee.[387] In addition, article 59, which has to be read in conjunction with the articles in Part 9, provides no grounds to delay the arrest proceeding so that the requested State has to take steps immediately to arrest the sought person and to bring the arrested individual promptly before the competent judicial authority. Moreover, the broad language of article 89 (1), in which it is determined that the Court may transmit a request to any State on the territory of which that person may be found, constitutes an appropriate measure to include theoretically every State, but the wording does not bypass the fact that only Members to the Statute or Non-Members with agreements are under an obligation to comply with such a request.[388] With regard to the second paragraph of article 89, it could be argued that the possible admissibility challenge of the person sought and therewith the connected capability of the requested State to postpone the execution of the request for surrender as long as the admissibility ruling is pending, constitutes a ground for refusal by the State and a bar for the Court to commence with its proceedings. This argumentation can be denied for the following reasons: First of all, it is in conformity with article 19 (2) (a) and (b) of the Rome Statute, which determines that either the State or the individual may challenge the admissibility of the Court, whereas it is not on the State concerned to decide on the admissibility of a case but on the Court itself, article 19 (1). Thus, the discretion whether a case is admissible or not lies with the Court and after consulting with the Court and its affirmation of the admissibility of the case, the requested State has to proceed with the request. That the requested State is permitted to suspend the surrender in a situation in which the admissibility ruling is pending, does not constitute an arbitrary ground to refuse the request but grants the latter the chance to act in conformity with and not in violation of the principle *ne bis in idem*.[389] Furthermore and with regard to the confusing wording of paragraph 4 of article 89, which regulates the situation in which the requested State is already proceeding against the sought person or when the latter is presently serving a sentence for a different crime other than the one investigated by the Court, the State may not postpone the request, even if it has the opportunity to consult with the Court.[390] Rather, the consultation between the requested State and the Court should serve as a clarification on how to proceed with the matter. Rule 183 of the Rules of Procedure and Evidence suggests that the requested State may temporarily surrender the sought person and the Court shall transfer the person back to the requested State, at the latest when the proceedings have been completed. It can be assumed that due to the seriousness of the crimes

[386]Model Treaty of Extradition, adopted by General Assembly resolution 45/116 (14 December 1990).

[387]See Kreß and Prost (2016), p. 2048, para. 5.

[388]See Rinoldi and Parisi (1999), p. 348.

[389]*Idem,* p. 350.

[390]See Kreß and Prost (2016), p. 2058, para. 59; Rinoldi and Parisi (1999), p. 350.

within the jurisdiction of the Court, the latter will be given priority, but the paragraph does not ultimately grant the Court priority.[391]

The examination of article 89 has shown that there are no grounds on which the requested State may refuse the arrest and surrender of the person sought; every single situation which might delay the surrender or in which the consultation between the requested State and the Court is provided for, is in compliance with the Rome Statute's provisions as well as with the rights of sovereign States. Now emphasis has to be put on the following article 90, which regulates the sensitive issue of competing requests and which might entail that the ICC may, despite its requests to the Member State, not proceed with its exercise of jurisdiction. Article 90 differentiates between States and Non-Member States as the requesting Parties, between existing obligations to extradite the person and no obligations and finally with regard to the same and different conduct. Pursuant to paragraph 1 of article 90, the requested Member State is obliged to notify the Court of the competing request of any other State, which seeks the extradition of the same person for the same conduct. With regard to State Members, as the requested and requesting State, paragraph 2 (a) and (b) give the Court in both subparagraphs priority, where the latter determined the case admissible. If the Court has not yet come to a conclusion on, whether the case is admissible, taking into account the investigation or prosecution conducted by the requesting State, the requested State may, at its discretion, proceed with the request for extradition while simultaneously being prohibited from extraditing the person until the Court has ruled the case inadmissible.[392] It is then for the Court to proceed without undue delay. With regard to the same conduct and same person, article 90 (2) and (3) empowers the Court to proceed with its requests for arrest and surrender if the requested and requesting State are contracting Parties to the Rome Statute. The requested State only has to grant the requesting State priority in situations where the Court has ruled the case inadmissible, article 17. This result strengthens and confirms the Rome Statute's provisions regarding jurisdiction and cooperation. Furthermore, in a situation in which the requesting State is not a Party to the Statute, priority will be given to the request for surrender of the ICC if the latter rules the case admissible and no treaty obligations between the Member and Non-Member State exist. On the one hand, paragraph 4 grants the Court priority for its request, but on the other hand the inclusion of this paragraph was also intended to protect the State Member and its possible obligations with regard to the Non-Member State; the Member-State should not be put in a situation that would result in a breach to its international obligations with regard to the State that has no obligations under the Statute.[393] This is also manifested in paragraph 6 of article 90, which determines that in cases of existing international obligations between the Non-Party and Party State, the latter shall determine, in consideration of the relevant factors listed in subparagraphs (a) to (c), whom to grant the request to surrender

[391] See Kreß and Prost (2016), p. 2058, para. 60–62.

[392] See Article 90 (3) Rome Statute.

[393] See Kreß and Prost (2016), pp. 2063–2064, paras. 16–17.

respectively to extradite. A balance between the obligations under the Statute and the inherent treaty obligations pursuant to the Vienna Conventions had to be found to circumvent the violation of one or the other.[394] Unlike paragraph 5, which, despite the non-existing treaty obligation but a pending admissibility ruling by the Court, grants the State-Member the discretion to proceed with the request for extradition from the requesting State, paragraph 6 requires the requested State to weigh the requests against each other. The fact that Non-Member States have no obligations under the Statute can, in the case of a request for arrest and surrender by the Court to the Member State, not be overruled. The discretion which is given to the requested State by examining the relevant factors, such as the dates of the requests, the specific interest of the Non-State Party as well as its guarantee to surrender the person after its national proceedings to the Court, can entail nothing else than a certain priority with regard to the request of the Court.

With regard to competing requests upon the same person but different criminal conduct, paragraph 7 (a) grants the request of the Court priority as long as no existing international obligations exist between the requested and any other State. If such obligations exist, it is again up to the requested State to determine under the factors, including but not limited to those determined in paragraph 6 (a) to (c), whether the State or the Court should be the recipient; with regard to this situation, special consideration has to be given to be relative nature and gravity of the conduct.

Regarding the analysis of article 90 it likewise could be proved that no grounds for refusal could be identified. The only situation, in which the requested State may extradite the person despite a pending determination of the admissibility ruling by the Court, is when the requesting State is a non-contracting Party to the Statute. In all the other circumstances, it is either a question of admissibility to grant the Court's request priority, or a question of balancing the different treaty obligations against each other. With regard to the affirmative admissibility ruling of a case, the Court's request for surrender of a person is granted priority in case the requesting State is a State Party or a Non-Member State with no international obligation to extradite. If such an international treaty obligation exists between the Member- and the Non-Member State, it is on the requested State to determine which' request to grant priority; the grounds, on which the requested State shall make such determination are on the one hand in favor of the Court but at the same time in protection of the obligations stemming out of other international obligations. *Cassese* concluded that this resulted in a "dilemma of international justice versus national justice" while accentuating that the Rome Statute obligations "should have taken precedence over those flowing from other treaties".[395] The priority of requests of the Court over other bilateral- or multilateral treaties would have been the better result; but this would have been in contradiction to the international law of the treaties and would therefore not only have violated the international obligations between the Party- and Non-Party State but also been contrary to articles 12 and 86 of the Rome Statute.

[394] Kreß and Prost (2016), p. 2065, para. 23.

[395] Cassese (1999), p. 166.

As it was already determined with regard to the jurisdiction of the Court: The latter has a large amount of discretion regarding its extensive jurisdiction mechanism, but this jurisdiction affects the relationship of the Court and the States—may they be Member- or Non-Member States to the Statute; the relationships among States, but first and foremost between Party and Non-Party States, cannot be treated the same.

The only situation in which obligations arising out of international extradition treaties become obsolete, is when the requests of the Court to surrender the sought person is based upon a SC resolution which explicitly obliged the Non-Member State to cooperate fully with the Court. The requested State would then not be in a position of violating its international obligation with respect to the requesting State, because the obligations under the Charter would prevail, article 103 UN-Charter. It is an indispensable fact that the ICC is a treaty-based Court which, as determined under the judicial pillar, is already in possession of a considerable amount of power, also with regard to Non-Member States. Nevertheless, this does not mean that the Court is able to bypass the obligations of Member States in relation to non-contracting States in every single manner. Consequently, article 90 reaffirms the principles of international law connected to the obligations stemming from the Rome Statute, while granting the Court within these boundaries the greatest scope to exercise its jurisdiction.

c. Other Forms of Cooperation Articles 93, 94, 96 and 99 Rome Statute

The analysis of the provisions regarding "other forms of cooperation" will focus on the relevant articles, in particular provisions 93, 94 and 96. With regard to article 99, which governs how the requests pursuant to article 93 and 96 shall be executed, emphasis will be placed in relation to the problematic paragraph (4).

Article 93 constitutes the most important article when it comes to all kinds of cooperation except for surrender. Paragraph 1 comprises 12 subparagraphs, of which 11 explicitly mention the kind of assistance while one was left open to refer to other types of assistance, which all relate to the forms of assistance in relation to investigation and prosecution. Without going deeper into the different detailed forms of assistance, which the Member States are obligated to provide for, certain paragraphs or subparagraphs have to be scrutinized in order to determine whether they might lead to a potential refusal of cooperation by the State concerned. Emphasis shall be put on article 93 (1) (l), (3) and paragraph (4). Beginning with paragraph 1 and its subparagraph (l), the requested State may deny other types of assistance if this form of cooperation is prohibited by the law of the latter State. The reference to the national law of the requested State seems to contradict the overall article itself as well as article 88 of the Rome Statute, which states that State Parties shall ensure that their national law provides for procedures to implement all forms of cooperation listed in Part 9. And while the latter article raises concerns with regard to the content of subparagraph (l), it simultaneously gives the explanation for it. The circumstance that, despite the various forms of cooperation listed in subparagraphs (a) to (k), also other forms of assistance, which could not entirely be enumerated, should be made

applicable and not constitute a bar for the Court to be asked for, led to the protection of the requested State in that it may refer to its national law in cases where the special request would infringe the law of the latter; it would have placed the Member State in a disadvantageous position if it had been obliged to comply with a form of assistance of which it was not aware of and which was not explicitly listed in the article.[396] Only for this reason and in respect of an argument of fairness, the State should be able to deny the request, but only after it has tried to implement the request by other means, the setting of specified conditions or at a later date, paragraph 5 of article 93. It is then for the Court or the Prosecutor to decide whether they are willing to accept the conditions for the requested assistance; in cases of an agreement, the latter have to comply with it. Consequently, article 93 (1) (l) cannot be regarded as a factual ground for refusal, but rather obliges the Member State to consult with the Court on which way to implement the request in order to circumvent a violation of the State's national law.

Furthermore, it has to be questioned whether paragraph 3 could entail a ground for refusal if the execution of a particular measure of assistance is prohibited in the State on the basis of an existing fundamental legal principle of general application. Once more the paragraph appears to contradict article 88, but akin to the special situation of paragraph 1 (l), it is the exact particular measure which might not be covered or which is prohibited on the basis of an existing fundamental legal principle of general application. Not every single measure of assistance could be incorporated into the Statute, taking into consideration all the different national legal systems of the States. The condition that the prohibition has to be based on "an existing fundamental legal principle of general application" demonstrates the three limitations which were incorporated in order to balance the national interests of the State and the ones of the ICC. First of all, the legal principle must be fundamental, secondly, it must have existed at the time of the request and thirdly, the legal principle must be of general application. Moreover, paragraph (3) does not grant the Member State the right to refuse the request of the Court but obliges the State to immediately consult with the Court to try to resolve the matter; it is on both the State and the Court to find a solution with regard to the problem, either by applying a different measure with the same result or by setting up conditions, under which the assistance can be provided for. Only in case the latter alternatives do not lead to the required assistance, the Court has to modify the request to the extent that the State may comply with. Thus, paragraph (3) does *a fortiori* not constitute a ground to deny the request of the Court, as ultimately the request has to be complied with, even if the Court adjusts the request.

With respect to paragraph (4) of article 93 the case proves to be more difficult. Paragraph (4) determines that the State could deny the request in whole or in part, if the request concerned the production of any document or disclosure of evidence which relates to its national security, in accordance with article 72. Despite the fact that the mechanism of article 72 mainly stems from the *Blaskic* decision, determined

[396]In the following see Kreß and Prost (2016), p. 2090 ff., paras. 37–53.

by the Appeals Chamber of the ICTY, it differentiates with regard to the fact that States at the Rome Conference preferred the horizontal approach; this is contrary to the ICTY's emphasis of the vertical relationship and the imposition of the obligation of States to disclose their information so that the denial constituted the exception - under the ICC this refusal became a right.[397] Nevertheless article 72 contains an extensive list of measures which have to be implemented until the State may deny the request. There are three steps which have to be fulfilled until the State or the person may assume that the disclosure of information or documents would prejudice its national security interests. Pursuant to article 72 (5), the State has to take all reasonable steps to seek to resolve the matter by cooperative means. Article (6) further determines that in case all reasonable steps have been taken with regard to paragraph (5) but the State still considers that the disclosure of the information would infringe its national security, it has to notify the Prosecutor or the Court to state the specific reasons for its decision, except if these reasons would itself result in a prejudice to its national security interests. It is only then on the State to invoke the ground of refusal. Furthermore, with regard to this sensitive matter of national security, the provisions of the Statute demonstrate that such a ground cannot easily and without a previously cooperation-presenting State be invoked. Article 93 (4) in conjunction with article 72 does not grant the State a blank check; if the Court comes to the conclusion that the State tried to circumvent its obligations under the Statute with the inadmissible reference to its national security, it may refer the matter in accordance to article 72 (7) (a) (ii) in conjunction with article 87 (7) to the Assembly of States Parties or the SC. Despite the tight mechanism provided for in paragraph 4, it has to be determined that article 93 (4) constitutes a ground for refusal when applied correctly by the State concerned. Regarding competing requests in respect of other forms of cooperation, the State shall endeavor to meet both the request of the Court and the request of the State, paragraph 9 (a) (i), in consulting with the latter. In order to comply with both' requests, one or the other may be postponed or conditions may be attached. Only if the problem regarding the two concurrent inquiries could not be solved, subparagraph (ii) would refer to the counterpart of paragraph 9 (a) (i), article 90, which intensively deals with competing requests in respect of the requests to arrest and surrender the person. Requests which contain information, property or persons subject to the control of a third State or an international organization by virtue of an international agreement do not have to be complied with by the requested State but shall be directed to the third State or international organization.

Article 94 outlines the possibility of the Member State to postpone the execution of a request which would interfere with an ongoing investigation or prosecution of a case different from that regarding the request of the Court. Article 94 forms the counterpart to article 89 (4), whereas the first article contains more limitations than only consulting with the Court; the State has immediately to execute the request and in case of an interference with its own proceedings the State shall consider whether

[397] See *Prosecutor v. Tihomir Blaskic*, Judgement of the Appeals Chamber, IT-95-14-AR9 (29 October 1997); Cassese (1999), p. 164 et seq.; Sluiter (2009), p. 189.

the assistance may nevertheless be provided for under certain conditions. Only if any such conditions may not change anything with regard to the interference, the State may postpone the execution for a period of time, which may not be longer than the prosecution of the person, agreed upon with the Court.[398] Furthermore, the Prosecutor is despite the postponement of the request by the State allowed to seek measures to preserve the evidence, article 93 (1) (j).

The final provision to be mentioned constitutes article 99 and its paragraph 4. Pursuant to this paragraph, the Prosecutor may carry out on site investigations if he determines that these are necessary for the successful execution of the request. These investigations relate, *inter alia*, to the interview of or taking of evidence from a person as long as they do not entail any compulsory measures; if it is essential for the execution of the request, they can even be implemented without the presence of the requested State's authorities. In case the crime has allegedly been committed in the territory of a Member State and the Court has determined the case admissible pursuant to articles 18 and 19, the Prosecutor may execute such request directly on the territory, only in public places of that Member State, after consulting with the requested State, subparagraph (a). Should the State be different to the territorial State, the Prosecutor may execute such requests but only after consulting with the State; the Member State may determine reasonable conditions or raise reasonable concerns with regard to on site investigations and it shall consult the Court without undue delay in circumstances of emerging problems regarding the specific request. Paragraph 4 is not easily to understand, which traces back to the difficult negotiation process at the Rome Conference. "The formulation [. . .] represented a true compromise - no State liked the text, but a vast majority could support it".[399] Despite the fact that the Prosecutor was only given a limited margin to carry out on site investigations, it nevertheless constitutes a great achievement that the Prosecutor may directly execute the request, if the requirements set out in the paragraph are fulfilled. If the case is determined to be admissible and the requested State is the territorial State on which the alleged crime might have been committed, the requested State will have no other option than to permit the Prosecutor to proceed with its investigation; only if the investigation requires compulsory measures, the State would be able to deny the request. Furthermore, article 99 (4) extends the scope of the condition under which the Prosecutor may take direct action on the territory of the Member State in contrast to article 57 (3) (d); the latter article only applies in cases where the State is clearly unable to execute a request for cooperation. But it has to be stated that with regard to all the other possible measures the Prosecutor could execute on the territory of the State, paragraph 4 reduces the Prosecutor's abilities. In addition to the necessary execution of the request on the territorial State, the Prosecutor can similarly act on a different territory. To permit the Prosecutor to operate on a territory in which the crime was not allegedly committed and to conduct interviews or gather evidence without the presence of the State's authorities, created for some States at the Rome

[398] See Kreß and Prost (2016), p. 2104, para. 6.

[399] In the follwing see Kreß and Prost (2016), p. 2120, para. 4 et seq.

Conference an unimaginable scenario; only for this reason was the State Party granted the possibility to raise reasonable concerns or to make the request subject to reasonable conditions. Should the latter options of the State not be reasonable, the Prosecutor could continue with the execution of its request. The consultative mechanism required by the State in case of the identification of problems, reflects the intent of article 97. Consequently, it can be determined that the incorporation of paragraph 4 has to be regarded as a positive addendum to the investigative mechanism anchored in article 57 (3) (d), whereas the range of measures and therewith the power of the Prosecutor is limited. The possibility of the latter, to request the State to be part of the execution of such requests which requires compulsory measures, remains untouched as long as it is not prohibited by the law of the State, paragraph 1.

d. General Provisions Under Part 9; Articles 95, 97 and 98 Rome Statute

The general provisions of this part will be analyzed with regard to article 95, dealing with the postponement of an execution of a request in respect of an admissibility challenge and with respect to the consultation article 97. While none of the two articles have to be regarded as problematic, special emphasis will be put on the extremely controversial article 98 (1) and its relationship to the irrelevance of the official capacity provision 27 (2). The determination of Article 98 (1) and its interrelationship to article 27 (2) is in relation to the cooperation mechanism and the therewith connected strength of the Court, of paramount importance. Article 98 (1) stipulates that the Court would be prohibited from requesting for surrender or assistance if this request obliged the requested State to act inconsistently with its obligations under international law regarding the diplomatic immunity of a person or property of a third State. This alters the previously vertical relationship into a triangular one. The vertical relationship between the Court and the requested State clashes with the horizontal relationship of States—Member to Member or Member to Non-Member States. For this reason an extensive analysis will be presented to determine whether article 98 (1) has to be regarded as another sovereignty approach to bar the Court's ability to exercise its jurisdiction or whether it can be referred to as the "corrective" for the broad jurisdiction mechanism granted to the Court and therewith the adherence to a treaty-based institution. Despite the fact that paragraph (2) of article 98, if strictly applied, had to be proved in between the "arrest and surrender articles", due to the fact that it relates only to a request for surrender, it remained within this part regarding its connection to article 98 (1).

(1) Article 95 Rome Statute

Article 95 entails the postponement of the execution of the request when there is a pending admissibility challenge with regard to articles 18 and 19 of the Court. Despite the fact that articles 94 and 95 provide for a postponement, it has to be

highlighted that this kind of suspension has to be regarded as a compromise for not granting the State a customary ground of refusal.[400] Article 95 constitutes the overall provision when it comes to the postponement of the execution of a request regarding an admissibility challenge pursuant to article 18 or 19; the article refers both to a request for arrest and surrender as well as to any other forms of assistance.[401] As already determined with regard to article 89 (2), the State may postpone the execution of the request as long as the admissibility challenge is pending and finally determined by the Court. This suspension of the proceedings cannot be assessed as a denial to cooperate but should be considered in light of various practical aspects; the State has to reassure itself that the Court is in possession of jurisdiction before it initiates the complex matter of cooperation. Regarding the principle of complementarity, it is also important for the State to wait until the Court rules the case admissible.[402] Should the Prosecutor be of the opinion that necessary investigative steps for the preservation or obtainment of evidence need to be taken, he may seek authority from the Court or the Pre-Trial Chamber[403]; in cases where the Court or Pre-Trail Chamber confirm or order the Prosecutor's concern, the State concerned cannot postpone the request but has to comply with it.

(2) Article 97 Rome Statute

With respect to article 97 which becomes applicable in cases where the State is impeded or prevented from executing the request, the following should be determined: The incorporation of this article constitutes a further important confirmation that the Member States do not have unlimited discretion to decide in special circumstances, for example 90 (6), whom to grant the request for surrender, but instead they have the obligation to consult with the Court when such problems with regard to the cooperation and judicial assistance may impede or prevent the execution of the request.[404] Possible grounds referred to in paragraphs (a) to (c) are not exhaustive; this is in conformity with articles such as 89 paragraph (2) and (4) or 93 (3), which are not covered by the three paragraphs of article 97 but, nevertheless, explicitly oblige the State to consult with the Court before adopting a decision. Furthermore, it has to be emphasized that not every established "contact" with the Court can be subsumed under "consultations", like the Pre-Trial Chamber II decided in the non-compliance' decision with regard to Jordan. The Chamber determined that only because the *note verbale* contained the sentence "Jordan is hereby consulting with the ICC", does not fulfil the requirements of article 97, especially when the information seemed to constitute a "notification of non-compliance"; if the *note*

[400] See Kreß and Prost (2016), p. 2103, para.2. and p. 2106, para 2.
[401] See Rinoldi and Parisi (1999), p. 371.
[402] See Kreß and Prost (2016), p. 2107, para. 4 and 7.
[403] See Articles 18 (6) and 19 (8).
[404] See Palmisano (1999), p. 409.

verbale does not "contain any question or call to action addressed to the Court that could enable its being interpreted as a request of any kind", article 97 is not pertinent.[405] More importantly, even if the State concerned consults with the Court do these consultations "not, as such, suspend or otherwise affect the validity of the Court's request for cooperation".[406] Thus, the State cannot arbitrarily invoke article 97 in order to justify its non-cooperation. This consultative mechanism can be regarded as the preliminary step the State has to take before making its decision; if the State does not beforehand and without undue delay consult in the correct manner with the Court but denies the request of the latter, the Court may make use of article 87 (7).[407] Thus, the approval of the Court with regard to emerging problems of this kind is of paramount importance and, furthermore, does not leave the Member State with the ultimate decision regarding the request.

(3) Article 98 Rome Statute

With respect to article 98 (1), the Court might not ask for cooperation, if this infringed States obligations under international law.

Article 98 (1) reads as follows:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court could first obtain the cooperation of that third State for the waiver of the immunity.

At first glance it appears that this provision contradicts article 27 (2), which explicitly states that the immunities attached to the official capacity do not bar the Court from exercising its jurisdiction. Article 27 has already incidentally[408] as well as directly been analyzed in the Judicial Pillar. Regarding cases in which the SC acts under Chapter VII of the UN Charter and refers pursuant to article 13 (b), a situation of a State not Party to the Statute to the Prosecutor, it was determined that officials of that Non-Member States equally lose their immunities, *ratione personae* or *ratione materiae,* in front of the Court. The Court is therefore not barred from exercising its jurisdiction upon them and article 27 is, by virtue of the SC resolution, applicable with regard to all further proceedings of the Court. The same holds true for Member-State and *proprio motu* referrals pursuant to article 13 (a), (c) in conjunction with article 12 (2) (a) regarding an official of a non-contracting State to whom personal

[405] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, para. 47.

[406] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, para. 48.

[407] See Kreß and Prost (2016), p. 2115, para.2.

[408] With regard to article 12 (2) (a) as well as 13 (b).

immunities are attached and who committed one of the core crimes on the territory of that Member State. The jurisdiction of the Court has been triggered so that the Court is not prevented to exercise its further jurisdiction regarding the applicability of article 27. The vertical relationship between the Court and the Non-Member State is determined and has, with respect to the jurisdiction itself, to be disconnected from the proceedings, which will become applicable at a later stage, namely when the Court requests cooperation.

As is well known, the ICC does not dispose of a separate executive mechanism which makes it dependent on the international cooperation and assistance of States; the strength of the Court does "not lie within the Court itself, but within the States parties."[409] For this reason it has to be examined how far article 98 (1) undermines the previously obtained jurisdiction of the Court and whether it operates more against the Court than for it.

In addition, the fact that both articles were written by two separate working groups of which the working group elaborating article 98 (1) did not seem to be aware of the conflict they caused in relation to article 27 (2) with the reference to a "third State" encouraged the discrepancy between the two articles.[410] The debate concentrates mainly on the interpretation of "third State", which' determination will simultaneously give the response, whether article 27 (2) removes personal immunity only in front of the Court or vis-a-vis all its State Members or whether only Non-Member States may rely on article 98 (1). The wording of "third State" seems in the first instance to contradict the foregoing determination that both relationships—the vertical and the triangular—have to be differentiated, whereas this assumption is not respecting the difference between the triangular relationship with the ICC and two Member States or the ICC and the requested Member-State and the Non-Member State. In examining what the authors of the article 98 (1) meant with "third State", the contradiction will be resolved.

For the analysis a distinction between the different trigger mechanisms with regard to the exercise of jurisdiction of the Court will be made. Firstly, the relation between article 27 (2) and 98 (1) with regard to Member States among each other will be considered pursuant to article 12 (1). Afterwards emphasis will be put on the exercise of jurisdiction in accordance with article 13 (a) and 13 (c) in conjunction with 12 (2) (a),[411] when Member States obligations of the Statute clash on the international obligations with regard to Non-Member States. Thirdly, SC referrals pursuant to article 13 (b) will be examined to conclude in what way they might prevent the ICC from exercising its jurisdiction with regard to article 98 (1).

[409] Rinoldi and Parisi (1999), p. 389.

[410] See Saland (1999), p. 202.

[411] See 12 (2) (b) is obviously not included as the requested State cannot be the "third State" at the same time.

(i) Article 98 (1) and its Relationship to Article 27 (2) in Conjunction with Article 12 (1) Rome Statute

Before the term "third State" is examined, it has to be determined what kind of immunity is covered by article 98 (1). The article speaks of the "State or diplomatic immunity of a person". That the State as such cannot be made criminally responsible but only the State agents acting on its behalf arises from article 25; the ICC only has jurisdiction over natural persons and will exercise its jurisdiction with regard to the individual criminal responsibility of the latter. The reference of "diplomatic immunity" in article 98 (1) could entail the immunity of diplomatic personnel with regard to the 1961 Vienna Convention on Diplomatic Relations.[412] Thus, it is questionable what kinds of immunities, *ratione personae* and/or *ratione materiae*, are protected by article 98 (1). For *Kreß* the reference "State immunity" obviously contains the conduct of the State official, *ratione materiae*; he questions rather to what extent the drafters wanted to include the immunity of a person, *ratione personae*.[413] The author concluded that through the absolute character of the latter international immunity, it would have been "odd" not to include "the most powerful international law immunity" into article 98 (1) to protect State's obligations under international law. For this reason, *Kreß* determined that with "State immunity of a person", article 98 (1) covers both *ratione personae* and *materiae*.[414] Other authors, such as *Cryer, Gaeta, Pedretti* and *Akande* reject the applicability of functional immunity under 98 (1).[415] While the first three authors base their arguments on the fact that it had become customary international law not to protect the conduct of State officials, when committing one of the core crimes,[416] the fourth author comes to the same result but with a slightly different approach. *Akande* relies on the decisions of the *Eichmann*- as well as the *Pinochet* case basing his argument on the fact that there is universal jurisdiction upon most of the international core crimes; a construct like functional immunity could therefore not be asserted anymore.[417]

It may be correct that the authors of article 98 (1) originally intended to cover both immunities, as *Kreß* suggests. With regard to the customary law approach it could be argued that at the time of drafting the article, in 1998, there was not yet such a customary law refusing functional immunity even on the national level; there were only some decisions of international tribunals and their reaffirmation in a couple of Conventions in addition to one famous decision of the Israeli Supreme Court in the

[412] See Benzing (2004), p. 202.

[413] See Kreß (2012), pp. 236–237.

[414] See Kreß (2012), pp. 237–238.

[415] See Cryer et al. (2014), p. 558 and more precisely pp. 546–555; Gaeta (2002), pp. 981–982; Pedretti (2015), p. 278; Akande (2003), p. 642.

[416] See Cryer et al. (2014), p. 558 and more precisely pp. 546–555; Gaeta (2002), pp. 981–982; Pedretti (2015), p. 278.

[417] See Akande (2003), p. 639.

Eichmann case.[418] Especially the *Pinochet* precedent and further decisions by national Courts as well as the ICJ shaped the approach of a customary law regarding the abolishment of functional immunity with respect to core crimes which affect the international community as a whole.[419] However, these decisions including the *Pinochet* case were only decided from 1998 onwards. Especially with regard to customary international law, State's practice as well as *opinio iuris*, which both evolve over time, cannot be disregarded. The authors in support of the customary law approach extensively portrayed that State's practice as well as *opinio iuris* demonstrate that the conduct of a State official in the case of immunity *ratione materiae* does not even exempt national Courts from prosecuting the perpetrators responsible for committing core crimes. The further statement that international crimes which are to be regarded as crimes of universal jurisdiction under customary international law exclude the applicability of *ratione materie* either way, serves as an additional argument.[420] Due to the controversial opinions, whether articles 6, 7 and 8 of the Rome Statute may entirely constitute crimes of universal jurisdiction, the customary law approach will be followed. Thus, even if it was assumed that at the time of the establishment of the Rome Statute and the creation of the first paragraph of article 98 such a customary international law with regard to the abolishment of *ratione materiae* with respect to the commitment of international core crimes had not yet evolved, this does not entail that the Court may disregard future modifications; the Court may apply contemporary principles of international law pursuant to article 21. In light of article 98 (1), the Court may proceed with a request for surrender and assistance, if that person of the third State, either of a Member- or Non-State Member, was only in possession of functional immunity; the requested State would not in doing so act inconsistently with its obligations under international law.[421]

Where the foregoing examination could be made without defining what exactly is meant by the reference to a "third State", the further analysis is based on the definition by which the question will be answered simultaneously in how far the proceedings of the Court may change with regard to the applicability of personal immunities.

There are two scenarios pursuant to which State Parties to the Statute may be in conflict with their obligations under the Statute on the one hand—and pursuant to its international law obligations on the other hand: either the Court requests the Member State to cooperate in requesting the surrender or assistance with regard to another Member State or with regard to a Non-Member State to the Statute. For this reason it is important to determine what is meant by "third State".

[418] An extensive portray about the different statements of Tribunals and case law with regard to the abolishment of functional immunity with regard to the commitment of core crimes: Gaeta (2002), pp. 981–982 and Cryer et al. (2014), pp. 546–555.

[419] See Cryer et al. (2014), pp. 548–549.

[420] See Akande (2003), p. 642.

[421] See Pedretti (2015), p. 278; Cryer et al. (2014), p. 559.

While one opinion[422] interprets "third State" as any other than the requested State and therefore includes not only Non-Members but also Member-States into that definition, other authors determine that the wording of "third State" means nothing more than a "Non-Party State" to the Statute.[423] The explanation presented by the authors of the first opinion focuses on the wording and the context of all the other provisions of section 9 of the Statute which unambiguously mention "State not party to the treaty" when referring to Non-Member States. The antagonists of the latter approach assume that in following this interpretation the Court would have to obtain the waiver of immunity in regard to every single request for arrest and surrender, irrespective of whether it is of a Member or Non-Member State to the Statute. With regard to the question on which level article 27 (2) applies, the answer would be that the provision only removes the immunity in front of the Court, even with regard to Member States and their relation to each other. *Gaeta* argues that it would render the whole of article 27 meaningless while subsequently preventing the Court's purpose to end impunity, if Party States to the Statute on the one hand waived their immunity in front of the Court and verified, by ratifying the Statute, to comply with its obligations, to then at a later stage make use of article 98 (1).[424] In addition to the rendered meaninglessness of provision 27 (2), by granting State Parties the possibility to insist on their personal immunities in front of other Member States, the whole cooperation system and thus articles such as 86 and 89 would become void. With the adherence to this opinion, article 27 (2) would completely lose its purpose, if the Court only applied the provision when the defendant was already in its custody, which cannot be realized if requested States are hindered to surrender them.[425] The arguments of the latter opinion would be fully comprehensible if the antagonists relied on the abolishment of personal immunities merely on the vertical level and also among Member-States. Despite the fact that they adhere to the fact that the "third" State should be regarded as any other than the requested State, they come to the same conclusion as the advocates for the Non-State Member approach; in ratifying the Rome Statute and in accepting article 27 I and II, States Member to the Statute abolished their personal immunities with regard to the Court as well as with regard to all the other Member-States of the Rome Statute.[426] The relationship between Members is absolutely distinguished from the relationship between a Member and a Non-Member State and on the level whether the ICC has jurisdiction upon this person of the Non-Party State. The waiver of immunity of the Member-States, by acceding to the Statute, comprises the triangular relationship between the

[422] See Kreß and Prost (2016), p. 2123, para. 11; Kreß (2012), p. 233; Pedretti (2015), p. 277; Schabas (2010), p. 1041.

[423] See Akande (2004), p. 423; Wirth (2001), p. 429; Gaeta (2002), p. 994.

[424] See Gaeta (2002), p. 994.

[425] See Akande (2004), p. 425.

[426] See Pedretti (2015), p. 277; Kreß (2012), pp. 238–239.

Court and the other two Member States; one as the third, the other as the requested State.[427] In its decision regarding the non-compliance by South Africa to arrest and surrender Al-Bashir, the Pre-Trial Chamber II explicitly determined

> that the effect of article 27 (2) of the Statute as just described concerns both, vertically, the relationship between a State Party and the Court and , horizontally, the inter-State relationship between States Parties to the Statute.[428]

This interpretation is in conformity with the decision of the Pre-Trial Chamber I which not only ruled on the triangular relationship of Member States to the Court but which made reference to the interpretation of the term "third State". Regarding the failure of the Republic of Malawi to arrest and surrender Al Bashir, the Chamber examined that

> a waiver of immunity would obviously not be necessary with respect of a third State which has ratified the Statute. Indeed, acceptance of article 27 (2) of the Statute, implies waiver of immunities for the purpose of article 98 (1) of the Statute with respect to proceedings conducted by the Court.[429]

So with regard to the Chambers decision, the "third State" can be a Member—when it ratified the Statute—or a Non-Member.

Pursuant to this decision and in light of the effectiveness regarding the relationship of article 27 (2) and article 98 (1), State Parties to the Statute do not act inconsistently when the Court requests for surrender or assistance with regard to another Member State, as the third State. Neither does the third State have to waive its personal immunity nor does the requested Member State breach its obligations under international law, because both of them already relinquished their immunities the moment they ratified the Rome Statute.[430] One important addition has to be made: The removal of immunities *ratione personae* even among State Members to the Statute only has an effect with regard to the ICC. This entails that Member States may only upon the request of the Court surrender or assist relating to the third State; if the link to the Court and therewith the obligations arising out of the Rome Statute are not given and the Member State acted on its own and, nevertheless, surrendered the official of the other Member State, it would violate its obligations with respect to the customary international law on State immunities.[431]

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[427] See Kreß (2012), p. 238.

[428] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 76.

[429] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision by the Pre-Trial Chamber I (12 December 2011), para. 18; Pedretti (2015), p. 283.

[430] See Pedretti (2015), p. 280; Kreß (2012), p. 239; Schabas (2010), pp. 1040–1041.

[431] See Pedretti (2015), p. 282; Akande (2004), p. 426.

This reverts back to the question, how far the forgoing examination will change, if the requested State is a State Member and the third State a Non-State Party to the Statute.

(ii) Article 98 (1) and Its Relationship to Article 27 (2) in Conjunction with Article 12 (2) (a) Rome Statute

As determined before, the ICC does not have to refrain from exercising jurisdiction upon nationals acting in their official capacity *ratione materiae,* even if those nationals are of Non-Member-States. Pursuant to the latter immunity, article 98 (1) would constitute no bar for the Court to ask for arrest and surrender of serving State officials or former officials.[432] The situation differs with regard to the immunity *ratione personae,* which still constitutes "the most fundamental prerequisite for the conduct of relations between States."[433] With regard to Member States of the Statute is has been determined that the claim to personal immunities has been repealed; State-Parties have waived their personal immunity in front of the Court and vis-à-vis other Member-States in the moment of acceding to the Rome Statute. Nevertheless, the situation is different with regard to Non-State Parties in cases where article 13 (a) in conjunction with 12 (2) (a) is applicable because the immunity *ratione personae* of the Non-Member State has neither been waived in front of a Member State nor is the latter bound by article 27 (2). The principle *pacta tertiis nec nocent nec prosunt,* enshrined in article 34 of the Vienna Convention of the Law of Treaties, allows no other result than the preservation of the attached immunity to the third State due to the fact that the Rome Statute does not create any obligations for a non-contracting State unless it gives its consent.[434] The removal of personal immunities does only apply *inter partes* and in connection with the Court and the Non-Member States. The removal of personal immunities of persons of Non-Member States affects only the vertical relationship with regard to the Court. With respect to the horizontal relationship, however, the immunities *ratione personae* of the Non-Member will persist further, so that the Court may neither proceed with a request to the territorial State-Party nor to other State-Parties, because this would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of that person.

Hence, article 98 (1) constitutes, in case of a State-Party referral over an official of a Non-Member State equipped with personal immunity, an impediment for the Court to continue its proceedings pursuant to the Statute. The waiver of immunity by a Non-Member State or the cessation of its official capacity would comprise the only possibilities for the Court to exercise its jurisdiction.

[432] See Akande (2003), p. 642.

[433] *United States Diplomatic and Consular Staff in Iran (US v. Iran)*, Merits, (1980) ICJ Report 3, para. 91.

[434] See Pedretti (2015), p. 285.

This dependency leads to the fact that article 98 (1) constitutes with regard to immunity *ratione personae* in respect of a Non-Member State as the "third State" a limitation for the Court to exercise its jurisdiction. Alternatively and with respect to the argument made in the beginning of the examination, it could also positively be concluded that the result constitutes the "corrective" to the broad jurisdiction mechanism granted to the Court. The fact that Member States removed their absolute personal immunity on the inter-state as well as vertical level constitutes a great concession in light of the fight against impunity. That this removal of immunity *ratione personae* cannot simultaneously be applied to States not Party to the Rome Statute is less a diminution of the mechanisms of the ICC but more a reaffirmation of principles such as *pacta sunt servanda* and the international law of immunities. In the end, the Rome Statute is and remains a treaty to which States may accede or not. And it is the treaty and mainly article 27 (2) which makes an exception to the inherent customary law of personal immunity attached to only a small group of senior officials to a State.

Thus, the fact that the Court may not proceed with its request to surrender or assist in cases where the "third State" is a Non-State Party, constitutes a bar for the Court to exercise its jurisdiction. The initial strength of the ICC, to be in possession of jurisdiction, even with regard to a Non-Member State, is weakened in the moment it is inhibited from obtaining custody of the suspect, a result of respecting States obligations under international law.

If and in which circumstances Non-Member States may be surrendered to the Court by a requested Member-State without violating its international obligations will be examined in the following part.

(iii) Article 98 (1) and Its Relationship to Article 27 (2) in Conjunction with Article 13 (b)

All difficulties which may arise out of a SC referral with regard to Head of States of Non-Member States to the ICC can be once more best presented by examining the two already mentioned SC referrals of the situations in Darfur and Libya to the ICC. The Pre-Trial Chamber I issued pursuant to article 58 arrest warrants for the Sudanese President Al-Bashir in 2009/2010 as well as against Muammar Gaddafi in 2011 and transmitted these requests not only to the competent Sudanese and Libyan authorities and to their neighboring States, but to all Party States to the ICC and all SC-Members, which are not State Parties to the Statute.[435] Consequently, it has to be elaborated whether State-Members to the Statute breach their international obligations when executing these ICC's requests triggered by a SC referral pursuant to article 13 (b).

[435] *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Pre-Trial Chamber I, ICC-01/11-12, 27 June 2011.

As analyzed in section 4 I 2 (b), Heads of States, including those of Non-Member States to the ICC, are bound by virtue of the SC referral to the Statutes provisions which removes not only the immunity in front of the Court but pursuant to the foregoing determination of article 98 (1) and its interplay with article 27 (2) also among the States, Party to the Statute. In conformity with this and on the assumption of the derogation of immunities on the vertical level, Member States to the Statute will not breach their international law obligations concerning the customary law on personal immunities if they arrest and surrender defendants of Non-Member States. This theory can be explained by means of two different approaches which, nevertheless, come to the same result. Pursuant to the analogous-Party approach, Member States will not be in violation of their international law obligations concerning personal immunities if they arrest and surrender the accused, because these Non-Party States have, by virtue of the SC resolution, to be treated like quasi Members which leads pursuant to paragraph (1) of article 89 to an obligation to surrender them to the Court.[436] The second approach rejects the analogous position of Non-Member States but focuses on the applicability of article 103 UN-Charter.[437] Pursuant to the definition set up in article 103 UN-Charter, obligations of UN-Members under the present Charter shall prevail over their obligations under any other international agreement.[438] For this reason the exact wording of the SC resolutions will be of paramount importance. The disparity of each resolution, especially with regard to the resolutions of the SC for the two *ad-hoc* tribunals and the resolution for Sudan, has to be taken into account.[439] While the resolutions for the ac-hoc Tribunals imposed obligations on all UN-Members to cooperate fully with the Tribunals,[440] which means that article 103 UN-Charter will always serve as a justification to comply with the requests of the Court by virtue of the resolution than with other obligations, the resolutions with regard to Sudan and Libya are worded differently. In the case of Sudan, the SC obliged only the Government of Sudan and all other Parties to the conflict and in the case of Libya, all Libyan authorities to cooperate fully. Further, the SC explicitly recognized in both resolutions "that States not party to the Rome Statute have no obligation under the Statute". Logically and in light of the object and purpose of referring a situation to the ICC (article 13 (b)), it could be assumed that the non-obligation of States not Party to the

[436]See Cryer et al. (2014), p. 560; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 88.

[437]See Gaeta (2009), pp. 330–331; Tladi (2015), p. 499.

[438]The discussion, if article 103 UN-Charter also covers under "agreement" customary international law has not to be decided, because pursuant to the majority view, treaties prevail over customary law obligations, so that obligations arising out of the UN-Charter a fortiori shall be regarded as taking priority over customary international law. See Akande (2009), p. 348.

[439]See Gaeta (2009), p. 330.

[440]UN Security Council Resolution 827 (1993) UN Doc S/Res/827, para.4 (ICTY); UN Security Council Resolution 955 (1994), UN Doc S/Res/955, para.2 (ICTR).

Rome Statute could *a contrario* be interpreted as the obligation of Party States to do so. Thus, in the case of a request of the Court to arrest and surrender a Head of State of an analogous Non-Party State, Member States of the Statute could pursuant to article 103 UN-Charter rely on their supreme obligation arising out of Charter and, more precisely, the SC resolution. Accordingly, they would not violate their obligations of customary international law on personal immunities. However, it must be repeated that the application of article 103 UN-Charter to suspend the applicability of article 98 (1) highly depends on the exact wording of the SC resolution. In the examples of the SC resolution with respect to the situation in Darfur and Libya, the SC simply "urges all States [. . .] to cooperate fully."[441] In using the word "urges" the SC expressed more a recommendation than an obligation to cooperate; consequently, all UN-Member but Non-Party States to the Rome Statute cannot only refuse the request to arrest and surrender, but they could be in violation with their international obligations arising out of the customary international law on personal immunities, if the personal immunity of the wanted Head of State is not waived vis-à-vis the requested Non-Member State. The approach adopted by some authors,[442] that UN-Member States not Party to the Statute could rely on the removal of immunities by article 27 (2) to arrest and surrender, by virtue of the SC resolution, has to be rejected. First of all, it would contradict the exact wording of the resolution, which explicitly makes an exception for Non-Party States and would secondly, override the treaty provisions of the Rome Statute. A Non-Party State could, when relying on the SC resolution to arrest and surrender a Head of State, not invoke article 103 UN-Charter, because the resolution did not oblige Non-Member States, it simply "urges" them to cooperate fully. Arguments that these recommendations could be seen as authorizations of the SC to make article 103 UN-Charter applicable, cannot be valid.[443]

As affirmed several times in the analysis of other articles, the ICC has not presented a unanimous opinion with regard to SC referrals and its relationship between article 27 (2) and 98 (1). The Pre-Trial Chamber dealing with the situation in Libya correctly supported its right to exercise jurisdiction upon the Non-State Member pursuant to the SC referral, article 13 (b), whereas it decided something completely different with regard to the non-compliance of the Member-States Malawi and Chad to arrest and surrender Omar al Bashir. After both States did not comply with the requests of the Court and Malawi opposed given that Al Bashir is the Head of State of a Non-Member State of the Statute and therefore in possession of immunity *ratione personae*, the Pre-Trail Chamber I concluded the following:

> The Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of

[441] UN Security Council Resolution 1593 (2005) UN Doc S/RES/1593, para. 2.; UN Security Council Resolution 1970 (2011) UN Doc S/RES/1970, para. 5.

[442] See Cryer et al. (2014), p. 561; Akande (2009), p. 345 et seq.

[443] See Akande (2009), p. 345.

> international crimes. There is no conflict between Malawi's obligation towards the Court and its obligations under international law; therefore, article 98 (1) does not apply.[444]

As it was already stated with regard to the analysis of article 27 and 13 (b), this book will not examine the question whether an automatic abolishment of immunity *ratione personae* in front of an international Court, either with regard to Member-or Non-Member State, constitutes a rule of customary international law.[445] What has to be highlighted is that the Chamber did not differentiate between the vertical and the horizontal level. Even assuming that it does constitute customary law that Head of States are not protected by their immunities in front of an international Court, which is supported by authors such as *Gaeta*,[446] the result does not alter anything with regard to international law obligations and therewith the inter-relation of States, especially with regard to Non-State Parties.[447] As *Akande* correctly emphasized, an article like 98 (1) will become superfluous if, pursuant to the Chamber's decision, immunities have always to be seen as abolished in cases where an international Court wants to exercise its jurisdiction.

This decision elaborated by the Chamber, is therefore not comprehensible. Instead of relying on the fact that the Non-Member State Sudan has to be regarded as an analogous Party to the Rome Statute by virtue of the SC referral and that the obligations to cooperate not only arise out of the Statute but, first and foremost, out of the SC resolution, the Chamber's decision leads to the complete annihilation of article 98 (1).

Three years later the Chamber ruled on the same matter, regarding the non-compliance of the DRC with respect to a request to arrest and surrender Al Bashir, with a different but likewise doubtful argument. This approach comes closer to the correct interpretation, and in comparison to the two foregoing decisions the Pre-Trial Chamber II did not declare article 98 (1) null and void; it precisely explained the construct of the customary law on international immunities and its interplay with article 27 as well as the intention of the drafters to incorporate an article like 98 (1).[448] But then again, the Chamber explained the abolishment of immunities, on either the vertical or on the horizontal level, by only referring to the text of the SC resolution, in which the Counsel decided that the Government of Sudan shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor. The Chamber concluded:

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[444] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I (12 December 2011), para. 43.

[445] More precisely to the analysis of this question: Kreß (2012), p. 240 et seq.; Daqun (2012), pp. 55–74.

[446] See Gaeta (2009), pp. 324–325.

[447] See Pedretti (2015), p. 298; Gaeta (2009), p. 329; Akande (2011).

[448] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09, Pre-Trial Chamber II (9 April 2014), para. 22–29.

> Accordingly, the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.[449]

It is very interesting to observe that the Chambers, in stating the above mentioned and likewise in the decisions with regard to the non-cooperation of Malawi and Chad, did not apply their own articles of the Statute to solve the problems surrounding competing obligations and immunities of Non-State Parties. Instead, the judges determined that it is the SC which implicitly waived the immunities of Al' Bashir. This examination is imprecisely—or more accurately—carelessly and wrong formulated. The SC does through the referral of a situation to the ICC not waive the immunity of any Head of State, but makes the Rome Statute, pursuant to article 13 (b), analogously applicable to that Non-Member State. Thus, it is article 27 which, by virtue of the SC resolution, will be applicable to the State and which removes the personal immunity of a Non-State Member in front of the Court and vis-à-vis all State Members to the Statute.[450] The Chamber argued, at least, that in case of competing obligations, articles 25 as well as 103 UN-Charter will serve as the justification that the ones arising out of a resolution will prevail.[451]

Fortunately, the Pre-Trial Chamber II changed its argumentation in its most recent decisions in 2017 regarding the non-compliance by South Africa and Jordan with the requests of the Court to arrest and surrender Al-Bashir. In the South Africa decision the Chamber did not only reverse the Chambers 2014' determination regarding the implicit waiver of immunities by the SC in clarifying that "it sees no such waiver – whether "explicit" or "implicit"", because the inapplicability of any immunity stems from the applicability of article 27 (2), namely the Statute of the ICC which has to be applied by the Court in the moment the jurisdiction is triggered.[452] Furthermore the Chamber stated that as a consequence of the trigger mechanism pursuant to article 13 (b), the State Sudan has to be seen as an analogous Party to the Statute with the consequence that any attached immunity to the Head of State of Sudan is abolished and therewith article 98 (1) not applicable; neither South Africa

[449] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Case No. ICC-02/05-01/09, Decision by the Pre-Trial Chamber II (9 April 2014), para. 29.

[450] See Pedretti (2015), p. 292.

[451] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Case No. ICC-02/05-01/09, Decision by the Pre-Trial Chamber II (9 April 2014), para. 30, 31.

[452] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, paras. 86 and 96.

nor Jordan would have been obliged to run counter their international obligations under international law when arresting and surrendering Al-Bashir to the ICC.[453]

In conclusion of the foregoing explanation and under a strict application of the customary law on personal immunities, the following is expressed: Requesting a Non-State Member for surrender and assistance could on the one hand lead to a violation of article 98 (1) by the Court, because Non-Member States have no obligations to comply with the request and could, in addition, not justify such an action by invoking article 103 UN-Charter. In the case of the compliance to the request, the customary international law on personal immunities and therefore the principle *par in parem non habet imperium* would be violated by the requested Non-Member State.[454]

In the case of a request to a Member-State, article 98 (1) will, with regard to one opinion, due to the analogous position of Non-Member States to the ICC, by virtue of the SC referral, not constitute any challenge. Member-States are either under the obligation to cooperate pursuant to article 86, or in accordance with the second approach, under article 103 UN-Charter, capable of arresting and surrendering the accused, without violating international law obligations with regard to immunities, because the obligations arising out of the resolution will prevail.

The foregoing statements indicate the dependency on the wording of the SC resolution. The result with regard to a request to surrender State officials of Non-Member States could be totally different if the SC was more explicit in its resolution or also obliged those Non-Parties to the Statute to cooperate with the Court. Therefore it is very difficult to come to a final conclusion with regard to the requests of the Court, when the request emerged out of the triggering mechanism of article 13 (b). Only in the case of a request to Member-States of the Statute, article 98 (1) will not constitute a bar, because either the analogous position of those Non-State Members by virtue of the SC resolution or the reliance on article 103 - UN-Charter permits Member-States to cooperate pursuant to its Statute's provisions, without violating any other international laws.

The request for surrender and assistance challenges the ability of the Court to fully exercise its powers as in cases where the requests are to Non-Member States, the Court is dependent on the wording of the SC resolution, which leads to a reduction of its power to be designated as a Criminal World Court.

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[453] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, paras. 88–94; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, paras. 44 and 54.

[454] See Akande (2004), p. 433.

(iv) Article 98 (2)

Paragraph (2) of article 98, prohibits the Court from proceeding with a request if the requested State acts, in carrying out the request, inconsistently pursuant to certain international agreements which require the consent of a sending State in order to surrender a person of that State to the Court, unless the Court is able to first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 98 (2) has featured mainly in relation to the "Bilateral Immunity Agreements" (BIA's), which the US attempts to conclude "with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future".[455] The objective of the so called "bilateral non-surrender agreements" is, for the US government to circumvent the surrender of all American citizens, whether in a private or official capacity, to the ICC.[456] Without putting too much emphasis on the latter agreements as such, it has to be determined what kind of international agreements in relation to what kind of "sending" States, State-Members or not, this paragraph seeks to protect, thus, in which circumstances the ICC will be hindered to proceed with its request for surrender.

Resembling the first paragraph of article 98, the second is similarly silent on the question of whether the article protects international agreements vis-à-vis Member-States or only with regard to Non-State Parties to the Rome Statute. In order to avoid an illogical result, the answer will be the same as the one determined for the first paragraph: Article 98 (2) refers to both States as the sending State, but due to the fact that Member States have subjected themselves to the provisions of the Statute and therewith to the provisions, it will only be applicable with regard to Non-State Parties. It can be assumed that it could not have been in the drafters aim to grant Member States the possibility to conclude such agreements to escape their obligations arising out of the Statute. Relying on this applicability to Member-States would only contradict the rationale of the Statute. As *Sok Kim* correctly states, paragraph 2 was "not designed as a license for impunity from the Court by letting states enter into the subsequent bilateral agreements undermining the entire statutory scheme".[457] Furthermore, the fact that the conclusion of such international agreements among State-Members could be interpreted as an act of bad faith and therefore amount to a violation of article 26 VCLT, cannot be disregarded.[458] Pursuant to the foregoing article, every treaty must be performed in good faith. Signing such agreements, which forbid the surrender to the Court, are contradictory to the whole cooperation system of the Statute and especially article 89. In addition to this, *Akande* highlights that article 98 (2) would become obsolete if the article only

[455]Coalition for the International Criminal Court, Fact Sheet "US Bilateral Immunity Agreements or So-Called "Article 98" Agreements", p. 3, available at: https://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf (Last accessed 26 Nov 2017).

[456]See Scheffer (2005), p. 333.

[457]Sok Kim (2007), p. 272; Akande (2003), p. 642.

[458]See Sok Kim (2007), p. 273.

related to Member-States: Pursuant to article 30 (3) and (4) VCLT, which regulate the relations between States of old and new treaties, the provisions of the Statute would either way prevail upon prior inconsistent obligations, if both States acceded to the new treaty.[459] With regard to the foregoing examination, it is noted that despite the imprecise wording in article 98 (2), the sending State may only constitute a Non-State Party to the Statute because a Member-State at the moment of acceding to the Statute is automatically barred to conclude such agreements for the reasons explained above. Even in cases in which the Member State concludes such an agreement with another Member-State, which would as a result be in violation of the VCLT and the Rome Statute, the ICC has the final decision as to whether such an agreement is invalid and if answered affirmatively, it may proceed with its requests to surrender as the requested State would not be acting inconsistently with its obligations.[460]

Another question which forms part of this debate and which considers the previous question from a different angle, is whether only pre-existing or new agreements, entered into force after the establishment of the ICC, are covered by article 98 (2). The wording of the article does not indicate whether new or only existing agreements were meant to be protected. Pursuant to a literal interpretation, it could be assumed that new international agreements are also shielded by paragraph 2. *Akande* refers to the subsequent practice of some Member-States to the Statute, which at least considers the ability that article 98 (2) also covers new agreements.[461] With regard to a teleological interpretation, *Schabas* argues that the provision "was intended to ensure that a rather common class of treaties known as "status of forces agreements" would not be undermined or neutralized by the Statute."[462] Article 98 (2) was mainly intended to apply in circumstances in which the previously concluded SOFA would have put the requested State, acceding to the Rome Statute, in the situation of conflicting obligations.[463] This interpretation is also in conformity with the Guiding Principles of the European Union, which determine with regard to the relationship between Member States of the Rome Statute and the US that State Members only have to take "existing agreements", such as SOFA's and extradition agreements into account; the conclusion of new agreements with the US, especially with the ones drafted at that time, would be contrary to the Member-States obligations arising out of the Rome Statute.[464] The above mentioned discussion demonstrates the discrepancy of article 98 (2): The wording of the article entails the

[459]See Akande (2003), p. 643.

[460]See Coalition for the International Criminal Court, Fact Sheet "US Bilateral Immunity Agreements or So-Called "Article 98" Agreements, p. 2, available at: https://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf (Last accessed 26 Nov 2017).

[461]See Akande (2003), p. 645.

[462]Schabas (2017), p. 65.

[463]See Cryer et al. (2014), pp. 175–176.

[464]See 2450th Council Session, General Affairs and External Relations, Doc. 12134/02, 30 September 2002 available at: https://www.iccnow.org/documents/2002_Council_Conclusions_on_ICC.pdf (Last accessed 27 Nov 2017).

applicability of pre-existing and newly concluded agreements, while the historical as well as teleological interpretation allows for no other result than to cover only pre-existing international agreements.[465] Any other result would amount to a breach of the Rome Statute. With regard to the foregoing opinion, article 18 of the VCLT serves in two respects: On the one hand, pre-existing SOFA's or extradition agreements between Member-States and Non-Member States still have to be respected, because every other outcome would be contrary to the object and purpose of the pre-existing agreement, article 98 (2) therefore applies so as to avoid a violation of article 18 VCLT. On the other hand and with regard to agreements concluded after the entry into force of the Rome Statute for the requested State, article 18 VCLT applies likewise to justify the impossibility to conclude such agreements without defeating the object and purpose of the Rome Statute and therewith violate its obligations of the VCLT and the Rome Statute; article 98 (2) would therefore not apply and the Court would be able to proceed with its request to surrender.[466] It is difficult to follow the opinion of *Akande*, who argues that article 98 (2) also protects newly concluded agreements between Member-States of the Rome Statute and Non-State Parties, due to the fact that the rights of the latter cannot be overridden.[467] It is correct that Non-Member States cannot be treated like Member States and that their agreements with State-Parties cannot be suspended or treated like they never existed. Concluding new agreements with Non-State Parties which are obviously contrary to the obligations under the Rome Statute is different to the situation in paragraph one of the article, where the customary law on immunities existed at the time of the establishment of the ICC and continues. As the author *Benzing* correctly emphasized, is it very questionable how State Parties may insist on the applicability of article 98 (2) when they "have maneuvered themselves willingly into a situation of competing international obligations after they have become a Party to the Statute".[468]

A further very important determination with regard to the agreements concluded by the US, is what kind of "international agreements" are protected by article 98 (2). The term "sending State" is very exclusive and can be derived from Conventions such as the Vienna Convention on Diplomatic Relations (1961) or on Consular Relations (1963) but, first and foremost, from special Status of Forces Agreements (SOFAs), which makes these agreements above all applicable.[469] SOFAs ensure that peacekeeping troops or forces based in foreign countries will not be subject to the

[465] See Coalition for the International Criminal Court, Fact Sheet "US Bilateral Immunity Agreements or So-Calles "Article 98" Agreements", available at: https://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf (Last accessed 26 Nov 2017); Benzing (2004), pp. 218–220; Wirth (2001), pp. 455–458.

[466] See Wirth (2001), pp. 456–458; Benzing (2004), p. 218.

[467] See Akande (2003), pp. 643–646.

[468] Benzing (2004), p. 218.

[469] See Akande (2003), p. 644; Benzing (2004), p. 211.

jurisdiction of the country they are deployed to.[470] While most of the authors[471] extend the applicability of article 98 (2) in stating that the interpretation of the provision must also contain extradition agreements, which provide that an individual who has already been extradited from one State to the other shall not be re-extradited to a third State without the consent of the first State, *Sok Kim* insists that article 98 (2) pertains to SOFA agreements exclusively.[472] He bases his arguments firstly on the term "sending State" which is solely used by SOFAs, while secondly emphasizing the old draft text of the Rome Conference which provided that "[w]here the requested State is under an international obligation to a third state under a Status of Forces Agreement pursuant to which the third state's consent is required [. . .]".[473] Pursuant to this drafting text, the author's view may be affirmed, however, attention must be paid to the final draft article which just mentions "international agreements". This wording is too broad to confine it just to SOFA's, therefore the predominant opinion has to be followed. With regard to the overall inclusion of US nationals in the bilateral agreements, emphasis has to be paid to the specific wording of article 98 (2) which states that a person of a "sending" State may not be surrendered. Only personnel, whether diplomatic or military, which were sent from the sending State are covered by such agreements. Even former US Ambassador *Scheffer* argued that this general inclusion of all US nationals into such agreements "seriously diverge from the original intent of the drafters".[474] For this reason it can be concluded that these US agreements, which cover all US citizens, do not fall within the meaning of article 98 (2) and therefore do not bar the Court from requesting the surrender of such persons.[475]

With regard to the above mentioned examination it can be concluded that article 98 (2) is not directed at Member-States, because in ratifying the Statute they subjected themselves to the Rome Statute and therewith the obligation to cooperate and assist the Court in its requests. Mainly article 89 leads to the inapplicability of article 98 (2) between State-Parties to the Statute. Any other interpretation would be *a contrario* to the rationale of the Rome Statute and in violation of the VCLT and the Rome Statute. Article 98 (2) was intended to cover pre-existing SOFA's as well as extradition agreements, to circumvent a clash of obligations between the requested Member State and the Non-State Party as the "sending State". Simply because a State decides to enter into a new treaty with different obligations, this does not suspend an old treaty which was formulated between the Member-State of the new treaty and the State, which no longer wants to be bound by that new contract. Article

[470] Schabas (2017), p. 65.

[471] See Akande (2003), p. 644; Wirth (2001), p. 455; 2450th Council Session, General Affairs and External Relations, Doc. 12134/02, 30 September 2002 available at: https://www.iccnow.org/documents/2002_Council_Conclusions_on_ICC.pdf. (Last accessed 26 Nov 2017).

[472] See Sok Kim (2007), p. 272; Akande (2003), p. 645.

[473] Sok Kim (2007), p. 272.

[474] Scheffer (2005), p. 335.

[475] See Cryer et al. (2014), p. 176; Akande (2003), p. 644; Benzing (2004), p. 220.

98 (2) was created to protect the latter State, which legally has the right to oblige its contracting partner to adhere to the previous agreement. Consequently, if a Member- and Non-State Party concluded a SOFA, which was completed prior to the Rome Statutes entry into force for the requested Member-State, the requested State would not be allowed to surrender the person to the Court unless the sending State gives its consent to the requested State or the ICC; without that consent, the Court would be barred to proceed with its request, and in cases where it still asked for the request, the Member State would have to act inconsistently with regard to its obligations arising out of the international agreement. Agreements, such as the Bilateral Immunity Agreements, concluded by the US, are not covered by article 98 (2); the overall surrender prohibition with regard to every US national is contrary to the content of article 98 (2), which explicitly mentions a person of a sending State. In respect of the wide formulation and the assumption that new international agreements are also covered by article 98 (2), the legality of the conclusion of international agreements between Member-States to the Statute and a Non-State Party is questionable. As determined above, the Member-State acts intentionally inconsistent with its obligations of the Rome Statute when it concludes such an agreement with a Non-State Party. A further important argument is that most of the persons being protected by these agreements only possess immunity *ratione materiae*, which would make them vulnerable either way. On the other hand, the concern of Non-Member States to conclude such agreements with Members of the ICC is not incomprehensible. Those States did not subject themselves to the Statute and therefore are not under the jurisdiction of the Court. The final decision, however, will fall on the ICC to determine whether an international agreement between the Member-State and the non-contracting Party is valid or not and, thus if the Court may proceed with its request or not. The assumption that article 98 (2) is to be regarded as the "Achilles heel" of the Statute, which the US used in concluding its agreements to circumvent a possible prosecution of its nationals, could therefore be refuted.[476]

e. Interim Result

The extensive analysis of the cooperation and judicial assistance regime of the Rome Statute has demonstrated that Part 9 was with regard to most of the provisions, particularly elaborated, whilst deliberately leaving other issues open. This is due to the circumstance that the cooperation mechanism constitutes a reflection of State sovereignty on the one side and the power of a new international criminal institution on the other side, which intervenes into the inherent sovereignty of States. The fact that Member States agreed to such an obligatory mechanism pursuant to article 86, can already be regarded as a great concession in light of the fight against impunity. That States further agreed to incorporate an article such as 88 in order to circumvent that States may rely on their national laws, as a loophole to claim that

[476] See Schabas (2010), p. 1045.

they will be hindered to grant the cooperation asked for by the Court, can be regarded as another appropriate effort to allow the Court to proceed with its requests regarding cooperation and judicial assistance. Moreover and in light of State sovereignty, articles such as 87 (7) as well as 87 (5) (b), which foresee a sanction mechanism in cases where State Parties or Non-contracting Members with an arrange- or agreement fail to comply with the requests to cooperate by the Court, are of great significance. Despite the fact that the sanction mechanism was not explicitly spelled out but just left within the discretion of the ASP and/or the SC, it could be demonstrated that both instances can theoretically apply various measures to ensure that the reluctant States comply with their obligations. These could either be diplomatic or political actions, of which the extent of the political pressure may vary, dependent on whether the ASP received the matter from the Court, or in cases where the matter was referred to the SC due to an initial trigger mechanism according to article 13 (b) with the correlating sanctions pursuant to articles 41 or 42 UN-Charter. Moreover and with respect to paragraph (6) of article 87, it could be determined that the applicability of the latter paragraph grants the Court an additional and advantageous possibility to ask for cooperation; in making use of peacekeeping operations which are already on the ground of the State where the atrocities had been committed, constitutes a great benefit for the Court. Even more so, when the mandate of the peacekeepers is formulated in a way that the mission may support the State in arresting and surrendering the suspect. Even if this paragraph does not constitute the appropriate provision regarding the non-compliance of Member States, it could still serve the same purpose in cases where the Court asks the SC for its cooperation, when the reluctance of the State to cooperate amounted to a threat to international peace and security. Even with regard to article 87 (7), the SC is not barred to be asked to react on the reluctant and non-cooperating Member State despite the fact that an article 13 (b) situation is not given. The same holds true for an applicable article 13 (b) situation regarding a Non-Member State to the Court; either article 87 (5) (b) or article 87 (7) would be the relevant provision in case where the Non-Member State does not cooperate by virtue of the SC resolution. With regard to the case law of the ICC and the assumption of the book that the Non-Member State has to be regarded as an analogous Party to the Statute, article 87 (7) can be applied by the Court.

The further analysis of the articles dealing with arrest and surrender has shown that no grounds for refusal could be found and that a possible delay to surrender the accused does not constitute a bar for the Court to exercise its jurisdiction but is instead in compliance with the Rome Statute's provisions and the rights of the States concerned. Even in relation to article 90 no such grounds are pertinent. The only case, in which the requested State may decide to extradite the person before the Court has ruled on the admissibility of the case, is when the requesting State is a non-contracting Party. Article 90 reaffirms in many but not all instances the balance between the obligations stemming out of the Statute and the international law obligations among the States concerned.

Moreover, it could be proved that with regard to the other forms of cooperation it is neither article 93 (1) (l) nor 93 (3) but only article 93 (4) which might prevent the

Court from exercising its jurisdiction when the request concerns the production of any document or disclosure of evidence which relates to its national security. Even with regard to this sensitive matter of national security, it could be demonstrated that article 72 (5) and (6) provide for an extensive list of measures which previously have to be taken into account by the State concerned before it gets able to deny the request of the Court; the national security argument does not grant the State a blank check to circumvent the request, and in case the State does apply the three-step procedure provided for in article 72, the Court reserves the right to refer the matter to the ASP or SC pursuant to article 72 (7) (a) (ii) in conjunction with 87 (7). Nevertheless, if applied correctly, article 93 (4) constitutes a bar for the Court to exercise its jurisdiction.

With regard to article 99 (4), it could be highlighted that this paragraph constitutes a further possibility for the prosecutor to investigate directly on the territory of a State, which is an additional measure in relation to the investigative mechanism anchored in article 57 (3) (d). However, it would have been appropriate to grant the prosecutor a wider range of measures instead of limiting them to interviews or the taking of evidence from a person. With regard to article 95 the following could be elaborated: The suspension of the execution of the request is firstly due to more practical aspects than to prevent the Court from exercising its jurisdiction and, secondly, the article reaffirms the principle of complementarity. Thus, also article 95 does not have to be assessed as a ground to refuse the request of the Court. Article 97 importantly determines the prerequisites for States to consult previously with the Court in cases where the State will be impeded or prevented from executing the requests of the ICC. Article 97 also constitutes an overall guidance with regard to Part 9; the incorporation of the provision significantly manifests that it is not in the discretion of States to consider whether they want to comply with the request or not, but that they are obliged to consult with the Court in the moment such a problem arises, whereas this consultation does not suspend the validity of the Court's request for cooperation. Should the State neglect to consult with the Court and solely determine to deny the request, the Court may make a finding to that effect and refer the matter to the ASP or SC, article 87 (7).

The only article in the whole cooperation mechanism which actually could bar the Court from exercising its jurisdiction is article 98 and its two paragraphs. The article may in specific circumstances lead to a reduction of the Court's previous strength to exercise jurisdiction upon Non-Party nationals. The extensive analysis has shown that the interplay of articles 98 (1) and 27 (2) in relation to article 13 (a), 13 (c) in conjunction with 12 (2) (a) lead to a prohibition for the Court to proceed with a request to surrender and assist, if the national of the Non-State Member is a Head of State or otherwise provided with personal immunity. Despite the fact that article 27 (2) is applicable to the Non-Party State, regarding the vertical relationship to the Court, the abolishment of these personal immunities is not applicable in relation to the Member State, so that the Court would put the requested State in a position whereby it would breach its international law obligations on diplomatic immunities. The relationship referred to in article 98 (1) touches the triangular relationship between the ICC, the requested and the third Non-Member State. Unlike Member

States, which abolished their immunities in front of the Court and among each other, the result is a different one with regard to Non-Party States. The exception to this result is when it comes to the interplay of article 98 (1) with 27 (2) in relation to article 13 (b). Pursuant to this situation, article 98 (1) would not be the pertinent provision and therefore be inapplicable as the Head of States of those Non-State Members have, by virtue of the SC acting under Chapter VII of the UN-Charter, to be regarded as "quasi" or analogous Members with regard to the special situation, which make some of the Statute provisions binding on them. Under these special circumstances the Court does has not have to refrain from its further proceedings and the requested Member-State will not be in violation when exercising its obligation pursuant to article 86. Even opponents of the latter opinion come to the same result in basing their argument on the applicability of article 103 of the UN-Charter, pursuant to which the obligations arising out of the SC resolution will prevail over other obligations of international agreements. The foregoing statement shows that the obligation of any State is dependent on the exact wording of the resolution. Thus, if the SC in its resolution only obliges certain States but just "urges" other States, those "urged" States will not have an obligation to cooperate, because such an obligation does not emerge out of the provisions of the Statute or out of the resolution itself. In this situation the requested Non-Member State in responding to the ICC's request for surrender of the accused person would violate its international law obligations on diplomatic immunities and could not justify this action by relying on article 103 UN-Charter, because an obligation to do so is not given. This underlines once more the importance of SC referrals but, first and foremost, the exact phrasing used and therewith the given power to the Court to exercise its jurisdiction.

Furthermore, article 98 (2) leads to a decrease in the Court's ability to exercise its jurisdiction in cases where the requested Member-State concluded an international agreement, with regard to extradition or SOFA agreements, with a Non-Member State. Only in relation to article 13 (b) and the assumption that the Rome Statute will be applicable to the Non-Party State by virtue of the SC resolution, the obligations stemming out of the resolution would pursuant to article 103 UN-Charter prevail over the international agreements between those two States.

With regard to article 98 (1) the examination has confirmed that immunities *ratione personae* still constitute one of the most precious doctrines in international law and that the voluntary abolishment of all kind of immunities in front of an International Court, such as the ICC, by Member States acceding to the latter's Statute has to be regarded as a great achievement and is of paramount importance. That this construct cannot simultaneously be applied to States which did not consent to such an extraordinary regime is obvious. That the Court is given the possibility to exercise its jurisdiction upon a Non-Member State, pursuant to articles 13 (a), (c) in conjunction with 12 (2) (a), can be regarded as a powerful manifestation. But that Non-Member States with regard to the before mentioned trigger mechanism will still be treated like that with regard to other Member States of the Court is in conformity with the law of treaties as well as with their international law obligations. With regard to immunity *ratione materiae* the Court will not be barred to proceed with its

request so that the official of a Non-Member State could unreservedly be surrendered to the Court without violating its international law obligations on diplomatic immunities.

Part 9 of the Rome Statute constitutes a thoroughly elaborated cooperation mechanism, which—if applied properly by all parties concerned, whether the ICC, Member, or correspondingly Non-Member States—balances State's interests and their international obligations with the jurisdiction apparatus of an independent international institution prosecuting the most serious crimes of concern. Most of the situations, in which State Parties may postpone or suspend the requests of the Court, entail the involvement of either Non-Member States or admissibility challenges of a case, which is not yet determined by the Court. These grounds may be practically disadvantageous for the Court, but they only reflect the adherence to article 34 VCLT as well as the Rome Statute's provisions. The ICC, as important as this institution may be, is nevertheless based on a treaty, the Rome Statute, to which States may subject themselves or not. Even if the Court was given an extensive jurisdiction mechanism, even with regard to non-contracting Parties, this still does not change anything with regard to the fact that not every State of the world will be bound by it. The framework of the Statute's cooperation system is significant, but the fact that Non-State Members may in this part of the Statute, except in situations of a SC referral, not be overruled affirms the assumption that the ICC may not be designated as an International Criminal World Court. The final and ultimate power lies within the States and their good will to apply the provisions and comply with the Court's requests. The "*Realpolitik*" of the world is the leading power to take or to omit action. In order to deduce how far this tight cooperation mechanism is practically implemented and to what extent States', Member or Non-Member, behavior as well as the practice of the ASP/SC and the ICC underline the assumption that the ICC might not be designated as a Criminal World Court, the previous practice of States on the one hand and the ICC on the other hand has to be examined.

2. International Cooperation and Judicial Assistance in Practice

To date[477] there are 25 cases before the Court, 31 arrest warrants have been issued against 27 suspects of whom eight persons have been surrendered to the Court and detained, while 15 remain at large.[478] Furthermore, three charges have been dropped due to the death of the suspects, nine additional summons to appear have been issued and four accused have been found guilty while one defendant was acquitted. The

[477] December 2017.

[478] In the following see: Homepage of the International Criminal Court, Facts and Figures of the International Criminal Court, available at: https://www.icc-cpi.int/about (Last accessed 17 Dec 2017).

Office of the Prosecutor is conducting 11 investigations in Member and Non-Member States to the Rome Statute, namely in Sudan, Libya, Mali, Uganda, Central African Republic I and II, Kenya, Cote D' Ivoire, the Democratic Republic of the Congo, Georgia and Burundi.[479] Regarding the latter Member State, the Pre-Trial Chamber III recently, in November 2017, authorized the Prosecutor to open an investigation *proprio motu* with respect to alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017. In addition to the situations above, which are under investigation, the Court is undertaking preliminary examinations in eight States with regard to alleged crimes committed in, *inter alia*, Afghanistan, Iraq/United Kingdom, Palestine, Columbia and the Ukraine.[480] These are the basic facts and figures about the Court since its establishment, respectively its entering into force in 2002.

Three of the above mentioned enumerations appear conspicuous. Firstly, ten out of eleven situations under investigation entail African States' involvement. Secondly, there are only nine convictions, even though the ICC has been in operation for 15 years. And thirdly, despite the high amount of arrest warrants, only eight suspects have been arrested and surrendered to the Court.

Regarding the first statement, the Court has faced serious allegations of being racist, neo-colonial and biased with respect to African States.[481] Without paying too much attention to this issue, due to the fact that the determination of the allegations does not relate to the question of this book, as it does not make the Court more or less effective, a few remarks will be made. It is correct that most of the situations under investigation pertain to African States, whereas the foregoing figures have demonstrated that next to Georgia also five out of eight countries that are under preliminary examinations by the Court are not African States. And they are not only not African States but with the preliminary examinations into the incidents in Iraq/UK and Afghanistan, high ranking personal such as UK forces as well as US armed forces and the CIA, will be under investigation. With regard to Afghanistan the Prosecutor just requested authorization from the Court to initiate an investigation into alleged War Crimes and Crimes against Humanity.[482] But the fact that the ICC investigates crimes which have been committed on African soil is not only attributable to the Court but more to the States themselves as well as to the SC. Uganda constitutes the first African State which triggered the jurisdiction of the Court by making a self-referral. Further States like the DRC, the Central African Republic, Mali as well as Gabon followed this example; all five African States referred the incidents, mainly

[479]See Homepage of the International Criminal Court, Situations under investigation, available at: https://www.icc-cpi.int/pages/situations.aspx (Last accessed 17 Dec 2017).

[480]See Homepage of the International Criminal Court, Preliminary Examination, available at: https://www.icc-cpi.int/pages/preliminary-examinations.aspx (Last accessed 17 Dec 2017).

[481]See Maunganidze and du Plessis (2015), pp. 66–67; Tull and Weber (2016), p. 8.

[482]Homepage of the International Criminal Court, Statement of the Prosecutor, 20 November 2017, available at: https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh (Last accessed 20 Dec 2017).

committed on their territory, to the ICC.[483] Furthermore, and pursuant to article 13 (b) in conjunction with Chapter VII of the UN-Charter, the SC referred two African situations to the Court, Sudan and Libya. Only in two instances, the Prosecutor acted pursuant to his *proprio motu* powers and opened investigations regarding the incidents in Kenya and Côte d'Ivoire. In regard to the latter State it is said that it previously approached to the Court to initiate investigations regarding the alleged crimes committed with respect to the post-election violence in 2010 and 2011.[484] Moreover, it has to be noted—unfortunately—that most of these atrocities are committed on the African continent; the Court cannot but react on that given fact.[485] In Europe, such incidents have not been committed until now[486] and hopefully will not occur in the future, therefore these States cannot be under investigation. But as already emphasized; the ICC is presently examining whether nationals of the United Kingdom, US armed forces and the CIA could be criminally responsible for the commitment of War Crimes during the conflict in and the occupation of Iraq and in Afghanistan and several detention centers.[487] This fact as well as the foregoing explanation, demonstrates that the allegations from African States cannot withstand and therefore do not need to be further assessed. The reputation of the ICC—regarding the foregoing allegations—remains untouched.

The second statement contained the conspicuous fact that it took the ICC 15 years to convict only four suspects. The first conviction of the ICC was of *Thomas Lubanga Dyilo*, who was found guilty on 14th of March 2012, 8 years after the referral of the DRC, for the commitment of War Crimes, particularly the recruitment of child soldiers.[488] Two years later, *Germain Katanga* was convicted as an accessory to one count of a Crime against Humanity and four counts of War Crimes. In March 2016, *Jean-Pierre Bemba Gombo*, President and Commander-in-chief of the Mouvement de libération du Congo at the time of being arrested, was found guilty of two counts of Crimes against Humanity and three counts of War Crimes.[489] Only in September 2016, *Ahmad Al Faqi Al Mahdi*, Member of a movement associated with Al Qaeda in the Islamic Maghreb, was being made responsible as co-perpetrator of the War Crime consisting of intentionally directing attacks against religious and

[483]See in the following: Homepage of the International Criminal Court, Situations under investigation, available at: https://www.icc-cpi.int/pages/situations.aspx (Last accessed 11 Dec 2017); Preliminary examination, available at: https://www.icc-cpi.int/gabon (Last accessed 12 Dec 2017).

[484]See Tull and Weber (2016), p. 8

[485]See du Plessis et al. (2013), p. 3.

[486]The alleged crimes committed in Ukraine and Crimea have not been confirmed yet.

[487]See Homepage of the International Criminal Court, Preliminary Examination, available at: https://www.icc-cpi.int/iraq (Last accessed 17 Dec 2017).

[488]In the following see Homepage of the International Criminal Court, Lubanga Case available at: https://www.icc-cpi.int/drc/lubanga (Last accessed 17 Dec 2017).

[489]See Homepage of the International Criminal Court, Bemba Case available at: https://www.icc-cpi.int/car/bemba (Last accessed 17 Dec 2017).

historic buildings in Timbuktu.[490] That international trials will always take longer than national ones, is obvious due to the different complexity in regard to international crimes; "the sheer size of international trials with multiple crime sites, a high number of distinct charges, often more than 50 witnesses per case, and thousands of pages documentation submitted as evidence on the ground, leading to a high degree of legal and factual compliance".[491] The Court was aware of the problem and the Study Group on Governance established in 2011 proposed to the ICC "to reflect upon measures that could be envisaged in order to expedite the judicial proceedings and enhance their efficiency"[492]; thus, the ICC identified various issues which had to be improved and established another Working Group on Lessons learnt, which would "be open to all interested judges in order to commence work on the issues" with the possibility to amend the Rules of Procedure and Evidence.[493] As a result, amendments to Rule 100, which grants the Court the ability to decide on the place of the proceedings, as well as to Rule 68, which regulates the introduction of previously recorded audio or video testimony of a witness, were proposed and adopted by the Assembly of States Parties.[494] Nevertheless, the activities adopted by the Court to enhance its effectiveness in amending the sometimes problematic and complicated Rules of Procedure and Evidence, reflect only one aspect of the problem. The length of the proceedings is also due to the fact that the Court operates in countries in which the atrocities were committed and investigates all parties to the conflict; this requires the cooperation of the States concerned. The often lacking cooperation combines the second and third and most important implication regarding the above mentioned figures: the small number of suspects who have been arrested and surrendered to the Court. Neither may the proceedings be expedited nor can they be initiated when the States concerned do not cooperate with the Court; with regard to either the arrest and surrender or other forms of cooperation. With regard to the self-referral of Mali, the Court only needed 3 years—from the initiation of the investigation in 2013 to the conviction of the accused in 2016; this is also owed to the schoolbook example of Niger's cooperation, which surrendered the accused to the Court only one week after the arrest warrant was issued.[495]

[490] See Homepage of the International Criminal Court, Al Mahdi Case, available at: https://www.icc-cpi.int/mali/al-mahdi (Last accessed 20 Dec 2017).

[491] Ambach (2015), p. 1283; Phooko (2011), pp. 193–194.

[492] Assembly of States Parties, Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, 23 October 2012, ICC-ASP/11/31/Add.1, para. 1.

[493] See Assembly of States Parties, Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, 23 October 2012, ICC-ASP/11/31/Add.1, para. 3, 13–14.

[494] See Assembly of States Parties, Resolution ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, para. 1–3; It has to be emphasized that in the same resolution amendments 134*bis,* 134*ter* as well as 134*qater* were adopted whereby these amendments were not followed to the roadmap but brought before the ASP by States Parties. See more: O'Donohue (2015), p. 120 et seq.

[495] Homepage of the International Criminal Court, Fact sheet, available at: https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf (Last accessed 20 Dec 2017).

The most well-known example of a State which is completely unwilling to cooperate with the Court constitutes Darfur, Sudan, and the five suspects, against whom arrest warrants have been issued, but none of them have been executed, especially in relation to the President *Al Bashir*, who is charged with allegedly committed Crimes against Humanity, War Crimes and Genocide.[496] The situation of Sudan, a Non-Member State to the Statute, was pursuant to article 13 (b) referred to the Court in 2005 by the SC acting under Chapter VII, determining the incidents in Sudan as a threat to international peace and security.[497] Nevertheless, cooperation cannot be achieved, neither with regard to the cooperation mechanism pursuant to article 89 nor with regard to all other forms of cooperation, article 93.

One year after the SC adopted the resolution, the former Prosecutor *Ocampo* stated in its third report to the SC that

> "the continuing insecurity in Darfur is prohibitive of effective investigation inside Darfur, particular in light of the absence of a functioning and sustainable system for the protection of victims and witnesses" so that "the investigative activities of the Office are therefore continuing outside Darfur."[498]

Ten years later and after two issued arrest warrants against *Al-Bashir* in 2009 and 2010, the new Prosecutor *Fatou Bensouda* addressed to the Security Council that

> my Office's countless appeals to you for action to address the persistent failure of Sudan to comply with its international obligations have not been heeded. I respectfully note that regrettably this Council has been equally consistent in its conspicuous silence over Sudan's non-compliance with its own resolutions.[499]

Furthermore, the Prosecutor highlighted that "grave crimes" are still being committed, thousands of people are internally displaced and that the continuous travelling of *Al Bashir* to several States around the world and the omitted action by the SC regarding the 11 findings of non-compliance sends the wrong message while simultaneously depriving article 87 (7) of its object and purpose.[500]

The latter example highlights the enormous problems which can arise when States do not comply with the requests of the Court, even when these States are additionally obliged to cooperate by virtue of the SC resolution. However, this problem is not a new one. In 2007, former Prosecutor *Ocampo* determined that the non-compliance with the Court's requests and the therefore not complied enforcement of the decisions of the Court constitute the main problem of the ICC. States would rather through all their political negotiations, exclude the justice component from the agenda:

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[496] See Homepage of the International Criminal Court, Al Bashir case available at: https://www.icc-cpi.int/darfur/albashir (Last accessed 17 Dec 2017).

[497] UN Security Council Resolution 1593 (2005), UN Doc S/RES/1593, para.1, 2.

[498] Ocampo (2006), Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 June 2006, p. 2.

[499] Fatou Bensouda (2016), Statement to the United Nations Security Council on the Situation in Darfur, Sudan pursuant to UNSCR 1593 (2005), 9 June 2016, para. 4,5.

[500] *Idem.*

> They believe that ignoring the law is a wise political decision in order to secure stability. They are ignoring the law, as it was ignored when the Rwandan genocide happened in front of our eyes. They are ignoring a law built upon lessons of decades when the international community repeatedly failed to prevent and deter massive atrocities. It is not acceptable. It is not efficient. The law established by the Rome Statute is not just for legal advisors, scholars, Judges, the Prosecutor and the Defence. The Law applies also to political leaders working to seek solutions to international conflicts, military actors, diplomats, negotiators and educators [. . .]. In Rome, States committed to support a permanent International Court whenever and wherever the Court decides to intervene. We cannot be put on the agenda or off the agenda according to the evolving political negotiations in such and such a situation.[501]

The problem described in detail by the former Prosecutor is not new but occurred initially after the First World War with the political decision of the Netherlands not to extradite the former convicted German Kaiser to Germany and ended with the non-execution of umpteen arrest warrants of the ICC.

The challenges the ICC has to face with regard to the non-compliance of States resemble the incidents and experiences the ICTY and ICTR had to deal with. Even though both *ad-hoc* Tribunals are establishments of the SC, which in its resolutions explicitly obliged every UN-Member State to cooperate with the Tribunals, the willingness to cooperate, first and foremost with regard to the ICTY, varied from government to government and was dependent on the current "*Realpolitik*" of the day.[502] While the Bosnian Muslim authorities of Bosnia-Herzegovina, as a logical consequence of the war, cooperated encouragingly, the authorities of Serbia, Serbia and Montenegro and the Federal Republic of Yugoslavia were the most reluctant entities with regard to the cooperation, which constituted a big challenge for the ICTY.[503] The fear that the ICTY would lose its credibility if it could not implement the main intention of its Statute to prosecute persons responsible for those serious violations and to restore peace, was omnipresent. In addition, the former President of the ICTY *McDonald* addressed in 1998 the severe problem which evolved out of the non-compliance of States with regard to key actors like President *Milosevic*, *Karadzic* and *Mladic*, which remained at liberty despite their pending arrest warrants in 1995:

> This international non-compliance has far-reaching consequences for international peace and security. No State should be permitted to act as of it is' above the law. Such transgression is not only unlawful, but importantly sends a message to other States that the measures adopted by the SC can be ignored.[504]

Even though *Milosevic* could be arrested on the 1 of April 2001 and was transferred to the ICTY two and a half months later, *Karadzic* was only arrested and transferred to the ICTY in July 2008 while *Mladic'* presence could only be

[501] Ocampo (2009), p. 18.

[502] See Broomhall (2003), p. 153.

[503] See Rastan (2009), p. 166.

[504] Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005) 17 June 2010, p. 9.

secured in May 2011, 16 years after his indictment.[505] That both fugitives, *Ratko Mladic* and *Goran Hadzic*, could all at once be arrested and transferred to the ICTY by the Serbian authorities, is probably based more on the political role Serbia tried to play in the future with regard to a possible accession to the EU, than on the recognition of the arrest warrants and the requests by the Tribunal. Too much evidence was presented in the past, according to which the Government of Serbia had knowledge about the residence of the suspects but was reluctant to comply with the Tribunal's requests to arrest and surrender them.[506] The foregoing example does not support the original intention of the Tribunal to immediately prosecute those responsible for the worst crimes of mankind. The fact that those accused, despite their arrest warrants, had the opportunity to continue their lives for the past 13 till 16 years, does not promote the reputation of the Tribunal. These elaborations with regard to the Tribunal ICTY certifies the assumption that the compliance of reluctant States with the Tribunal is owed rather to political consideration or could be enforced by the imposition of economic sanctions and the action of bilateral- and multilateral assistance, mostly of the World Bank, the United States and NATO forces, than in the respect of the Tribunal's decisions.[507] This leads to the conclusion that only the interplay between the law on the one side and politics on the other side contributed to the enforcement of the decisions made by the Tribunals.

Even though these problems occurred in the *ad-hoc* Tribunals, it was not possible for the ICC to improve the cooperation system in such a way as to circumvent these past difficulties. On the contrary, due to the fact that the ICC has an even tighter jurisdictional mechanism in that it is a treaty-based body which, in comparison to the SC, does not have the power to oblige every State on the world to cooperate with it but only its Members, and in special circumstances Non-Member States to the Statute. How the Member States of the ICC comply with regard to their obligations stemming from the cooperation and judicial assistance Part 9 of the Rome Statute as well as the Court's reaction in cases where these obliged States do not comply but deny the cooperation with the Court, will be presented in the following. Emphasis will mainly be focused on the SC referral of the situation in Darfur, Sudan, due to the fact that nearly all the judicial findings made by the Court pursuant to article 87 (7) and (5) correspond to this particular referral.

Before analyzing States' cooperation with regard to the requests regarding the SC referrals of Sudan and Libya, Member States' cooperation with regard to the cases/situations in Uganda, the Democratic Republic of the Congo, the Central African Republic, Kenya, Côte d'Ivoire, Mali, Burundi and Georgia shall be outlined.

[505] See Case information sheet of the ICTY: *Milosevic* (IT-02-54), *Karadzic* (IT-95-5/18), *Mladic* (IT-09-92).

[506] See Address Prosecutor Serge Brammertz, International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council (6 December 2010).

[507] See Rastan (2009), p. 167; Broomhall (2003), p. 153.

a. States Cooperation Regarding Self-referrals and Prosecutor's *proprio muto* Investigations

The situation of the Central African Republic (CAR) is determined as "the textbook example of how cooperation ought to take place between States and the Court".[508] In 2004, CAR referred the situation to the Court and in 2007 the Prosecutor opened the investigations against *Jean-Pierre Bemba Gombo*. The arrest warrant against the latter was issued in May 2008 and in July 2008, Belgian authorities complied with the request of the Court and arrested and surrendered him to the ICC.[509] Further proceedings began in another case which involved charges against *Aimé Kilolo Musamba*, *Jean-Jacques Mangenda Kabongo*, *Narcisse Arido*, *Fidèle Babala Wandu* and *Bemba Gombo* for offences against the administration of justice in connection with witness' testimonies allegedly committed in connection with the case of *Bemba Gombo*. Only three, respectively four days after the issuance of arrest warrants against the four suspects, Belgian, French, Dutch and Congolese authorities followed the Court's requests and arrested and surrendered the alleged perpetrators to the Court.[510] In 2014, CAR referred the situation regarding the incidents of renewed violence since 2012 to the Court, which opened its investigations in 2014. On 21 June 2016, Pre-Trial Chamber III sentenced *Jean-Pierre Bemba Gombo* to 18 years imprisonment.

Another successful but slightly different example of cooperation between a Member State and the ICC constitutes the self-referral of the DRC in 2004. Due to the lack of a proper domestic functioning apparatus, the DRC's cooperation was supported by the military and logistical capacity of the international community, first and foremost, the *Mission de l'Organisation des Nations Unies en Republique dèmocratique du Congo* (MONUC).[511] In addition to the mission, Member States like France and Belgium played an essential role in the arrest and/or surrender to the Court. With the support of both the MONUC and the two Member States, the DRC could arrest and surrender four of the six suspects: *Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui* and *Callixte Mbarushimana*. The issued arrest warrant against *Sylvestre Mudacumura* could not yet be executed and the suspect is still at large. *Bosco Ntaganda* was not arrested after the first arrest warrant in 2006 and remained at large; a second arrest warrant followed in 2012 and in March 2013;

[508]Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 8.

[509]See Homepage of the International Criminal Court, Bemba case, available at: https://www.icc-cpi.int/car/bemba#6 (Last accessed 17 Dec 2017).

[510]See Homepage of the International Criminal Court, Case information sheet, ICC-PIDS-CIS-CAR-02-010-15/Eng available at: https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf (Last accessed 17 Dec 2017).

[511]See Rastan (2009), pp. 173–174.

Bosco Ntaganda surrendered himself voluntarily to the ICC, his trial is ongoing.[512] In 2012, *Lubango Dyilo* was the first accused convicted by the Court for the recruitment of child soldiers, followed by *Katanga* in 2014. *Ngudjolo Chui* was acquitted for the charges of Crimes against Humanity and War Crimes, and the case against *Callixte Mbarushimana* was adjusted due to the fact that there was not sufficient evidence which could confirm his criminal responsibility with regard to the alleged commitment of five counts of Crimes against Humanity and eight counts of War Crimes.[513] Despite the fact that the mission had to support the DRC, it was primarily the good will of the Congolese government that the cooperation could be successfully guaranteed and the requests by the Court be executed. It is exactly the latter fact which is the basis for accusations that the ICC only undertakes unilateral investigations, as a consequence shielding the government of the DRC; only the "small fishes" would be the focus of ICC's investigations in cases where the State referred the matter to the Court.[514] This accusation leads to the third situation under investigation, the self-referral of Uganda.

Uganda was the first African State which made a self-referral in 2004. Despite its willingness to cooperate with the Court, the State is unable to arrest the perpetrators due to the fact that the LRA committed the crimes mainly from Sudan[515]; despite the good cooperation by the Ugandan authorities regarding the conduct of investigations, none of the arrest warrants against the original five[516] top members of the Lord's Resistance Army could be implemented since 2005. LRA leader *Joseph Kony* and his commanders *Vincent Otti* and *Dominic Ongwen* remain at large whereby *Ongwen* surrendered himself to the Court, 10 years after the issuance of his arrest warrant. His trial will be opened in December 2016.

The problems the ICC had to face following the referral, mainly from 2006 onwards, were manifold. The judicial proceedings, mainly the issuance of the arrest warrants against the LRA leaders, were accompanied by peace negotiations between the government of Uganda and LRA, which led to the Juba Peace Agreement in 2006.[517] The ICC was asked to postpone the arrest warrants due to the fear that the peace settlement could be endangered; the ICC refused the requests and stressed that

[512]See Homepage of the International Criminal Court, Case information sheet, ICC-PIDS-CIS-DRC-02-011-15/Eng available at: https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf (Last accessed 17 Dec 2017).

[513]See Homepage of the International Criminal Court, Case information sheet, ICC-PIDS-CIS-DRC-04-003-15/Eng available at: https://www.icc-cpi.int/drc/mbarushimana/Documents/MbarushimanaEng.pdf (Last accessed 17 Dec 2017).

[514]See Phooko (2011), pp. 198–190.

[515]See Oola (2015), p. 149.

[516]The ICC issued five arrest warrants, but due to the deaths of *Raska Lukwiya* and *Okot Odhiambo* the proceedings were terminated. See Homepage of the International Criminal Court, Case information sheet, ICC-PIDS-CIS-UGA-001-005-15/Eng available at: https://www.icc-cpi.int/uganda/kony/Documents/KonyEtAlEng.pdf (Last accessed 17 Dec 2017).

[517]In the following see Oola (2015), p. 155 et seq.

it is a judicial institution, ruled by law and not by political decisions.[518] Furthermore and in light of the peace agreement, both Uganda and the LRA attempted to reach a joint agreement, with respect to accountability and also reconciliation, leaving the ICC out; thus, a War Crimes- or respectively International Crimes Division was established in the High Court of Uganda, which shall prosecute individuals responsible for the commitment of international crimes, such as War Crimes, Genocide and also terrorism, piracy and crimes by the Ugandan Penal Code Act.[519] In addition to that, Uganda implemented the Rome Statute 2 years later into its domestic legislation pursuant to "The International Criminal Court Act 2010" which likewise foresees full cooperation with the ICC.[520] What appeared to constitute a positive direction towards complementarity on the one side, has been harshly criticized on the other side.[521] The trial of *Thomas Kwoyelo* by the High Court of Uganda in 2011 demonstrated in several respects that the International Crimes Division was not yet prepared to prosecute crimes on that level. The further Amnesty Act of 2000, which provided amnesty to everyone who had fought against the government since 1986, seemed to be completely ignored during the establishments of the International Criminal Division as well as the ICC-Act of 2010, which resulted in the acquittal of *Kwoyelo* by the Constitutional Court on the grounds that the latter was entitled to amnesty.[522] In 2015, however, the Supreme Court of Uganda overturned the decision and re-opened the trial of *Kwoyelo.*

The foregoing presentation of the situation regarding the self-referral of Uganda has demonstrated how complicated the exercise of jurisdiction may be, despite a willing and cooperative State such as Uganda. The clash of peace versus justice has reached its peak; accusations against the ICC range from prejudice regarding unilateral investigations only against the LRA and not against Uganda, to the prevention of long-lasting peace in that area as well as originator to the absence of the two wanted fugitives.[523] Whether the ICC could improve this image through the trial proceedings against *Ongwen* will be seen in the next years.

Kenya is the first State-Member in which the Prosecutor acted pursuant to his *proprio motu* powers and was authorized to open an investigation regarding the post-election violence in 2007 and 2008.[524] Kenya challenged the admissibility of the Court pursuant to article 19 and claimed that it is willing to prosecute the accused; the ICC rejected the claim and determined that the Kenyan government had to

[518] See Rastan (2009), p. 175.

[519] See Oola (2015), pp. 157–158; Maunganidze and du Plessis (2015), p. 78.

[520] See Maunganidze and du Plessis (2015), p. 77.

[521] See Oola (2015), p. 161 et seq.; Rastan (2009), p. 176.

[522] See Oola (2015), p. 163.

[523] See Rastan (2009), p. 176; Oola (2015), p. 169.

[524] See Homepage of the International Criminal Court, Kenia, available at: https://www.icc-cpi.int/kenya (Last accessed 11 Dec 2017).

demonstrate that it initiated proceedings against the six suspects for the same crime.[525] The suspects against whom the Court investigated were *Uhuru Muigai Kenyatta*, *William Samoei Ruto*, *Joshua Arap Sang, Francis Kirimi Muthaura, Henry Kiprono Kosgey and Muhammed Hussein Ali*. With respect to the latter three suspects, the charges were withdrawn due to the lack of sufficient evidence. In 2013, the Court issued further arrest warrants against *Walter Barasa* and in 2015 against *Paul Gicheru* and *Philip Kipkoech Bett;* all three suspects are charged with offences against the administration of justice in corruptly influencing witnesses regarding cases from the situation in Kenya.[526] The latter charges against the three accused evidently reflect the Kenyan lobbying campaign against the ICC.

Since the time of the admissibility challenge and the subsequent rejection by the Court, the Kenyan government vehemently opposed to cooperate with the Court; instead it tried to suspend the proceedings by applying to the SC twice, in 2011 and 2013, to invoke article 16 and therewith defer the situation for at least 1 year; both requests were rejected by the SC.[527] Meanwhile, the accused *Kenyatta* and *Ruto* were elected as President and Vice-President of Kenya, which made their presence at the trials even more complicated.[528] Nevertheless, *Kenyatta*, *Ruto* and *Sang* appeared before the Court, however, none of them were in the custody of the ICC, and in December 2014 as well as in April 2016 the Court had to withdrew the charges. In 2014, the Prosecutor argued that it had no other choice than to file a notice to withdraw the charges against *Kenyatta* due to the fact that cooperation with Kenyan authorities could not be secured and that crucial documentary evidence was made inaccessible for the Court. Thus, the inability to carry out investigations led to the withdrawal of the case. Two years later, the charges against *Ruto* and *Sang* were likewise withdrawn. The Pre-Trial Chamber V (A) decided that the Prosecutor could not present sufficient evidence.[529] The Chamber did not acquit the accused for what the Prosecutor interpreted as that the

> Chamber endorsed the Prosecution's position that this case has been severely undermined by witness interference and politicization of the judicial process. The decision further noted that other evidence may have been available to the Prosecution had it been able to prosecute the case in a different climate, less hostile to the Prosecution, its witnesses and the Court in general.[530]

[525] See Homepage of the International Criminal Court, Kenyatta case, available at https://www.icc-cpi.int/kenya/kenyatta (Last accessed 11 Dec 2017).

[526] See Homepage of the International Criminal Court, Gicheru and Bett case, available at: https://www.icc-cpi.int/kenya/gicheru-bett (Last accessed 11 Dec 2017).

[527] See Article 16 of the book.

[528] See Grono and de Courcy Wheeler (2015), p. 1235.

[529] See Homepage of the International Criminal Court, Ruto and Sang Case, available at: https://www.icc-cpi.int/kenya/rutosang (Last accessed 10 Dec 2017).

[530] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future, 6 April 2016 available at: https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-160406 (Last accessed 10 Dec 2017).

In all the three cases the Chamber noticed that the termination of the cases is without prejudice to the possibility of presenting the case on the same charges based on new evidence. The example of Kenya, a Member State of the Statute, demonstrates how the judicial proceedings of the Court may end in cases where the State is completely unwilling to cooperate. The charges against the six suspects had to be dropped due to insufficient evidence which the reluctant government of Kenya did not share with the Court. Despite the fact that Kenya claimed the admissibility of the case, in that it was able to carry out the investigations and prosecutions, it did not implement any of its commitments: Kenya did not establish the Special Tribunal nor could the government demonstrate that it was able, through its new Constitution of 2010, "to hold individuals from Kenya's elite accountable".[531] Instead, Kenya tried to sabotage the prosecutions of the ICC whenever it could.[532] Despite the fact that the Chambers and the Prosecutor repeatedly stated that the reluctance of Kenya's cooperation amounted to a failure that "has reached the threshold of non-compliance",[533] the Prosecutor only once applied for a finding with regard to the non-compliance of Kenya, pursuant to article 87 (7) due to Kenya's failure to comply "with the Prosecution's April 2012 request under Article 93(1) of the Statute to produce financial and other records relating to the accused ('Records Request')".[534] The Trial Chamber V (B) rejected the application and considered it inappropriate to refer the matter to the ASP; instead the Chamber concluded that despite the various failure of Kenya to comply with the Prosecutor's request, the Prosecution had not exhausted all judicial measures.[535] Without examining the complete decision of the Pre-Trail Chamber,[536] it has to be determined that the decision is highly problematic. The Chamber interpreted the cooperation mechanism in a different manner and therewith changed the obligation regime against the Court and in favor of the reluctant State. After it had determined that Kenya did not comply with the Court's requests, it did not further focus on the failure by Kenya to cooperate, but it determined that not every conduct of non-compliance would fall within the meaning of article 87 (7).[537] Moreover, the Chamber acknowledged that

[531] *Idem.*

[532] See Grono and de Courcy Wheeler (2015), p. 1235.

[533] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case, 4 December 2015 available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014 (Last accessed 10 Dec 2017).

[534] *The Prosecutor v. Uhuru Muigai Kenyatta,* Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute, Pre-Trial Chamber V (B), ICC-01/09-02/11, 3 December 2014, para. 89.

[535] *Idem,* para. 88–90.

[536] See for detailed analysis of the Pre-Trial Chamber's decision Kreß and Prost (2016), pp. 2038–2041, para. 58–68.

[537] *The Prosecutor v. Uhuru Muigai Kenyatta,* Decision on Prosecution's application for a finding of non- compliance under Article 87 (7) of the Statute, Pre-Trial Chamber V (B), ICC-01/09-02/11, 3 December 2014, para. 39, 40.

article 87 (7) could be under special circumstances applied as a sanction mechanism; however, that would require that the breach of State's non-cooperation is of a serious nature.[538] The Chamber would have to take into account every circumstance, which led to the violation of the State. And then the Chamber shifted the emphasis to the Prosecutor's conduct with regard to his investigations in the given case. It kind of explained the Prosecution how it had to proceed when requesting States for their cooperation, pursuant to article 93, and that it would be on the Prosecutor to clarify the special intent of its request; then the Chamber enumerated the failures, which were made by the Prosecution.[539] The authors *Kreß* and *Prost* correctly stated that "While an evident purpose of article 87 (7) is to sanction non-compliance of States, the Chamber has in essence used the refusal of a referral as a form of sanction against the Prosecution for its perceived failing".[540] Thus, the Chamber determined that in considering the overall interests of justice and integrity of the proceedings, it did not consider it appropriate to refer the matter to the ASP. The Prosecutor appealed against the decision of the Pre-Trial Chamber V (B); in August 2015, the Appeals Chamber reversed the decision to the Trial Chamber to determine, in light of all the relevant factors made by the Prosecution, whether Kenya's non-compliance had to be referred to the ASP.[541]

The Pre-Trial Chamber's decision, regarding the repeated failure of the Kenyan Government to comply with the Court's requests, was especially with regard to the reluctant and the Court sabotaging conduct a very misleading judgement, notwithstanding the fact that the decision did not have a deterrent affect but more a repetitive one.

The Republic of Mali referred the situation to the Court in 2012 and the Prosecutor opened an investigation in 2013 on the territory of Mali. On the 18th September 2015, the Court issued an arrest warrant against *Ahmad Al Mahdi* who is alleged of having committed War Crimes in Mali in 2012; the suspect was arrested and surrendered to the Court by Nigerian authorities and was convicted only 1 year later at the 27 September 2017.[542] That the cooperation was that successful is not surprising as the accused was a member of the Ansar Eddine movement against which the State was fighting. Presently the national Malian Court opened a trial against Mr. Sanago and other alleged perpetrators for crimes committed during the incidents in Mali.[543] In the vein of the principle of complementarity, the Prosecutor encouraged the Malian authorities to continue their efforts while recalling the ICC's

[538] *Idem*, para. 84.

[539] *Ibidem*, para. 85–87.

[540] See Kreß and Prost (2016), p. 2041, para. 66.

[541] *The Prosecutor v. Uhuru Muigai Kenyatta,* Judgement on the Prosecutor's appeal against Trial-Chamber V (B)'s Decision on Prosecution's application for a finding of non- compliance under Article 87 (7) of the Statute, Appeals Chamber, ICC-01/09-02/11 OA 5, 19 August 2015, para. 98.

[542] See Homepage of the International Criminal Court, Case Information Sheet, available at: https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf (Last accessed 17 Dec 2017).

[543] Fatou Bensouda (2016), Statement of the Prosecutor, available at https://www.icc-cpi.int/Pages/item.aspx?name=161201-otp-stat-mali (Last accessed 17 Dec 2017).

jurisdiction with regard to the situation in Mali. It will become apparent how cooperative the government of Mali will be in further cases where the Prosecutor, as reaffirmed, investigates against all the different parties of the conflict.[544]

In 2008, the Prosecutor announced preliminary examination of the incidents in Georgia and submitted a request to the Pre-Trial Chamber for authorization to open an investigation into the situation in and around South Ossetia on 13 October 2015.[545] This *proprio motu* investigation was pursuant to article 15 (3) authorized by the Pre-Trail Chamber I on the 27 January 2016. The Prosecutor will proceed with investigations of alleged Crimes against Humanity and War Crimes committed in the context of an international armed conflict between 1 July and 10 October 2008 in and around South Ossetia. In July 2017 the Registrar of the ICC signed an agreement with the Government of Georgia in order to obtain cooperation and assistance as required by the Member State.[546]

In consultations with the State Côte d'Ivoire which, at the time of the preliminary examinations, was not a Member State to the Statute[547] but declared its acceptance pursuant to article 12 (3) to the Court's jurisdiction in 2003 and reconfirmed it in 2010 and 2011, the Prosecutor was authorized to open investigations on his own initiative in October 2011.[548] The first request by the Prosecutor to initiate investigations regarding the post-electoral violence at the end of 2010, from 28 November 2011 onwards, was expanded in February 2012 and entailed that the Prosecutor was authorized to investigate crimes allegedly committed in the territory of Côte d'Ivoire between 19 September 2002 and 28 November 2011. The issued arrest warrant against former Head of State *Laurent Gbagbo* was immediately executed by the Ivorian authorities who arrested and surrendered the accused to the Court. It constituted a great victory for the ICC to obtain the latter into its custody, even if the cooperation of government was not surprising as they previously consulted with the Court to initiate investigations into the said situation.[549] The former President is accused of having committed Crimes against Humanity in the context of the post-electoral violence in Côte d'Ivoire. While the further issued arrest warrant against *Charles Blé Goudé* was likewise followed in 2014 and both of the cases were joined in order to guarantee the expeditiousness of the proceedings, the arrest warrant against *Simone Gbagbo*, the wife of the former President, has not been executed. Instead, Côte d'Ivoire challenged the admissibility of the case claiming that the State would prosecute the same person for the same conduct in their national courts. The

[544] See Grono and de Courcy Wheeler (2015), p. 1235.

[545] See Homepage of the International Criminal Court, Situation in Georgia available at: https://www.icc-cpi.int/georgia (Last accessed 10 Dec 2017).

[546] Homepage of the International Criminal Court, Press Release, available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1327 (Last accessed 20 Dec 2017).

[547] Côte d'Ivoire ratified the Statute in 2013.

[548] See in the following: Homepage of the International Criminal Court, Situation in the Republic of Côte d'Ivoire, ICC-PIDS-CIS-CI-04-02-15/Eng, available at: https://www.icc-cpi.int/cdi (Last accessed 10 Dec 2017).

[549] See Tull and Weber (2016), p. 8.

challenge of admissibility was dismissed by the Pre-Trial as well as the Appeals Chamber on the ground that the government could

> not demonstrate that concrete, tangible and progressive investigative steps are being undertaken by the domestic authorities of Côte d'Ivoire in order to ascertain Simone Gbagbo's criminal responsibility for the same conduct as that alleged in the proceedings before the Court. Nor does this documentation indicate that Simone Gbagbo is currently being prosecuted by Côte d'Ivoire for the same conduct attributed to her in the case before the Court.[550]

Despite the fact that the Chamber reminded the State of its obligations under the Statute to comply with the request of the Court, Côte d'Ivoire's President *Ouattara* reaffirmed in April 2015 that *Simone Gbagbo* will not be surrendered nor any other accused; all trials which relate to the post-election violence of 2010 and 2011 will be conducted in national courts.[551] The trail against the former First Lady, who is accused for the commitment of War Crimes and Crimes against Humanity, began in May 2016 at the *Cour d'Assises*. The trial was being observed by several Human Rights Organizations in order to guarantee a fair trial, which could finally not be achieved as *Simone Gbagbo* has been acquitted for Crimes against Humanity and War Crimes by an Ivorian court in 2017.[552] "The poor quality of the investigation and weak evidence presented in her trial underscore the importance of the ICC's outstanding case against her for similar crimes, not least as an opportunity for victims of her alleged crimes to obtain justice" to speak in the words of Param-Preet Singh, associate international justice director at Human Rights Watch.[553]

With regard to Burundi, the Court is confronted with a very new situation: After the Prosecutor announced the preliminary examination of the situation in Burundi in April 2016, the Parliament of Burundi determined that it wants to withdraw from the Rome Statute, which became effective on 27 October 2016.[554] On the 25th of October the Prosecutor asked for authorization to open *proprio muto* investigations. The Pre-Trail Chamber III authorized investigations regarding crimes within the jurisdiction of the Court allegedly committed in Burundi or by nationals of Burundi

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[550] *The Prosecutor v. Simone Gbagbo*, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Pre-Trial Chamber I, ICC-02/11-01/12, 11 December 2014, para. 78; *The Prosecutor v. Simone Gbagbo,* Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", Appeals Chamber, ICC-02/11-01/12 OA, 27 May 2015.

[551] See Human Rights Watch (2016), "Côte d'Ivoire: Simone Gbagbo Trial Begins", available at: https://www.hrw.org/news/2016/05/30/cote-divoire-simone-gbagbo-trial-begins (Last accessed 11 Dec 2017).

[552] Human Rights Watch (2017), "Côte d'Ivoire: Simone Gbagbo Acquitted after Flawed War Crimes Trial", available at: https://www.hrw.org/news/2017/03/29/cote-divoire-simone-gbagbo-acquitted-after-flawed-war-crimes-trial (Last accessed 17 Dec 2017).

[553] Human Rights Watch (2017), "Côte d'Ivoire: Simone Gbagbo Acquitted after Flawed War Crimes Trial", available at: https://www.hrw.org/news/2017/03/29/cote-divoire-simone-gbagbo-acquitted-after-flawed-war-crimes-trial (Last accessed 17 Dec 2017).

[554] See Homepage of the International Criminal Court, Burundi, available at: https://www.icc-cpi.int/burundi (Last accessed 17 Dec 2017).

outside Burundi since 26 April 2015 until 26 October 2017.[555] Furthermore, the Chamber determined that the Prosecutor is authorised to extend her investigation to crimes which were committed before 26 April 2015 or continue after 26 October 2017 if the "legal requirements of the contextual elements are fulfilled".[556]

Despite the fact that the ICC has jurisdiction during the above mentioned timeframe and Burundi the obligation to cooperate, it will be very interesting to observe, how the ICC will obtain any kind of cooperation or assistance of a State, which for a time of 12 years was a Member of the Statute but withdrew from the treaty in the moment the Prosecutor initiated investigations against that State.

b. States Cooperation Regarding UN Security Council Referrals

The SC unanimously decided in 2011 to refer the situation in Libya, pursuant to article 13 (b), to the ICC.[557] The Prosecutor conducted a preliminary examination with regard to the incidents in Libya and issued in May 2011 three arrest warrants against *Muammar Gaddafi*, *Saif Al-Islam Gaddafi* and *Abdullah Al Senussi*; all the suspects are accused of having committed Crimes against Humanity in Libya from 15th February to at least 28th of February.[558] As *Muammar Gaddafi* died during the conflict, his arrest warrant was withdrawn. One year after the issuance of the arrest warrants, the Libyan government challenged the admissibility of both the cases concerning *Saif Al-Islam Gaddafi* and *Abdullah Al Senussi.* The first challenge regarding *Saif Al-Islam Gaddafi* was made in 2012 and was rejected by the Pre-Trial Chamber on the ground that

> the Chamber has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr. Gaddafi. The Chamber finds that the present case is admissible before the Court and recalls Libya's obligation to surrender the suspect.[559]

The second admissibility challenge regarding the accused *Al Senussi* was filed by Libya in April 2013, and for the first time the Pre-Trial Chamber judged in favor of an admissibility challenge and declared the case as inadmissible before the Court pursuant to article 17 (1) (a); the Chamber concluded that the domestic authorities are conducting the same case against *Al Senussi* and that Libya demonstrated that is

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[555] Pre-Trail Chamber III, Public redacted version of "Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic Burundi", ICC-01/17-X-9-US-Exp, 25 October 2016, para. 193.

[556] *Idem*, para. 192.

[557] See UN-Security Council Resolution 1970 (2011) UN Doc S/Res/1970.

[558] See Homepage of the International Criminal Court, Situation in Libya, available at https://www.icc-cpi.int/libya (Last accessed 11 Dec 2017).

[559] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, ICC-01/11-01/11, 31 May 2013, para. 219.

it neither unwilling nor unable to genuinely carry out its proceedings with respect to *Al Senussi*.[560] The Appeals Chamber confirmed the Pre-Trial Chamber I's decision. The decision is with regard to the credibility of the Court of paramount importance in order to reject the accusation that the ICC—as a Court of last resort and complementary to national criminal jurisdiction—would in every instance of an admissibility challenge determine that the State is either unwilling or unable and therewith prevent domestic courts to prosecute their own nationals. It further highlights that the Court with due diligence considers all the different aspects of each individual case and that, as a consequence, two different decisions can be taken with regard to one State challenging the admissibility.

Although Libya cooperates with the Court to some extent, it still did not comply with the request to arrest and surrender *Saif Al-Islam Gaddafi* and to return the original documents to the Defence of the suspect, which were seized by Libyan authorities during a visit to the accused; the Chamber noted that "both outstanding obligations are of paramount importance for the Court's exercise of its functions and powers in the present case, and the non-compliance of Libya effectively prevents the Court from fulfilling its mandate".[561] Consequently, the Chamber determined that Libya had failed to comply regarding the two requests and issued pursuant to article 87 (7) a finding of non-compliance and referred the matter to the SC.[562] It is interesting to observe that despite Libya's repeated non-compliance to the requests of the Court, the Chamber explicitly acknowledged the government's commitment to the Court and further recognized that the State did not attempt to block the jurisdiction of the Court.[563] Furthermore, the Chamber explained its finding of non-compliance by determining that the decision was "value-neutral" and should not be interpreted as a sanction or criticism against Libya.[564] The latter statement by the Chamber indicates the ambivalent relationship between the requested State and the Court. Due to the fact that Libya is acknowledging the obligations stemming out of the SC resolution and therewith not fully disregarding the Court's requests for cooperation, the Chamber is very cautious in its assessment with regard to the finding of non-compliance. It appears as if the Court does not want to upset the Libyan government before the latter denies the cooperation with the Court.

The SC received the matter and in the adoption of two different country specific resolutions it referred to the finding of the Court. In the first resolution the SC

[560]See *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi,* Decision on the admissibility of the case against Abdullah Al Senussi, Pre-Trial Chamber I, ICC-01/11-01/11, 11 October 2013, para. 311.

[561]See *The Prosecutor v. Saif Al-Islam Gaddafi,* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, Pre-Trial Chamber I, ICC-01/11-01/11, 10 December 2014, paras. 13, 26.

[562]See *The Prosecutor v. Saif Al-Islam Gaddafi,* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, Pre-Trial Chamber I, ICC-01/11-01/11, 10 December 2014, paras. 4, 33.

[563]*Idem,* para. 31.

[564]*Ibidem,* para. 33.

referred to the Pre-Trial Chamber's decision of a finding of non-compliance and emphasized "*strongly* the importance of the Libyan government's full cooperation with the ICC and the Prosecutor".[565] Furthermore, the SC determined the situation in Libya still as a threat to international security and acting under Chapter VII UN-Charter, the SC called upon the Libyan government to cooperate fully with and provide any necessary assistance to the ICC and the Prosecutor.[566] In September 2015, the SC adopted a further resolution; this time it did not only make reference to the Chamber's decision of 2014 but expressly recalled Libya to immediately surrender *Saif Al-Islam Gaddafi* to the Court.[567] It appears as if the SC for the first time has attempted to fulfill its duty as the one enforcement arm of the Court, while it has to be determined that the reiteration of the State's obligation cannot be equated as a sanction in order to react to the State's failure to cooperate.

It is irrelevant to ask whether the SC would have acted differently, respectively stricter, if the Court had strongly condemned the non-compliance of Libya rather than determining that the finding does not have to be regarded as a sanction but as a reminder for the State to cooperate. Nevertheless, the example of Libya demonstrates that the Court carefully balances its interests: on the one hand it tries to remain practically operative in order to exercise its jurisdiction and on the other hand it applies the sanction mechanism available under the Statute. Whether the documents were referred back to the Defence, as required by the decision of the Chamber regarding the non-compliance of Libya, is not mentioned in any of the reports of the Prosecutor to the SC. That the accused *Saif Al-Islam Gaddafi* is still not in the Court's custody, 3 years after the decision of the Court pursuant to article 87 (7) and after the SC resolutions, is a fact. The previous circumstance that Libya was not capable of arresting the accused as the latter continued to be in custody in Zitan and therewith was still unavailable to the Libyan authorities,[568] could also not be used as a justification anymore as this changed in June 2017; the Office of the Prosecutor got the information that *Saif Al-Islam Gaddafi* was released from custody.[569] In the meantime the Chamber issued another arrest warrant against *Al-Tuhamy Mohamed Khaled*, who is alleged to be responsible for the commitment of Crimes against Humanity and War Crimes.[570] The alleged accused is still not in custody. Four months later, in August 2017, another arrest warrant was issued against *Mahmoud*

[565]UN Security Council Resolution 2213 (2015) UN Doc S/Res/2213.

[566]*Idem,* para. 7.

[567]UN Security Council Resolution 2238 (2015), UN Doc S/Res/2238, para. 12 of the Preamble.

[568]Office of the Prosecutor, Eleventh Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), para. 3, 4.

[569]Fatou Bensouda (2017), ICC Prosecutor calls for arrest and surrender, available at: https://www.icc-cpi.int/Pages/item.aspx?name=170614-otp-stat (Last accessed 17 Dec. 2017).

[570]Homepage of the International Criminal Court, Khaled Case, available at: https://www.icc-cpi.int/libya/khaled (Last accessed 18 Dec 2017).

Mustafa Busayf Al-Werfalli, allegedly responsible for the commitment of War Crimes.[571] Despite the fact that all suspects are still at large, the Prosecutor continuously uses a soft language in her statements to the SC and no further findings regarding the non-compliance of Libya were released. Already in past reports of the Prosecutor, it was expressly and repeatedly stated that the cooperation with the Libyan Prosecutor- General's Office has led to positive results regarding witness and document-based evidence and that the regular working meetings have strengthened the cooperation and assistance between the two Offices.[572] In addition, the Prosecutor highlighted that both Offices would share the burden regarding the investigation and prosecution of former officials who worked under the State apparatus of *Muammar Gaddafi* and that the "valuable exchanges between the Office and Libyan authorities have led the groundwork for continued judicial cooperation".[573] Even in her most recent report to the SC, the Prosecutor expresses "gratitude once again for the collaborative relationship it continues to enjoy with the Libyan Prosecutor- General's office" as well as her meeting with the Libyan Prime Minister "who reaffirmed Libya's commitment to the rule of law and accountability, and to cooperating with the ICC".[574] As already determined, the ICC has an ambivalent relationship to Libya and its "cooperation": despite the exchange of positive and cooperative assessments from both sides and the reiterated call that "Libya's promises of cooperation must be turned in concrete action", all suspects remain at large and "the situation in Libya continues to constitute a threat to international peace and security".[575]

The situation regarding the SC referral of Sudan to the ICC in 2005 has proved to be the most challenging cooperation relationship between the Court and Sudan on the one side and the Court and its Member-States on the other side. In 2005, the International Commission of Inquiry in Darfur informed the SC about the ongoing violent conflict since 2003 and assumed that the atrocities would amount to War Crimes as well as Crimes against Humanity; the foregoing SC resolutions 1556 and 1564 regarding the violence in Darfur and their call to stop the atrocities committed by the government of Sudan were fully disregarded.[576] In light of the terrible atrocities and the fear of another situation similar to Rwanda, the SC made, for the first time since the Rome Statute's entering into force, use of article 13 (b) and referred the situation in Darfur since July 2002 to the ICC. Acting under Chapter VII

[571] Homepage of the International Criminal Court, Al-Werfalli Case, available at: https://www.icc-cpi.int/libya/al-werfalli (Last accessed 18 Dec 2017).

[572] Office of the Prosecutor, Eleventh Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), paras. 12 and 25.

[573] *Idem,* para. 26.

[574] Office of the Prosecutor, Fourteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), paras. 36–37.

[575] *Idem,* paras. 43 and 45.

[576] In the following see: Homepage of the International Criminal Court, Situation in Darfur, Sudan, available at: https://www.icc-cpi.int/darfur (Last accessed 11 Dec 2017); Grono and de Courcy Wheeler (2015), p. 1233.

UN-Charter, resolution 1593 obliged "the Government of Sudan and all other parties to the conflict in Darfur", to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor, despite the fact that Sudan is not a Party to the Rome Statute. With the acquired jurisdiction, the Prosecutor conducted investigations and issued his first two arrest warrants against *Ahmad Muhammad Harun* and *Ali Muhammad Ali Abd-Al-Rahman* in 2007 for the alleged commitment of Crimes against Humanity and War Crimes. In April 2009, the Pre-Trial Chamber I issued an arrest warrant against the sitting Head of the State, *Omar Hasan Ahmad Al Bashir*, for charges of War Crimes and Crimes against Humanity. In 2010, a second arrest warrant followed which entailed the additional charge of Genocide. Further arrest warrants were issued against *Abdel Raheem Muhammad Hussein* in 2012, charged with Crimes against Humanity and War Crimes, and *Abdallah Banda Abakaer Nourain* in 2014, accused of being criminally responsible for the commitment of War Crimes. The latter had already voluntarily appeared, pursuant to a summons to appear in 2009, but decided then to absence from trial, despite the fact the Pre-Trial Chamber I confirmed the charges. The charges against *Bahar Idriss Abu Garda* for War Crimes were not confirmed by the Pre-Trial Chamber I in light of insufficient evidence. Since the first arrest warrants in 2007, all five suspects remain at large.

In its first report to the SC, the former Prosecutor addressed very comprehensively all the different forms of the ICC's investigation-mechanisms in the area of Darfur while, at that time, not being aware of the fact that the referral of the situation in Darfur would become one of the most challenging cooperation matters for the Court so far. One year after its first report, the former Prosecutor confirmed in its third report to the SC in 2006 that

> "the continuing insecurity in Darfur is prohibitive of effective investigation inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses" so that "the investigative activities of the Office are therefore continuing outside Darfur."[577]

After the Court had issued the arrest warrants against *Harun* and *Abd-Al-Rahman* (*Ali Kushayb*) in 2007, the Sudanese Government did not only refuse to comply with the requests to arrest and surrender the two suspects but instead protected them, simultaneously granting *Harun* to remain in his capacity as Minister of State for Humanitarian Affairs; *Kushayb* was reportedly permitted to move freely in Sudan.[578] Furthermore, the former Prosecutor emphasized in his sixth report to the SC that several public statements were made by the Sudanese Foreign Affairs Minister and the Minister of Interior that demonstrated an attitude of reluctance to cooperate with the Court; the government of Sudan would neither presently nor in the future cooperate with the Court due to the fact that "the Prosecutor has no

[577] Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 June 2006, p. 2.

[578] In the following see Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007, paras. 6, 22.

jurisdiction here. He is an intruder".[579] This was the first report in which the Prosecutor notified the SC of the fact that the government of Sudan does not cooperate with the Court and has failed to comply with its legal obligations under the SC resolution 1593. A procedure pursuant to article 87 (7) was not made; the reference to the non-cooperation of Sudan constituted only a notification to the SC. The situation in Darfur did not change, on the contrary; the conflict was still ongoing and the cooperation between the Court and the Sudanese Government practically stagnated. After another report of the former Prosecutor to the SC, in which *Ocampo* vehemently called attention to the fact that

> The GoS has not responded. The GoS is not cooperating with the Court. The GoS has not complied with UNSC 1593. The GoS has taken no steps to arrest and surrender the suspects and stop the crimes,[580]

the President of the SC subsequently released a statement with regard to the non-cooperation matter. Ten days after the Prosecutor's report, the President recalled resolution 1593 while calling attention to the two outstanding arrest warrant against the accused *Harun* and *Kushayb,* urging "the Government of Sudan and all other parties to the to the conflict in Darfur to cooperate fully with the Court [. . .] in order to put an end to impunity for the crimes committed in Darfur".[581] It is interesting to observe, how soft the language was chosen by only "urging" Sudan to cooperate. Why was Sudan only "urged" when the SC resolution 1593 obligated Sudan to cooperate fully? Nevertheless, nothing changed but was only aggravated. After the official arrest warrant against *Al Bashir* for the commitment of Crimes against Humanity and War Crimes, the sitting Head of State expelled international aid agencies as well as Human Rights groups.[582] The fact that the government of Sudan appeared to be completely immune against a possible "threat" resulting from the jurisdiction of the ICC or the action of the SC, was meanwhile obvious. After 3 years of in-action by the Government of Sudan to arrest and surrender the fugitives, the Prosecutor requested the Chamber in 2010 to issue a finding of non-cooperation of the Government of Sudan, pursuant to article 87 Rome Statute, due to the fact that Sudan did not execute the arrest warrants against *Harun* and *Kushayb*.[583] With regard to the non-compliance procedure, the former Prosecutor did not specify whether the Chamber should apply paragraph 5 or paragraph 7 of article 87; the applicability of the latter paragraph underlined the obligations stemming out of the SC resolution making all the provisions of the Statute applicable to

[579] *Idem,* paras. 13 and 14.

[580] Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, para. 5.

[581] Statement by the President of the Security Council, S/PRST/2008/21 (16 June 2008).

[582] See Grono and de Courcy Wheeler (2015), p. 1234.

[583] *The Prosecutor v. Ahamad Muhammad Harun & Ali Mihammad Abd-Al-Rahman, "*Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *The Prosecutor v. Ahamd Harun and Ali Kushayb,* pursuant to Article 87 of the Rome State", Pre-Trial Chamber I, ICC-02/05-01/07, 19 April 2010.

Sudan, or with regard to paragraph (5), the resolution constituted the "other appropriate basis", so that a procedure pursuant to paragraph (5) (b) was likewise be pertinent.[584] Pursuant to *Ocampo*, both possibilities would lead to the same result, namely "that the Chamber should proceed to enter a judicial determination of a failure by the Government of Sudan to comply with its obligations towards the Court".[585] Although the Pre-Trial Chamber did not decide on whether to apply paragraph 5 or 7 of article 87, it determined that the Court would have the inherent power to inform the SC in case Sudan failed to cooperate with the Court, thereby preventing the latter from exercising its jurisdiction; thus the Chamber ordered the Registrar to transmit the decision regarding the non-compliance of Sudan to the SC in order "to take any action it may deem appropriate".[586] Despite the fact that the non-cooperation of Sudan was applied pursuant to article 87, it did not constitute a judicial finding of non-cooperation with respect to the actual interpretation of the procedure regarding article 87 (7); first of all, it is the President of the Court which has to refer the matter to either the SC or the Assembly of States Parties and, secondly, the matter was not referred to the SC but served more as information, respectively a communication to the Council.[587] Three more of such communications were issued to the SC as well as to the Assembly of States Parties regarding the visits of President *Al Bashir* to Member States such as Chad, Kenya and Djibouti to remind them of their inherent obligation to arrest and surrender him.[588] Except for the note of the Secretary General that he would convey the communication to the SC, no action was taken by the latter.

Contrary to the foregoing non-cooperation determinations by the Prosecutor, respectively the Pre-Trial Chamber, which had been more informative in character, the further visits of the Head of State *Al Bashir* to Member States such as Malawi,

[584] *Idem,* paras. 52–56.

[585] *Ibidem*, para. 60.

[586] *The Prosecutor v. Ahamad Muhammad Harun & Ali Mihammad Abd-Al-Rahman,* Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I, ICC-02/05-01/07, 25 May 2010.

[587] See Verduzco (2015), p. 46; Kreß and Prost (2016), p. 2037, para. 54. Other authors, such as *Sluiter and Talontsi* and the Expert Workshop Group subsume also these communications under judicial findings with respect to article 87 (7). See Sluiter and Talontsi (2016), pp. 82–84; Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 27.

[588] See Verduzco (2015), p. 47; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision informing The United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre-Trial Chamber I, ICC-02/05-01/09, 12 May 2011; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision informing The United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision informing The United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010.

Chad, the DRC, Nigeria or South Africa changed in this respect. The fact that *Al Bashir* was peacefully travelling around the world and visited conferences in Member-States to the Rome Statute, which were obliged to comply with the Court's requests to arrest and surrender Sudan's President, could not remain without any action. In 2011, the Court made two judicial findings regarding the non-compliance of Malawi as well as of Chad to arrest and surrender the accused, and the President of the Court referred both matters to the SC as well as to the Assembly of States Parties.[589] Without analyzing the content of the two decisions, due to the fact that this has been done elsewhere,[590] it should be mentioned that the Chamber rejected both the arguments presented by Malawi as well as by Chad, which stated that they could not arrest and surrender President *Al-Bashir* because his personal immunities were not relinquished neither by article 27 nor with respect to the decisions adopted by the AU.[591] The Chamber concluded that customary international law provides for an exception regarding personal immunities, when an international court is prosecuting international crimes. Furthermore, the Chamber stated that both States should have consulted with the Court, pursuant to article 97, which they likewise had omitted to do. Thus, the Chamber decided that both Malawi as well as Chad failed to consult with the Court regarding the issue of *Al-Bashir*'s immunity and failed to cooperate with the Court in not complying with the Court's requests to arrest and surrender the suspect. Therefore the Pre-Trial Chamber I referred the matter to the President of the Court who responsibly transferred the decisions to the SC as well as to the Assembly of States Parties. With regard to the mechanism provided by the Assembly of States Parties, the President of the Assembly took action pursuant to article 14 (b) of the Assembly procedures relating to non-cooperation and sent two letters to the Foreign Ministers of Malawi and Chad, which had to justify their conduct of non-cooperation and had to respond within two weeks.[592] While the Member State Malawi was very cooperative and willing to meet its obligations under the Statute, the correspondence with Chad was problematic. The Permanent Representative of Chad reaffirmed that Chad had not violated its obligations and the Representative made clear that Chad would comply with the decision of the AU, which obliges AU Members not to cooperate with the ICC pursuant to article 98 for

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

[590] See "Article 27" of the book, p. 85 et seq.

[591] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision pursuant to article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 13 December 2011, para. 12–14.

[592] In the following see: Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/11/29, 1 November 2012, para. 4 et seq.

the arrest and surrender of President *Al Bashir*.[593] While the position of Chad remained the same in that they adhered to the principles of international law pertaining to immunities for Head of States, the Malawian authorities decided to deny to host *Al Bashir* at the upcoming AU summit; as a result the summit was rescheduled and hosted in Ethiopia.[594] Despite the fact that none of the States were sanctioned for having violated their obligations under the Rome Statute, the efforts of the President of the Assembly led at least with regard to the Member-State Malawi to a non-repetition of this conduct.[595] The SC did not react to the non-compliance of the two Member-States, despite the fact that it was the institution itself which referred the situation of Sudan to the Court in 2005. In the consultations with the President of the Security Council as well as with Members of the Rome Statute, the President of the Assembly raised the issue of non-cooperation but realized that the SC would not take action. Consequently, it can be positively confirmed that at least the diplomatic pressure by the President of the ASP on Malawi prevented the State from hosting the fugitive President *Al Bashir*.

As the Member State Chad assumed to be aware of its conduct, which conformed to international law and the decision of the AU regarding President *Al-Bashir*'s immunity, it is not surprising that the subsequent judicial finding was made with regard to the non-compliance of Chad to arrest and surrender *Al Bashir* on two different occasions within 1 month in 2013. Despite the fact that Chad was informed by the Registry about *Al Bashir's* visit and reminded of its obligation to arrest and surrender the suspect, *Al Bashir* was nevertheless permitted to enter Chad's territory and was neither arrested nor surrendered.[596] After the repeated incident, the New York Working Group met to discuss the non-cooperation and delegates urged Chad not to deny the requests by the Court.[597] However, one week afterwards, Sudan's President visited the Republic of Chad once again but was likewise not arrested or surrendered to the Court. The further incident that Chad was not willing to transmit its observations concerning *Al Bashir's* visit within the time given by the Court, resulted in a kind of sanctionary decision in that the Chamber determined that it "considers that the republic of Chad has waived its right to be heard on the matter pursuant to regulation 109 (3) of the Regulations, and accordingly, the appropriate

[593]See Decision on the meeting of African State Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (xiii), 9 July 2009.

[594]*Idem,* para. 9,10.

[595]See Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 38.

[596]See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the court regarding the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 26 Match 2013, para. 7, 8.

[597]Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/12/34, 7 November 2013, para. 13.

remedy is to disregard its observations".[598] Consequently, the Pre-Trail Chamber II found that the Republic of Chad had failed to consult with the Court and failed to cooperate with the Court in arresting and surrendering President *Al Bashir*; the matter was then referred to the SC and the Assembly of States Parties. All the actions taken by the President of the Assembly were without consequence regarding the reluctant State Chad; neither the pressure of publicly condemning Chad's non-compliance in issuing a press release nor the meeting with the President of the SC lead to any measures forcing the cooperation of Chad. Despite the adjuring request to the President of the SC, to act on the non-complying Member State Chad, the SC remained silent.

In the same year, Nigeria failed to arrest and surrender *Al Bashir* during his visit to the Summit of the AU on HIV/AIDS, Tuberculosis and Malaria. Regarding the outstanding arrest warrant against *Hussein* from 2012, Chad and the Central African Republic failed to comply with the request of the Court pursuant to article 89. In all three cases of non-compliance, the Chamber decided not to refer the matter to either the SC or to the Assembly of States Parties.[599] Instead, the Chamber was satisfied with the explanations made by the Member States. The Federal Republic of Nigeria regretted its failure to comply with the Court's request by stating that "the sudden departure of President Al-Bashir prior to the end of the AU Summit occurred at the time that officials [. . .] of Nigeria were considering the necessary steps to be taken in respect to his visit in line with Nigeria's international obligations".[600] Furthermore, Nigeria claimed that it had not invited the Sudanese President and that it is committed to cooperate with the Court in its fight against impunity. Thus, the Chamber decided that it would not be warranted to refer the matter to the SC or ASP. The explanation made by Chad was similar to Nigeria's explanation in that Chad determined that it only became aware of the presence of *Hussein* when the accused had already left the territory of Chad.[601] The circumstances pursuant to which the Central African Republic failed to arrest and surrender the accused *Hussein* differentiated completely from the explanations made by Nigeria and Chad. The Central African authorities claimed that due to the lack of judicial police and any judiciary, there had been no capacity to secure the arrest of the accused, who additionally only remained in the country for a couple of hours.[602] The Chamber made clear that "political changes do not *per se* release the State from its international obligations

[598] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the court regarding the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 26 March 2013, para. 19.

[599] See Kreß and Prost (2016), pp. 2037–2038, para. 55, 56.

[600] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Cooperation of the Federal Republic of Nigeria regarding Omar Al-Bashir's arrest and surrender to the Court, Pre-Trial Chamber II, ICC-02/05-01/09, 05 September 2013, para. 12.

[601] See Kreß and Prost (2016), p. 2038, para. 56.

[602] See *The Prosecutor v. Abdel Raheem Muhammad Hussein,* Decision on the Cooperation of the Central African Republic regarding Abdel Raheem Muhammad Hussein's arrest and surrender to the Court, Pre-Trial Chamber II, ICC-02/05-01/12, 13 November 2013, para. 11.

towards the Court", but the Chamber did not deem it necessary to make a finding of non-compliance.[603] Despite the fact that all the three incidents of non-cooperation were not referred to the Assembly of States Parties, it has to be emphasized that the President of the Assembly of States Parties, nevertheless, sent letters to the Foreign Ministries of the three Member States and met with their representatives of the latter to discuss the matter of non-cooperation.[604]

Another visit of President *Al Bashir* was to the DRC to attend the "Common Market for Eastern and Southern Africa summit in Kinshasa".[605] The DRC was informed about the visit of *Al Bashir* by the Registry on the same day, as *Al Bashir* attended the summit. One day later, the President left the country without being arrested and surrendered to the Court. The explanation of the DRC entailed three justifications on which it tried to explain the non-cooperation: Firstly, the DRC argued that it had two contracting obligations, one as a Member under the Statute and one pursuant to its Membership to the AU. The second argument was that the Sudanese President had not been invited by the DRC but by the regional organization while it was, thirdly, "materially impossible" to arrest the President due to the fact that the latter had left the next morning after the DRC was informed about his visit.[606] Regarding the latter argument of insufficient time, the government of the DRC added that it would have—under different circumstances—consulted with the Court. The Chamber rejected all the three arguments. With regard to the applicability of article 98 (1), which was thoroughly examined in Part I,[607] the Chamber determined that the SC implicitly lifted the immunities of President *Al Bashir* through the SC resolution 1593, so that pursuant to article 103 UN-Charter the obligations out of the SC resolution prevailed over the obligations pursuant to the AU decision. Furthermore, the Chamber stated that the invitation of a regional organization would not excuse the DRC of its obligations under the Statute; it could be assumed that the State had to have knowledge of such a visit by a President. In light of the "insufficient-time" argument, claimed by the DRC, the Chamber deviated from its determination with regard to the non-cooperation of Nigeria, which had explained its non-cooperation along the same lines argument. In this case, the Chamber concluded that the DRC could not claim that the request to arrest and surrender "came as a surprise" because the "DRC was put on notice about the Court's pending requests for more than four years and the fact that *Omar Al-Bashir* left *only* one day after the

[603] *Idem,* para. 13.

[604] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/12/34, 7 November 2013, para. 12.

[605] In the following see: *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al-Bashir's arrest and surrender to the Court, Pre-Trial Chamber II, ICC-02/05-01/09, 09 April 2014, para. 5 et seq.

[606] *Idem,* para.12.

[607] See "Article 27" of this book, p. 88 et seq.

notification" could not be an excuse.[608] As a result, the Chamber recalled article 87 (7) and decided that the DRC had failed its obligation to arrest and surrender the President of Sudan and therewith prevented the Court from exercising its functions and powers under the Statute. The matter was referred to the SC as well as to the ASP. The latter consulted with the DRC, which reaffirmed that it was willing to cooperate fully with the Court. Furthermore, Member States of the ICC addressed the importance of the cooperation with the Court at the 19th session of the Universal Periodic Review and called on the DRC to comply with the Court's requests.[609] With the political pressure in the background, the DRC assured that it would fully cooperate with the Court especially with regard to the execution of arrest warrants. Despite the fact that the SC was once again reluctant to act on the further non-cooperation by a Member State, a little progress could be achieved through the persisting requests made by the President of the Assembly of States Parties to the President of the SC. In recalling all the previous judicial findings and communications of non-cooperation to the SC and the latter's omitted action with regard to the obligation-breaching States, the SC made for the first time reference to the importance of the cooperation to the ICC. The Council determined in its adopted country specific resolution 1247 that the DRC needed to cooperate with the ICC and had to actively seek "to hold accountable those responsible for War Crimes and Crimes against Humanity in the country and of regional and international cooperation to this end".[610] It is not a resolution sanctioning the State, nor does the resolution relate only to that matter. Nevertheless, the Council reaffirmed the obligations regarding SC resolution 1593 and expressly stressed the importance of the DRC to cooperate with the ICC.

It is interesting to observe that Chad changed its attitude towards the Court, first and foremost, in relation to its cooperation obligations. In 2014, President *Al Bashir* once again visited the country to address the forum of tribes living in the border of Sudan and Chad.[611] The Chamber did not make a finding to that effect due the fact that the Sudanese President did not enter Chad at the time the Prosecutor asked for action; it only reminded the Member State of its obligations. Despite the fact that the President was nevertheless allowed to enter Chad, the latter informed the Member States and observers at the New York Working Group about the fact that the visit of the President should not be assessed as a refusal to cooperate with the Court but that his presence was important in the context of border security imperatives and that Chad was the mediator with regard to specific peace agreements. Furthermore, the

[608] In the following see *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al-Bashir's arrest and surrender to the Court, Pre-Trial Chamber II, ICC-02/05-01/09, 09 April 2014, para. 14.

[609] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/13/40, 5 December 2014, para. 22.

[610] UN Security Council Resolution 2147 (2014) UN Doc S/RES/2147, para. 22 of the Preamble.

[611] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision regarding Omar Al Bashir's Potential Visit to the Republic of Chad, Pre-Trial Chamber II, ICC-02/05-01/09, 25 March 2014, para. 8.

representative of Chad reaffirmed its support to the ICC and highlighted the ongoing consultations pursuant to article 97.[612] In comparison to the reluctant behavior of the Member State presented years before, it could be assumed that either the diplomatic measures provided by the President of the Assembly of States Parties or the official Pre-Trial Chamber decisions of judicial findings on non-compliance changed something with regard to the conduct of Chad towards the ICC.

Six years after the first issuance of an arrest warrant against the Sudanese President *Al Bashir*, the Court decided for the first time to issue a judicial finding of non-compliance against the Republic of Sudan to arrest and surrender the Sudanese President.[613] The Chamber emphasized all the various occasions in which the authorities of the Sudanese Government fervently affirmed that they did not accept the jurisdiction of the Court, that they would not exchange any documents, that they would not even send a Lawyer representing the State in front of the Court or that they would arrest and surrender *Al Bashir*.[614] Moreover, the Chamber determined that all the accusations surrounding the non-existing jurisdiction of the Court were false due to the fact that Sudan was bound by the treaty by virtue of the SC resolution 1593 and had thus the obligation to cooperate with the Court pursuant to articles 86 and 89. The non-complying conduct of Sudan would impede the Court from exercising its mandate under the Rome Statute as well as pursuant to the SC resolution. The decision of the Chamber was not only addressed to the State Sudan but also to the SC. With regard to the possibility to make use of an article 13 (b) trigger mechanism, the Chamber directed its further assessment to the SC and determined importantly:

> When the SC, acting under Chapter VII of the UN Charter, refers the situation in Darfur, Sudan to the Court as constituting a threat to international peace and security, it must be expected that the Council would follow-up by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of Sudan to cooperate in fulfilling the Court's mandate as entrusted to it by the Council. Otherwise [. . .] any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to out an end to impunity. Accordingly, any such referral would become futile.[615]

The Chamber referred further to regulation 109 (3) of the Regulations of the Court, which states that the State has to be heard before the Chamber makes a finding to that effect, and determined that Sudan had waived its right to be heard due to its constant reluctance to cooperate over the past 6 years; with respect to article 87 (7), the Chamber concluded that Sudan had failed to cooperate with the Court regarding

[612] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/13/40, 5 December 2014, para. 24.

[613] See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecutor's request for a finding of non-compliance against the Republic of Sudan, Pre-Trial Chamber II, ICC-02/05-01/09, 9 March 2015.

[614] *Idem,* paras. 9–13.

[615] *Ibidem,* para. 17.

the arrest and surrender of the Sudanese President *Al Bashir* and referred the matter to the SC, which should take appropriate measures with regard to the incident.

Following this decision, the Pre-Trial Chamber decided 3 months later on Sudan's failure to comply with the Court's request regarding the arrest and surrender of *Abdel Raheem Muhammad Hussein*.[616] The decision contained the same explanation as with regard to the failure to arrest and surrender the Sudanese President. The Chamber recalled article 87 (7) and determined that Sudan had failed to comply with the request of the Court to arrest and surrender the accused *Hussein*, who had recently been appointed as Governor of Khartoum. The Chamber confirmed that "the Court does not remain silent or inane" with regard to that matter and therefore referred the finding of non-compliance of Sudan with regard to the arrest and surrender of *Hussein* to the SC.[617]

As the Chamber referred both matters to the SC only and not to the Assembly of States Parties, the latter did not proceed with regard to that matter, irrespective of the fact that Sudan completely neglects and rejects any kind of diplomatic relationship; the Sudanese Embassy did not even accept the delivery of a Note Verbale by the Court, regarding another incident of non-cooperation, so that the Note was returned to the Registry.[618] The SC still did not take any measures with regard to the non-cooperation of Sudan regarding the requests to arrest and surrender *Al Bashir* and *Hussein*. In her report to the SC in 2016, the Prosecutor *Bensouda* insistently pleaded to the SC that it has not taken any measures regarding its own referred situation to the Court since 2005 and that this failure by the Council would send the wrong message to the "would-be-perpetrators"; there will be no deterrent effect "if those against whom international warrants have been issued for the world's most egregious crimes can travel freely, and without any repercussions for those who facilitate, or worse, keep suspects of atrocity crimes as company".[619] Furthermore, the Prosecutor highlights that the non-compliance constitutes equally a violation of the obligations stemming from the resolution and not just of the Rome Statute. The Council will promote the non-compliance with SC resolutions if it does not take the appropriate measures against such a violation; some UN-Member States already at this point expressed pride in their conduct to disregard the Council's authority.[620]

But the failure to cooperate does not stop at this point. A few remarks shall be made with regard to further Member States, such as Djibouti and Uganda, which in 2016 likewise refused to comply with the requests of the Court to arrest and

[616] See *The Prosecutor v. Abdel Raheem Muhammad Hussein,* Decision on the Prosecutor's request for a finding of non-compliance against the Republic of Sudan, Pre-Trial Chamber II, ICC-02/05-01/12, 26 June 2015.

[617] *Idem,* para. 11.

[618] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/14/38, 18 November 2015, para. 19.

[619] Statement of ICC Prosecutor Fatou Bensouda to the United Nations Security Council on the Situation in Darfur, Sudan pursuant to UNSCR 1593 (2005), 9 June 2016, para. 11.

[620] *Idem,* para. 12.

surrender *Al Bashir*. But most importantly the Chambers decision of 2017 regarding the failure of South Africa to cooperate with the Court in 2015 will be highlighted.

In May 2016, *Al Bashir* continued travelling around the continent and attended inaugurations of both the Presidents of the Republic of Djibouti and Uganda. Both are Members to the Rome Statute and both did not arrest and surrender *Al Bashir* to the Court. In the Chambers view, both their observations with respect to their failure to arrest and surrender the President of Sudan did not justify their non-cooperation; despite the perennial argument of Al-Bashir's attached personal immunity, Djibouti claimed that its national laws lack for procedures to arrest and surrender such suspects while Uganda tried to justify their non-compliance with a political-peace argument.[621] The Chamber rejected both the latter's arguments but highlighted the inapplicability of article 98 (1) due to the fact that the SC would have implicitly waived the immunity pursuant to its resolution 1593 so that it came to the conclusion that both States failed to comply with their obligations arising out of the Statute, thereby preventing the Court from exercising its jurisdiction; the Chamber further made a finding to this effect and referred both matters to the ASP as well as SC.[622]

The decision of the Pre-Trail Chamber II regarding the non-compliance of South Africa is for some reasons interesting. In 2015, *Al Bashir* attended the African Summit in South Africa. Despite the fact that South Africa, a Member State of the Statute, was informed about *Al Bashir's* visit as well as being reminded by the Chamber of its obligation to arrest and surrender *Al Bashir* during his visit, the South African authorities did not comply with the request but relied on the personal immunities of the Sudanese President; the latter had visited the Summit especially in capacity of his status as President.[623] The media reported extensively about *Al Bashir's* visit to South Africa and civil societies obliged South Africa to arrest and surrender the President. In September 2015, South Africa was given the opportunity to be heard on that matter. Due to the fact that South African Courts were litigating

[621] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision of the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, Pre-Trial Chamber II, ICC-02/05-01/09, 11 July 2016, para 10; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision of the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, Pre-Trial Chamber II, ICC-02/05-01/09, 11 July 2016, para 14.

[622] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision of the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, Pre-Trial Chamber II, ICC-02/05-01/09, 11 July 2016, paras. 17, 18; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision of the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, Pre-Trial Chamber II, ICC-02/05-01/09, 11 July 2016, para. 16–17.

[623] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/14/38, 18 November 2015, para. 12, 13; Tull and Weber (2016), p. 7.

on that case, the request of the State to extend the time-limit until the judicial proceedings before the South African Courts were completed, was granted. In March 2016, the Supreme Court of Appeal of South Africa rendered its judgement and determined that *Al Bashir* was not entitled to immunity due to the fact that the Government of South Africa implemented its obligations of the Rome Statute by passing the Implementation Act, which relinquishes any immunities in front of South African Courts prosecuting international crimes as well as with regard to the cooperation with the ICC by way of arrest and surrender of individuals charged with the core crimes of the ICC; the Supreme Court concluded that South Africa violated its obligations pursuant to the Rome Statute as well as with regard to section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 and that the omission to arrest and surrender *Al-Bashir* was unlawful.[624] South Africa appealed the Decision of the Supreme Court but then decided to withdraw it with the result that the decision has become the final one. In July 2017, the ICC likewise ruled on the failure of South Africa to arrest and surrender Al-Bashir with some very new modifications compared to all its other decisions. Firstly, the Chamber based its argument for the inapplicability of article 98 (1) on the direct applicability of article 27 (2) to Sudan, with the reference that the State Sudan had "rights and duties analogous of those of Sates Parties to the Rome Statute".[625] Through the SC resolution 1593 the jurisdiction of the Court was triggered and as the Court was bound by and applies its own Statute, the latter became applicable to Sudan for the special situation referred to it by the SC.[626] Thus, as immunities were no longer attached to the President of Sudan, no conflicting obligations would arise with regard to article 98 (1) due to the fact that the abolishment of immunities applied for Member States at the vertical as well as horizontal level. Interestingly the Chamber did not only alter its determination made in decisions on the non-compliance of the DRC, Djibouti and Uganda, but expressly refuted the assessment that it would have been the implicit or explicit waiver by the SC, which led to the abolishment of Al-Bashir's immunity; such a waiver was not needed due to the fact that it would be article 27 (2) which applied through the trigger mechanism of the SC resolution 1593.[627]

The second and third interesting observations regarding the Chambers decision are connected to each other. Despite the fact that the Chamber concluded that South Africa failed to comply with its obligations under the Statue, it profoundly proved whether it would like to make a finding to that effect and whether a referral of

[624] *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre,* The Supreme Court of Appeal of South Africa, Judgement, 15 March 2016, para.103, 113.

[625] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under 87 (7) of the Rome Statute on the non-compliance South Africa with the request to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 88.

[626] *Idem,* paras. 86–91.

[627] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 96.

the matter to the ASP and SC would be warranted.[628] The fact that South Africa was the first Member State, which invoked article 97 to consult with the Court on the determination of conflicting obligations under international law and simultaneously "presented extensive written and oral legal arguments" played an essential role in the Chamber's discretion to refer further the matter or not; the invocation of article 97 did not only impress the Chamber but was assessed to be of "significance".[629] The further fact that the South African Court had already ruled that South Africa breached its national as well as international obligations and South Africa accepted that decision in withdrawing its appeal, was sufficient evidence for the Chamber that South Africa would be henceforth aware of its obligation to arrest and surrender the Sudanese President, so that the Chamber decided that a referral of the matter would not be warranted.[630] But the latter determination was not the only reason why a referral of the matter to the ASP and SC would not be warranted which leads to the third very interesting and likewise surprising statement made by the Chamber. The Chamber highlighted the six instances, in which the matters of the State Members' non-compliances have been referred to the ASP and SC and the manifold meetings of the SC, without any measures taken against these States, the Chamber concluded that "a referral of South Africa is not warranted as a way to obtain cooperation".[631] Without interpreting too much into this last statement it would be a disaster for the Court, if the Judges of the Chamber already at this stage would be disillusioned by the reluctance of the two executive arms of the Court to take action and therefore not refer any matters to the ASP or SC anymore. This determination made by the Chamber was certainly owed to the special situation with regard to South Africa, because with respect to the further failure of the State Jordan to arrest and surrender Al-Bashir to the Court, the Chamber recently reaffirmed its South African ruling regarding the jurisdiction of the Court and decided under article 87 (7) that Jordan failed to comply with the Court's request to arrest and surrender Al-Bashir and that this matter will be referred to the ASP as well as SC.[632]

With respect to the traveling of Al Bashir to States, which are not Members to the ICC, such as, *inter alia*, Kuwait in 2013 and 2014, Ethiopia in 2014, 2015, 2016, Qatar in 2014 and 2016, Egypt in 2014, 2015, 2016 and Saudi Arabia in 2014, 2015, 2016 the Chamber has issued decisions inviting the competent authorities of these States to arrest and surrender the Sudanese President by virtue of the SC resolution

[628] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, paras. 124 ff.

[629] *Idem,* paras. 128–129, 139.

[630] *Ibidem,* paras.137 and 139.

[631] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 06 July 2017, para. 138.

[632] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request of the Court to arrest and surrender Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, paras. 54, 55.

1593. Except for Kuwait, no State has responded to the Chamber's invitation.[633] This invitation is in conformity with both the Rome Statute as well as the SC resolution. Although the latter recognized the status of Non-Member States to the Statute, it only "urged" these States to cooperate fully. Article 87 (5) (a) determines that Non-Member States to the Statute may only be invited to provide assistance on the basis of an ad hoc arrangement, an agreement or on any other appropriate basis. As it was determined in the analysis of article 87, the SC resolution falls within the meaning of another appropriate basis, the Chamber therefore acted consistently in only inviting these States to cooperate.

c. Interim Result

The analysis of the international cooperation and judicial assistance section with regard to States practice has demonstrated that the implementation of Part 9 is highly dependent on the States and their political interest and willingness to cooperate with the Court. As the honorable Judge *Kaul* correctly stated, the ICC can "be only as strong as the states parties make it."[634] In light of the foregoing statement, the Court could be a very effective and powerful institution if all States cooperated in the same manner as the Central African Republic, which referred the situation to the Court and instantly cooperated and executed the requests of the ICC. The accused *Jean-Pierre Bemba Gombo* was sentenced to 18 years imprisonment while the other trials are still ongoing. In respect to the self-referral of the DRC, it could be examined how effective the cooperation relationship between a Member State and the ICC can be, regardless of the fact that the DRC was unable to grant the Court the full cooperation it had asked for. With regard to the investigation in the territory of the DRC, the latter did everything to comply with its obligations pursuant to article 93 et seq. But regarding the arrest and surrender of the suspects, the DRC was unable to solely implement the requests. The DRC's political will to cooperate with the ICC through the enforcement power of the MONUC as well as with the support of States like France and Belgium, led to the arrest and surrender of four out of five suspects. Two of the four accused were convicted by the Court, while the conviction of *Thomas Lubanga Dyilo* constituted the first of the ICC. The trial against *Bosco Dyilo* is ongoing. The same cooperative behavior could be verified with regard to the self-referral of Mali as well as with regard to the situation of Côte d'Ivoire, in which both States with undue delay complied with the requests to arrest and surrender the suspects. With regard to the latter State the situation differed from that of Mali, as Côte d'Ivoire challenged the admissibility of the case regarding the subsequent

[633] See Assembly of States Parties, Reports of the Bureau on non-cooperation, ICC-ASP/13/40, 5 December 2014, para. 14-17 and ICC-ASP/14/38, 18 November 2015, para. 21, 22; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Report of the Registry on information regarding Omar Al Bashir's travels to State Parties and Non-States Parties, Pre-Trial Chamber II, ICC-02/05-01/09, 11 April 2017, paras. 3–28.

[634] Kaul (2007), p. 580.

request of the ICC to arrest and surrender *Simone Gbagbo*. Despite the fact that the Pre-Trial Chamber rejected the admissibility challenge, Côte d'Ivoire did not comply with the request. Instead, the Ivorian Government claimed that *Simone Gbagbo* would be prosecuted in its own domestic courts what resulted in her acquittal. The latter example demonstrates that the willingness to cooperate with the Court is only granted to a specific extent; it seems as if the State does not consider the obligation to cooperate as mandatory.

The situation of the first African self-referral of Uganda started out as promising as Uganda cooperated extensively with regard to the conduct of investigations in its territory, which lead to the issuance of five arrest warrants against the top LRA commanders. Nevertheless, none of them could be arrested and surrendered to the Court; only *Dominic Ongwen* appeared 10 years after his arrest warrant voluntarily before the ICC. The previously enjoyed cooperation between the ICC and Uganda shifted from a judicial to a political agenda, and the clash between justice and peace resulted in the fact that no international consensus could be reached on how to proceed with that situation.[635] Moreover, the situation of Kenya demonstrates the negative impact on the exercise of the Court's jurisdiction, if a State is completely reluctant to cooperate with the latter. The most apparent reason for this negative cooperation example is that it was the Prosecutor who initiated investigations *propio muto;* Kenya was completely against such intervention of the ICC and challenged the admissibility of the case, which was dismissed by the Court. Ever since, Kenya has attempted to block the jurisdiction of the Court by applying all kinds of political actions and legal justifications to underline its reluctance to cooperate with the Court. The Prosecutor only applied article 87 (7) once and requested the Chamber to decide on a finding regarding the failure of Kenya to comply with the requests of the Court with respect to article 93. Incomprehensively, the Chamber determined that such a finding was not warranted, what ultimately led to the circumstance that the charges against the three accused *Kenyatta*, *Ruto* and *Sang* had to be dropped due to the fact that the Prosecution did not have sufficient evidence which the Kenyan authorities made inaccessible for the Court. The case of Kenya demonstrates that the Court can have jurisdiction, even on the basis of a *propio motu* investigation, but still is not able to exercise it. Kenya is a Member State to the Statute and gave its consent to the jurisdiction of the Court as well as committed itself to cooperate with the Court. Nevertheless, it denied any of the foregoing obligations but tried instead to invoke any possibility given by the Rome Statute, such as article 16 or article 19 (b) to prevent the Court from exercising its jurisdiction—with success. Without the cooperation of the State concerned, the Court is powerless. And the further fact that the Chamber rejected the Prosecutor's request to react to the constant failure of Kenya to comply with its requests, despite the fact that the Chamber repeatedly determined the violation of Kenya's obligation and the therewith connected inability of the Court to exercise its functions and powers, exacerbates the problem. It is true that the Court can only be as effective as the States allow the Court to be, but if the Court itself does

[635] *Idem*, p. 176.

not make use of its own provisions relating to the non-cooperation of Member-States, it acts *ultra vires* of the Statute itself. It is correct that the ICC constitutes a Court of last resort and that it is complementary to national criminal jurisdiction, but only in cases in which the States are willing and able to carry out such investigations or prosecutions. Kenya did not prove that it was at any time willing to carry out such criminal procedures. Hopefully the ICC will not have a déjà vu regarding the situation of Burundi, which withdrew from the Rome Statute due to *propio motu* investigations by the Prosecutor. This leads to the situation of Libya which, in consideration of the circumstance that Libya constitutes a Non-Member State to the Statute, referred to the Court by the SC acting under Chapter VII UN-Charter, is not as reluctant to cooperate in comparison to Kenia. However, the applied proceedings of the Court with regard to the situation of the Non-Member State are not comparable with the failures the Court did with regard to Kenya. Libya challenged the admissibility of the cases twice: once regarding the case of *Saif Al-Islam Gaddafi* and once in the case concerning *Abdullah Al Senussi*. Regarding the first admissibility challenge, the Court rejected the challenge on the ground that Libya could not present sufficient evidence that it will prosecute the same conduct, thus, Libya would be unable to carry out the investigations. With respect to the second admissibility challenge regarding the case against *Al Senussi*, the Chamber decided in favor of Libya's admissibility challenge due to the fact that the State could prove that the domestic court was prosecuting the same person for the same conduct. Despite the fact that Libya's obligation to comply with the request to arrest and surrender *Gaddafi* persists, *Gaddafi* is still not in the Court's custody. Consequently, the Chamber decided pursuant to article 87 (7) on the failure of Libya to cooperate with the Court to arrest and surrender the sought accused and referred the matter to the SC. The Council, on the insistent request of the President of the Assembly of States Parties and well as of the Prosecutor, called in two of its adopted resolutions on Libya and reminded the Non-Member State to cooperate fully with the Court and to comply with the Court's request to arrest and surrender *Gaddafi* to the ICC. This was the first time that the Council reacted to a State's failure to cooperate by such an explicit call to the State concerned. It is the truth that such a statement by the SC is far away from constituting a sanction against Libya which has violated its obligation with regard to the Rome Statute but also with regard to the SC resolution. Yet, in comparison to the situation of Sudan, it can be regarded as an achievement. But the fact that two other wanted suspects as well as *Gaddafi,* who is being said to be released of the prison in Zitan, could still not be arrested and surrendered to the Court minimizes the action of the SC. Nevertheless, the Chamber as well as the Prosecutor reaffirmed the continuous cooperation with Libya which seems to have improved, since the decision of the failure to comply with its obligations was released. But as the Prosecutor correctly stated: verbal confirmations are not enough, Libya has to take concrete action. The situation of Libya does not constitute a perfect example of how an effective cooperation-mechanism between a State and the Court should be. But despite the fact that Libya is a Non-Member State to the Statute and only pursuant to article 13 (b) under the jurisdiction of the Court while simultaneously challenging the admissibility of a case, it still cooperates with the Court.

As it has been repeatedly reported, the situation of Sudan can be determined as the most challenging cooperation situation the Court has had to face so far. President *Al Bashir*, still sitting Head of Sudan, is completely undermining the authority of the Court on the one side, and the power of the SC on the other side. Sudan neither accepts the Court's jurisdiction nor does it comply with its obligation stemming from the UN-Charter, respectively the SC resolution 1593 of 2005. Charged with Crimes against Humanity, War Crimes and Genocide and two outstanding arrest warrants of 2009 and 2010, the Sudanese President is travelling around the world while also taking part in conferences in territories of Member States to the Rome Statute. Regardless which kind of States the President travelled to, he has never been arrested nor surrendered to the Court. Despite various decisions of the Chambers regarding the failure to comply with the Court's requests, most of the African Member States were/are reluctant to arrest and surrender *Al Bashir*. The further fact that the African Union adopted a decision in 2009, forbidding its Member States to arrest and surrender the Sudanese President but instead to respect his personal immunities, only complicated the cooperation with the Member States of the Rome Statute. Most of Member States to which *Al-Bashir* travels refer to article 98 (1) and state that their obligations under international law would prevail and that the requests of the Court would put them in the situation of breaching its obligations pursuant to the AU decision. That this is for various reasons explained above not the case, is obvious. Unfortunately, the Chambers do not apply one and the same standard when determining that Member States do not violate their international obligations. This lack of unity in their judgments has to be regarded as a big obstacle. Even with regard to the observations made by the States to explain their non-compliance, the Chambers do not apply one and the same reasoning with the result that the non-compliance of Nigeria was not referred to the ASP while the DRC's exact same explanation did not satisfy the Chamber, thus, the failure was referred to the ASP and SC. It would strengthen the Court's credibility tremendously, if the Chambers applied one and the same standard for the exact same situation.

Nevertheless, the Court is confronted yearly with the failure of States such as Malawi, Chad, the DRC, South Africa, Uganda, Djibouti or Jordan to cooperate with the Court and comply with its requests to arrest and surrender the accused. Only in 2014, the Chamber decided on the non-compliance of Sudan to cooperate with the Court regarding *Al Bashir's* arrest and surrender. That President *Al Bashir* would not voluntarily appear in front of the Court, seems self-evident. Especially taking note of official statements by the Sudanese Government, which vehemently determine that they will never cooperate with the Court, raises the question why the ICC had to wait 5 years until it decided on the failure of Sudan to cooperate in arresting and surrendering *Al Bashir*? The almost conceited behavior of Sudan, in blocking any kind of cooperation attempts, would have given the Court the right to apply article 87 (7) every year with the outcome that the SC would have been informed and would have been forced to take measures with regard to that obligation-breaching State. The foregoing determination leads to the most problematic aspect regarding the situation of Sudan. The SC did and does not take any appropriate measures to bring the recalcitrant States back to their obligations to cooperate. Despite the yearly

reports of the Prosecutor since 2005, which became progressively intense in the sense of attempting to receive a reaction of the SC on the non-cooperation of Sudan, the latter remained paralyzed. Except for two soft statements of the President of the Council in 2008 and 2010 and one reminder in a country-specific resolution to the DRC to cooperate with the Court in 2014, no action was taken, especially not with regard to Sudan as the non-cooperating State. The fact that the SC held a debate in 2012 on "The promotion and strengthening of the rule of law in the maintenance of international peace and security," which focused specifically on the relationship of the ICC and the Security Council, can certainly not—as identified by *Sluiter* and *Talontsi*—be highlighted as a proactive approach towards the ICC.[636] The SC debate can be evaluated as an overall general interaction with the ICC; no explicit procedures regarding the referred situations were decided on. As regards the general adoption of SC resolution, especially when they are renewed or for example relate to the deployment of peacekeepers, it should be mentioned that the SC only in 2014 adopted several resolutions, but none of them made any reference to resolution 1593 nor did the Council *remind* Sudan of its obligations.[637] The ICC is almost ignored or avoided in the SC debate about Sudan. The fact that it was the SC which referred the matter to the Court but remained silent both on the violation of the Rome Statute but likewise on the UN-Charter, sends the wrong messages to the States. The SC, as one enforcement arm of the ICC, was given the right to react on States' failure to cooperate, whereby it is on the SC to determine the concrete measures. The former ICTY President *Meron* correctly stated with regard to the cooperation mechanism of the ICTY that only with a real anchored penal mechanism in the Statute, through which the use of force may constitute a possible sanction, compliance could be achieved because

> verbal admonitions, even made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power to enforcement, has been demonstrated once again.[638]

In light of the statement of *Meron,* it can be determined that the Court was not even getting admonitions; the SC behaves in a way as it had decided that resolution 1593 is a creature of the past. The SC seems to arbitrarily decide which situations it would like to refer to the Court, to leave it by that referral. This is completely against the rationale of the trigger mechanism as well as against its enforcement task. With regard to the situation in Darfur it has to be determined that the SC is less than helpful and that the Court cannot make use of this one and most important executive organ. China's ongoing oil-interests as well as the more than hard reached North-South deal make the US as well as China to the greatest veto-power States.[639] This

[636] See Sluiter and Talontsi (2016), p. 104.

[637] See Security Council report on Sudan (Darfur), Monthly Forecast, available at: http://www.securitycouncilreport.org/monthly-forecast/2014-11/sudan_darfur_12.php (Last accessed 11 Dec 2017).

[638] Meron (1999), p. 347.

[639] See Grono and de Courcy Wheeler (2015), p. 1234.

omission by the SC to react on failures to comply with States obligations already lead to a statement by the Chamber that a referral of a non-compliance matter is not warranted due to the further inaction of the executive arm of the Court.

Regarding the action taken by the Assembly of States Parties, it can be concluded that their measures in increasing the political pressure has with regard to some instances led to the improvement of State's cooperation; may it be the fact that States did not repeat their non-cooperative failure or that they have begun consulting with the Court in case of emerging problems evolving from requests of the Court. The additional function of the President of the Assembly to consult with the President of the Security Council after the finding had been referred to the Council, has with regard to the non-compliance of the DRC and Libya led to an affirmative response, in that both States were recalled of their obligation to cooperate with the Court. The decision of the Chamber with respect to Libya's failure to arrest and surrender *Gaddafi* and its explicit determination that the finding would not constitute a sanction, revealed the careful handling with States already cooperating to some extent. The concerns that the State could be alienated by imposing sanctions on it, constitute an issue which always have to be considered. Nevertheless, some of the actions taken by the ASP had an impact on a few non-complying States; these measures cannot be regarded as a proper enforcement mechanism to compel Member States to cooperate nor will these States be afraid of such measures. One important reason with regard to the foregoing assessment is that the alliance of African Member States in the ASP is still captured in the debate of the applicability of personal immunities, thus, the AU decision and the obligations of the Rome Statute and SC resolution; these States remain reluctant to take concrete measures with regard to the non-compliance of African States to comply with the Court's requests as long as the matter of article 98 (1) is not solved.[640] In the end, the ASP is a political body, such as the SC. The action which could be taken, as the enforcement apparatus of the ICC, was made dependent on the political will of the Members of both organs. The SC as well as the ASP could take effective and credible measures in order to comply with their mandate to react on the failure of States violating their obligations. If the AU and the Member States which are simultaneously Parties to the Rome Statute made the same effort in forcing the States to comply with the ICC's cooperation requests, as they do in reverse to prevent the Court to exercise its jurisdiction, the ASP would have an effective enforcement strategy and certainly the possibility to impose sanctions on that State. The exact same can be determined for the SC.

In conclusion it can be examined that the enforcement pillar of the ICC constitutes presently the weakest point of the Rome Statute, because as powerful as the States could implement the decisions of the ICC and therefore strengthen the judicial credibility of the Court, as weak and insignificant do they make the ICC through the non-adherence of the Statute's provisions. It is one thing to determine that the Chamber's incoherent approach to non-compliance findings is undermining its

[640] See Sluiter and Talontsi (2016), pp. 107–108.

own credibility while sending the wrong message to the States concerned. This is the failure made by the Court. But it is another issue to make the failures of the SC as well as of the ASP attributable to the Court. The Court can only apply its own provisions. And in referring a matter to either the SC or the ASP, the Court's task is accomplished. Then it is up to the ASP and SC to react on the failure of the obligation-breaching States. However, the circumstance that both the enforcement arms of the Court, the ASP but mainly the SC, likewise not comply pursuant to their theoretical capability, not only reduces the Court's power and simultaneously the authority of the ASP but, first and foremost, the SC. The cooperation and judicial assistance Part of the Rome Statute does grant the Court the possibility to exercise its jurisdiction upon Member- and Non-Member States. But the practical implementation of the Rome Statute's cooperation mechanism diminishes the power of the Court and the fact that there is no effective sanction mechanism, allows States to remain in their violation approach. Why should States comply with a request which may lead to tensions between the requested and the third State if the option of denying the request has no further consequences? Not among the States and not with regard to the relationship to the Court. There is no higher instance than the States themselves and they decide whether to comply with the Court's requests or not. The Court and its Rome Statute are mature; if every Member State and every organ complied with their obligation, the Court would be an effective International Criminal Court. Together and in unity the Court could represent a powerful international criminal entity through which justice can be done and peace be achieved. The Rule of Law is premised on the notion of unity, a consensus that the law shall be upheld; if the unity cannot be maintained, the rule of law collapse.[641] From this perspective, the question whether the ICC through its enforcement pillar could be presently regarded as an International Criminal World Court has to be negated.

3. Possible Solutions

The foregoing determination that the ICC can presently not be designated as an International Criminal World Court is not only attributable to the Court itself but primarily to its Member States and the two executive organs, the ASP and the SC. Regarding the analysis with respect to the judicial as well as enforcement pillar, it has been concluded that the Court's theoretical judicial statutory regime is effective and authoritative enough to grant the Court the power to exercise jurisdiction over Member- and in special circumstances Non-Member States to the Statute, which have to comply with the further proceedings regarding cooperation and judicial assistance. The drafters of the Rome Statute had foreseen a penalty mechanism with respect to cases in which Member States as well as Non-Party States do not comply with their obligations under the Statute and decided that the Court, after

[641] Rastan (2009), pp. 169–171, 178–179.

having positively examined the failure, may refer the matter to either the SC or the Assembly of States Parties. The determination of States practise as well as the response of the Court in applying its provisions with respect to such violations has demonstrated that the system, as anchored in the Rome Statute, is inoperative when concrete action of either the SC or the ASP is required. It was determined that both organs are theoretically powerful enough to adopt effective measures as a reaction to the obligation-breaching State. Nevertheless, either no action or only soft diplomatic measures are applied, which will not have the desirable deterrent effect. "If the Court can replace impunity with accountability, it will be able to capitalize on its potential to deter those contemplating future atrocities"[642]; due to the fact that both executive organs are, first and foremost, political bodies, such accountability is not always the intended aim.

In order to strengthen the cooperation regime of the Court and to repeal the negative answer to the question of the book, different possible solutions will be presented.

As it was determined above, the Pre-Trial Chamber in several instances applied different interpretations to one and the same matter when considering its judicial findings. Incoherent and insufficient explanations by the Chambers do not only affect the overall credibility of the Court but may lead to further problems when such judicial findings are referred to the ASP or SC; the lack of a well-argued reasoning challenges the legitimacy of the finding which could result in the refusal of the two organs to seize measures against the non-complying State.[643] In addition to the latter argument that the different decisions of the Chambers may be disputed among Member States in the Assembly, some experts have questioned why the State concerned is generally not given the opportunity to appeal against the judicial findings of the Trial Chambers.[644] The Statute neither in articles 81, 82, 87 (5), (7) nor in the Regulations of the Court provide for an appeal against a judicial finding of the Court; regarding the consequences (with respect to State responsibility), which such a judicial finding might have and in light of the rule of law in guaranteeing a fair trial, such an access to appellate should have been provided for. Consequently, it is demanded that such an appeal mechanism has to be granted in order to ensure "the quality and fairness of enforcement procedures" and to reject likewise accusations of impartiality of the Judges.[645] In addition to the fairness argument, it could be argued that an appealed review would also help to resolve the problem of the different interpretations made by the Trial Chambers. First of all, the Appeals Chamber is composed of different Judges than the Trial Chamber which ruled twice on the same

[642] See Grono and de Courcy Wheeler (2015), p. 1243.

[643] See Sluiter and Talontsi (2016), p. 100.

[644] In the following see Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 32; Sluiter and Talontsi (2016), pp. 99–100.

[645] Sluiter and Talontsi (2016), p. 100; Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 32.

matter: Once when it issued the request to cooperate and secondly, when it made the judicial finding on non-compliance with regard to that State. Secondly, the Appeals Chamber will consider all different approaches by the Chamber, the Prosecution and the Defence to reach a final conclusion with regard to the disputed matter. This appealed jurisprudence will be of a completely different quality and would thus not only help to clarify the legal matter but restore the reputation of the Court.

With regard to the Assembly of States Parties, as one important enforcement tool of the Court, different suggestions are made to improve cooperation on the one hand and a functioning sanctions mechanism on the other hand. It is said that the political pressure on governments has to be increased; compliance should not only be enforced by measures of the ASP but also on a Member-to-Member State basis on which States proactively compel other States to cooperate with the Court.[646] Furthermore, is it demanded that effective and operative procedures with regard to non-compliance referrals should be established.[647] The ASP procedures relating to non-cooperation do not fall within such an operative mechanism, but can rather be determined as an overall guideline and only the initial step towards any such procedure due to the fact that neither article 87 (7) nor article 112 (2) (f) made reference to how such measures should look like. Authors such as *Sluiter* and *Talontsi* claim that the "[R]adical transformation and improvement of addressing enforcement of cooperation within the ASP" should be of most significance; the ASP should be specialized on the issue of non-compliance.[648] A straight and strict system with regard to non-compliance shall assure a "de-politicisation" of the ASP; decisions of the Chambers regarding findings of non-compliance shall not be made contestable or be challenged, instead an automatic enforcement mechanism shall apply. A specialized Committee shall conduct the foregoing mechanism and is intended to seize, if necessary, measures which would have an impact on the obligation-breaching State. Such penalties could entail the increase of the State's financial contribution, the State's exclusion of the ASP or a temporary loss of the State's voting right.[649] Another suggestion to improve the cooperation mechanism is made with reference to the International Court of Justice (ICJ), which could by the ASP or by its Member States be asked to provide an Advisory Opinion, either with regard to the dispute around article 98 or with respect to the obligation-breaching State.[650] The author highlights the ICJ's moral authority and positive record of compliance regarding Advisory Opinions, whereby the author simultaneously determines that States would not bring non-compliance findings to the Court nor would subdivisions of the ICC be admitted to make requests before the ICJ. It is questionable whether the ICJ would rule on matters upon which another judicial authority has

[646] See O'Donohue (2015), p. 133; Ambach (2015), p. 1294.

[647] See Ambach (2015), p. 1293; Sluiter and Talontsi (2016), p. 108.

[648] In the following Sluiter and Talontsi (2016), pp. 108–109.

[649] See also Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 40.

[650] In the following see Maryam Jamshidi (2013).

the competence to decide on; article 119 (1) determines that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. But the settlement of a dispute regarding the applicability or interpretation of the Rome Statute's provisions can be brought before the ASP which is in turn able to refer the matter to the ICJ, in cases in which no settlement could be reached, article 119 (2). Thus, the ICJ could rule on the dispute of competing obligations stemming from the AU directive and the Rome Statute, but this has to be distinguished from making the ICJ a further enforcement tool of the Court.

The SC and its decision to remain silent on most of the judicial findings on non-compliance, especially with regard to the State Sudan gives the impression, as if the Council exploits the Court for its random decisions.[651] The original intention—comparable to the principle of reciprocity—that the Council can make use of the Court in referring situations, which constitute a breach to international peace and security to the latter, while the Court should have been able to make use of the SC as the enforcer of measures which could be invoked against the obligation-breaching State, is rendered meaningless. While the possible improvements of the SC differ from the ones of the ASP, insofar that the SC has functioning and powerful enforcement procedures which it can/could apply, reference is made to an automatic follow-up mechanism in order to secure compliance, possible asset freezing's, listing of perpetrators by UN-sanction committees also with regard to situations which were not referred to the Court by the SC, official Press releases by the President of the Council and the adoption of resolutions to pressure the reluctant States.[652] A further approach would be to determine that SC resolutions which relate to the article 13 (b) trigger mechanism, should be drafted more precisely in order to circumvent any possible misinterpretations with regard to the question, which States are obliged to cooperate and which are only urged. The resolutions could explicitly refer to UN-Member States obligation to comply with the resolution pursuant to article 25 UN-Charter and further recall article 103 UN-Charter in cases of conflicting obligations.

The grammatical subjunctive reveals that the SC could do a lot of things, but it does not and if it does, than for various political reasons. The same holds true for the ASP. Irrelevant of the best elaborated procedures, diplomatic and sanction mechanisms: if these procedures and measures are not applied, the cooperation system will remain as ineffective as it is now with regard to the SC and ASP involvement. In the theoretical part of the enforcement pillar, in which the provisions of the Rome Statute were examined, it had been concluded that both the SC and the ASP are powerful enough to be designated as the enforcement arms of the Court. Ultimately, both are political bodies; States sovereignty and geo-political self-interests still constitute the highest values. This leads to the last and most important suggestion,

[651] See Report of the Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 86; Verduzco (2015), p. 61.

[652] *Idem,* pp. 49 and 61.

how an improvement could be achieved in order to make States comply with their obligations.

As it was already determined in the entry of the "International cooperation and Judicial Assistance in Practise" part of the book, the cooperation with regard to the ICTY and ICTR was not more successful than the cooperation of the ICC, despite the fact that both Tribunals are establishments of the SC and every UN-Member State is obliged to cooperate, as a result of the SC's resolutions. Thus, even precisely drafted resolutions are not the ultimate answer to achieve cooperation. The further circumstance that the SC likewise did not take action with regard to UN-Member States failing to cooperate, except for verbal remarks, led to a stagnation of the cooperation system. One of the Legal Advisors of the of the Jurisdiction, Complementarity and Cooperation Division of the ICC, *Rod Rastan*, correctly highlighted that the only measure that resulted in a successful cooperation of the reluctant States was the united political pressure exercised by international organisations such as the EU, the NATO and the World Bank.[653] This "policy linkage" resulted in the cooperation of the non-complying States: when the report of the Prosecutor to the SC revealed that a specific State did not comply with its obligations, as it was mainly the case with regard to Serbia, the World Bank lifted economic sanctions by withholding all foreign assets, or the EU threatened Serbia to cease the diplomatic negotiations relating to possible EU accession. These are only two examples of how the cooperation in the Balkans was enforced. However, they demonstrate that a unified approach in combination with a concrete threat against the reluctant State forced the latter to comply with its obligations. Ultimately, it does not have anything to do with the SC and its Chapter VII mechanism, but it is all about regional alliances. This leaves the question open in how far the result would have been a different, if Serbia had not had the geo-political interests in acceding to international organisations such as the EU or the NATO. Consequently, it can be determined that such alliances only lead to certain cooperation in cases where States have specific interests, may they be of a political, economic or military nature. That the positive political reputation of a State is important enough to require the State to act, even with regard to situations in which it abstained from taking action, can be manifested in the example of China.

With the Olympics in 2008, China wanted to alter its old and damaged image of being a weak and poor State; what had started with the slogan "One World, One Dream" was changed into "The Genocide Olympics".[654] Despite the fact that China is one of the Permanent Five Members which referred the situation in Darfur to the ICC, Beijing is the main arms supplier for Sudan and further protects and finances the State in order to obtain Sudanese Oil. In 2007, the international community criticized that China impliedly supported the Genocide in Darfur and rejected with its non-interference policy the deployment of UN- Peacekeepers in the region; the public outcry was significant. In order to circumvent that the Olympics turn out to be

[653] In the following see Rastan (2008), p. 438 ff.; Rastan (2009), p. 166 ff.

[654] In the following see Kristof (2008).

a catastrophe, the Chinese Government pressured Khartoum to accept the deployment of more than 20.000 UN-Peacekeepers to Darfur, in awareness that this would be positively attributed to China. Beijing's reputation had to be sustained as long as the Olympics were celebrated and as long as the public had an eye on this part of the world; after the focus on China had shifted to other international issues, China could afford the reputational risk of being associated with the incidents in Darfur. This can be highlighted by China's invitation of President Al Bashir—meanwhile charged with the three core Crimes—in June 2011 to discuss, as Foreign Ministry spokesman Hong Lei emphasized "how to advance and consolidate our traditional friendship, expand and deepen comprehensive co-operation and exchange views on the north-south peace process".[655] This example demonstrates how arbitrary decisions are taken by States and that they are only based on political aspirations. Despite the fact that China is not a State-Party to the Statute and therefore neither obliged to cooperate with the Court nor explicitly out of the resolution 1593, this reflects a devastating picture when one of the permanent Members of the SC concludes that the situation in Darfur amounts to a threat to the peace on the one side and on the other side entirely ignores the arrest warrants by the Court and even worse, invites the President into its country. The last time Al Bashir travelled to China was in September 2015.[656]

The above mentioned examples demonstrate the political sphere in which the ICC is embedded. With regard to the situation of Sudan and its relationship to the SC no unified approach exists in the Council due to the different geo-political interests of the States; it is better to expect no possible action as long as there are no higher sovereignty values which have to be preserved. That the SC has not referred the still ongoing incidents in Syria to the ICC underlines the fact that it is not about restoring or securing peace or justice, but rather exclusively about the subjective interests of the P5 Members in the Council.

Consequently, it can be determined that it is very important to establish alliances, which support the Court in the implementation of its main goal: to end impunity for the worst crimes of mankind. The ICC is extensively engaged in entering agreements or arrangements with international and regional organizations such as, *inter alia*, Interpol, Eurojust, the EU, the OHCHR, the World Bank but also cooperation with NGO's and journalists.[657] The Agreement between the International Criminal Court and the European Union on Cooperation and Assistance is a good example of how alliances can be concluded. The EU supports the ICC to a great extent; either by responding to present or future non-cooperation issues or by condemning instances of non-cooperation which are discussed in the ASP.[658] With regard to alliances

[655] Branigan (2011).

[656] See Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/14/38, 18 November 2015, para. 21.

[657] See Turlan (2016), p. 71.

[658] See Expert Workshop, "Cooperation and the International Criminal Court", University of Nottingham, United Kingdom, 18–19 September 2004, para. 79, 80.

between States, Parties to the Rome Statute are encouraged to publicly declare their cooperation with the Court and furthermore, use their international partnerships but, first and foremost, they are stimulated to use the political environment in these organizations to encourage other States, Non-Member to the Statute to accede to the Rome Statute.[659] Regional as well as international partnerships can be used in order to establish a unity. Political as well as legal platforms of the Human Rights Council, NGO's or the UPR—only to mention a few—can likewise be used in order to promote the ICC and to enhance cooperation together with its Member- States. The fact that many powerful countries are not Members of the Statute, constitutes with regard to the cooperation mechanism a deficiency. Thus, it is very important to generate more ratifications in order to guarantee a greater consensus in the ASP. If States like the US or Russia became Member States to the Rome Statute and therewith subjected to the cooperation regime, more pressure on reluctant States could be exercised; the relationship to both States is too important for States to ignore their possible pressure. The more States become Members of the Statute, the more difficult it will get to disregard non-compliance. Additionally, it would become more difficult for the P5 Members to disregard non-compliance findings when they are simultaneously Members of the ICC and the ASP. Regarding the linkage of political pressure it is suggested that efforts should be investigated to alter the AU's difficult relationship with the ICC. If the dispute with regard to article 98 was settled and cooperation of the AU secured, the cooperation system of the Court would most probably be very effective. If an African State failed to comply with the request of the Court, the AU could be used as a very effective tool to force the State to do so, because the non-complying State would have a great interest to remain in the AU. In addition, the other African States would uphold the positive relationship between the AU and the ICC; it is an alliance of States which could stand against the non-complying State, as it is now in reverse by preventing the cooperation with the Court.

The analysis of the various possible improvements has demonstrated that there is not only one solution for addressing, how cooperation of States can be generated. It is a balance of the establishment of strict procedures, which automatically have to be applied in each case of non-compliance, with the pressure of alliances to take over the responsibility to enforce the cooperation of the obligation-breaching States, when the procedures available to enforcement organs do not lead to a result. The possible measures for the enforcement of the Court's requests, either by Member States, the United Nations Security Council or the Assembly of States, already exist; they only have to be applied. If all States accepted their obligations under the Statute and automatically executed the requests of the Court without undue delay, further consulted with the Court in cases of arising problems, and were made responsible for their non-compliance by the "collective international community", the current system would reflect the rule of law and be effective.[660]

[659] See Ambach (2015), p. 1293.

[660] Similar see Rastan (2008), pp. 455–456; Rastan (2009), p. 182.

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Chapter 5
Conclusion

The analysis conducted in the course of this book has shown that the ultimate decision to establish an international criminal court like the ICC can be regarded as a true phenomenon. The historical excursus has portrayed that the idea to create a Tribunal to prosecute those responsible for the worst crimes of mankind was not a novelty, but its final practical implementation was. That States agreed to the encroachment of substantial parts of their sovereignty to permit the existence of a criminal entity like the ICC, underlines the huge and positive development of international criminal law over the past 50 years. Especially after the Cold War, no one would have believed that States would unite in order to hold perpetrators who are responsible for the commitment of the most serious crimes of concern accountable and thus, end impunity for such crimes. Nevertheless, the analysis of the twin-pillar system has demonstrated that State Members to the Statute, although their subjection under the jurisdiction of the ICC, agreed theoretically to a strong judicial mechanism which they practically are not willing to implement to the required extent; this results in an unequal pillar system.

The judicial pillar and in particular the extensive examination of the most significant articles dealing with the jurisdiction of the Court was, with regard to an affirmative response of the question of the book, of utmost importance. The analysis of the two most disputed provisions of the Rome Statute, article 12 (2) (a) as well as article 13 (b), has demonstrated that the ICC may exercise its jurisdiction upon Member—and Non-Member States of the Rome Statute. With regard to article 12 (2) (a) it was determined that the ICC has jurisdiction in cases where crimes were committed on the territory of a Member State and either the latter refers the situation to the Court or the Prosecutor initiates investigations *proprio motu*. It was verified that the most frequent and strongest allegation that article 12 constituted a violation of article 34 VCLT and therewith entailed an invalid *Drittwirkung,* could not be sustained and had to be clearly rejected. With respect to article 13 (b) which constitutes one of the most powerful provisions of the Rome Statute, the SC can refer any situation which amounts to a threat to the peace, breach of the peace or an act of aggression to the ICC; the latter will be in turn permitted to exercise this established

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jurisdiction upon every UN-Member State in the world, regardless if the State is a Member or a Non-Member State to the Statute. Non-Member States which are accused of having committed one or more of the core crimes under the Statute are, by virtue of the SC resolution, to be treated as analogous Parties to the Rome Statute. The trigger mechanism of the SC acting under Chapter VII is *condition-sine-qua-non* for all the further proceedings of the Court, which makes the Rome Statute applicable to them. As a logical consequence it has been further determined that article 27 is applicable to the Non-Member State so that even the highest official capacity of a Non-Member State official's and the in general untouchable immunity *ratione personae,* does not constitute an obstacle for the Court to exercise its jurisdiction. The allegation that the applicability of the Rome Statutes provisions to the Non-Party State constituted a violation of the principle of *pacta teriis nec nocent nec prosunt* and therefore article 34 VCLT was rejected, due to the fact that it is the SC resolution which explicitly obliges UN-Member States to cooperate with the Court and which makes the Rome Statute, by virtue of the SC resolution, applicable to these States; pursuant to article 25 UN-Charter, these UN-Member States have to accept and carry out the decisions of the SC. Following the above mentioned argument that the trigger mechanism sets the foundation for launching the chain of causation for the applicability of the Statute's provisions, it was determined that article 27 applies additionally to nationals equipped with immunity *ratione personae* of Non-Member States regarding the trigger mechanisms pursuant to articles 13 (a), 13 (c) in conjunction with article 12 (2) (a). Unlike a SC referral of a Non-Member State, which makes the non-contracting Party an analogous Member to the Statute, other Non-State Parties with regard to this triggered jurisdiction will obviously not be turned into a State Party, and it is only article 27 which is applicable. The article does not impose rights or obligations to the Non-Member State so that a violation of article 34 VCLT is precluded; the article applies only on the vertical relationship between the Court and the Non-Member State. The incorporation of article 27 and its applicability to either Member or Non-Member States to the Statute with regard to all three possible jurisdiction trigger mechanisms is a reflection of one of the core objectives of the ICC to end impunity of all persons responsible for the commitment of one of the core crimes listed in article 5 while it simultaneously contributes to the evolvement of a customary international law on the abolishment of immunity *ratione personae*, when international crimes are prosecuted by international courts. Subsequently, it can be emphasized that the jurisdiction of article 12 (2) (a) contributes significantly to the ICC's capability of exercising jurisdiction upon either Member- or Non-Member States to the Statute, regardless of the official capacity of the accused which serves as the first indication that the ICC has to be regarded as an International Criminal World Court. Article 13 (b) constitutes the strongest evidence that the Court can theoretically exercise its jurisdiction upon every UN-Member State of the world if the SC refers all incidents which threaten international peace and security and which fulfill the requirements of one of the core crimes to the ICC. For this reason the question of the book was once more positively affirmed, so that the ICC can be designated as an International Criminal World Court.

The incorporation of the Crime of Aggression and the unanimous consensus to a definition of the crime has to be regarded as a significant accomplishment in international criminal law. Apart from the Nuremberg and Tokyo trials, the ICC constitutes the first international criminal court that holds individuals criminally responsible for the commitment of the Crime of Aggression as of July 2018. As the crime has always been a sensitive matter, the agreement with regard to the jurisdiction mechanism of the Crime, anchored in articles 15 *bis* and 15 *ter,* was heavily disputed and the present tight jurisdiction mechanism is the result of various politically motivated compromises. It was examined that cases in which the ICC may exercise its jurisdiction with regard to the Crime of Aggression and especially in respect to article 15 *bis* will in practice be rare. Nevertheless, the fact that States decided to include the Crime of Aggression and to activate the Court's jurisdiction regarding the "crime of crimes" can be proclaimed as historic. Only a world Court is given the discretion to deal with a crime like this.

Articles 16 to 19 as well as article 124 were reviewed in order to determine whether these articles may bar the Court from exercising its jurisdiction. Regarding article 16, it was examined that the article serves the purpose of balancing both the principles of peace and justice. Although the two SC resolutions 1422/1487 were determined to be unlawful as they were contrary to the object and purpose of article 16, they, nevertheless, do not have to be taken too seriously as they constituted the initial *ad-hoc* reaction of the US which feared that the new operating Court could investigate US national peacekeepers. The SC never applied the article again and the few examples presented by African States demonstrated that the article cannot randomly be invoked in order to block the ICC to exercise its jurisdiction. In addition, it was analyzed that articles 17, 18 and 19 do not bar the Court from exercising its jurisdiction, but instead they reaffirm one of the main norms of the Statute, the principle of complementarity while the possibility to challenge the admissibility of a case or the jurisdiction simultaneously reflects the principles of the rule of law. Article 124 was nothing more than a calculated measure taken in order to increase future ratifications. It was applied twice but was never invoked again.

The judicial pillar contributes with the analyzed articles, especially with regard to provisions such as 13 (a), 13 (c) in conjunction with article 12 (2) (a) as well as 13 (b) and article 27, to an extremely powerful legislative framework, in that the ICC can potentially exercise its jurisdiction upon every national of a UN-Member State in the world, regardless of the State's Member status to the Rome Statute; the question whether the ICC can be regarded as an International Criminal World Court can therefore be positively affirmed.

The enforcement pillar was analyzed with regard to the international cooperation and judicial assistance in theory as well as with regard to States practice in order to determine to what extent the initial strength of the judicial pillar could be maintained or if it was rather nullified. The fact that the ICC does not dispose of its own enforcement apparatus, but was made entirely dependent on the cooperation of States, may strengthen or endanger the whole functioning of the Court. Consequently, the practice of States was intensively scrutinized. In relation to the

determinations of the Rome Statute's cooperation and judicial assistance Part 9 it was examined that the part was thoroughly elaborated by the drafters of the Rome Statute. Article 86 commences in obliging all Member States to cooperate fully with the Court's investigation and prosecution, while article 88 importantly requires the Member States to ensure that there are procedures under their national laws in order to guarantee the implementation of all forms of cooperation under Part 9. As this is a general provision of the cooperation and judicial assistance regime, it applies as the primary provision; the State's national law cannot easily be invoked in order to circumvent cooperation even if some provisions make reference to national law. Furthermore, it could be highlighted that the Court was given great discretion to react to the failure of Member-, and in some instances also Non-Member States, to comply with the requests of the Court and that the ICC can further revert to several different measures in order to secure States compliance. If the ICC is prevented from exercising its functions and powers due to the failure of Member or Non-Member States (which entered in an ad-hoc arrangement or agreement with the Court) to comply with the Court's request, the latter may refer the matter to either the ASP or the SC, article 87 (7) as well as article 87 (5). The ASP and the SC are the two executive organs of the Court that may decide on appropriate measures as a reaction to the violation of the obligation-breaching State. That the SC may take any kind of measure, diplomatic as well as the use of armed forces, stems from its Chapter VII powers. As article 112 (2) (f) remains silent on what kind of measure the ASP may take, the ASP established in 2011 procedures relating to non-cooperation; these measures are exclusively diplomatic but it was determined that with regard to the International Law Commission Articles on State responsibility the ASP can apply "collective countermeasures" as the obligation of article 86 exists, *erga omnes partes,* and the violation of the non-cooperating State amounts to an internationally wrongful act. With regard to Non-Member States and their failure to comply with the Court's requests, it was differentiated between Non-Member States which entered into an ad-hoc arrangement or an agreement with the Court and Non-Member States which' situation was referred to the ICC by the SC. Regarding the first example, the Court may apply article 87 (5) (b) in order to refer the matter to the ASP, while the analogous Member-States status to the Rome Statute makes article 87 (7) the pertinent provision. In addition to the foregoing determination, the ICC can likewise make use of article 87 (6) and ask intergovernmental organizations, such as, *inter alia*, the UN, respectively the SC or the EU, for other forms of cooperation. With regard to the SC it was determined that the ICC may take advantage of peacekeeping missions on the ground. Depending on the mandate which is given to the peacekeepers, the latter may also be commissioned to cooperate with the Court in helping States to arrest and surrender the suspects, as it was concluded in the Memorandum of understanding between the UN and the ICC in relation to the UN mission in the DRC (MONUC). Moreover, the SC can also, with regard to paragraph 6 of article 87, oblige the concerned States, on which' territory the peacekeepers are deployed, to cooperate with the ICC as anchored in the Rome Statute; this was done with respect to the mission in Mali (MINUSMA).

The further analysis of the articles referring to arrest and surrender of persons demonstrated that there are no grounds for refusal *stricto sensu.* Every instance which may lead to a possible delay of the surrender or requires consultation between the Court and the State is in conformity with the Rome Statute's provisions and a reflection of the criminal law procedures of a constitutional State. Even with respect to competing requests, no such grounds for refusal could be identified. On the contrary, article 90 balances the vertical and the triangular relationship of the Court and the requested State on the one side, and the requested to the requesting State on the other side, especially when the latter is a non-contracting State. The fact that the Court is given priority when no international obligations to extradite exist and the case is ruled admissibly, already provides the Court with a large discretion. The only situation in which the requested State may decide to extradite the person before a decision regarding the admissibility of the case has been ruled on, is when the requesting State constitutes a Non-Party State to the Statute; it is obviously not the best result, but in the circumstance that the case is not yet ruled admissibly and the requesting State is not a Party of the Statute, may grant the State Party the choice to surrender the person either to the Non-Party State or to the Court. The analysis of other forms of cooperation, articles 93 et seq., has revealed that the allegations that article 93 (1) (l) as well as article 93 (3) constituted grounds for refusal could be rejected while there is only one provision which might prevent the Court from exercising its jurisdiction: article 93 (4). If the request of the ICC concerns the production of any document or disclosure of evidence which relates to the State's national security, the State may deny the request of assistance, in whole or in part. Nevertheless, article 93 (4) in conjunction with article 72 was not incorporated as a circumvention to comply with the Court's request. It could be determined that article 72 (5) and (6) requires the State to pass through a three-step procedure until it finally can deny the request of assistance. Even if the request is denied on the national security ground, and it can be assumed that this rejection is inadmissible, the Court may pursuant to article 72 (7) (a) (ii) in conjunction with article 87 (7) refer the matter to the ASP or SC. The foregoing procedures demonstrate that the ground for refusal cannot be simply applied but is subject to the highest verification. Regarding articles 94 and 95 it could be demonstrated that both articles were drafted from a very practical perspective and therefore are not to be regarded as grounds for refusal as they ultimately do not prevent the Court from exercising its jurisdiction. The examination of article 99 (4) has shown that this article constitutes a further and effective measure for the Prosecutor to conduct on site investigations, such as the interview of or taking evidence from a person, even without the presence of the authorities of the requested State, when it is essential for the request to be executed. Despite the fact that the measures could have been broader, the article extends the scope of the conditions under which the Prosecutor may take direct action in contrast to article 57 (3) (d). Furthermore, emphasis was given to a very important provision strengthening the Court, article 97. The article requires the Member State to consult with the Court with undue delay in cases where the State is impeded or prevented from executing the request. The article reaffirms that the Court is in the first instance to be consulted in cases in which complications may occur; it does not lay within the

discretion of the State to deny the request of the Court. The required consultation with the Court is so much mandatory for the State so that the Court may, in case of a failing to consult with the Court before rendering its decision, make a finding to that effect and send the matter to the ASP.

With respect to article 98, the extensive analysis has demonstrated that this is the only article which might indeed lead to the prevention of the Court from exercising its jurisdiction. The fact that the Court, pursuant to article 98 (1), may not proceed with a request to surrender or assist, if this required the requested State to act inconsistently with its international law obligations regarding the State or diplomatic immunity of a person or property of a third State, constitutes the response of the shifting from a vertical relationship to a triangular one. With regard to Member States it was determined that they waived their immunities in front of the Court and among each other in the moment of acceding to the Rome Statute, so that article 98 (1) cannot be invoked by Member States. Should the third State be a Non-Member State to the Statute in a situation of a State referral or investigation *proprio motu* by the Prosecutor pursuant to articles 13 (a), (c) in conjunction with article 12 (2) (a), the Court may not proceed with the request as this would require the Member State to act inconstantly with its international law obligations regarding the personal immunities of the national of the Non-Member State. Article 27 (2) applies only in relation to the Non-Member State and the ICC, but does not affect the horizontal relationship between the Member- and the Non-Member State. In cases where the Non-Member State is a State which' situation was referred to the ICC by the SC, pursuant to article 13 (b), the State Member will on the basis of two different interpretations not violate its international obligations in relation to the Non-Member State. Firstly, the Non-Member State has, by virtue of the SC resolution, to be treated as an analogous Party to the Statute, which leads to the abolishment of immunities on both the vertical as well as horizontal relationship. Secondly, the State Member can invoke article 103 UN-Charter which determines that the obligation of the UN-Charter shall prevail. It has to be highlighted that with regard to SC referrals the wording of the resolution is of paramount importance. Should the ICC request Non-Member States which were only "urged" to cooperate with the Court, these States would infringe their obligation under the customary law on personal immunities with regard to the third State because they could not rely on article 103 UN-Charter. With respect to article 98 (2) it has been determined that it only covers pre-existing Status of Forces Agreements (SOFA's) as well as extradition agreements. The concluded "Bilateral Immunity Agreements" by the USA do not fall within the scope of article 98 (2).

The thorough analysis of the theoretical part with regard to cooperation and judicial assistance of the enforcement pillar has demonstrated that the strength of the judicial statutory regime could not be maintained. The main reason for this is that the vertical relationship shifted to the horizontal, respectively the triangular relationship. While the Court was given a great discretion to exercise its jurisdiction upon Non-Party States, and even with regard to nationals equipped with immunity *ratione personae* of these Non-Member States, article 34 VCLT cannot entirely be overridden. The fact that these Non-Member States (in exception of article 13 (b) situations)

did not ratify the Statute cannot be disregarded. Opponents of the extensive judicial jurisdiction system of the Court would presumably determine article 98 as the corrective to article 12 (2) (a) and article 27. Nevertheless, the fact that the Court has potential jurisdiction upon every national of a UN-Member State of the world, but is prevented from exercising this jurisdiction due to the fact that the suspects are not allowed to be arrested and surrendered, diminishes the strength of the jurisdiction system of the Court tremendously. Consequently, it has to be determined that the affirmative response to the question has to undergo a correction which results in the rejection of the determination that the ICC constitutes an International Criminal World Court.

The analysis with regard to the practical implementation of Part 9 of the Rome Statute could have altered the foregoing determination that the Court cannot be designated as an International Criminal World Court, but due to the fact that most of the Member States do not comply with their obligations stemming from the Statute, only underlines the negative response to the question of the book. Despite the fact that the Tribunals, ICTY and ICTR, had to face the same challenges with regard to State's cooperation, the ICC's cooperation mechanism could not be improved. The determination with regard to the practical implementation has revealed the extent of the Court's dependency on States cooperation. The determination of State practice has demonstrated that Member States which made self-referrals or requested the Prosecutor to initiate investigations *proprio motu* are the most willing and cooperative States. The Central African Republic is always said to be the textbook example of how States should cooperate; all the arrest warrants against the accused were executed, *Jean-Pierre Bemba Gombo* was sentenced to 18 years imprisonment while the other trials are continuing. A further, very positive example of States cooperation relates to the self-referral of the DRC. Despite the fact the State was unable to secure the suspects, together with the UN mission in the DRC, MONUC, and the support of States like France and Belgium, the accused could be arrested and surrendered to the Court; two of them, *Lubango Dyilo* as well as *Germain Katanga,* were convicted while one trial is still ongoing. The case of Uganda serves a good example how the Court makes use of article 87 (6) and asks the UN for cooperation which was guaranteed and implemented. The same successful cooperation is provided by Mali, so that the one released arrest warrant against *Al Mahdi* was promptly executed and the accused found guilty. With regard to Côte d'Ivoire it has to be mentioned that the Ivorian authorities complied with the requests of the Court regarding the arrest warrants against *Laurent Gbagbo* and *Charles Blé Goué*, while refusing to comply with the arrest warrant against *Simone Gbagbo* due to the fact that Côte d'Ivoire claimed that it wanted to prosecute the latter in its national Courts, which unfortunately resulted in her acquittal. Despite the fact that Uganda was the first African State which made a self-referral in 2004 and initially cooperated with the Court to the extent to which it was able to, none of the suspects could be arrested and surrendered to the Court. From 2006 onwards, the ICC found itself in a clash of a peace- versus justice debate while the proceedings were paralyzed. Kenya is next to Sudan the most complicated matter of cooperation the Court has had to deal with. In contrast to Sudan, which is negating the existence of the ICC, Kenya attempts actively every

possibility to block the jurisdiction of the Court. Kenya challenged not only the admissibility of the cases—which was rejected due to the fact that Kenya could not provide information which demonstrated that the State is investigating the case - but tried twice to invoke article 16, in order to defer the investigations by the ICC which the SC rejected. The reluctance of Kenya to cooperate, either with regard to articles 89 or 93, led to the circumstance that the ICC had to withdraw its charges against three of the most wanted accused. The further instance in which the Pre-Trial Chamber did not make a finding with regard to Kenya's repeated failure to cooperate, only exacerbated the situation. The analysis with respect to the two SC referrals of Sudan and Libya to the ICC in 2005 and 2011 has demonstrated that despite the fact that both States are Non-Parties to the Statute and did not voluntarily subject themselves to the treaty, the cooperation could not be more different. Nonetheless, that Libya challenged the admissibility of both cases against *Saif Al-Islam Gaddafi* and *Abdullah Al Senussi*, on which the latter challenge was ruled inadmissible, the State is to some extent still cooperating with the ICC. Libya has not yet arrested and surrendered *Al-Tuhamy Mohamed Khaled*, *Mahmoud Mustafa Busayf Al-Werfalli* or *Gaddafi*, which led in 2014 to a non-compliance finding by the Chamber with regard to the latter suspect. The SC recalled for the first and only time the referral in two of its country-specific resolutions and called upon Libya to immediately arrest and surrender *Gaddafi* to the Court. The cooperation is not as it should be, but regarding the fact that the State is treated like an analogous Member to a Statute, it has never ratified and additionally challenged the admissibility of the cases, this may be the best cooperation that can be expected. Libya accepted its obligations under the Statute, by virtue of the SC resolution, to some extent in contradiction to Sudan, which is the most reluctant Non-Member State the ICC has ever had to deal with. The fact that the President of Sudan, *Al Bashir*, is responsible for the commitment of Crimes against Humanity, War Crimes and Genocide but has still not been arrested and continues travelling from one Member-State to another, illustrates the highly problematic situation the ICC has to face. The verification of Sudan's cooperation revealed not only the incessant reluctance of the State to comply with the Court's requests to arrest and surrender *Al Bashir*, *Harun*, *Abd-Al-Rahman*, *Hussein* and *Nourian*. It further highlighted the inability of the SC and the ASP to react appropriately to the failure to comply with the Court's request as well as the result it may have when an intergovernmental organization such as the AU interferes in judicial proceedings of the Court; the AU's obligation to its Member States, to refrain from cooperating with the ICC in arresting and surrendering Sudan's President *Al Bashir,* has led to various instances of non-cooperation. Member States such as Kenya, Nigeria, Malawi, Chad, South Africa, Djibouti, Uganda, the DRC and Jordan did not comply with the requests of the Court to arrest and surrender either *Al Bashir* or *Hussein*. The Member States justified this non-compliance regarding the detention of *Al Bashir* by referring to his attached personal immunity as well as to article 98 (1) and their international obligations pursuant to the AU's decision. Instead of resolving the dispute in relation to the applicability of article 27 and 98, the Chambers applied four different approaches to explain why none of these articles were pertinent. The lack of unity in the reasoning of the decisions challenges the

credibility of the Court. The further and very important fact that the theoretically strong enforcement arms of the ICC, the ASP and, first and foremost, the SC remain paralyzed in their reaction to the obligation-breaching States, sends the wrong message to these States and other would-be perpetrators: First of all, both executive organs undermine their own and therewith also the Court's authority and, secondly, the deterrent effect will be nullified when non-complying States do not fear any consequences. Article 87 (7) as well as 87 (5) were incorporated to prevent exactly the foregoing result. The Court is dependent on its two executive arms that should compel States to cooperate. The measures taken by the ASP are not effective enough to be determined as sanctions. The only effect they have generated was that some Member States did not repeat their failure. The work of the President of the ASP shall not to be undermined; even when it was presumed that the ASP could theoretically apply stricter sanctions than these soft diplomatic procedures, it has to be emphasized that this is practically impossible. The block of 34 African States rejects taking any concrete measures due to the fact that most of them adhere to the decision of the AU. With regard to the SC the situation is different as it was the political body which referred the situation to the ICC and therewith triggered the jurisdiction of the Court. The SC is violating the mandate pursuant to the Rome Statute; it is against the rationale of the trigger mechanism anchored in article 13 (b) as well as in contradiction to its function as the enforcement organ of the ICC. The SC, furthermore, undermines its own resolution and the obligation of UN-Member States to comply with it, pursuant to article 25 UN-Charter. The possibility of "letting major war criminals live undisturbed to write their "memoirs" in peace" would, pursuant to the Chief Prosecutor at Nuremburg, *Robert Jackson,* "mock the dead and make cynics of the living".[1] Even worse, the President of Sudan is not writing his memoirs but continues to commit these crimes in Sudan, which the Council is more than aware of. Thus, it can be inferred that the SC supports impunity and the further violation of inherent Human Rights of the victims in Sudan.

Consequently, it was determined that the analysis with regard to States practice' implementation of the international cooperation and judicial assistance part of the Rome Statute does not only underline the conclusion made pursuant to the theoretical determination of Part 9 but leads to the assumption that the enforcement pillar is the weakest point, quasi the Achilles heel of the Rome Statute. As strong as the Court could be, States' non-cooperation in combination with an almost paralyzed enforcement organ diminishes the Court's judicial strength to a great extent. The initial possession of jurisdiction with regard to Member- and Non-Member States is rendered meaningless when the Member States do not comply with their obligations of the Court. Despite the fact that this judicial institution was established by its Member States, "[T]he arbiters of the world order are, in the last resort, the states and they both make the rules [. . .] and interpret and inforce them"[2] There is no higher instance as the States themselves and as the ASP, as well as the SC, are political

[1] Booth (2003), pp. 177–178.

[2] Shaw (2017), p. 9.

bodies, composed of States, the governmental interests of each of them will prevail upon the interest of the judicial body. Only when both interests are comparable, a positive result can be achieved. This leads to the assessment that is put forward in the solution part of the book. It is important and appropriate to create further procedures for the ASP as well as the SC in order to establish a sanction-architecture that will automatically be applied when the Court refers a matter of non-compliance to the enforcers of the statutory regime. *Sluiter* and *Talontsi* suggested that with regard to the ASP a specialized Committee should be established which exclusively deals with matters of non-cooperation, with no possibility of the ASP members to contest the judicial findings of non-compliance made by the Chambers and an effective penalty mechanism, such as the State's exclusion of the ASP or the increase of State's financial contribution in order to improve the work of the ASP and one of the enforcement arms of the Court. With regard to the SC, it was suggested that a follow-up procedure has to be created which likewise foresees an automatic response to the obligation-breaching State. Nevertheless, all these defined procedures are rendered void when they are not applied. The ICC disposes of a good statutory regime, but it is not applied. The ICC always emphasizes the differences between the SC as the political body within the UN system and the ICC's Office of the Prosecutor as the independent organ within an independent judicial institution.[3] The determination is correct but in its absoluteness it disregards that law and policy can never be completely disconnected.[4] It is of paramount importance for the Court to make use of the power of the politics. With regard to the ICTY it could be demonstrated that cooperation could only be achieved if the EU, NATO and World Bank collectively worked together in order to pressure States to cooperate. The ICC has already entered into various agreements with international as well regional organizations and, additionally, with NGO's and individuals of the private sector. Following the suggestion of the foregoing authors, a subsidiary body of the ASP should be established, but not as a procedure-oversight mechanism. The Committee shall rather be exclusively responsible for the linkage between the Court and the ASP and outside organizations, thus combining the law with the politics. The ASP cannot be de-politicized, but a Committee which works independently of the ASP can use policy in a different manner as they do not have political interests. The Committee should be composed of Lawyers, Mediators but also Political Scientists and Media Experts. The Committee should produce a list of information with regard to the different geo-political, military or economic subjective interests of the most important States concerned in non-compliance in order to use this information on various diplomatic platforms. It has to be emphasized that this political pressure which could be used as a measure to enforce cooperation can only be applied, when such self-interests of States exist and they are not independent enough to endure the force. With regard to the situation in Georgia as well as Ukraine there are certainly enough geo-political interests, through which cooperation could be achieved. Furthermore,

[3] See UN Security Council 6849th meeting, S/PV.6849 (17 October 2012), p. 6.

[4] See Shaw (2017), p. 8.

alliances have to be established within the Court, respectively the ASP, as well as outside. Like-minded groups within the ASP have to be traced in order to establish new coalitions. The fact that 34 African States of the ASP are reluctant to release stricter measures to react on the non-compliance of States, has to be dealt with. In cases of evolving problems, such as the dispute regarding the applicability of articles 27 and 98, immediate steps have to be taken to resolve these issues; either by an Appeals Chamber ruling on the matter or, first and foremost, within the ASP. The new Committee could implement these measures as it should operate on a day-to-day basis and not only a couple of times a year, and in addition Mediators should negotiate between the two different positions within the ASP: the African Member State's versus the European Member State's position. No effort should be left unattempted in order to reverse the AU's decision. The cooperation of the AU is of great significance for the ICC to exercise its jurisdiction; the combination of the work of Mediators and Political Scientists could establish sharp measures in order to reverse approaches that are in contraction to the aim of the Court and therewith prevent the latter to operate effectively. This cannot be achieved by only condemning the opposing parties during the Assembly meetings, it should rather be attempted to gather them on the same side. Should this not lead to a success, a further very important tool of the Committee should be created to make the public aware of the States' failure to comply with the requests of the Court. The public condemnation of States' behavior and the resulting pressure of civil societies may lead to successful results as it has been demonstrated with regard to the example of China's Genocide Olympics. If NGO's, journalists, the EU or any other international or regional organization calls to attention the non-cooperation of certain States, the latter will not be able to hide any longer. This is not only important with regard to the obligation-breaching States; it ultimately also affects the other States which in turn cannot limitlessly remain silent. The public will not be aware of what is happening behind the scenes if it is not widely informed of these incidents. Especially with regard to the new era in which social media has become one of the most important tools to expose incidents which under normal circumstances never would have been brought to light, the Committee should make use of it. Various social media channels should be used to raise awareness of facts which only accompany the Court every day. It could be assumed that these kinds of measures are trivial, but the practice demonstrates how effective they are. Public statements by official persons, either politicians or celebrities, have a massive influence on the community. The "Kony 2012" campaign is an interesting example of how the collective responsibility of States, civil societies as well as others was triggered in order to capture the war criminal. From one moment to the next everyone felt responsible to react to the incidents in Uganda. States have to be reminded of their "unity of thought"[5] to react in a community to the breaches of other States' obligations; the doctrine of the responsibility to protect has to be raised at every political or legal occasion.

[5]Rastan (2009), p. 182.

It is true that the above-mentioned suggestions do not reflect the original idea of how the Court was meant to operate; nevertheless, it reflects the realism of the present situation. The description of "a giant without arms or legs"[6] has become reality not only with regard to the *ad-hoc* Tribunal ICTY but also for the ICC, if the cooperation of Member States remains the same. The Office of the Prosecutor shall certainly remain an independent legal body. But it should make use of subsidiary Committees of the ASP to be able to implement the ICC's main aim to end impunity for the most serious crimes of concern to the international community as a whole. Law and policy have to interact in order to obtain a certain outcome, especially with regard to the fact that the Court was established by States and was further made exclusively dependent on their cooperation. If the ICC does not attempt to make use of politics, the result will be no other than what the famous international lawyer *Carrara* stated: "When politics gets in by the door, justice is scared away through the window".[7] The strength of the ICC's judicial statutory regime already exists; only the enforcement has to be secured in order to be an effective International Criminal World Court. If the Court through its new established subsidiary bodies, as suggested above, made use of this reciprocal relationship between law and politics, the forging statement of *Carrara* could be possibly altered to the following phrase: "When politics gets in by the door, justice reaches out its hand and scares politics through the window".

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[6]Cassese (1998), p. 13.

[7]Carrara (1871), p. 635 (original version: "quando la politica entra della porta del tempio, la giunstizia fugge impaurita dalla finestra").

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